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Combatting Wage Theft in Global Supply Chains: A Proposal for Transnational Wage Lien Laws

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ABSTRACT

When the world went into lockdown due to the COVID-19 pandemic, major fashion brands attempted to protect their profits by refusing to pay overseas suppliers for over $16 billion USD of goods between April and June 2020. These decisions had a devastating impact on garment workers who toil at the bottom of the supply chain; thousands of garment workers and their families faced wage theft, dealing with months of unpaid wages, benefits and/or severance pay. In the absence of a regulatory framework to hold corporations responsible, workers, unions, and NGOs resorted to naming and shaming brands into taking action. However, many incidents of pandemic wage theft remain unresolved to date. The COVID-19 pandemic only further exacerbated an existing problem of wage theft and wage insecurity in global supply chains and highlighted the need for a regulatory framework to mitigate the immense influence transnational corporations (TNCs) have over actors within the supply chain. To address this problem, this paper proposes a transnational wage lien law that will allow workers in the global supply chain to recover unpaid wages from TNCs. I begin in Part II by defining the current problem of wage theft in the global labor supply chain – focusing specifically on pandemic wage theft in the garment sector – and discuss why addressing this problem is a key component of the business and human rights agenda. In Part III, I discuss the business and human rights landscape in relation to the regulation of global labor supply chains, including principles of responsibility allocation in labor supply chains, duty-based and chain liability-based legal models for regulating supply chain relationships, and the importance of access to effective remedy. In Part IV, I present a proposal for a transnational wage lien law to enable employees of subcontractors to secure unpaid wages directly from TNCs headquartered in the U.S. This includes an examination of current domestic wage lien laws in the US; an analysis of constitutional and international law considerations, including constitutional division of powers, and extraterritorial jurisdiction and comity, respectively; and finally, practical considerations, such as the administrative agency framework, time- and cost-efficiency, access to information and due diligence, procedural fairness, and political will for enacting such a statutory scheme.

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I. INTRODUCTION

When the world went into lockdown due to the COVID-19 pandemic, major fashion brands attempted to protect their profits by refusing to pay overseas suppliers for over $16 billion USD of goods between April and June 2020.[1] Facing a drop in sales at the beginning of the pandemic, many transnational fashion retailers delayed payments to suppliers and abruptly cancelled orders already completed or in production. These decisions had a devastating impact on garment workers who toil at the bottom of the supply chain; thousands of garment workers and their families faced wage theft, dealing with months of unpaid wages, benefits and/or severance pay. Non-payment of

[1] Anner, Mark, *Unpaid Billions: Trade Data Show Apparel Order Volume and Prices Plummeted through June, Driven by Brands' Refusal to Pay for Goods They Asked Suppliers to Make*, Center for Global Workers' Rights, Oct. 6, 2020, https://www.workersrights.org/wp-content/uploads/2020/10/Unpaid-Billions_October-6-2020.pdf.

wages combined with job losses have pushed workers into further destitution; many have been unable to feed themselves and their families, pay for rent, medical bills or their children's school fees, and have been forced to take out high interest loans. In the absence of a regulatory framework to hold corporations responsible, workers, unions, and NGOs resorted to naming and shaming brands into taking action. However, many incidents of pandemic wage theft remain unresolved to date.

Wages are an important dimension of human rights, as wage violations are key indicators of more serious labor and human rights abuses. However, wage issues are often overlooked in modern business and human rights (BHR) literature. The existing literature on corporate responsibility with respect to global labor supply chains has by and large focused on the efficacy of existing labor regulatory schemes, which have primarily been soft law schemes[2] and (more recently) human rights due diligence laws;[3] empirical investigations on key factors shaping labor conditions;[4] the degree of responsibility to assign corporations;[5] and the doctrine of joint employer liability, primarily in the domestic context.[6] While the wages are necessarily embedded in these issues, few have analyzed the role of wages in protecting supply chain workers from human rights abuses.[7] Furthermore, although access to remedy has been recognized as an fundamental pillar of business and human rights, there remains a dearth of literature considering potential avenues for

[2] See Fick, Barbara J., *Corporate social responsibility for enforcement of labor rights: are there more effective alternatives,* Global Bus. L. Rev. 4 (2013); Kun, Attila, *From Transnational Soft Law to National Hard Law-Regulating Supply Chains,* Pecsi Munkajogi Kozlemenyek 8 (2015).

[3] See Taylor, Mark B, *Human rights due diligence in theory and practice,* in Research Handbook on Human Rights and Business (Surya Deva and David Birchall, eds., 2020).

[4] See Dahan, Yossi, Hanna Lerner, and Faina Milman-Sivan, *Shared Responsibility and Labor Rights in Global Supply Chains,* Journal of Business Ethics (2021); Martin, Isabelle, *Corporate Social Responsibility as Work Law: A Critical Assessment in the Light of the Principle of Human Dignity,* Canadian Lab. & Emp. LJ 19 (2015).

[5] See Kole, Jos, *Commentary: The Scope of Chain Responsibility,* in European Business Ethics Cases in Context, 213 (Springer, Dordrecht, 2011).

[6] See Brown, Ronald C., *Due Diligence" Hard Law" Remedies for MNC Labor Chain Workers,* UCLA Journal of International Law and Foreign Affairs (2018).

[7] Genevieve Lebaron, et al., *The Unequal Impacts of Covid-19 on Global Garment Supply Chains: Evidence from Ethipia, Hnduras, India and Myanmar*, Worker Rights Consortium (2021): 17, https://www.workersrights.org/wp-content/uploads/2021/06/The-Unequal-Impacts-of-Covid-19-on-Global-Garment-Supply-Chains.pdf.

implementing remedial mechanisms in the transnational context, especially with respect to wage violations.

In this paper, I intend to re-focus BHR and labor supply chain discussions towards accessible remedies for wage-related wrongs by introducing one possible way to address this problem: a transnational wage lien law that will allow workers in the global supply chain to recover unpaid wages from TNCs. I begin in Part II by defining the current problem of wage theft in the global labor supply chain – focusing specifically on pandemic wage theft in the garment sector – and discuss why addressing this problem is a key component of the business and human rights agenda. In Part III, I review the business and human rights landscape in relation to the regulation of global labor supply chains, including principles of responsibility allocation in labor supply chains, duty-based and chain liability-based legal models for regulating supply chain relationships, and the importance of access to effective remedy. In Part IV, I present a proposal for a transnational wage lien law to enable employees of subcontractors to secure unpaid wages directly from TNCs headquartered in the U.S. This includes an examination of current domestic wage lien laws in the US; an analysis of constitutional and international law considerations, including constitutional division of powers, and extraterritorial jurisdiction and comity, respectively; and finally, practical considerations, such as the administrative agency framework, time- and cost-efficiency, access to information and due diligence, procedural fairness, and political will for enacting such a statutory scheme.

II. THE PROBLEM OF WAGE THEFT IN GLOBAL SUPPLY CHAINS

A. Pandemic Wage Theft

1) Irresponsible (and Possibly Illegal) Corporate Conduct

In the first quarter of 2020, the COVID-19 pandemic led to a 3 per cent drop in global trade values.[8] The economic contraction triggered by the pandemic affected all industries, including the garment industry. The industry experienced its own catastrophic challenges as a highly integrated

[8] UNCTAD, *Textile and garment supply chains in times of COVID-19: challenges for developing countries*, UNCTAD (May 29, 2020), https://unctad.org/es/node/3024.

global supply chain that traditionally has buyers (TNCs) in "developed" countries contracting and subcontracting with suppliers that operate and employ workers in "lesser-developed" countries. The starkness of the power imbalance in this relationship is worth noting. On the one end, there are Western buyers who bring in over a billion dollars in profits per year,[9] while on the other end there are suppliers in low-income countries, with low cash reserves and little access to credit, and workers, who are paid significantly less than a living wage and have no savings or access to a governmental safety net for loss of income.[10] This dynamic between the actors in the global garment supply chain and the extremely fragile system in which they operate – which is founded on decades of buyer price-squeezing – has played a crucial role in the devastating impact the pandemic has had on workers in the supply chain.

A March 2020 study conducted by the Center for Global Workers' Rights on the impact of COVID-19 on the garment sector in Bangladesh provides strong empirical evidence of harmful practices engaged by TNCs during the pandemic and the consequences of same on workers. Beginning in January 2020, suppliers in Bangladesh started seeing an increase in the prices of their raw materials (i.e. fabric) being shipped in from China. However, 91.9 percent of suppliers reported that buyers did not adjust their prices in response to the large increase in raw material prices.[11] Subsequently, as the pandemic spread to Europe and the US in early 2020 and consumer demand for apparel dropped, fashion brands began to delay payments, abruptly cancel orders and/or refuse to pay for shipments of completed and in-production orders.[12] When orders were canceled, 72.1 percent of buyers refused to pay for raw materials already purchased by the supplier

[9] For example, the Irish fashion retailer, Primark, recorded $1.07 billion in operating profits in 2019. See Anner, Mark, *Abandoned? The Impact of COVID-19 on Workers and Businesses at the Bottom of Global Garment Supply Chains*, Center for Global Workers' Rights (Mar. 27, 2020): 5, https://www.workersrights.org/wp-content/uploads/2020/03/Abandoned-Penn-State-WRC-Report-March-27-2020.pdf.

[10] Triponel, Anna and John Sherman, *Moral bankruptcy during times of crisis: H&M just thought twice before triggering force majeure clauses with suppliers, and here's why you should too,* Harvard Kennedy School Corporate Responsibility Initiative & the Business & Human Rights Resource Centre (Mar. 31, 2020), https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/TriponelSherman_ForceMajeureArticle_31March2020_Final_0.pdf.

[11] Anner, supra at 4.

[12] Clean Clothes Campaign, *Un(der) Pain in the Pandemic: An estimate of what the garment industry owes its workers*, Clean Clothes Campaign (2020): 5, https://cleanclothes.org/file-repository/underpaid-in-the-pandemic.pdf/view; UNCTAD, *supra* note 6.

and 91.3 percent of buyers refused to pay for the cut-make-trim (i.e. production) cost of the supplier.[13]

Many buyers invoked 'force majeure' clauses in their contracts to justify breaking their contractual obligation to pay for orders completed or in production, which garnered criticism both on social policy and legal bases. First, contracts between buyers and suppliers are often contracts of adhesion – they are born out of unequal bargaining power and tend to maximize the rights and interests of the buyer.[14] For example, the force majeure clause relied upon by US department store Kohl's Inc. when cancelling all orders on March 22, 2020 revealed some astonishingly one-sided provisions. Per the contract, Kohl's retained the right to completely and unilaterally cancel orders under a number of circumstances, including any outbreak of illness (even one more limited than a pandemic), any "government restrictions", and "other reasons beyond [Kohl's] reasonable control." None of these terms were defined in the contract and were at Kohl's "sole and absolute discretion".[15] Furthermore, Kohl's retained the right to "take possession of the Merchandise and materials" for orders it had canceled and then, remarkably, make the supplier pay for the cost of completing the order. Notably, after cutting $150 million dollars in orders in Korea and Bangladesh, Kohl's paid shareholders $109 million dollars in dividends on April 1, 2020.[16]

Second, legal experts have opined that the applicability of force majeure clauses in these circumstances is dubious. While a legal analysis of the legitimacy of the force majeure claims is outside the scope of this paper, it is worth observing that experts have raised a number of legal concerns around the abrupt use of the force majeure clauses during the pandemic, including the fact that: most force majeure clauses do not list pandemics as a reason for failure to pay[17] and some jurisdictions require a force majeure event (i.e. "pandemic") to be explicitly listed in the contract;[18]

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[13] Anner, supra at 5.

[14] Vogt, Jeffrey, et al., *Farce majeure: How global apparel brands are using COVID-19 pandemic to stiff suppliers and abandon workers,* European Center for Constitutional and Human Rights (2020): 5, https://media.business-humanrights.org/media/documents/ECCHR_PP_FORCE_MAJEURE3.pdf.

[15] Ibid.

[16] Ibid at 5-6.

[17] Anner, supra at 5.

[18] Vogt, supra at 9.

brands are required to show that it is impossible or impracticable to pay, which is unlikely since most brands were not insolvent and had sufficient cashflow to honor their short-term debts;[19] brands must show the pandemic and its impact on business was unforeseeable – an assertion that is less likely to be successful for brands that placed orders after mid-January, when the emergence of COVID-19 and government lockdowns had already been publicized and documented;[20] brands must show they tried to mitigate the effects of the pandemic;[21] and in the event the existence of a force majeure is established, adjudicators would likely only permit delaying payment, not cancelling orders.[22]

2) Devastating Impact on Workers and Response from Companies

As a result of the delay in payments, refusal to pay, and cancellation of orders by buyers, thousands of factories in producing countries, including Myanmar, Cambodia, Bangladesh, Philippines, and Ethiopia, among others, were forced to partially or fully shutdown. A devastating consequence of this was the dismissal or furlough of millions of garment factory workers, often without payment of earned wages and legally-mandated severance pay.[23] In Bangladesh, 72.4 percent of furloughed workers and 80.4 percent of dismissed workers were sent home unpaid in March 2020 because the supplier had abruptly lost buyer in-process contracts with no compensation.[24] There were also reports across the global supply chain of garment manufacturers dismissing workers and then rehiring them at lower rates of pay. Studies have shown that garment workers' wages decreased by over 21 percent during the pandemic,[25] and Clean Clothes Campaign

[19] Ibid at 11.

[20] Ibid at 10.

[21] Ibid at 12.

[22] Ibid at 12.

[23] Anner, supra at 1.

[24] Clean Clothes Campaign, supra at 5-6.

[25] Business & Human Rights Resource Centre, *Wage theft and pandemic profits: the right to a living wage for garment workers*, Business & Human Rights Resource Centre (Mar. 2021): 6-7, https://media.business-humanrights.org/media/documents/Unpaid_wages_v9.pdf [BHRRC].

estimates that garment workers were deprived of up to $5.8 billion in wages between March to May 2020 alone.[26]

"Wage theft" is the illegal practice of partially or totally withholding compensation legally owed to employees for provision of labor services, as stipulated in a written or non-written contract.[27] It also includes "the payment of salaries below the minimum wage, non-payment of overtime, non-payment of contractually owed benefits, the non-negotiated reduction of salaries, and unilateral deductions.[28] The impact of wage theft during the pandemic on garment workers has been severe. A March 2021 report by the Business & Human Rights Resource Centre states that the standard wages for workers in 2020 were, on average, four times less than the wages needed to live on.[29] Most garment workers in the global supply chain live in countries with weak social safety nets. Thus, non-payment of wages combined with job losses have pushed workers into further destitution; many have been unable to feed themselves and their families, pay for rent, medical bills or their children's school fees, and have been forced to take out high interest loans, thus getting trapped into cycles of debt.[30] In 2020, workers reported being more worried about dying from hunger than from contracting COVID-19.[31]

The labor abuses experienced by garment workers in the global supply chain can be contrasted with the immense profits recorded by buyers in the second half of 2020. The Business & Human Rights Resource Centre's research into 51 brands in November 2020 revealed that 73 percent of the companies once again turned profits after the initial disruption earlier in the year.[32] Sixteen of the brands linked to cases of wage theft cumulatively recorded at least $10 billion in profits in the

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[26] Ibid at 5.

[27] Ibid; Patriarca, Cristina, *Justice for Migrant Workers: Creating an Effective Solution to Address Wage Theft*, Migrant Forum in Asia (Oct. 2020), https://mfasia.org/policy-brief-no-1-justice-for-migrant-workers-creating-an-effective-solution-to-address-wage-theft.

[28] Ibid.

[29] BHRRC, supra at 3.

[30] Ibid at 6.

[31] Ibid at 28.

[32] Ibid at 7.

second half of 2020 alone.[33] Among these companies are H&M, which reported a profit of $220 million in the third quarter of 2020 alone, and Nike, which reported a profit of $1.25 billion in the same period.[34] Some online fashion retailers, such as ASOS and Boohoo, even recorded higher profit earnings during the pandemic compared to the previous year.[35] Boohoo, notably, has still made no public commitment to pay suppliers in full for orders during the pandemic.[36]

The mass wage theft in the global garment supply chain in 2020 ultimately triggered the #PayUp social media campaign, a global movement calling on brands to honor their contracts so that garment workers could get paid what they are owed.[37] The campaign was anchored by a petition, which gathered over 200,000 signatures from around the world and tweets and videos directed at brands from social media influencers and celebrities. Additionally, on April 22, 2020, the International Labor Organization (ILO) released a "Call to Action", which called on actors in the global garment supply chain "to take action to protect garment workers' income, health and employment and support employers to survive during the COVID-19 crisis." However, the ILO did not set any wage-related targets or establish any mechanisms for enforcement.[38] The most recently available information regarding responses from major fashion brands to the #PayUp campaign and/or ILO Call to Action indicates that 25 companies have endorsed the ILO Call to Action and 35 companies have paid in full for orders completed and in production.[39]

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[33] Ibid.

[34] Ibid.

[35] Ibid.

[36] Business & Human Rights Resource Centre, *Boohoo,* Business & Human Rights Resource Centre (Mar. 1, 2022), https://www.business-humanrights.org/en/companies/boohoo/?issue=332.

[37] Pay Up Fashion, *A Petition to Center Workers, Citizens, and the Planet,* Pay Up Fashion (Mar. 1, 2022), https://payupfashion.com.

[38] International Labour Organization, *COVID-19: Action in the Global Garment Industry*, International Labor Organization (Apr. 22, 2020), https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/genericdocument/wcms_742371.pdf.

[39] Business & Human Rights Resource Centre, *COVID-19 Apparel Portal,* Business & Human Rights Resource Centre (Mar. 1, 2022), https://www.business-humanrights.org/en/from-us/covid-19-action-tracker/.

3) The Need for Legal Accountability

Wage theft has been an existing and pervasive problem in global supply chains – even before the pandemic – and brands compensating workers in their supply chain for wages owed is rare. Workers have to protest and wait for long periods and often receive just a portion of what they are legally owed.[40] For example, in 2010, nearly 2,000 workers in two factories in Honduras producing goods for Nike were dismissed without severance pay. Nike initially denied any responsibility to the workers. However, after over a year of campaigning by workers and labor rights groups, Nike finally agreed to pay $1.54 million in severance pay and back wages owed to workers.[41] In 2013, Cambodian workers were sent home without severance pay after a Kingsland factory shutdown. Four months before the factory closed, the salaries of the workers were reduced by 50 per cent in violation of Cambodian labor laws. Workers protested for two months, with nearly 200 of them sleeping in the street in front of the factory 24/7 and 82 launching a hunger strike. Initially, H&M and Wal-Mart denied doing any official business with the Kingsland factory, but the companies ultimately agreed to pay out $200,000 for unpaid wages to the workers.[42]

Although it is evident that protesting, naming and shaming, and global pressure can lead to at least some success in accessing remedy for garment workers, protesting wage violations comes with serious risks, especially in countries where workers' rights to collective action and freedom of association are regularly violated. For example, in Pakistan, police allegedly shot at hundreds of unarmed workers protesting unpaid wages and forced dismissals in front of a Karachi denim factory in May 2020.[43] In Myanmar, marches organized by garment workers' unions to protest forced dismissals and salary cuts were met with arrest warrants issued for union leaders and police

[40] BHRRC, supra at 18.

[41] People & Planet, *Nike Agrees to Pay $1.5M Severance Pay to Honduran Workers*, People & Planet (2010), https://peopleandplanet.org/history/nike-agrees-pay-15m-severance-pay-honduran-workers.

[42] Pearlman, Alex, *Cambodian workers win $200,000 settlement from Walmart, H&M*, The World (Mar. 3, 2013), https://theworld.org/stories/2013-03-03/cambodian-workers-win-200000-settlement-walmart-hm.

[43] Toppa, Sabrina, *Fast fashion: Pakistan garment workers fight for rights amid Covid-19 crisis,* The Guardian (May 27, 2020), https://www.theguardian.com/global-development/2020/may/27/fast-fashion-pakistan-garment-workers-fight-for-rights-amid-covid-19-crisis?CMP=share_btn_wa.

raids in union leaders' residences in early 2021.[44] In Bangladesh, after the A-One BD Ltd. garment factory closed down in March 2020, workers staged a series of protests to demand payment of wages and benefits owed since January 2020. These protestors were violently attacked by police in early December 2020 with batons, tear gas and water cannons, leaving many of them injured.[45] Crackdowns on worker organizing continue to be a problem in producing countries like Bangladesh – despite incremental achievements in enacting more robust labor protections – due to government failure to enforce labor laws.[46]

The above incidents only further highlight the need for a regulatory framework that will not only mitigate the immense influence corporations have over actors within the supply chain but also provide labor protections and accessible remedies to workers who are otherwise unable to access justice in their own country. Moreover, the #PayUp Campaign and previous settlements between buyers and workers demonstrate the inconsistency and uncertainty of labor protections when the complex relationships in the labor supply chain are unregulated and workers are left to rely on the goodwill and reputational interests of companies to access any form of remedy. Notably, a number of brands implicated in pandemic wage theft in the global garment industry had policy commitments to ensure workers in their supply chain were paid in full, but only complied with these policy commitments after mounting public pressure.[47] This is a serious access to justice concern; not only are workers required to overcome significant time and cost hurdles to receive even a portion of their unpaid wages, the plight of the large majority of laborers usually go unnoticed and only a small proportion of workers are actually successful in achieving any form of redress.

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[44] Paton, Elizabeth, *Myanmar's Defiant Garment Workers Demand That Fashion Pay Attention*, The New York Times (Mar. 12, 2021), https://www.nytimes.com/2021/03/12/business/myanmar-garment-workers-protests.html.

[45] Business & Human Rights Resource Centre, *COVID-19 Apparel Portal,* Business & Human Rights Resource Centre (Oct. 26, 2020), https://www.business-humanrights.org/en/latest-news/bangladesh-1100-workers-hold-demonstrations-to-demand-8-months-unpaid-wages-from-a-one-garment-factory/

[46] Human Rights Watch, "*Whoever Raises their head Suffers the Most": Workers' Rights in Bangladesh's Garment Factories* (Apr. 22, 2015), https://www.hrw.org/report/2015/04/22/whoever-raises-their-head-suffers-most/workers-rights-bangladeshs-garment.

[47] For example, see BHRRC, supra at 3.

B. Wages As a Dimension of Human Rights

Wages are an essential and underlying dimension of human rights, and wage violations undermine fundamental principles recognized in international human rights instruments. For example, Article 23 (3) of the Universal Declaration of Human Rights (UDHR) affirms "[e]everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity."[48] Wage theft also violates Article 12 of ILO Convention No. 95, Convention Concerning the Protection of Wages, which states that workers' "wages shall be paid regularly [and] [u]pon termination of a contract of employment a final settlement of wages due shall be effected." The Convention also states that deductions from wages are permitted only under very few circumstances.[49]

Wage violations also leave workers vulnerable to more severe labor and human rights abuses, such as modern slavery/forced labor, which are the subject of core ILO conventions. 'Modern slavery' describes a set of specific legal concepts including debt bondage, forced marriage, slavery and slavery-like practices, human trafficking, and forced labor. According to the ILO Forced Labour Convention of 1930, forced or compulsory labor is "all work or service which is exacted from any person under the threat of a penalty and for which the person has not offered himself or herself voluntarily."[50] Workers may be coerced by threats of violence or intimidation, or by more subtle means, such as manipulated debt, retention of identity papers or threats of denunciation to immigration authorities.[51] The ILO Forced Labour Convention has received almost universal ratification,[52] and a subsequent Protocol of 2014 was drafted to recognize the changing forms and context of forced labor, including the fact that there is an increased number of workers who are in

[48] UN General Assembly, *Universal Declaration of Human Rights,* 10 December 1948, 217 A (III), Art. 23, https://www.un.org/en/about-us/universal-declaration-of-human-rights.

[49] International Labour Organization (ILO), *Protection of Wages Convention,* 24 September 1952, C095, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312240.

[50] International Labour Organization (ILO), *Forced Labour Convention, C29*, 28 June 1930 (revised 2017), C29, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029.

[51] International Labour Organization, *What is forced labour, modern slavery and human trafficking*, International Labor Organization (Mar. 1, 2022), https://www.ilo.org/global/topics/forced-labour/definition/lang--en/index.htm.

[52] With the exception of Afghanistan, Brunei, China, Marshall Islands, Palau, Tonga, Tuvalu and the US.

forced or compulsory labour in the private economy. The Protocol has been ratified by 57 countries to date, including Bangladesh.[53]

Research from the University of Sheffield and the Worker Rights Consortium published in June 2021 found that the declining income and working conditions for workers in the global garment supply chain during the pandemic increased workers' vulnerability to forced labor.[54] In particular, there are well-documented links between debt and key indicators of forced labor, such as verbal abuse, threats and intimidation, unfair wage deductions and withholdings, and access to things such as water and toilet being restricted – one or more of which were present with respect to the garment workers interviewed in the study.[55] During the pandemic, Bangladesh and India were for the first time placed in the "extreme risk" category of the Modern Slavery index, a global index created by risk analytics company Verisk Maplecroft.[56]

The strong links between wage violations and vulnerability to forced labor were also identified in a recent study of global tea and cocoa supply chains published by Genevieve Lebaron.[57] Lebaron's study revealed that in almost all of the business models of forced labor she reviewed, wages were a key part of the picture: "[d]eductions from wages, underpayment and theft of wages, and by-passing wage controls…were all fundamental components through which forced labour was manifesting in these supply chains."[58] Importantly, these wage violations could be traced back to commercial practices and pressures. Lebaron found that producers used forced labor in these industries "as a cost minimization strategy" and "an attempt to manage the price cost squeeze they [faced] in recent decades as production costs have risen while the prices paid by buyers have stagnated or declined." Lebaron's study urges a reconceptualization of the relationship between

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[53] International Labour Organization (ILO), *Ramifications of PO29 – Protocol of 2014 to the Forced Labour Convention, 1930,* 9 November 2016, https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:3174672.

[54] Lebaron, supra.

[55] Ibid at 6.

[56] Karim, Naimul, *Modern slavery risks surge for Asian garment workers with coronavirus,* Reuters (Sept. 3, 2020), https://www.reuters.com/article/us-asia-workers-rights-trfn/modern-slavery-risks-surge-for-asian-garment-workers-with-coronavirus-idUSKBN25U38Q?edition-redirect=uk.

[57] Lebaron, Genevieve, *Wages: An overlooked dimension of business and human rights in global supply chains,* Business and Human Rights Journal 6, no. 1 (2021).

[58] Ibid at 5.

forced labor and free labor – two concepts that are often assumed to be binaries with fundamentally and ontologically different types of relations. Rather, the same forms of labor exploitation and abuse can exist in both "free" and "forced" labor relationships to varying degrees, which can make it difficult to position contemporary labor relationships as either clearly "free" or "forced" labor.[59]

Despite the interconnection between wage violations and other human rights abuses, wages are often overlooked in business and human rights academic and policy debates. As Lebaron accurately points out, most of the attention in the business and human rights scholarship has focused on the human rights responsibilities and obligations of TNCs (and the relative role of other actors in enforcing such obligations) and the rights of workers, but not necessarily with respect to wages.[60] Ensuring workers get paid what they are owed is an important element of equitable value distribution in the supply chain and strengthening worker capacity, which in turn can have an impact on the human rights of workers within global supply chains. This is a key concept that underpins this paper and the transnational wage lien law proposed herein.

III. BUSINESS AND HUMAN RIGHTS AND CHAIN LIABILITY

A. From Corporate Social Responsibility to Corporate Liability

4) The Evolution of Business and Human Rights

While the interface between business and human rights could be said to be as old as the notions of "business" and "rights",[61] for a long time both academics and business leaders did not view human rights to be relevant to business activities. In the mid-late 20th century, Milton Friedman famously argued that the only social responsibility of businesses is to increase profits for shareholders.[62] The shareholder primacy model was embraced by both courts and business organizations. In *Dodge v Ford Motor Company*, Chief Justice Ostrander of the Michigan Supreme

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[59] Ibid at 4-5.

[60] Ibid at 17-18.

[61] Deva, Surya, *From business or human rights to business and human rights: what next?,* in Research handbook on human rights and business (Surya Deva and David Birchall, eds, 2020): 1.

[62] Friedman, Milton, *The Social Responsibility of Business is to Increase its Profits*, New York Times Magazine (Sept. 13, 1970).

Court opined that "a business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end."[63] And as late as 1997, the Business Roundtable released a statement stating that "the paramount duty of management and of boards of directors is to the corporation's stockholders."[64]

However, with the rise of globalization and enterprise disaggregation came a shift in focus towards corporations as targets for addressing human rights violations. Whether apartheid in South Africa, violations of the labor rights in Bangladesh, or gender-based violence in Papua New Guinea, corporations were directly or indirectly implicated and quickly became the pressure point for preventing and redressing human rights violations. The understanding of a corporation's purpose also shifted. In 2019, the Business Roundtable released a new statement embracing the stakeholder theory of corporations, stating "businesses play a vital role in the economy by creating jobs, fostering innovation, and providing essential goods and services…While each of our individual companies serves its own corporate purpose, we share a fundamental commitment to all of our stakeholders." While the shareholder primacy model continues to have some support, not many businesses today would claim – at least publicly – that their sole purpose is to maximize profits irrespective of any adverse social impacts.[65]

Surya Deva posits that the evolution of business and human rights can be broadly divided into four phases. The first phase lasted about two decades, from 1974-1992, and was primarily dominated by the discourse around rights and responsibilities. While developing countries sought to impose duties on TNCs, developed countries sought to secure fair treatment rights for TNCs in host states.[66] The second phase, between 1998-2004, was concerned with the debate between voluntary and binding regulations,[67] and of which I would argue the former prevailed at the time. The concerns of the business and human rights movement expanded to include social issues that were traditionally addressed under the rubric of Corporate Social Responsibility (CSR) by

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63 *Dodge v Ford Motor Company,* 204 Mich. 459, 170 N.W. 668 (Mich 1919).

64 The Business Roundtable, *Statement on Corporate Governance*, The Business Roundtable (Sept. 1997), http://www.ralphgomory.com/wp-content/uploads/2018/05/Business-Roundtable-1997.pdf.

65 Deva, supra at 2.

66 Ibid at 3.

67 Ibid at 4.

management scholars,[68] and CSR tools, such as Corporate Codes of Conduct, were the most common methods for addressing issues in the supply chain.[69] Moreover, the 2000 UN Global Compact, a voluntary, principle-based framework for corporate sustainability was formally launched, while the 2003 UN Draft Norms on the Responsibilities of Transnational Corporations and Business Enterprises were declared by the Commission on Human Rights to have "no legal standing" and largely discarded.[70]

The third phase (2005-2011), and a turning point in business and human rights, was the mandate of Professor John Ruggie as the Special Representative of the UN Secretary-General.[71] Ruggie was tasked with building a framework for addressing the human rights impacts of businesses. In 2008, the United Nations unequivocally endorsed Ruggie's 'Protect, Respect and Remedy Framework', which was later operationalized into the UN Guiding Principles on Business and Human Rights (UNGPs) in 2011. A non-binding set of guidelines directed at both states and companies, the UNGPs are organized under three pillars: 1) the state duty to protect; 2) the corporate responsibility to respect; and 3) access to remedy.[72] The UNGPs have been a tremendous force in driving the modern business and human rights movement. For better or for worse, the guidelines have shaped the business and human rights agendas of Fortune 500 companies and have even influenced court decisions around the world.[73]

The beginning of the fourth phase is marked by the UN Human Rights Council adopting a resolution in 2014 to establish an open-ended intergovernmental working group to consider "an international legally-binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises."[74] According to Deva,

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[68] Santoro, Michael A., *Business and Human Rights in Historical Perspective*, Journal of Human Rights 14 (2015): 157.

[69] Kun, supra at 58.

[70] Deva, supra at 4.

[71] Ibid.

[72] United Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" framework,* 2011 [UNGP].

[73] For example, see *Friends of the Earth v Royal Dutch Shell* (2021).

[74] Deva, supra at 4.

"[t]his resolution created a 'soft versus hard' law cleavage – similar to the second phase – between the implementation of the UNGPs and a push to develop a binding instrument."[75] I would further argue that, unlike the second phase, the fourth phase witnessed the scales incrementally tipping in favor of binding instruments, nationally, regionally, and internationally, as opposed to relying entirely on voluntary measures.

5) A Shift Towards 'Hard Law'

As described above, much of the business and human rights movement has focused on the use of non-binding 'soft' instruments to address and prevent corporate human rights abuses. Voluntary measures, such as UN Global Compact, the OECD Guidelines, the UNGPs, and corporate Codes of Conduct – ranging from simple programmatic expectations and informal questioning to more formal measures, including assessment, certification, auditing, inspection, monitoring and capacity building[76] – have been the tools of choice for addressing human rights in transnational supply chains. Efforts to hold TNCs accountable for human rights violations through binding international regimes or conventions failed in the past, largely due to aggressive lobbying by companies and business associations.[77] In turn, states also resisted adopting binding rules to enhance corporate accountability.[78]

The amount of literature regarding "soft law" and "hard law" in international governance has been prolific. Legal positivists tend to view hard and soft law in binary terms and favor the former, with compliance literature arguing that sanctions are essential for corporations' willingness to comply.[79] Constructivists, on the other hand, favor soft law for its capacity to generate shared

[75] Ibid.

[76] Kun, supra at 58.

[77] Schilling-Vacaflor, Almut, *Putting the French Duty of Vigilance Law in Context: Towards corporate accountability for human rights violations in the global south?*, Human Rights Review 22, no. 1 (2021): 112.

[78] Ibid.

[79] Shaffer, Gregory C. and Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance,* Minnesota Law Review 94 (2009), 707; Yan, Min, *Corporate Social Responsibility versus Shareholder Value Maximization: Through the Lens of Hard and Soft Law,* Northwestern Journal of International Law & Business 40 (2019), 69.

norms and a sense of common purpose and identity.[80] Rationalists contend that hard law and soft law have different attributes and deficiencies, and this literature has focused on how these instruments can be combined or built upon each other.[81] Notwithstanding this ongoing debate, corporate-guided initiatives have recently become the subject of increasing criticism, especially during the fourth phase of the business and human rights movement.[82] Over time, the limitations of self-guided voluntary approaches have become apparent, including lack of legitimacy, limited uptake, weak auditing, and deficient forms of traceability.[83] Moreover, as Atilla Kun explains, "there is often a conflict between sourcing priorities (such as prices, delivery requirements) and sustainability goals. As a result, considerable empirical evidence exists to suggest codes of conduct…are not sufficient to implement supply chain responsibility."[84]

In the last five years, a number of states have taken up the task of passing binding transnational regulations, starting with France's milestone due diligence legislation, Duty of Vigilance of Parent and Instructing Companies law ("Vigilance Law"),[85] in 2017. France's Vigilance Law establishes "a legal obligation to adhere to a standard of reasonable care, while performing acts that could foreseeably harm human rights or the environment."[86] Companies covered by the statute[87] are required to implement and publish vigilance plans, which must include measures to prevent human rights violations and environmental damage from the operations of their suppliers or subcontractors. Companies that fail to comply could be subject to sanctions and the parent

[80] Shaffer, supra at 708

[81] Ibid at 707.

[82] Schilling-Vacaflor, supra at 112.

[83] Ibid.

[84] Kun, supra at 59.

[85] Law No. 2017-399.

[86] Schilling-Vacaflor, supra at 115.

[87] The Vigilance Law applies to corporations headquartered in France that employ at least 5000 employees in France or 10,000 employees worldwide, including through direct and indirect subsidiaries. The law also applies to foreign companies headquartered outside of France with French subsidiaries, if those subsidiaries employ at least 5000 employees in France.

company can be held liable for actual harm to fundamental freedoms, health and safety or the environment caused by a failure to properly implement a plan.[88]

Other European countries have followed in France's footsteps and passed similar due diligence laws. In 2019, Netherlands passed legislation requiring companies selling goods on the Dutch market to exercise due diligence to prevent goods or services from being produced by child labor in their supply chains. Failure to comply with the legislation can result in administrative orders and fines.[89] In 2021, Germany, Norway, and Switzerland passed due diligence laws as well. Germany's Act on Corporate Due Diligence on Supply Chains, which enters into force in 2023, requires certain companies to identify human rights and environmental risks by direct suppliers, and where relevant, indirect suppliers, in their supply chain. Failure to comply can lead to fines, exclusion from public tenders, and vicarious liability for suppliers' abuses.[90] Norway's new law requires approximately 9000 companies to conduct due diligence on human rights and labor.[91] Switzerland's new laws, passed in January 2022, require Swiss companies to conduct due diligence with respect to minerals and metals from conflict zones and produced through child labor.[92]

Additionally, human rights due diligence laws are under discussion in other states, including Belgium, Finland, Austria, Denmark, Italy, Luxembourg, Spain, Sweden,[93] and Canada.[94] Furthermore, the EU Commission released a draft of its proposed directive on Sustainable Corporate Due Diligence in February 2022, which would create new due diligence obligations for

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[88] Law No. 2017-399.

[89] Methven O'Brien, Claire, *Business and human rights in Europe 2011-2021: A decade in review*, European Yearbook of Human Rights (2021): 4.2.

[90] Ibid.

[91] Ibid.

[92] Ibid.

[93] Business & Human Rights Resource Centre, *National & regional movements for mandatory human rights & environmental due diligence,* Business & Human Rights Resource Centre (May 22, 2019), https://www.business-humanrights.org/en/latest-news/national-regional-movements-for-mandatory-human-rights-environmental-due-diligence-in-europe/.

[94] Business & Human Rights Resource Centre, *Canadian Network on Corporate Accountability letter calls for Canada to develop comprehensive mandatory human rights due diligence legislation,* Business & Human Rights Resource Centre (Mar 6, 2019), https://www.business-humanrights.org/en/latest-news/canadian-network-on-corporate-accountability-letter-calls-for-canada-to-develop-comprehensive-mandatory-human-rights-due-diligence-legislation/.

certain EU companies (and some non-EU companies) to identify and address human rights and environmental breaches in their supply chains and publicly communicate on due diligence.[95] This trend in adopting diligence laws is necessarily guided by Ruggie's "Protect, Respect, and Remedy" framework and the UNGPs, in which human rights due diligence is a central concept. While an important first step towards hardened corporate accountability, human rights due diligence laws have limitations, especially in the absence of other forms of binding transnational regulation, as further discussed below.

B. Regulating the Global Labor Supply Chain Through Chain Liability

Despite the strides made in the business and human rights movement, including the promulgation of hardened human rights due diligence laws, this paper asserts the need for more liability-based, as opposed to duty-based, laws to achieve stronger labor rights protections and accessible justice for rightsholders. In the following sections, I will present some arguments in support of chain liability laws to regulate TNCs, which will include a discussion on principles of responsibility allocation in labor supply chains, limitations of due diligence laws, and examples of existing chain liability models.

1) Corporate Responsibility for Global Labor Standards

The nature of employment relationships has changed dramatically as a result of the growth of corporations operating transnationally. Globalization has tremendously changed the operations of corporations and has led to exponential growth for TNCs. For example, in 2011, it was reported that Wal-Mart had revenues that put it on par with the GDP of the 25th largest economy in the world.[96] This growth is attributable largely to shifting business models for TNCs that focus more on "core competencies" that produce value for investors and consumers, while transferring other activities that were once considered central to the company – such as hiring and training employees – to other organizations. This fragmentation of the workplace is described by David Weil as

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[95] European Commission, *Just and sustainable economy: Commission lays down rules for companies to respect human rights and environment in global value chains,* European Commission (Feb. 23, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145.

[96] Brown, supra at 122.

"fissurization", where companies subcontract down the chain of labor suppliers and shift employment to a complicated network of smaller business units.[97] A 2016 Report of the International Trade Union Confederation found that "60 per cent of major corporations" and "[the global supply chain of 50 companies] only employ six per cent of people in a direct employment relationship" while relying on an indirect workforce of 94 per cent.[98] Workers within the global supply chain are subject to "both the power of their *de jure* employer and the power of their *de facto* employer, [the TNC],"[99] while legal liability and responsibility for the protection of workers have been shifted outside the TNC.[100]

Fissurization of the workplace undermines legal protections for workers. A key characteristic of the fissured workplace is that the lower-level businesses taking on the employment functions tend to operate in highly competitive markets, which puts downward pressure on labor conditions.[101] Labor law classically protects workers through three functions: 1) providing minimum working conditions; 2) ensuring employer accountability for work-related risks; and 3) enabling workers' collective action.[102] Isabelle Martin contends that the fissurization model frustrates all three functions. First, it permits TNCs to benefit from the work of workers who are not considered to be their employees under employment law. Second, it undermines workers' ability to hold TNCs accountable for work-related risks because TNCs are able to define and limit their legal responsibility to workers without relinquishing control over the performance of work and conditions of production, such as quality, quantity, and timing. Finally, due to the dispersion of workers throughout the supply chain, they are unable to unite and "create a counter-power equivalent to economic power of the networks through collective bargaining."[103]

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[97] Weil, David, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* 100 (2014).

[98] Ibid at 105.

[99] Martin, supra at 260.

[100] Brown, Ronald C., *Up and Down the Multinational Corporations' Global Labor Supply Chains: Making Remedies that Work in China,* UCLA Fac. Basin LJ 34 (2016): 104.

[101] Weil, supra at 8.

[102] Ibid at 260-261.

[103] Ibid at 262.

The instances of wage theft in the garment industry during the COVID-19 pandemic is an apt example of this disempowerment. During the pandemic, fashion brands leveraged the control they had over suppliers to significantly reduce their own costs, which in turn had drastic effects on the rights of the workers in the supply chain. A research report by the Center for Global Workers' Rights noted that 65 percent of suppliers surveyed were asked to cut prices on new orders that were bigger than the year-over-year reductions buyers usually ask for.[104] One supplier recounted that certain buyers sought to get discounts without a costing rationale, stating only that they suffered a loss of sales during the pandemic. If discounts were not given, buyers advised that future business was at risk, all while holding back current payments due.[105] In turn, garment workers suffered a loss of wages but had no recourse against the buyers under employment law. Furthermore, although many workers took to the streets to protest the wage theft, collective action was nonetheless throttled by the fact that the workers were spread out across various states. Fissuring simultaneously leads to greater profitability for lead firms and increasingly precarious working conditions for workers at the lower level of the supply chain.[106]

Unsurprisingly, scholars have identified a "responsibility gap" in global labor supply chains – that is, a gap between the formal responsibilities recognized and enforced by existing legal and political arrangements, on the one hand, and the moral responsibilities that actors in the global supply chain should bear, on the other hand.[107] A novel normative framework proposed by Yossi Dahan, Hanna Lerner and Faina Milman-Sivan to close the responsibility gap is the Labor Model of Shared Responsibility (LMSR). Recognizing the complex empirical reality of global labor and taking into consideration existing national and international legal obligations, LMSR seeks to identify those actors in the supply chain who have more responsibility than others based on five principles of responsibility allocation: connectedness, contribution, benefit, capacity and

[104] Anner, supra at 2.

[105] Ibid at 5.

[106] Weil, supra at 8.

[107] Dahan, supra at 2.

power.[108] These principles are used to measure the degree of responsibility an actor has in relation to other actors in the labor supply chain.

According to Dahan et al., *connectedness* refers to the existence of a special relationship between actors in the supply chain – which in this case is the joint activity of production and distribution of specific products – that results in moral responsibilities. *Contribution* refers to the causal connection between an actor's actions or omissions and the negative consequences of these actions or omissions on others in the supply chain.[109] *Benefit* rests on the moral proposition "it is wrong to benefit from others' suffering or vulnerability or profit at another's expense."[110] Thus, an actor who benefits by wrongful conduct towards another actor has a moral responsibility to provide remedial justice to that actor. *Capacity* limits the degree of responsibility an actor bears to their ability to remedy an unjust situation without risking high costs. Finally, the principle of *power* assigns moral responsibility based on an actor's inherent structural power over another actor to make the other actor do something they would not otherwise do.[111] These five principles are implemented based on three parameters to measure the level of responsibility for an actor: 1) the *number* of principles that pertain to a particular actor; 2) the *degree* of responsibility assigned to a particular actor with respect to each principle; and 3) the *prioritization* of the principles based on the circumstances.

Applying the principles of responsibility allocation to the issue of wage theft, it can be argued that TNCs have a higher level of responsibility than other actors in the global labor supply chain for wage violations. Both the studies on pandemic wage theft in the garment sector in 2020 and Genevieve Lebaron's study of cocoa and tea supply chains from 2016-2019 reveal that wage violations do not randomly occur, but are rather traceable to commercial practices and pressures. As Lebaron explains, "where buyers do not pay suppliers enough for products to cover costs of

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[108] The actor's responsibility is dependent on whether a reasonable person would have been able to foresee the consequences of the actions or omissions.

[109] Dahan, supra at 4-6.

[110] Ibid at 6.

[111] Ibid at 7.

production and margins at the base of supply chains, business actors are not able to cover the cost of relevant wage standards."[112]

Thus, TNCs *contribute* to wage theft – particularly by leveraging their *power* over suppliers – and *benefit* from such labor violations. While all five principles of responsibility allocation pertain to TNCs in the global labor supply chain, I would argue that the principles of contribution, benefit and power should be prioritized with respect to wage violations and TNCs bear a high degree of responsibility regarding each of these principles. Moreover, TNCs' capacity to remedy wage violations weighs in favor of bearing greater responsibility. Wage violations can have immediate consequences for workers, such as inability to access basic needs, starvation, and turning towards more exploitative industries that leave them vulnerable to forced labor. TNCs have a higher capacity than other supply chain actors (such as suppliers) to provide prompt remedy, as evidenced by the responses to the #PayUp movement, and therefore should be responsible for both preventing and redressing wage violations.

It is worth remarking that I do not argue that TNCs bear sole responsibility to workers who toil at the bottom of global labor supply chains. The complexity of global labor necessitates shared responsibility for protecting workers between TNCs, direct employers, host governments and home governments. However, in utilizing the LMSR framework for assigning responsibility, I argue that with respect to the *particular issue of wage theft,* where the main objective is to provide immediate remedy to vulnerable workers, TNCs bear the greatest moral responsibility. I recognize that this can raise a concern regarding the free-rider problem – that some actors, such as direct employers, may avoid their obligations under the expectation that TNCs will shoulder the responsibility for wages. This concern can be mitigated, however, by increased monitoring and reporting between TNCs and direct employers that is likely to result by assigning greater responsibility to TNCs. In the following section, I discuss how this responsibility can be translated to liability in the global supply chain.

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[112] Lebaron, supra at 2.

2) Strengthening Labor Protections Through Strict Chain Liability

In 2007, the International Chamber of Commerce released the *ICC Guidance on Supply Chain Responsibility*, which defined supply chain responsibility as "a voluntary commitment by companies to take into account social and environmental considerations when managing their relationships with suppliers."[113] In recent years, we witnessed these voluntary commitments turn into legal commitments through state human rights due diligence laws in France, the Netherlands, Germany, Norway and Switzerland. However, neither the ICC's definition of chain responsibility nor human rights due diligence laws accurately capture the obligations that should follow from chain responsibility in a global labor market characterized by fissurization. Chain responsibility should achieve the basic functions of labor law. In other words, "[t]he core idea of chain-responsibility arrangements must be to ensure that subcontracting does not result in escaping labor law's grasp, and liability is attached to the 'hub' company (the 'real' power dominating the supply chain)."[114] Thus, I argue that in order to achieve the goals and functions of labor law with respect to protection from wage violations, strict chain liability must be imposed.

First, it is important to distinguish chain liability from joint and several liability, since the two types of liability are often conflated. Joint and several liability concerns *direct* liability between immediately contracting parties in one segment of the supply chain.[115] This is purely contractual liability.[116] Chain liability, on the other hand, is a form of third party liability and applies not only in relation to directly contracting parties, but also throughout the entire chain. Therefore, an aggrieved party in the supply chain can seek redress from any link in the chain, including the main contractor or lead firm.[117] Strict chain liability would hold one party in the contracting chain (the lead firm or TNC) prima facie liable for harm caused to another party in the chain (the worker) in

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[113] ICC Commission on Business in Society, *ICC Guide to Responsible Sourcing: Integrating social and environmental considerations into the supply chain,* International Chamber of Commerce (2008): 1, https://iccwbo.org/content/uploads/sites/3/2008/10/ICC-guide-to-responsible-sourcing.pdf.

[114] Kun, supra at 56.

[115] Ibid at 57.

[116] Bogoeski, Vladimir, *Chain liability as a mechanism for strengthening the rights of posted workers: the German chain liability model*, PhD Diss., Hertie School of Governance, Berlin (2017), 6.

[117] Kun, supra at 57; Bogoeski, supra at 6.

the absence of negligence or intent.[118] It is worth noting that in modern American law, liability is traditionally fault-based and when there is third-party strict liability, it is almost always linked to control.[119]

Strict chain liability can also be differentiated from duty-based liability. Duty-based liability is the most common form of third-party liability in America.[120] As Brishen Rogers explains, this type of liability takes the form of "gatekeeper" liability: "[it holds] liable third parties who provide an input essential to misconduct, and who can thus deter or prevent that misconduct by withholding that output."[121] These types of regimes can impose a duty to monitor for misconduct and to withhold support once misconduct is detected.[122] Notably, contemporary efforts to harden corporate accountability in global labor supply chains have primarily relied on the duty-based model of lability. Human rights due diligence laws impose a duty of reasonable care on TNCs. These laws hold powerful parties to more stringent duties than weaker ones, such as imposing requirements to monitor and identify human rights risks and implement measures to prevent human rights violations.[123] A corporation's liability under due diligence laws is thus a consequence of the corporation's failure to perform these duties (not strictly from the fact of harm).

The duty-based approach to corporate liability in the global labor supply chain falls short in key respects concerning access to justice for rightsholders. Although the adoption of human rights due diligence laws has been lauded as a remarkable advance for increasing transnational corporate accountability, the fact remains that not much has changed for vulnerable workers on the ground.[124] First, human rights due diligence laws, on their own, fail to capture the reality of the relationship between workers at one end of the supply chain and TNCs on the other. Despite the

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118 Epstein, Richard A., *A Theory of Strict Liability*, Journal of Legal Studies 2, 151 (1973).

119 Glynn, Timothy P., *Taking the Employer out of Employment Law-Accountability for Wage and Hour Violations in an Age of Enterprise Disaggregation*, Emp. Rts. & Emp. Pol'y 15 (2011): 233.

120 Rogers, Brishen, *Toward Third-Party Liability for Wage Theft*, Berkeley Journal of Employment and Labor Law 31.1 (2010): 35.

121 Ibid.

122 Ibid.

123 For example, France's Vigilance Law.

124 Deva, supra at 4.

fact that supply chain workers continue to be subject to the power of TNCs, who essentially operate as *de jure* employers in a disaggregated workplace, the corporation's liability is confined to performing the delineated duties. As Mark Taylor explains, "it is entirely possible – arguably it is quite likely – that a textile company can implement ongoing human rights due diligence on its supply chain, and manage it diligently, only to find that child labor has appeared in its supply chain from one day to the next."[125]

Second, and importantly, access to remedy remains an enormous hurdle. For example, under the French Vigilance Law, there is a due diligence defense: if there is no violation of due diligence, there is no liability. However, the harmed worker may nonetheless remain unpaid or their injury uncompensated.[126] Even if a due diligence violation is found on the part of the TNC, the worker must overcome additional practical barriers, such as finding a lawyer, engaging in costly litigation, and overcoming the burden of proving duty, causation and damages.[127] Since the French Vigilance Law incorporates tort law, plaintiffs are required to undergo uncertain, prolonged, costly and fact-intensive inquiries into corporate conduct to recover any damages. Other due diligence laws, which impose administrative fines and exclusion from public tenders for violations, do not provide any opportunity for remedy for rightsholders.[128]

In view of these limitations, I argue that a strict chain liability model is required to address the economic realities of global labor and provide meaningful remedy to rightsholders. Although this would be a novel approach to transnational corporate liability, strict liability models have been implemented in the domestic context. For example, California's anti-sweatshop law, AB 633, makes garment manufacturers liable as guarantors for the unpaid wages of their subcontractor's employees.[129] Employees can enforce these obligations by filing a claim with the Labor Commissioner against the contractor (their direct employer) and the guarantor (the

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[125] Taylor, supra at 105.

[126] Brown, supra at 151.

[127] Ibid.

[128] For example, Germany's due diligence law.

[129] Section 2673.1 (a).

manufacturer).[130] In Illinois, the Day Labor Services Act imposes strict vicarious liability to employees engaged by day and labor agencies and performing non-clerical work. The law makes "third party clients," which are firms that contract with day and temporary labor service agencies, liable for unpaid wages owed to day and temporary workers covered by the Act.[131]

Outside of the US, Germany's posted workers law imposes strict chain liability in a wide range of sectors. Under this law, a principal contractor or the intermediate subcontractor that hired the services of another contracting company is liable as a guarantor for unpaid wages of the subcontracting company's employees.[132] This means posted workers can hold multiple parties in the supply chain responsible for wage theft, although the federal labor court has interpreted this provision in some cases to mean only the party or parties outsourcing part of their work to subcontractors.[133] The German posted workers law was initially introduced exclusively in the construction sector to address the concern that "principal contractors tended to opt for subcontractors who keep their costs down by not paying minimum wages." The law now covers almost every industry in Germany.[134]

The above examples demonstrate that strict chain liability has been used in the domestic context to strengthen labor protections and essentially expand the scope of the "employment" relationship, and the liabilities associated with it, to include indirect employers. These laws were enacted to reflect the reality of labor in their respective jurisdictions, where it was apparent that third parties exerted control over subcontractors, contributed to wage violations, and benefited from these violations. Thus, although these liability schemes are not necessarily common, they

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[130] It is worth noting that while this has been characterized as a strict liability model by scholars (see Glynn, supra at 221), guarantors liability under the statute turns on considerations on bad faith on the part of the guarantor.

[131] (820 ILCS 175/85)Sec. 85. (b).

[132] Amon, Matthew R., *Liability Regulations in European Subcontracting: Will Joint Liability be the 21st Century European Approach?,* Journal of International Business and Law 9, 1 (2010): 29.

[133] Bogoeski, supra at 9.

[134] Ibid. Other states with national third party schemes (including joint liability schemes) include Austria, Belgium, Finland, France, Italy, Netherlands and Spain.

should embolden us to envision similar transnational laws that respond to the highly globalized and disaggregated nature of modern labor supply chains.

C. Re-Focusing the Discussion on Rightsholders and Access to Remedy

A final remark regarding the objective of the law reform proposal in this paper concerns the pertinent issue of remedy. Access to effective remedy is one of the three fundamental pillars of the UNGPs, which recognizes that unless states take appropriate steps to investigate, punish, and redress business-related human rights abuses, the state duty to protect can be rendered weak or even meaningless.[135] Access to effective remedy has both procedural and substantive components and can be achieved through state-based judicial mechanisms, state-based non-judicial mechanisms, and non-state-based mechanisms.[136] The effectiveness of state-based judicial and non-judicial mechanisms is dependent on a number of factors including: legitimacy, accessibility, predictability, equitability, transparency, rights-compatibility, and opportunity for continuous learning. Operational level mechanisms should also be based on engagement and dialogue.[137]

The UN Office of the High Commissioner for Human Rights has noted that people who have suffered adverse human rights impacts as a result of business activity continue to face multiple and serious legal, financial, and practical barriers to remedy.[138] With respect to state-based judicial mechanisms, these barriers can arise where:

- Where claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim;
- The costs of bringing claims go beyond being an appropriate deterrent to unmeritorious cases and/or cannot be reduced to reasonable levels through other means of support;

[135] UNGP, supra at Principle 25 (Commentary).

[136] Ibid.

[137] Ibid at Principle 31.

[138] United Nations Office of the High Commissioner for Human Rights, *OHCHR Accountability and Remedy Project: Phase III: Enhancing Effectiveness of non-State-based grievance mechanisms*, OHCHR (Nov. 1, 2018), https://www.ohchr.org/Documents/Issues/Business/ARP/ARPIII-PoW.pdf.

- Claimants experience difficulty in securing legal representation, due to a lack of resources or of other incentives for lawyers to advise claimants in this area;

- There are inadequate options for aggregating claims or enabling representative proceedings (such as class actions and other collective action procedures), and this prevents effective remedy for individual claimants;

- State prosecutors lack adequate resources, expertise and support to meet the State's own obligations to investigate individual and business involvement in human rights-related crimes.[139]

Access to effective remedy remains one of the greatest challenges within the business and human rights agenda. This third pillar is often termed the "Forgotten Pillar" and is largely overlooked.[140] Although there is a wealth of literature on transnational corporate responsibility and liability frameworks in business and human rights, remedy – and specifically a legal framework for accessing remedy – requires further discussion. This is true to a greater extent with respect to remedial frameworks for recovering unpaid wages in the global labor supply chain. Transnational corporate liability regimes are futile in the absence of effective remedies for violations. In short, there are no rights without remedies. Accordingly, an underlying and essential objective of this paper is to re-center the interests of the rightsholder and the goal of access to effective remedy in the business and human rights and global labor supply chain literature.

IV. A PROPOSAL FOR TRANSNATIONAL WAGE LIEN LAWS

To address the pervasive problem of wage theft in the global supply chain, this paper proposes the enactment of a transnational wage lien statute to provide effective and accessible remedy to workers in the supply chain. Specifically, the proposed law would permit workers to claim a wage lien on the real and personal property of a TNC for which they have provided labor. In the following subsections I will consider legal, policy and practical issues pertinent to building a framework for and enacting the proposed transnational wage lien statute in the US. Such

[139] UNGP, supra at Principle 26 (Commentary).

[140] McGrath, Sarah, *Fulfilling the Forgotten Pillar: Ensuring Access to Remedy for Business and Human Rights Abuses,* Institute for Human Rights and Business (Dec. 15, 2015), https://www.ihrb.org/other/remedy/fulfilling-the-forgotten-pillar-ensuring-access-to-remedy-for-business-and.

considerations include features of existing wage lien frameworks in the US; federal versus state constitutional power to enact legislation dealing with the regulation of corporations abroad; international law considerations with respect to the extraterritorial application of the proposed domestic legislation; important practical features of an administrative agency framework; and other practical considerations, such as time and cost, access to information, procedural fairness, and political challenges.

A. Brief Background on Lien Laws

A lien is a form of security interest that encumbers an item or property to secure the payment of a debt or satisfaction of an obligation or duty. Liens can be consensual, statutory, or judicial. Consensual liens are voluntary and usually the result of a loan or advancement of credit. Statutory and judgment liens both arise by law. Statutory liens are established by operation of state or federal law, such as mechanic's liens, carrier's liens, and wage liens. Judgment liens are granted by a court after a court judgment. It gives a creditor – the successful party in the judgment – a security interest in the debtor's real or personal property and thus gives the creditor the right to take possession of the property in the event the debtor fails to fulfill their obligations.

One of the most common types of liens is the mechanic's lien, also known as a construction lien. This type of statutory remedy provides a claimant – that is, someone who has provided their labor, materials, or machinery for the improvement of real property or structures affixed to real property – a security interest in the improved property. In the event the claimant is not paid for their contribution to the real property, they may compel the sale of the property to satisfy the outstanding payment.[141] While mechanic's lien statutes vary by country and state, they generally involve the following procedure:

a) Upon a person supplying their services or materials to the improvement of a real property, a lien is created (in some jurisdictions, notice to the owner may be required of what has been contributed);

[141] Nelson, Blake, *Construction Liens: A National Review and Template for a Uniform Lien Act*, 34 William Mitchell Law Review 34, 1 (2000): 246.

b) If the laborer or supplier is not paid, the lien claimant provides notice to the owner of the property of their intention to enforce the lien and file the lien with the county clerk's office;

c) The lien claimant enforces the lien by filing a lawsuit.

For the purposes of this paper, both wage liens (discussed in detail in the following section) and mechanic's liens are of particular interest. Wage lien statutes in the US are generally limited to direct employment relationships. With some limited exceptions, employees who file wage liens are entitled to a security interest of their direct employer. Mechanic's liens, in contrast, permit workers to claim an interest in the property of a party with whom they have no direct relationship. This broadly serves two interests: 1) preventing owners from getting the benefit of work done at their instance on their property without paying for them; and 2) protecting the worker. In fact, the labor movements in the late nineteenth century were perhaps the most significant forces in expanding mechanic's lien legislation.[142] For supporters of the labor movement, "construction liens were the answer to a prevalent condition whereby contractors used laborers and materialmen to put up buildings for profit and then refused them their rightfully owed wages."[143]

Furthermore, the mechanic's lien model recognizes that the building process is complex and involves many different entities, including owners, contractors, subcontractors, labourers, and material suppliers. This raises particular difficulties since most of the people in the subcontracting chain looking for security have no contractual relationship with the owner.[144] Mechanic's liens overcome this problem of multiple subcontracting relationships within the building process by allowing laborers at the bottom of the subcontracting chain to hold owners at the top – who ultimately derive value from the labour – accountable for unpaid work.

Accordingly, the mechanic's lien framework provides a helpful guide for addressing similar worker protection issues in other sectors characterized by subcontracting. The transnational wage

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[142] Ibid at 247.

[143] Ibid at 248.

[144] Law Reform Commission of British Columbia, *Report on Debtor-Creditor Relationships: Part II Mechanics' Lien Act: Improvements on Land,* Law Reform Commission of British Columbia (1972): 10, https://canlii.ca/t/sg7s.

lien law proposed in this paper, therefore, is informed by both domestic wage lien mechanisms in the US and mechanic's lien principles.

B. Wage Lien Laws in the US

Over the last decade, wage theft has become a serious problem facing poor and working class workers in the US.[145] A report from the Economic Policy Institute (EPI) released in 2017 found that 2.4 million workers in the ten most populous U.S. states lost 8 billion dollars annually from wage theft.[146] The wage theft crisis has led a number of states to enact laws aimed at strengthening wage collection mechanisms, including wage lien laws, in order to increase efficiency in the enforcement of wage judgments that have traditionally difficult to collect on. Wage liens allow workers to place a lien on their employer's real and/or personal property for the amount of unpaid wages due to them, as well as interest and costs in certain circumstances.

At the time of writing this paper, there are eleven U.S. states with wage lien laws: Kentucky,[147] Texas,[148] New Hampshire,[149] Idaho,[150] Maryland,[151] Wisconsin,[152] Indiana,[153] Ohio,[154] Tennessee,[155] Alaska,[156] and Washington.[157] The wage lien laws across these eleven states can broadly be described as falling under two types: 1) a wage lien mechanism that requires workers to go through administrative channels before unpaid wages become a lien. Under this framework,

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[145] Hallett, Nicole, *The Problem of Wage Theft*, Yale Law & Policy Review 37, 93 (2018): 100.

[146] Cooper, David and Teresa Kroeger, *Employers Steal Billions from Workers' Paychecks Ear Year*, Economic Policy Institute (May 10, 2017), http://perma.cc/V9CH-MXL5.

[147] Kentucky rev. Stat. 337.075.

[148] V.T.C.A., Labor Code § 61-081.

[149] N.H. rev. Stat. 275:51

[150] Idaho Code, 45-620.

[151] MD Lab & Emp Code, 3-1105.

[152] WI Stat. § 109.09.

[153] IC 32-28-12.

[154] 1311.34-36

[155] Tenn. Code Ann, § 66-13-101.

[156] Alaska Stat., § 34.35.445.

[157] Wash. Rev. Code Ann., § 49.48.084-086.

the lien is normally recorded and enforced by an administrative body on behalf of the employee; and 2) a wage lien mechanism that allows workers to directly file and enforce a lien without the requirement to go through administrative channels.

In this section, I will provide an overview of the wage lien frameworks enacted across the U.S., organized under the categories of administrative or direct lien mechanisms. A review of the wage lien laws across the country enables us to perform a comparative study of the various legal frameworks and an analysis of the advantages and disadvantages of each. This provides a foundation upon which to envision a transnational wage lien framework for the collection of unpaid wages within the global supply chain.

1) Administrative Wage Lien Mechanisms

Kentucky, Texas, New Hampshire, Idaho and Washington[158] each have laws providing for wage liens that can be recorded, perfected and enforced through administrative channels. The wage lien frameworks in these five states are similar in that they generally involve the following steps:

a) the employee files a wage claim with an administrative body;

b) the administrative body investigates the complaint and, where appropriate, issues judgment requiring the employer to pay unpaid wages;

c) subject to available appeal mechanisms, the judgment will result in a lien on the employer's personal and/or real property, which is either recorded automatically or by the administrative body;

[158] Although Wisconsin is not listed here, employees in Wisconsin have the option to either file a wage complaint directly with the court or through the Department of Workforce Development. This is further described in the next section.

It is also worth mentioning that California has laws for collecting wages that look similar to the administrative wage lien mechanisms described in this section, but the remedies are more akin to those available to judgment creditors and therefore has been left out of this discussion. California is currently in the process of considering a draft bill that would implement a direct wage lien mechanism. See Senate Bill No. 588: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160SB588.

d) the employee or administrative body will then have a certain amount of time to enforce the lien in court to collect the unpaid wages.

The wage lien laws of each of these five states are further detailed below.

i) Kentucky

Kentucky's statute[159] requires employees to file a complaint for unpaid wages to the commissioner of the Department of Workplace Standards.[160] The commissioner may bring any legal action necessary to collect the unpaid wages, including assessing civil penalties for breaching the provisions requiring payment of wages.[161] Where an employer has been assessed for civil penalties by the commissioner, the statute grants the option of placing a lien on all real and personal property of the employer. However, before a lien can be placed, an employer has the right to seek an appeal of the commissioner's decision, in which case an administrative hearing will be held. Decisions on appeal may also be judicially reviewed.[162]

Once administrative and judicial appeals have been exhausted, the commissioner or the commissioner's designee may record a lien with the prescribed county clerk's office on the employer's property in the amount totaling the unpaid wages and penalties in favor of the Labor Cabinet.[163] The recorded lien will be superior to any mortgage or encumbrance brought after the recording and will continue for ten years from the time of the recording, unless it is otherwise released or discharged sooner.[164]

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[159] Kentucky has two wage lien mechanisms. The older one, established in 1952, can be found in 376.150-170 only establishes a wage lien when the employer's business is assigned or distributed among creditors. A wage lien automatically attaches when the employer suspends, sells or transfers its business. Given the limited applicability of this provision, this paper focuses on the later wage lien mechanism established under 337.075.

[160] Kentucky, supra at 337.385.

[161] Ibid at 337.385 and 337.990.

[162] Ibid at 337.310 and 337.075.

[163] Ibid at 337.075.

[164] Ibid at 337.075.

ii) Texas

The Texas *Labor Code* requires employees to file wage complaints with the Texas Workforce Commission no later than 180 days after the wages become due.[165] An examiner employed by the commissioner then reviews and investigates the claim and, if warranted, issues a preliminary order to pay.[166] Preliminary orders may be appealed by the parties within 21 days of the order being mailed out, failing which the preliminary order will be final.[167] Decisions on appeal may be modified by the commission either by the commission's own motion or by a further appeal to the commission by the parties.[168] Commission decisions may be judicially reviewed.[169]

Employers are required to pay outstanding wages within thirty days of the commission's final order, and a lien automatically attaches to the employer's real and personal property as soon as a final order is made.[170] The process for enforcing the lien is the same as that for enforcing tax liens in Texas – a lien notice is issued and filed by the comptroller, after which a suit can be brought in court to perpetuate and foreclose the lien.[171] Wage liens under the *Labor Code* have priority over all other lien claims except for liens for *ad valorem* taxes and continue for ten years from the date of filing.[172]

iii) New Hampshire

New Hampshire offers the option to either an employee or the Department of Labor, on its own motion, to file a wage claim with the labor commissioner within thirty-six months of the wages becoming due. The employer is then notified and given ten days to file objections, failing which the commissioner can make an order for payment. Where requested, the commissioner will hold a

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165 Texas, supra at 61.051.

166 Ibid at 61.052.

167 Ibid at 61.054-057.

168 Ibid at 61.0612.

169 Ibid at 61.062.

170 Ibid at 61.066.

171 Ibid at 61.082 and Subchapters A and B, Chapter 113 of the Tax Code.

172 Ibid at 61.0825.

hearing of the matter and issue a written decision within thirty days, which can be appealed to the superior court. In the absence of an appeal, the commissioner's decision is entered upon the superior court docket and a lien is placed on any property of the employer situated within the state.[173] The lien will continue for a period of three years from the time of the decision, and the statute empowers the commissioner to bring any legal action necessary to collect the unpaid wages on behalf of the employee.[174]

iv) Idaho

Idaho requires employees to file wage claims with the Department of Labor within two years of the cause of action accruing, or where the employer has paid the employee partial wages, within twelve months from the accrual of the cause of action. The wage claim triggers an investigation conducted by a compliance officer, who makes a determination regarding whether wages are owed. Notably, Idaho's framework caps wage claims to the small claims court limit, which is $5,000.[175] The compliance officer's decision may be appealed by the parties to the appeals examiner. An appeals examiner's decision may be judicially reviewed.[176]

If an employer fails to pay wages determined to be owed in a final order, the department may file a notice of lien against the employer's real and personal property with the Office of the Secretary of State.[177] If no payment is made within thirty days of the notice being filed, the lien may be enforced by either the Director of the Department of Labour or Sheriff of the county by issuing a warrant to seize and sell the employer's property. The statute also permits the department to collect on the lien in the same way it collects tax liabilities and overpayment of benefits.[178]

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173 New Hampshire, supra at 275.51.

174 Ibid at 275.51 and 275.53.

175 Idaho, supra at 45.617.

176 Ibid at 45.618.

177 Ibid at 45.618.

178 Ibid at 45.621.

v) Washington

Washington is unique in that it has both administrative and direct wage lien mechanisms, the latter of which will be discussed in the following subsection. The administrative wage lien mechanism requires employees to file a wage complaint with the Department of Labor and Industries for unpaid wages going back not more than three years. The department then conducts an investigation and, if warranted, issues a citation and notice of assessment against the employer. The department may then issue an order to pay, as well as civil penalties if it makes a finding that the non-payment of wages was wilful.[179]

Employers may appeal the department's citation and notice of assessment with the Director of the Department of Labor and Industries within thirty days, in which case the issue will go to a hearing with an administrative law judge. Following the hearing, the administrative law judge will issue an initial order. The initial order can be further challenged through a petition for administrative review with the Director of the Department of Labor and Industries, who will then issue a final order. The director's order may be judicially reviewed.[180]

If the employer defaults in paying a final order, the director may file a with the clerk of any county within the state a warrant in the amount of unpaid wages, plus filing fees, which becomes a lien upon all real and personal property of the employer. Once a warrant is issued by the director and mailed to the employer, writs of garnishment in favor of the state can be issued against the employer.[181]

2) Direct Wage Lien Mechanisms

Maryland, Wisconsin, Indiana, Ohio, Tennessee, Alaska and Washington have wage lien laws that allow employees to directly pursue liens against an employer's property without having to go through administrative channels. These frameworks tend to be more complex and vary from state to state with respect to timelines, the types of documents required and the number of steps

[179] Ibid at 49.48.084.

[180] Ibid at 49.48.084.

[181] Ibid at 49.48.086.

involved. That said, most of the wage lien statutes in these states require some form of notice to the employer, a recording of the lien, and enforcement of the lien within a specific time period. Each state's wage lien laws are further detailed below.

i) Maryland

Maryland's wage lien statute requires employees to first serve a Notice to Employer of Intent to Claim Lien for Unpaid Wages to the employer in a prescribed form. The Notice must include the employee's name and address, the employer's name, the employee's dates of employment, the dates for which wages are due, the basis for the claim, the monetary amount of the lien, a description of the real or personal property on which the lien is being placed, and the owner and location of the property.[182] An employer in receipt of the Notice may dispute the lien by filing and serving a complaint in the circuit court where the property in question is located, along with an explanation for why wages are not due and supporting documents for same.[183]

A lien for unpaid wages is established if either the employer does not dispute the Notice within thirty days after a the Notice is served or the circuit court issues an order establishing a lien.[184] Once a lien for unpaid wages is established, the employee may record the lien by filing a Wage Lien Statement in the manner prescribed, depending on whether the lien is on real or personal property. If the employee does not record the wage lien within 180 days of the lien being established, the recorded lien will be released.

Wage liens must be enforced within twelve years of the date of recording the lien. The enforcement procedures are the same as those for the enforcement of judgments under Maryland law.[185] Wage liens under the statute are considered secured claims with priority over other claims

[182] Maryland, supra at 3-1102.

[183] Ibid at 2-1103.

[184] Ibid at 3-1104.

[185] Ibid at 3-1106.

from the date of the court order establishing the lien or, where the lien was not disputed, the date from when the lien was filed.[186]

ii) Wisconsin

In Wisconsin, employees can seek a wage lien by bringing an action for unpaid wages against the employer in court.[187] The employee will then need to file a Notice of Lien with the clerk of the Circuit Court in the county in which they performed their employment services. The Notice must include a description of the nature of the claim, including a statement that a lien is being filed, the amount sought by the employee, and a description of the real and/or property on which a lien is being placed. The employee is required to serve a copy of the Notice of Lien on the employer.[188]

The Notice of Lien must be filed within two years of the date on which the wages were due. Furthermore, the lien will cease to exist if an action to enforce the lien is not brought within two years of the employee's unpaid wages claim being filed.[189] The lien will take priority over all other debts and liens except for any lien by a commercial lending institution that originated prior to the employee's lien. If a prior lien by a commercial lending institution exists, only the last six months of the employee's wages up to $3,000 can be prioritized.[190]

In addition to a direct wage lien mechanism, the Wisconsin statute gives employees the option to use administrative channels to seek a lien.[191] Employees may opt to file a wage claim under s. 109.09 (1) with the Department of Workforce Development, in which case the department will investigate the matter and pursue the above steps on behalf of the employee, including bringing a lawsuit against the employer, filing and serving a Notice of Lien, and enforcing the lien within the required timeframe.[192]

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[186] Ibid at 3-1105.

[187] Wisconsin, supra at 109.03 (5).

[188] Ibid at 109.03 (5) and 109.09 (2).

[189] Ibid at 109.09 (2).

[190] Ibid at 109.09 (2).

[191] Ibid at 109.03 (5).

[192] Ibid at 109.09 (1).

iii) Indiana

Indiana's statute allows employees of a corporation doing business in the state to obtain a wage lien against the employer's property and earnings.[193] To obtain a lien, the employee is required to file a notice of the employee's intention to hold a lien upon the employer's property and earnings. The Notice must be filed with the recorder's office of the county in which the employer is located or doing business and must include the name of the corporation, the date of employment and the amount sought.[194] The wage lien takes priority over all other liens created or acquired after the date of the employee's employment.[195]

The employee may enforce the lien by filing a complaint in the Circuit or Superior Court in the county where the lien was acquired. The complaint must be filed within six months of the date the lien was acquired. The Court will then render a judgment, and if the employee is successful, order that the employer's property be sold to satisfy the judgment. The Court may also make orders with respect to the earnings of the corporation.[196]

iv) Ohio

In order to obtain a wage lien in Ohio, an employee is required to file a statement, verified by affidavit, with the county recorder in which the labor was performed. The statement must include a description of the amount, kind, and value of the labor performed, the period during which the labor was performed, and the amount due to the employee, including all credits and offsets.[197] The statement must be filed within thirty days from three months after the employee performed the labor in question. Once the statement is filed, it becomes a lien on the real property of the employer for one year from the date of filing the statement.[198]

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[193] Indiana, supra at 32-28-12-1.

[194] Ibid at 32-28-12-2.

[195] Certain exceptions apply under s. 32-28-1 for employees whose wage liens arise from a sale or conveyance of real estate.

[196] Indiana, supra at 32-28-12-4.

[197] Ohio, supra at 1311.35.

[198] Ibid at 1311.35.

During this one-year period, the employee must bring an action to enforce the lien by filing a complaint with the court. The court will then make an order with respect to the lien, including an order for sale of the employer's property if the lien is established.[199] Wage liens under the Ohio statute are superior to attachment liens and certain mortgage liens taken during the existence of the unpaid labor.[200]

v) Tennessee

Employees in Tennessee have an automatic lien against their employer's personal and real property for any sums due to them for labor performed for the employer.[201] The amount that can be claimed through a wage lien is limited to wages accrued within three months of the employee bringing a suit to enforce the lien.[202] Suits to enforce a lien must include an affidavit from the employee that the debt is due and unpaid from the employer.[203] Tennessee wage liens have priority over all other liens, except for vendor's liens, mortgage liens and deeds of trust to secure purchase money.[204]

vi) Alaska

In order to obtain a wage lien in Alaska, an employee must first create an account of service showing the amounts owed to them and provide the account to the employer within thirty days of the wages becoming due. The employee must record a lien notice with the recorder of the recording district in which the employee's services were performed within ninety days of the employee's termination of performance. The lien attaches to "all products, machinery, tools, fixtures, appurtenances, goods, wares, merchandise, chattels, wagons, carts, or things of value, of whatever character" owned by the employer and that are created in whole or in part by the employee's labor, that may be used or useful by the employer, or may be necessarily connected with the performance

[199] Ibid at 1311.36 and 2323.07.

[200] Ibid at 1311.34.

[201] Tennessee, supra at 66-13-101.

[202] Ibid at 66-13-102.

[203] Ibid at 66-21-101.

[204] Ibid at 66-13-101.

of the employee's labor. Thus, the Notice must include a description of the property on which the lien is being placed to sufficiently identify the property.[205] In order to enforce the lien, the employee must bring a suit within six months of recording the lien.[206]

vii) Washington

As described above, Washington has both an administrative and direct wage lien mechanism. The direct wage lien mechanism was brought into effect in April 2021 and incorporates some of the provisions of the administrative wage lien mechanism. Under the new mechanism, employees may establish a wage lien for unpaid wages within two years from the date the wages first became due. The types of property on which a wage lien can be sought is broader in Washington than in other states. In particular, an employee can hold a wage lien on: 1) any real property owned or acquired by the employer in Washington; 2) any goods and tangible chattel paper owned or acquired by the employer in Washington; 3) any accounts and payment intangibles owned or acquired by the employer; and 4) any real property in Washington that was maintained by the employee and for which maintenance the employee was not paid.[207]

The process for establishing the lien differs depending on whether the lien is being established against real or personal property. If the lien is on real property, the employee must file a Notice of Claim of Wage Lien with the county where the property is located and include their name, phone number and address, the employer's name and address, the name of the owner of the property and the amount claimed. The Notice must be served on the employer and the property owner, if different from the employer. If the employee is establishing a lien on personal property, they must file a financing statement with the Department of Licensing (if the employer is in Washington) or the office designated under the Uniform Commercial Code in which the employer is located (if the employer is located outside Washington). The financing statement must be mailed to the employer along with a Notice of Claim of Wage Lien, which must include the name, phone number

[205] Washington, supra at 34.35.435.

[206] Ibid at 34.35.440.

[207] Wash. Rev. Code Ann s. 60.90.20.

and address of the employee, the name of the employer, and a description of the property or a statement that the lien covers all goods and tangible chattel paper located in Washington.[208]

Once a wage lien is established, the employer may bring a motion in court for an order challenging the lien as frivolous or without reasonable cause.[209] Assuming the employee is successful in demonstrating that the lien is not frivolous nor without reasonable cause (or if no motion was brought by the employer), the employee may proceed with enforcing the lien. If the lien is on real property, the employee must file a Notice of Pendency of Wage Claim with the auditor of the county in which the property is situated within eight months of recording the wage lien.[210] Whether or not the lien is on real or personal property, the employee must bring a suit to enforce the lien and foreclose in Superior Court within eight months of recording the lien.[211] Notably, wage liens under this mechanism can also be enforced by the Department of Labor and Industries using the warrant procedures under ss. 49.47.086.

3) Examining the Efficacy of Wage Lien Mechanisms

Wage liens have proven to be quite effective in at least partially recovering unpaid wages. For example, Wisconsin – which has one of the oldest wage lien statutes – is reported to have very high collection rates for unpaid wages. A 2013 study by the National Employment Law Project (NELP) and the UCLA Labor Center found that 95% of the wage claims filed between 2007 and 2012 in Wisconsin were settled, dismissed or paid in full; notably, 55% of employers paid outstanding wages in full and only 5% of all claims went to litigation because employers refused to pay or settle.[212] The NELP Study also found that due to the high recovery rate for wage claims, very few wage liens are actually enforced in Wisconsin and the ones that are usually involve employers who have closed, sold, entered bankruptcy or defaulted. Where wage liens were

[208] Ibid at 60.90.030.

[209] Ibid at 60.90.140.

[210] Ibid at 60.90.060 and 60.90.070.

[211] Foreclosure suits can be brought by the employee or the Department of Labor and Industries or the employee's union on behalf of the employee.

[212] Cho, Eunice Hyunhye, et al., *Hollow Victories: The Crisis in Collecting Unpaid Wages for California's Workers,* National Employment Law Project, June 27, 2013, at 17-18, https://www.nelp.org/wp-content/uploads/2015/03/Hollow-Victories-Unpaid-Wages-Report.pdf.

enforced by the Wisconsin Department of Justice between 2005 to 2013, 80% of those cases resulted in partial or full payment of the wages claimed.[213]

An important feature of Wisconsin's wage lien statute that makes it particularly effective in wage recovery is that it permits pre-judgment liens. Specifically, after an employee files a wage claim with the Department of Workforce Development (DWD), the statute permits the DWD to file a lien on the employer's property *before* making a determination on the merits of the wage claim where the DWD finds "the employer's business is closing or closed, the employer is looking to sell the business or file for bankruptcy, or multiple employees have filed for unpaid wages." The NELP Study reported that the pre-judgment nature of the wage lien in Wisconsin was critical. Since the lien was recorded before an employer's assets disappeared, employees of particularly problematic companies could access these assets (which would otherwise be unavailable) in order to seek recovery of wages owed.[214]

The NELP Study further compared wage recovery rates between Wisconsin and California, which does not have a wage lien statute, and found that workers in Wisconsin recovered wages 1.6 times more than similarly situated workers in California.[215] That said, the study revealed that the actual amounts collected through wage lien enforcement in Wisconsin remains lower than desired since workers represented by the Department of Justice collected 25 percent of the wages claimed.[216] This is likely due to the fact that enforcement actions are brought primarily against employers in high risk of going out of business or entering bankruptcy. However, the study demonstrates that full recovery is possible outside of these circumstances and the existence of a wage lien statute can be very effective in ensuring timely and cost-effective recovery.

As previously mentioned, Wisconsin has both a direct wage lien and administrative wage lien mechanism. Between the two options, the latter is more attractive for the purposes of a transnational wage lien. This is in consideration of the purpose of the proposed law, which is to

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[213] Ibid, at 18.

[214] Ibid.

[215] Ibid.

[216] Ibid.

provide an accessible remedial mechanism, and the demographic of rightsholders, who are likely to be individuals in developing countries with low legal literacy and minimal financial resources. Direct wage lien mechanisms tend to be complex – they generally involve more steps and require more information in order for an employee to file and enforce a lien. Moreover, and importantly, they require the employee to perform each of the steps, which would in turn require retaining a lawyer and incurring additional time and cost. Administrative wage lien mechanisms, in contrast, generally require an employee to provide some initial information, after which an administrative agency takes the requisite steps to file the lien. In some jurisdictions, the agency will also enforce the lien. This is preferred in a remedial mechanism where an impecunious complainant is up against a resource-rich company.

C. Constitutional Considerations

A key issue in enacting domestic legislation that seeks to govern corporations based in the US with extraterritorial application is whether Congress or state legislatures would have jurisdiction to enact the proposed law. In the following subsections, I consider the issue of division of power and argue that, in light of federal government's foreign affairs and foreign commerce powers, Congress would have the authority to enact the proposed transnational wage lien law.

1) Division of Power: Congress and State Legislatures

The US Constitution establishes a system of dual sovereignty, which divides powers between the federal and state governments. Article I, Section 8 of the Constitution enumerates specific powers belonging to the federal government, which, among other things, include regulation of foreign commerce, as well as the power to make laws which are "necessary and proper for carrying into Execution […] Powers vested by [the] Constitution in the Government of the United States, or in any Department or Officer thereof."[217] The Tenth Amendment confers general powers to the states, which are not delegated to the federal government by the Constitution nor prohibited by it to the states.[218] As a result of this constitutional division of powers, the power

[217] U.S. Const. Art. 1, s. 8.

[218] U.S. Const. Tenth Amendment.

to make laws with respect to foreign commerce and foreign affairs is reserved for Congress. State Legislatures have general powers to make laws with respect to the regulation of corporations within state borders, but Congress may nonetheless regulate domestic corporations under certain circumstances, such as for the purposes of regulating interstate commerce. Although the proposed transnational wage lien law seeks to regulate corporations domiciled within states in the US, it is explicitly transnational in its application – it will permit foreign workers from outside of the US to transcend borders and seek remedies for unpaid wages from US-based corporations. This necessarily implicates Congress' foreign commerce and foreign relations powers.

Foreign commerce is considered to be within the "exclusive and absolute" power of Congress.[219] In *Bowman v Chicago & N.W. Ry. Co.*, the Supreme Court of the United States explained that "[l]aws which concern the exterior relations of the United States with other nations and governments are general in their nature, and should proceed exclusively from the legislative authority of the nation."[220] The Supreme Court's discussion in *Bob-Lo Excursion Co. v. Michigan*, which concerned the application of a Michigan civil rights statute on a corporation transporting passengers from Detroit to an amusement park on an island in Ontario, Canada, provides helpful commentary on when a law concerns the exterior relations of the US. Specifically, in that case, the Supreme Court looked at whether the business of the corporation was run in a manner that insulated it "from all commercial and social intercourse and traffic with the people of another country," and explained that such transnational intercourse would be "characteristic of foreign commerce."[221]

In addition to its enumerated foreign commerce power, Congress also has an implied power to deal with foreign affairs.[222] The foreign affairs power of Congress includes the power to enact laws touching on the rights of foreigners, as provided by the Supreme Court in *Hines v Davidowitz*: "When the national government by treaty or statute has established rules and regulations touching

[219] *Buttfield v. Stranahan*, 192 U.S. 470 (1904) at 493.

[220] Ibid at 697.

[221] *Bob-Lo Excursion Co. v. Michigan*, 222 U.S. 28 (1948).

[222] See, for example *Hines v Davidowitz,* 213 U.S. 52 (1941), in which the Supreme Court invalidated Pennsylvania's Alien Registration Law because it encroached on a field reserved for the federal government. Justice Black reaffirmed "the supremacy of the national power in the general field of foreign affairs".

the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land."[223] Moreover, the foreign affairs power is understood to allow Congress to enact legislation on any subject dealing with, relating to, or affecting the relations of the US with other nations, and can support legislation on any matter of "international concern."[224] Both the federal foreign commerce power and foreign relations power seem to imply the "identical concern of the Constitution to vest in the national government authority to deal with what affects the nation as a whole."[225]

A domestic legislation establishing a wage lien mechanism for foreign workers, which allows them to bring transnational claims against US corporations, not only concerns the exterior relations of the US with other nations but also affects the nation as a whole. First, given that the businesses to be regulated by the proposed transnational wage lien law are precisely those commercially engaged with persons and businesses of another country, it is clear that the law would touch on activities that are characteristic of foreign commerce. More generally, it can be said that the regulation of labor conditions abroad, including security of wages, is properly the subject of Congress' foreign commerce and implied foreign affairs power. After World War I, nations recognized that the labor conditions in one country affected conditions, wages and prices in other countries and, therefore, labor conditions in one country were a proper concern of other countries. This led to the negotiation of minimum standard-setting multilateral treaties through the International Labor Organization.[226] The fixing of high labour standards globally and the protection of human rights within supply chains are widely recognized within the international community to be of international concern.[227] This strongly suggests that the proposed transnational wage lien law would properly fall under the legislative authority of Congress rather than State Legislatures.

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[223] *Hines v. Davidowitz,* 312 U.S. 52 (1941) at 64.

[224] Ibid at 922.

[225] Ibid at 925.

[226] Henkin, Louis, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, University of Pennsylvania Law Review 5, 107, at footnote 15.

[227] See Protocol PO20, supra*;* Henkin, supra at footnote 22 ("To recognize that even "human rights" and "genocide" may be matters of authentic international concern, one need only think of recent events in Communist countries, India and Pakistan, Cyprus and other actual or potential situations where the

2) Dormant Foreign Affairs and Foreign Commerce Doctrine

If the transnational wage lien statute were to be enacted by a State Legislature instead of Congress, it would likely be susceptible to constitutional challenge under the dormant foreign affairs doctrine and the dormant foreign commerce clause doctrine. The primary case dealing with the dormant foreign affairs doctrine is *Zschernig v Miller*. In that case, the Supreme Court considered the constitutionality of an Oregon statute, which made a foreigner's right to inherit real property in Oregon conditional upon an Oregon resident having the right to inherit real property in the foreigner's home country. The Court ruled that the statute was preempted because it required a state court to assess foreign political and judicial systems and, therefore, offended federal interest in the conduct of foreign affairs.[228] The reasoning in *Zschernig* was later read by the Supreme Court in *American Insurance Association v. Garamendi* to stand for the proposition that "state action with more than incidental effect on foreign affairs is preempted, even absent any affirmative federal activity in the subject area of the state law, and hence without any showing of conflict."[229] Thus, a state-enacted transnational wage lien statute may offend the dormant foreign affairs clause even in the absence of a federal statute dealing with the matter.

Although the dormant foreign commerce clause operates in a similar fashion to, and may overlap with, the dormant foreign affairs clause, it is worth noting that Congressional silence may be interpreted differently when applying the dormant foreign commerce clause due to the Supreme Court's decision in *Barclays Bank PLC v. Franchise Tax Board*. In that case, the Supreme Court considered a challenge to California's 'worldwide combined reporting' method to determine corporate franchise tax owed by a unitary business in California. Specifically, California's method looked at the worldwide income of a unitary business and taxed a percentage of that income, while the federal government employed a separate accounting method which treated each corporate entity discretely for the purposes of determining income tax liability. The Court noted that in the past three decades, despite being aware that foreign governments deplored California's use of the

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treatment of individuals or minority groups, even if local citizens, is intimately related to war and peace among nations.")

[228] Dunoff, Jeffrey L., et al., *International Law Norms, Actors, Process* (2020), 437-440.

[229] *American Insurance Association v Garamendi,* 539 US 396 (2003) at 398.

'worldwide combined reporting' method, Congress failed to enact any bills prohibiting the conduct.[230] The Supreme Court essentially recognized Congressional inaction or silence as constituting tolerance of the state policy, and thus not offensive to the dormant foreign commerce clause.[231]

Notwithstanding the Supreme Court's decision in *Barclays Bank*, it is arguable that the absence of a federal transnational wage lien statute will not necessarily signal implicit Congressional approval of the state legislation since the foreign commerce clause in question in *Barclays Bank* turned on the fact that Congress *knew* that California's method was a potential irritant to US foreign relations for many years and did nothing about it. Therefore, whether a state transnational wage lien statute will be struck for offending the dormant foreign commerce clause may depend largely on international reaction to the statute and Congress' response to same.

D. International Law Considerations

The proposed transnational wage lien law is envisioned to be a statute that is enacted domestically, but a key feature of the statute is its application to non-nationals – specifically workers residing outside of the US. This raises a number of international law considerations with respect to sovereignty, extraterritorial jurisdiction, and international comity, which I argue can be respected through proper drafting of the proposed legislation.

1) <u>US Jurisdiction Over Transnational Business Activity</u>

i) Sovereignty and Principles of Extraterritorial Prescriptive Jurisdiction

Traditionally, territory is the principal and the most common basis for a nation's jurisdiction to promulgate law applicable to persons or activities (otherwise referred to as "jurisdiction to prescribe" or "prescriptive jurisdiction"). International law has long recognized limitations on the authority or competence of a nation to exercise jurisdiction to prescribe in

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230 *Barclays Bank PLC v. Franchise Tax Board,* 512 U.S. 298 (1994), 2281-2286.

231 Bermann, George A., *Transnational Litigation in a Nutshell* (2021), 202-203.

circumstances affecting the interests of other nations.[232] This is derived from the principle of sovereign equality, which assumes that all sovereign nations are formally equal and have supreme authority and lawful control over their respective territories to the exclusion of other states.[233]

However, the practice of nations has over time reflected conceptions better adapted to the contemporary realities of international intercourse, and prescriptive jurisdiction is often exercised extraterritorially on the basis of other related principles. To that end, it is widely recognized that certain links must exist between the law and the person or activity that the law seeks to regulate. In particular, the United States' practice recognizes jurisdiction to prescribe law with respect to: a) persons, property, and conduct within its territory; b) conduct that has a substantial effect within its territory; c) the conduct, interests, status, and relations of its nationals and residents outside its territory; d) certain conduct outside its territory that harms its nationals; d) certain conduct outside its territory by persons not its nationals or residents that is directed against the security of the United States or against a limited class of other fundamental US interests; and f) and certain offenses of universal interests.[234]

These links noted above restate principles for exercising jurisdiction under international law, which include – in addition to the territorial principle – the effects principle and the nationality (or active personality) principle.[235] The effects principle asserts that a nation may have jurisdiction with respect to conduct outside of its territory but having an effect within its territory that creates a genuine connection between the conduct and the prescribing nation.[236] The nationality principle

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[232] Restatement (Third) of Foreign Relations Law IV 1 A Intro. Note (1987).

[233] UN Committee Consensus on Sovereign Equality of States, *United Nations: Consensus of sovereign equality of States reached by Special Committee on Principles of International Law Concerning Friendly Relations of States*, International Legal Materials 4, 1 (1965), https://www.jstor.org/stable/20689860?seq=1#metadata_info_tab_contents.

[234] Restatement (Fourth) of Foreign Relations Law § 402 (1987)

[235] International law also recognizes the "passive personality principle" and "protective principle". The "passive personality principle" asserts that a nation may prescribe law – particularly criminal law – with respect to an act committed outside its territory by a person not its national where the victim of the act was its national. This principle is generally limited to ordinary torts or crimes. The "protective principle" recognizes a nation's right to exercise prescriptive jurisdiction with respect to a limited class of offenses committed outside of its territory by non-nationals, but which are directed against the security of the nation. As both principles have limited application, they are not discussed further for the purposes of this paper.

[236] Restatement (Fourth) of Foreign Relations Law § 409 (1987).

asserts that a nation may exercise jurisdiction to prescribe over the conduct, interests, status and relations of their own nationals, even when they are located outside national territory. The nationality principle applies to both natural persons and corporations. International law has also increasingly recognized the right of a nation to exercise jurisdiction on the basis of domicile or residence, and it has even recently been extended in other countries to corporations simply conducting part of their business in the home state. For example, Australia's Modern Slavery Act of 2018 requires reports on modern slavery from any business with annual revenues of $100 million that "carries on business in Australia at any time".[237]

ii) Application of Extraterritorial Prescriptive Jurisdiction in the US

The US has a number of federal statutes that exercise varying degrees of extraterritorial prescriptive jurisdiction. For example, Title VII of the Civil Rights Act prohibits discrimination against US citizens abroad by US companies as well as foreign companies controlled by US companies, unless the discrimination is required by foreign law.[238] The Age Discrimination in Employment Act contains similar provisions, which expressly applies to employees who are US citizens employed in a workplace in a foreign country.[239] The Sherman Antitrust Act, which prohibits anti-competitive conduct, was interpreted by the Supreme Court in *Hartford Fire Insurance Co. v. California*[240] to apply to "foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."[241] Congress has also sought to regulate property located outside of the US through the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act (also known as the Helms-Burton Act), which permits anyone with a claim to property expropriated by Cuba to sue anyone who "traffics" in that property.[242] Evidently, it is not uncommon for Congress to enact legislation that is applicable extraterritorially.

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[237] Ibid.

[238] 42 U.S.C. ss 2000e(f) and 2000e-1.

[239] See Section 11 (f).

[240] 509 U.S. 764.

[241] Ibid at 796.

[242] 22 U.S.C. ch. 69A ss 6021.

It is, therefore, possible to conceive of a transnational wage lien framework that is consistent with international law principles regarding prescriptive jurisdiction, both with respect to the nationality principle and effects principle. Specifically, the legislation seeks to regulate and impose liability on corporations that are US "nationals"; in the case of corporations, the most common bases for recognizing nationality are the country in which the corporation is incorporated and the country where it has its "seat" or "center of control."[243] In fact, over time the international business and human rights agenda has shifted towards encouraging nations to exercise jurisdiction over the transnational business activities of its corporations; both the UNGPs and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy encourage governments to regulate multinational enterprises in the field of labor rights.[244] Thus, with the changing nature of both business activities and the international support for more home state governance, a strong case can be made under international law to enact a law that attaches liability – such as a lien liability – to transnational business activities, especially where the corporation is incorporated in the US.

In considering the applicability of the effects principle, it is worth noting here that while the principles of extraterritoriality would govern the proposed regulatory measures, the reality of TNC business activity today is that it does not just take place either within or outside of a nation's territory – in fact, the business activities of TNCs cross many national borders and with the routine use of internet transactions, many activities are by their nature supra-territorial.[245] The transnational nature of business activities, in my view, strengthens the case for regulating TNC conduct that is not purely domestic. Arguably, the analysis of whether a company's activities have a "substantial effect" on the US under the effects principle should be expanded to recognize the new reality of labor relations in the global economy. The American economy is characterized, at least in part, by the symbiotic relationship between the actors in the global labor supply chain. The commercial practices of corporations in the US play a key role in creating and/or maintaining the working conditions (such as, wages, hours, security, benefits, and health and safety) of workers outside of

[243] Restatement (Fourth) of Foreign Relations Law § 410 (1987)

[244] UNGP, supra at Principle 2, ILO Forced Labour Convention, supra.

[245] Cassel, Doug, *State jurisdiction over transnational business actvitiy affecting human rights,* in Research Handbook on Human Rights and Business (Surya Deva and David Birchall, eds., 2020): 200.

the US. These same working conditions influence the profitability of the corporation and its competitive position in, and effect on, the US economy. Thus, the transnational business activities of US-based TNCs substantially effect US interests. The (albeit rhetorical) question is whether it is in the US interest for its economy to be propped up by labor exploitation.

2) Limits on Extraterritoriality: The Doctrine of International Comity

Even if the proposed wage lien law is consistent with prescriptive jurisdiction principles, due consideration must be given to the doctrine of international comity. International comity is a principle or practice among nations whereby one nation allows "recognition" within its own territory of another nation's legislative, executive, or judicial acts.[246] The doctrine encourages courts to take into account sovereign interests that the exercise of judicial power would implicate and thus avoid conflict between sovereigns.[247] The doctrine of international comity has generally been used by American courts to restrain the reach of domestic law,[248] and therefore forms the rationale for two other interpretive principles: the presumption against extraterritoriality and the presumption against "unreasonable interference" with the sovereign authority of other nations (also referred to as "prescriptive comity"). Although these are principles applied by courts, they should nonetheless inform the drafting of any transnational wage lien statute in the US, as the dialogue between Congress (through the statute) and the judiciary (through statutory interpretation) will affect the potential geographic reach of the statute.

i) Presumption Against Extraterritoriality

First, the proposed law must overcome the presumption against extraterritoriality, which provides that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[249] The canon reflects the "presumption that United States law governs domestically but

[246] Black's Law Dictionary 11th ed, citing Hilton v Guyot, 159 U.S. 113.

[247] Childress, Donald Earl, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, UC Davis Law Review 44 (2020): 14.

[248] Dodge v Ford Motor Company, supra at 2072.

[249] Morrison v National Australia Bank Ltd., 561 U.S. 247, 255 (2010).

does not rule the world."[250] In *RJR Nabisco, Inc. v. European Community,* the Supreme Court outlined a two-step framework for analyzing extraterritoriality issues. At the first step, the court looks for a "clear, affirmative indication" of geographic scope – that is, a clear indication of congressional intent of extraterritorial application of the statute. If the court find a clear indication of congressional intent, it applies the statute according to its terms. If there is no clear indication, then the second step of the analysis involves determining whether the case "involves a domestic application of the statute […] by looking to the statute's 'focus'"[251] If the focus of the statutory provision occurred in the US, then the application of the provision is considered domestic and permitted. If the focus of the provision occurred outside of the US, then the application of the provision is considered extraterritorial and not permitted.[252]

It will, therefore, be important for Congress to demonstrate a clear intention for the transnational wage lien statute to apply extraterritorially. The intention does not need to be demonstrated through a clear statement rule, as courts will also consider the text, structure, and historical background of the statute.[253] For example, in *RJR Nabisco*, the Supreme Court found that certain provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO) plainly applied to at least some foreign conduct, such as "the prohibition against engaging in monetary transactions in criminally derived property, which expressly applies, when 'the defendant is a United States person,' to offenses that 'tak[e] place outside the United States.'"[254] In contrast, the Supreme Court is *Kiobel v Royal Dutch Petroleum Co*. found that the Alien Tort Statute (ATS) did not evince a clear indication of extraterritoriality. The ATS has a single provision: "[t]he district courts shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States."[255] Thus, it is not enough for a statute to specify that it permits "aliens" to bring an action. Rather, it will be necessary for any

[250] Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454 (2007).

[251] RJR Nabisco, Inc. v European Community, 200 U.S. 321 (2016) at 2101.

[252] Bermann, supra at 265

[253] Morrison, supra at 561.

[254] RJR, supra at 238.

[255] Alien Tort Statute, 28 U.S.C. 1350.

transnational wage lien statute to expressly provide that the statute applies to wage loss occurring outside of the United States.

ii) Presumption Against Unreasonable Interference

A second and separate interpretive principle applied by the courts to determine the geographic scope of federal statutes is the presumption against unreasonable interference. Described as "prescriptive comity" by the Supreme Court in *F. Hoffman-La Roche Ltd. V. Empagran S.A.*, this principle "accounts for the legitimate sovereign interests of other nations and helps the potentially conflicting laws of different nations work in harmony."[256] It provides that courts should construe ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations.[257] Prescriptive comity does not seek to avoid all interference. Rather, as stated in § 405 the Restatement (Fourth), "[i]nterference with the sovereign authority of foreign states may be reasonable if application of federal law would serve legitimate interests of the United States."[258] Moreover, the fact that a federal statute has overcome the presumption against extraterritoriality does not preclude courts from interpreting the statute to include prescriptive comity limitations.

Thus, it is worth considering the possible extent to which a transnational wage lien statute may interfere with the sovereign interests of the nation in which the foreign worker in question is located. The proposed law should avoid interfering with the local law of the host country – such as wage recovery laws – to the extent possible to strengthen the viability of the US law. For example, permitting workers in Bangladesh to file wage claims through the transnational wage lien mechanism and local Bangladeshi labor law mechanisms at the same time may lead to conflicting findings of fact and liability and potentially result in double recovery. One way to address this concern is to limit eligibility for the transnational wage lien to workers who have not availed themselves of local wage collection mechanisms. Where a worker has filed a wage claim under national laws, they would be unable to take advantage of the transnational wage lien regime

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[256] Restatement (Fourth) of Foreign Relations Law § 405 (1987).

[257] *F. Hoffman-La Roche Ltd. V. Empagran S.A.,* 542 U.S. 155 (2004), at 164.

[258] Restatement (Fourth) of Foreign Relations Law § 405 (1987).

or continue to do so (if a subsequent claim is filed with the host country after filing a wage lien claim in the US). This approach of restricting access to the wage lien regime is preferrable since any attempt to restrict a foreign workers access to their own legal system would likely be deemed unreasonable interference.

E. Establishing An Administrative Framework

1) Existing Frameworks for Foreign Labor Complaints in the US

In the U.S., there are few opportunities to bring complaints for violations of labor standards (and specifically violations of wage standards) occurring abroad before an administrative agency. The frameworks that currently exist are multilateral regimes that seek to link labor rights with trade in the global economy. It is nevertheless valuable to review both the structure and track record of these regimes for the purposes of understanding their strengths and limitations and consider them accordingly in conceptualizing a transnational wage lien framework.

i) Specific Instance Process – OECD Guidelines

The OECD Guidelines for Multinational Enterprises are a set of non-binding principles and standards for business conduct adopted by the 38 member countries of the Organization for Economic Co-operation and Development (OECD). The guidelines are recommendations for business responsibility – including in the areas of human rights, labor rights, environment, bribery, consumer interests, and privacy, among others – addressed by governments to multinational businesses operating in or from their jurisdiction.[259] In addition to providing standards for business conduct, the guidelines require OECD members to establish National Contact Points (NCPs), which are agencies tasked with promoting the guidelines, providing support to multinational enterprises on the implementation of the guidelines, and handling cases submitted through the

[259] OECD, *OECD Guidelines for Multinational Enterprises,* OECD (Apr. 30, 2022), http://mneguidelines.oecd.org/guidelines/.

'Specific Instance' grievance mechanism.[260] In the U.S., the NCP is housed in the Bureau of Economic and Business Affairs of the U.S. Department of State.[261]

The NCP Specific Instance process is designed to handle disputes concerning alleged corporate social, environmental, labor and human rights abuses. Complaints may be brought by "a community affected by a company's activities, a company's employees, members of a trade union, an NGO, or an individual."[262] The submitter must have a specified interest in the matter, be in a position to supply information about the issue, and have a clear view of the outcome they wish to achieve.[263] Upon submission of a Specific Instance, the NCP will notify all involved parties of the Specific Instance and produce an initial assessment using OECD admissibility criteria. The NCP will offer voluntary mediation for admissible submissions.[264] Where parties agree to mediate, the NCP will facilitate the mediation and publish a final report regarding any agreement reached.[265] Where the parties fail to reach an agreement, or one party does not agree to mediation, the NCP will publish a final statement on the matter, including the issues raised, the procedures followed, and recommendations on the implementation of the OECD Guidelines, as appropriate.[266] Final statements published by the NCP are non-binding.

Notwithstanding the "soft law" nature of NCP final statements, the Specific Instance process is viewed to be an important accountability measure. Proactive NCPs can play an important role

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[260] OECD, *What are National Contact Points for RBC?*, OECD (Apr. 30, 2022), http://mneguidelines.oecd.org/ncps/.

[261] U.S. Department of State, *U.S. National Contact Point for the OECD Guidelines for Multinational Enterprises,* U.S. Department of State (Apr. 30, 2022), https://www.state.gov/u-s-national-contact-point-for-the-oecd-guidelines-for-multinational-enterprises/.

[262] U.S. Department of State, *Specific Instance Process,* U.S. Department of State (Apr. 30, 2022), https://www.state.gov/u-s-national-contact-point-for-the-oecd-guidelines-for-multinational-enterprises/specific-instance-process/.

[263] Ibid.

[264] U.S. Department of State, *The UNSCP Specific Instance Process Flowcharts,* 2 (June 2016), https://2009-2017.state.gov/documents/organization/249397.pdf.

[265] Information on the content of the agreement reached will only be included to the extent both parties agree to its public disclosure. See U.S. Department of State, *U.S. NCP Procedures for Specific Instances Under the OECD MNE Guidelines,* 3 (November 2011), https://2009-2017.state.gov/documents/organization/167188.pdf.

[266] Ibid.

in pushing parties to resolve their disputes in the face of an impending final statement and publish detailed final statements that assess a company's performance and hold them accountable for their behavior.[267] However, the Specific Instance process in the U.S. tends to be under-utilized by parties and many early complaints under guidelines were dismissed by the U.S. NCP after initial assessment. The 2019 Peer Review of the U.S. NCP found that the agency handled 45 cases since 2000 of which 19 were not accepted for further examination.[268] This improved after the OECD Guidelines were updated in 2011 and mediations were offered in 67% of Specific Instances. However, no mediations took place because the companies at issue refused to engage in mediation.[269] Among other things, the 2019 Peer Review recommended that the U.S. NCP focus more attention on awareness raising of the NCP mechanism with civil society and consider additional efforts to encourage companies to participate in mediation.[270]

ii) National Administration Office – NAALC

The North American Agreement on Labor Cooperation (NAALC) is a supplemental agreement to the North American Free Trade Agreement (NAFTA), which was negotiated between the U.S., Canada and Mexico to explicitly link labor rights to trade liberalization. As a condition of adopting NAFTA, the member countries committed to promote a set of labor principles, including: freedom of association and protection of the right to organize; the right to bargain collectively; the right to strike; prohibition of forced labor; labor protections for children and young persons; minimum employment standards, such as minimum wages; elimination of employment discrimination; equal pay; prevention of occupational injuries and illnesses and

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[267] Human Rights Watch, *U.S.: Review of the National Contact Point for the OECD Guidelines for Multinational Enterprises,* Human Rights Watch, November 3, 2013, https://www.hrw.org/news/2010/11/03/us-review-national-contact-point-oecd-guidelines-multinational-enterprises.

[268] OECD, *OECD Guidelines for Multinational Enterprises National Contact Point Peer Reviews: United States,* 25 (2019), http://mneguidelines.oecd.org/United-States-NCP-Peer-Review-2019.pdf.

[269] Ibid at 26.

[270] Ibid at 6-7.

compensation for same; and protection of migrant workers.[271] However, these principles do not establish common minimum standards for their domestic laws.[272]

The NAALC further established a complaint and enforcement mechanism. Notably, this mechanism does not allow for complaints against specific enterprises, nor does it grant specific remedies such as reinstatement, back pay, damages for discrimination, fines or other measures for workers whose rights have been violated.[273] Rather, the NAALC permits complaints against one of the three member states for alleged government failure to fulfill obligations related to one or more of the labor principles.[274] Each state has a National Administration Office (NAO), which reviews complaints about labor law matters arising in the territory of one of the other two member states.[275] This means that complaints under NAALC must be extraterritorial. Complaints may be filed by anyone and must include information on whether: 1) the matters complained of appear to be inconsistent with the party's obligations under NAALC; 2) there has been harm to the complainant or other persons, and to what extent; 3) the matters complained of appear to demonstrate a pattern of non-enforcement of labor law; 4) relief has been sought under domestic laws of another party and if so, to what extend; and 5) the matters complained of are pending before an international body.[276]

Once a complaint is submitted to the NAO, the NAO Secretary has 60 days to accept or decline the submission for review. If accepted, the matter is reviewed and a public report is published within 120-180 days after acceptance. The review process can involve a public hearing, ministerial consultations, an ECE evaluation and/or arbitral panel, depending on the labor matters at issue. For example, alleged violations of any of the labor principles in under Article 49 of NAALC can be subjected to ministerial consultations. If the matter is not resolved, any member state can request

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[271] North American Agreement on Labor Cooperation, Sept. 13, 1993, 32 I.L.M. 289, Art. 49 [NAALC].

[272] Atleson, James, et al., *International Labor Law: Cases and Materials on Workers' Rights in the Global Economy* (2008), 281.

[273] Ibid at 282.

[274] Ibid.

[275] NAALC, supra at Art. 16.3.

[276] Bureau of International Labor Affairs, *North American Agreement on Labor Cooperation: A guide,* U.S. Department of Labor, October 2005, https://www.dol.gov/agencies/ilab/trade/agreements/naalcgd#NAO.

an evaluation by an Evaluation Committee of Experts (ECE), which is composed of independent experts.[277] However, complaints involving freedom of association, collective bargaining, and the right to strike cannot be submitted for ECE evaluation. Following evaluation, the ECE will publish one or more reports, including recommendations for resolution. If the parties are unable to reach a resolution at this stage, a party may request that an independent arbitral panel hear the matter. This step is reserved only for complaints involving occupational health and safety, child labor, or minimum wage technical labor standards. The panel has the authority to fine an offending government for "persistent pattern of failure to effectively enforce domestic labor law" and authorize trade sanctions against the firm, industry, or sector where the workers' rights violations occurred.[278]

The U.S. NAO – now expanded into the Office of Trade and Labor Affairs (OTLA) – is housed in the Bureau of International Labor Affairs under the U.S. Department of Labor. To date, the OTLA received more than 23 submissions, of which it accepted and issued reviews for 13.[279] Eight of the 13 cases reviewed by the OTLA were resolved through ministerial consultations between the state parties resulting in an agreement. For the remainder of the cases, the OTLA either found that the complaints were not substantiated or if they were, made recommendations regarding the enforcement of labor laws. Reports issued by the OTLA are non-binding. Criticisms of the OTLA have broadly focused on the number of petitions accepted for review and review delays.[280] Critics have also taken issue with the fact that the NAALC does not set out standards regarding how labor ministries in the three member states should design programs to address instances of non-compliance with NAALC. Joel Solomon argues that this has led NAOs to be timid in their work: "important issues that have come to light through cases have gone unaddressed by the governments; petitioners concerns have been ignored; some case reports have been devoid

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[277] NAALC, supra at Art. 23.

[278] Atleson, supra at 283.

[279] Bureau of International Labor Affairs, *Submissions under the North American Agreement on Labor Cooperation (NAALC)*, U.S. Department of Labor (Apr. 30, 2022), https://www.dol.gov/agencies/ilab/submissions-under-north-american-agreement-labor-cooperation-naalc-print.

[280] Congressional Research Service, *Labor Enforcement Issues in U.S. FTAs,* 2 (December 18, 2020), https://crsreports.congress.gov/product/pdf/IF/IF10972.

of findings of fact; interpretation of the NAALC's obligations has been minimal; and agreements between governments to address concerns arising in NAALC cases have, by design, provided little or no possibility of resolving the problems identified by petitioners."[281]

iii) Office of the US Trade Representative – US Generalized System of Preferences

The Trade Promotion Authority laws adopted by Congress in 1974 require a labor rights provision to be included in every trade agreement entered by the U.S. These trade agreements are negotiated by the Office of the U.S. Trade Representative (USTR), which administers the U.S. General System of Preference (GSP). The GSP eliminates duties on goods imported from certain less developed countries.[282] The GSP program includes a labor rights clause requiring beneficiary countries to respect "internationally recognized worker rights", which include the right of association, right to organize and bargain collectively, prohibition against forced labor and child labor, and minimum standards, including minimum wages.[283] The USTR regulations also provide a procedure for filing petitions to challenge a country's GSP status due to labor rights violations.[284] Like the NAO procedure under NAALC, there is no standing requirement, and any person can request a labor rights review of a beneficiary country.[285]

The Trade Policy Staff Committee (TPSC), an interagency committee chaired by the UTSR, is the body responsible for deciding whether to accept petitions for review and actions to take in response to petitions. Petitions are reviewed during annual and general reviews in accordance with the schedule set by the UTSR regulations.[286] Among other things, the petition must provide reasons for why the beneficiary country's status should be reviewed and supply supporting information for same.[287] An interested party or any party may make submissions regarding the petition. The TPSC

[281] Solomon, Joel, *Trading Away Rights: The Unfulfilled Promise of NAFTA's Labor Side Agreement* (2001), https://www.hrw.org/reports/2001/nafta/nafta0401-01.htm#P208_22225.

[282] *Statute Authorizing the U.S. GSP Program,* 19 U.S.C. 2461 ET SEQ [GSP Regulations].

[283] GSP Regulations, supra at § 507.

[284] 15 C.F.R. § 2007 [UTSR Regulations]; Atleson, supra at 438.

[285] Ibid.

[286] UTSR Regulations, supra at § 2007.3.

[287] Ibid at § 2007.1.

also holds public hearings to provide an opportunity for public testimony on petitions. Upon completing its review of the petition, the TPSC prepares recommendations for the President on any modifications to the GSP, including a recommendation that changes be made with respect to the GSP status of an eligible beneficiary country.[288]

The 1986 petitions filed by the AFL-CIO and the independent United Electrical, Radio and Machine Workers of America challenging Chile's beneficiary status demonstrate some of the strengths of the GSP complaint mechanism. At the time, Chile was under the military rule of General Augusto Pinochet. Working closely with Chilean unionists and human rights monitors, the U.S. unions alleged systematic labor rights violations including police harassment, beatings, jailing, and killings of union activists. This led the U.S. to suspend Chile from the GSP in February 1988. Though not the sole catalyst behind Chile's ultimate regime change, the U.S. GSP action spurred Chile's economic elites to soften their support for Pinochet, who stepped down in 1990. A new democratically elected government abolished abusive features of the labor code.[289]

However, GSP petition decisions have not always been encouraging. In 1987 and 1988, the AFL-CIO, the International Labor Rights Forum, Asia Watch and other groups filed GSP petitions regarding Malaysia and Indonesia. In Malaysia, the government effectively banned unionizing in all industries except the electronics sector, where only state-sponsored unions were permitted, and limited bargaining to the enterprise rather than the industry. Around the same time, the Indonesian regime was accused of murder and abuse of trade unionists. Despite multiple GSP petitions filed detailing these events, no action was taken by the three successive administrations. The Bush administration's failure to review Malaysia, Indonesia and other countries under the GSP regulations led several unions and NGOs to sue the administration under the Administrative Procedure Act, but the case was ultimately dismissed.[290]

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[288] Ibid at § 2007.2.

[289] Atleson, supra at 442.

[290] Ibid at 449; *International Labor Rights Education and Research Fund v. George Bush, et al.,* 752 F. Supp. 495 (1990).

iv) Comparing the Regimes

The complaint mechanisms described above vary significantly in terms of the parties who may be the subject of complaints, the procedures for dispute resolution, and the remedies available. The Specific Instance process under the OECD Guidelines is the only mechanism that permits complaints against corporations for violations of minimum labor standards. The NAO and GSP complaint processes are generally limited to complaints against countries that fail to uphold labor principles. Furthermore, both the Specific Instance and NAO processes are broadly limited to providing forums for negotiations, such as mediations and ministerial consultations, respectively, and any decisions and reports published are non-binding (except for the NAO arbitral panel). Neither of these administrative agencies can make binding orders for individual remedies. The GSP process, in contrast has hard edges, offering an opportunity to request economic sanctions against countries, which can have a substantial effect on workers' rights in those countries. However, the GSP mechanism, like the other mechanisms considered in this subsection, does not provide for individual remedies.

That said, a review of these frameworks demonstrates that administrative agencies tasked with enforcing labor rights can play a significant role in increasing access to justice. Each of these regimes permit a broad range of persons and entities to file a complaint, not just individuals who have suffered a legal injury. By removing the standing requirement, it enables labor rights issues experienced by vulnerable individuals to be heard in the U.S., which has relatively stronger labor protections than the countries in which the violations occurred. These issues are often reviewed in a public manner, which increases the likelihood of settlement, while minimizing concerns around costs and legal illiteracy for individuals affected. The limitations of these regimes generally relate to the non-binding nature of decisions (e.g. NCP decisions), the absence of appropriate standards on how to deal with cases of non-compliance (e.g. NAO decision), and the provision of broad discretion leading to inconsistent results (e.g. GSP decisions). These are concerns that the proposed transnational wage lien statute will necessarily address.

2) The Proposed Transnational Lien Framework

In light of the above considerations regarding constitutional, international and administrative issues, the legislative scheme for the transnational wage lien statute is as follows: The law would permit a worker, or a union or NGO on behalf of the worker, to file a wage complaint with an administrative agency housed in the Bureau of International Labor Affairs under the U.S. Department of Labor, which would trigger an investigation to determine: 1) whether the worker is connected to the corporation's supply chain; and 2) whether the worker is owed unpaid wages. The corporation will have a prescribed amount of time to file objections and submit evidence. If the above two conditions are satisfied, or the corporation does not file an objection within the prescribed amount of time, a lien is automatically filed against the corporation's real and personal property and the corporation is notified of the decision. The decision may be appealed by either party to an appeals examiner, who will make a final order, which can be subject to judicial review. If no payment is made by the corporation within a prescribed period of time, the lien may be enforced by the administrative agency. The parties may submit to mediation at any time during this process before a judicial decision regarding enforcement of the lien is issued.

As discussed in Subsection B.3 of this part, an administrative wage lien mechanism, as opposed to a direct wage lien mechanism, is preferred in the interest of providing an accessible remedial regime. It is important to ensure that the transnational wage lien mechanism does not pose the same problems with complexity and delay as traditional litigation regarding wage claims. Where lien statutes are not written simply and require numerous complex steps, they present serious challenges to accessibility. In order to avoid this, the transnational wage lien statute should allow workers to file claims with an administrative agency rather than courts. The agency in turn should offer template forms to file claims with ease, which can limit prohibitive legal costs.[291] For these same reasons regarding cost, the proposed statute would extend standing to bring complaints to unions and NGOs on behalf of individual workers. Both of these features – the administrative

[291] For example, in Maryland, employees can file wage claims – and employers can respond to same – using simple online forms that minimize attorney's fees on both sides. Advocates in Maryland have reported that the availability of wage liens has enabled more low-wage workers to seek representation, especially for smaller amounts of unpaid wages (See: National Center for Law and Economic Justice, et al., *Empty Judgments: The Wage Collection Crisis in New York,* NCLEJ, 2015 at 16, https://nclej.org/wp-content/uploads/2015/11/Empty-Judgments-The-Wage-Collection-Crisis-in-New-York.pdf.)

agency mechanism combined with broad standing – can address time, cost and illiteracy challenges faced by workers from lesser-developed countries.

Another important feature considered in proposing this mechanism is the extent to which employers have an opportunity to challenge or appeal a wage lien claim. As previously discussed, in certain jurisdictions, there are several opportunities for the corporation to respond to wage claims, challenge the amounts assessed by the administrative body, appeal the decision, and file for judicial review. This can again create significant barriers for access to remedy, as having to respond to employer challenges and appeals can be costly and time-intensive. Thus, a balance will need to be struck between procedural fairness for the corporation and accessibility for the worker. To that end, it is preferrable to offer both parties an opportunity to provide information regarding the worker's connection to the corporation's supply chain and how much money (if any) is owed. While the parties should have an opportunity to appeal and judicially review a finding on the questions of supply chain connection and amount of wages, such steps should be limited, as further discussed in Section F below.

Finally, as demonstrated by the existing frameworks of foreign labor complaints in this section, the opportunity to formally engage in negotiations can be an effective step towards early and cost-effective resolutions. Therefore, the statute should offer an option to mediate through the Department of Labor. To that end, it will be important for the agency to make parties aware of this option and take measures to encourage mediation.

F. Benefits and Challenges: Practical Considerations

1) <u>Time and Cost</u>

One of the primary advantages of the proposed transnational wage lien law is that it prioritizes access to remedy for rightsholders. As discussed in Part III, effective and accessible remedial mechanisms should address issues of time and costs. Admittedly, enforcing liens can be time-consuming because it involves obtaining a court order to sell the property in question to satisfy the debt. However, the very existence of a lien on corporate property can result in expeditious wage recovery before having to undertake enforcement measures. Since liens can freeze bank accounts and prevent the sale of property, the recording of a lien is often enough to induce a company to pay the outstanding amounts as soon as possible. As discussed in Subsection B.3 of this part, the 2013 NELP Study found that 95% of the wage claims filed between 2007 and 2012 in Wisconsin were settled, dismissed or paid in full, and due to the high recovery rate for wage claims, very few wage liens are actually enforced in Wisconsin.[292] Where wage liens were enforced by the Wisconsin Department of Justice between 2005 to 2013, 80% of those cases resulted in partial or full payment of the wages claimed.[293] Thus, not only can the availability of wage liens be effective in obtaining timely payment of at least a portion of unpaid wages – if not full payment – in most cases, they can increase the likelihood of payment where lien enforcement becomes necessary.

Additionally, as described above, time and costs are further minimized by permitting unions and NGOs to bring wage lien claims on behalf of employees; empowering an administrative agency to review wage claims and record and enforce wage liens; offering an opportunity for the parties to engage in formal mediation; and limiting the number of reviews and appeals.

2) Evidence and Access to Information

A transnational wage lien law based on strict liability has the added benefit of limiting the amount of evidence required to access remedy. As previously mentioned, the proposed law would only impose the following burdens on the worker: 1) proving the wage violation – that is, that they are owed outstanding wages; and 2) demonstrating that their labor is connected to the company from which they are seeking the outstanding wages. Workers will not need to take on the heavy burden of demonstrating the defending party's intent, misconduct, or causation, which is required under duty-based liability schemes. Rather, the evidence needed to bring a successful claim will be limited to the records of the worker's direct employer (demonstrating hours worked and wages owed/paid) and the records of the TNC (demonstrating the proportion of the worker's damages attributable to the TNC). As Rogers explains, administrability is a key factor that makes strict liability regimes preferrable: "[t]he harm of wage and hour violations by labor contractors, after all, is generally divisible. While garment workers may sew clothes for multiple manufacturers in a given week, and farm workers may pick produce that is then sold to various retailers, the goods

[292] Cho, supra at 18.

[293] Ibid.

themselves are discrete. With accurate recordkeeping, it would be fairly simple to determine what percentage of a given user firm's output was ultimately delivered to any given purchasing firm."[294]

To this point, accurate record-keeping regarding hours and wages and access to information regarding the supply chain will be of utmost importance to the effectiveness of the lien law. The former may be more easily accessible given the worker's proximity to their direct employer and ability to keep track of their own hours and wages. Information regarding a TNC's supply chain, on the other hand, will present a greater challenge due to the indirect relationship between the worker and TNC. Without knowledge about the purchasing firm and the proportion of hours worked that are attributable to the firm's supply chain, the worker will be unable to determine which TNC to file a wage claim against and the amount of damages to claim. Thus, the effectiveness of the proposed transnational wage lien law may depend on the availability of supply chain information from the corporation. Some TNCs already voluntarily make this information publicly available, e.g. Primark, H&M and Inditex, each publish yearly supplier lists.[295] Others are required to disclose certain information regarding their supply chains under human rights due diligence laws, as discussed above. However, in the absence of such regulations and voluntary company initiatives, the effectiveness of the proposed transnational wage lien law will be weakened. Access to reliable information regarding corporate activity is a core condition for effective access to remedy.[296] Thus, concurrent laws requiring disclosure of supply chain information by TNCs may be necessary to give effect to a transnational wage lien statute.

3) Due Diligence and Mitigating the 'Free-Rider' Problem

As briefly mentioned in Part III, there is a concern that imposing liability on TNCs for wage violations committed by their contractors and subcontractors can result in the free-rider problem; direct employers may avoid their obligations to pay wages under the expectation that TNCs will shoulder the responsibility. While this is certainly a risk posed by the nature of a third-party strict liability scheme, it can also be mitigated by the likely outcomes from such a scheme. In particular,

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[294] Rogers, supra at 28.

[295] BHRRC, supra at 20.

[296] Jagers, Nicola, *Access to effective remedy: the role of information,* in Research handbook on human rights and business (Surya Deva and David Birchall, eds, 2020): 419.

baseline strict liability arguably best incentivizes firms to monitor and prevent violations,[297] which in turn decreases the likelihood that the direct employer will commit wage violations in the first place. For example, the intention behind Germany's posted workers law (discussed in Part III above) was partly to establish a certain level of precaution when contractors in the construction industry subcontract part of their work and incite them to choose the companies they contract with more carefully. In fact, trade union networks in the industry reported witnessing an increased usage of certain check and control mechanisms by German contractors as a result of the strict chain liability law.[298] This included a higher degree of due diligence and internal monitoring, such as requiring subcontractors to provide records demonstrating hours worked by and wages paid to workers.

Tim Glynn, who has proposed third party strict liability for wage violations in domestic labor supply chains, posits that strict liability regimes can have other compliance-enhancing consequences within the supply chain, such as innovation in monitoring arrangements and technology, an increasing emphasis on reputation for compliance, and better record-keeping.[299] Moreover, the proposed transnational wage lien law is likely to incentivize TNCs to forego commercial practices that tend to lead to wage violations in the supply chain, such as price squeezing and imposing unreasonable delivery targets. Contractors and subcontractors, in turn, will feel less pressured to use cost-minimizing strategies – such as wage theft – in the absence of price squeezing, and moreover, be incentivized to build a reputation of compliance. Suppliers lacking adequate compliance records and a demonstrated willingness to cooperate with a TNC's monitoring efforts will have difficulty competing for and keeping contracts with TNCs covered by the transnational wage lien statute.[300]

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[297] Glynn, supra at 230.

[298] Bogoeski, supra at 10.

[299] Ibid at 233.

[300] E.g. See Glynn, supra at 232, suggesting same in the domestic context.

4) Procedural Fairness and Balance of Interests

A transnational wage lien law that imposes strict liability is important for the purposes of making the remedial mechanism accessible for workers who would not otherwise be able to bring such claims due to time, cost and uncertainty. That said, optimizing for the protection of vulnerable workers does not mean defendants must be denied due process and fairness. In order to balance worker protection with the TNC's interest in avoiding unbridled exposure to wage claims, the proposed law should provide defending companies with notice and an opportunity to be heard by challenging the lien. This can be achieved by providing corporations with notice of a wage claim and an opportunity to file an objection and submit evidence for same. The corporation should also be afforded the opportunity to appeal a decision to record a lien on its property, and a subsequent opportunity for judicial review. However, these opportunities to challenge, appeal and judicially review a wage lien decision should not be used to delay or avoid payment and increase costs for workers in such a way as to deter meritorious wage claims. This can be avoided by: 1) allowing the filing of pre-judgment wage liens against certain at-risk businesses (similar to the Wisconsin wage lien law); and 2) allowing wage liens to be filed after an agency decision has been made on the merits and remain on record throughout the appeal and review process. This will likely induce corporations to pay out legitimate wage claims and limit appeals to frivolous or fraudulent claims.

Other factors to consider in balancing the interests of the parties include a timeline for enforcing a lien and whether or not to include a cap on the amount that can be claimed and secured through a lien. The recorded lien should expire after a certain period of time if the claimant or agency does not take steps to enforce the lien. However, the time limit for enforcing a lien should not be so short as to incentivize corporations to wait out the limitation period instead of paying out the amounts owed. And ensuring access to justice requires providing enough time for workers to become aware of their right to file and enforce a wage lien. Additionally, setting out an upper limit on the amount that can be recovered through a wage lien can add a level of predictability for corporations subject to the strict liability regime. However, the cap imposed should be reasonable and not act as a barrier to bringing a wage claim when weighed against the costs for same.

5) Political Challenges

Arguably, the greatest challenge to enacting the proposed transnational wage lien law is political. As discussed in Part IV, it is unlikely that state legislatures would have jurisdiction to enact the proposed law due to Congress' authority under the foreign affairs and foreign commerce clause. However, the US has a long history of failing labor law reform, which suggests that passing the proposed legislation through Congress will be challenging.

Cindy Estlund argues that the ineffectuality of American labor law is partly traceable to its "ossification": "[t]he core of American labor law has been essentially sealed off-to a remarkably complete extent and for a remarkably long time-both from democratic revision and renewal and from local experimentation and innovation."[301] The most important barrier to labor law innovation is impasse at the national level.[302] Since the enactment of the National Labor Relations Act (otherwise known as the Wagner Act) in 1935, there have been only two successful revisions of federal labor laws: the Taft-Hartley Act of 1947[303] and the Landrum-Griffin Act of 1959.[304] Both revisions weakened labor protections envisioned by the Wagner Act, in part by allowing "right to work" laws and tightening restrictions on secondary boycotts. Court and National Labor Relations Board (NLRB) decisions have also incrementally corroded labor rights under the Wagner Act through interpretations that, among other things, permitted employers to permanently replace striking workers[305] and restricted striking during the term of a collective agreement.[306]

Legislative efforts to fix these problems and restore worker power have been unsuccessful to date in large part due to Senate inaction. For example, an effort under President Johnson to repeal the "right to work" provisions under the Taft-Hartley Act was passed by the House in 1965 but

301 Estlund, Cindy 1530

302 Ibid.

303 Pub. L. 80-101, 61 Stat. 136.

304 Pub. L. 86-257, 73 Stat. 519.

305 *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

306 *NLRB v. Sands Manufacturing Co.*, 306 U.D. 332 (1939).

failed as a result of Senate filibuster.[307] In 1978, the Labor Law Reform Bill initiative similarly came to an unsuccessful end after six tries to collect the 60 votes needed to break the Senate filibuster.[308] The most recent defeated labor law reform was the Employee Free Choice Act (EFCA) under President Obama in 2010, which was the most comprehensive pro-labor reform since the Wagner Act. Despite large Democratic majorities in Congress at the time, the EFCA was ultimately defeated after the replacement of Senator Ted Kennedy reduced the Democratic majority seats to 59 – one short of the number of votes needed to override the Republican filibuster.[309] In addition to the gatekeeping at the Senate, industry opposition plays a significant role in blocking labor law reform – labor law reform arguably threatens business interests more than nearly any other type of legislation.[310]

Despite the evident political challenges associated with strengthening labor protections through Congress, recent events demonstrate that there is political will to address the human rights impacts of corporations through legislation in the US. In December 2021, Congress successfully passed bipartisan legislation targeting the use of forced labor in the Xinjiang region of China. The new Uyghur Forced Labor Prevention Act (UFLPA) requires Customs and Border Protection to apply a presumption that all goods, wares, articles and merchandise mined, produced or manufactured in Xinjiang are barred from entry into the US on account of being the product of convict labor, forced labor or indentured labor, unless proven otherwise.[311] The Statement of Policy for the UFLPA expresses that it is the US's policy "to regard the prevention of atrocities as in its national interest, including [...] the widespread and systematic use of forced labor.[312]

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[307] Estlund, supra at 1534-1535; Hogler, Raymond, *Happy anniversary, right-to-work, but it's time to go,* The Hill, Sept. 7, 2015, https://thehill.com/blogs/pundits-blog/labor/252620-happy-anniversary-right-to-work-but-its-time-to-go.

[308] The New York Times, *The Death of Labor Law Reform,* The New York Times, Jun. 23, 1978, at A24, https://www.nytimes.com/1978/06/23/archives/the-death-of-labor-law-reform.html.

[309] Eidlin, Barry, *To Pass the PRO Act, We Need to Examine Past Labor Law Reform Failures,* Jacobin, Jun. 24, 2021, https://www.jacobinmag.com/2021/06/pro-act-collective-bargaining-labor-law-legislation.

[310] Ibid.

[311] Pub. L. 117-78, 135 Stat. 1525, § 4a.

[312] Ibid at § 3.

Since the passage of the UFLPA, Senators from both parties have introduced the Slave-Free Business Certification Act, which would require certain businesses to conduct annual audits of their global supply chains to detect the use of forced labor.[313] Additionally, in January 2022, the House of Representatives passed legislation requiring companies to disclose data on environmental, social and governance metrics. The proposed legislation is now being considered by the Senate.[314]

While it remains unclear whether the latter two proposals will receive Senate approval, there appears to be recent bipartisan interest in addressing issues of forced labor and other human rights impacts in the global supply chains of US corporations. Furthermore, the global trend towards embracing the use of hard law, however incremental, to advance the business and human rights agenda and values underpinning the UNGPs continues to be a silver lining. As described earlier in this paper, growing national, regional, and international interest in preventing modern slavery and forced labor in supply chains have led to a number of legislative steps taken in recent years that impose, or attempt to impose, burdens on TNCs. It is thus conceivable that political partisanship or industry lobbying may not pose as great a barrier as it has with respect to domestic labor law reform in the US. Although wage violations in global supply chains and the provision of accessible remedies are issues that have been traditionally overlooked, they are intimately connected to the goal of preventing forced labor. Therefore, heightened attention to such issues can pave the way for legal reform in the US that embraces a legislative remedial mechanism like the transnational wage lien laws proposed in this paper.

V. CONCLUSION

The transnational wage lien laws proposed in this paper are an ambitious attempt to enhance corporate responsibility towards workers in their global supply chains, tackle the oft-forgotten issue of wage theft and corresponding human rights abuses, and refocus business and

[313] Boutros, Andrew, et al., *Congress Moves to Combat Use of Forced Labor in Supply Chain,* JD Supra, Feb. 17, 2022, https://www.jdsupra.com/legalnews/congress-moves-to-combat-use-of-forced-7826227/.

[314] Malik, Pooja, *Corporate America's Response to ESG Initiatives*, Forbes, Jan. 10, 2022, https://www.forbes.com/sites/forbesfinancecouncil/2022/01/10/corporate-americas-response-to-esg-initiatives/?sh=6504c1511e45.

human rights discussions towards the rightsholder and accessible remedy. The proposal takes advantage of a general trend in the business and human rights movement towards the enactment of 'hard law' measures to increase corporate accountability for human rights impacts, including mandatory human rights due diligence and reporting. However, this paper argues that legislative steps must go beyond duty-based liability models towards strict liability models in order to address the 'responsibility gap' in global labor supply chains and reflect the reality of the employment-like relationship between workers at one end of the supply chain and TNCs on the other.

The proposed transnational wage lien laws address these issues by imposing strict liability on TNCs for wage theft in their labor supply chains – which are often connected to the commercial practices of the TNCs – and providing wage liens as a form of security interest for such unpaid wages. Borrowing concepts from mechanics' liens and domestic wage lien models in the US, this paper argues that the imposition of a transnational wage lien on the personal and real property of TNCs is an effective and accessible way to recover unpaid wages, especially in consideration of the demographic of vulnerable workers who suffer from wage insecurity and the goliath they are up against. Although there are a number of legal and practical challenges to consider in enacting a transnational wage lien statute, including establishing Congress's constitutional authority to legislate on the subject, overcoming international law hurdles – such as the presumption against extraterritoriality and principles of comity – and giving due regard to issues of time, cost, access to information, procedural fairness and political will, the law reform proposal in this paper nonetheless presents a viable step towards protecting workers in the global supply chain and providing meaningful access to remedy for labor and human rights violations.