Made in Misery: Mandating Supply Chain Labor Compliance

ABSTRACT

Virtually all consumer products in the developed world are produced in supply chain factories abroad. Media exposés periodically reveal the deplorable working conditions in factories that produce products for world-renowned brands. Public institutions, however, tend to be too weak to enforce local labor laws in the prime jurisdictions for supply chain manufacturing, and the recent efforts of private regulators to maintain labor standards throughout the chains have failed. This Note argues that supply chain labor compliance ought to be mandatory, not aspirational. Several examples of innovative public-private partnerships have delivered on the promise of supply chain labor maintenance. In order to scale-up those successful programs, both public and private actors must orchestrate a transnational enforcement mechanism. Each downstream actor, in its own specialized capacity, must influence actors upstream to enforce labor compliance.

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I. INTRODUCTION

International outsourcing has become a hallmark of the modern economy. On the campaign trail, Donald J. Trump put companies on notice that outsourcing would be reversed under his presidency. Trump’s “re-shoring” or “insourcing” plan—the idea that as the cost of manufacturing in developing nations increases, manufacturing jobs will return to developed countries—underscores the lack of nuance behind such a policy. Manufacturers will not be driven back to developed countries, but rather will seek out alternative countries in the developing world with more favorable manufacturing conditions. Outsourcing appears to be a permanent market feature, and therefore the workers that assemble most consumer products will remain abroad. To ensure that products have not been made under abhorrent working conditions, the transnational community must orchestrate a comprehensive supply chain maintenance framework.


While intra-industry trade—the flow of goods within the same industry—comprises a large portion of international trade between developed countries, international outsourcing has introduced developing countries as major players in the world market. From 2004 to 2008, the value of outsourcing contracts ranged from $85 billion to $97 billion worldwide. The trade in parts or components of a final product has proven more cost-efficient for firms than intra-firm production in many industries. Developments in telecommunications, finance, and neoliberal trade policies have enabled firms to produce goods at a lower cost by fragmenting the stages of production, often across the globe.

On the whole, developing countries lack the robust regulatory and enforcement frameworks possessed by their developed counterparts. Even when developing nations have robust labor protections on paper, their public institutions are generally too weak to enforce them on the ground. The developing countries’ labor markets, therefore, have a comparative advantage over the labor forces in developed countries. The absence of regulatory safeguards for labor conditions effectively lowers the cost of labor in the developing world as compared to the developed world. Although firms are tasked with coordinating the modularized production system and transporting the goods from one stage to the next, the savings in the costs of labor exceed the added transactional costs. Developing nations, therefore, are presented as prime locations to modularize the manufacturing of component parts.

Indeed, a survey of three hundred high-ranking corporate executives revealed that the most attractive destinations for offshore activities are India, China, and Latin America.

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7. Blair, O’Hara O’Connor & Kirchhoefer, supra note 5, at 263 (referring to the process by which firms outsource the stages of production as “modularization”); Jones, Kierzkowski & Lurong, supra note 1, at 306.
11. Id.; see also Gold et al., supra note 1 (“[A] denim shirt that cost $3.72 to make in Bangladesh would cost more than three times as much to make in the United States.”).
13. Id.
The corporations investing in international outsourcing have a strong interest in perpetuating substandard working conditions, particularly in those developing regions mentioned above.\textsuperscript{14} In part, the cost advantage of outsourcing is the product of discounts on workplace safety and worker rights protections.\textsuperscript{15} As a result, principal corporations are reticent to urge their suppliers to raise the labor standards at their factories unless reputational consequences would harm the principal corporations’ bottom lines.\textsuperscript{16} Otherwise, a firm-wide policy to raise labor standards at outsourcing facilities may very well undermine the gains the firm yields by outsourcing.\textsuperscript{17}

Historically, consumer demand has driven change in the labor conditions of manufacturing workplaces in the developed world. While campaigns for sweatshop labor reform organized by consumers can be an effective strategy for changing corporate behavior, typically a highly publicized tragedy must strike in order to galvanize consumers.\textsuperscript{18} The infamous Triangle Shirtwaist Factory fire revealed the consequences of the poor treatment of factory workers during the Industrial Revolution in the United States.\textsuperscript{19} The company had a policy of locking the workers inside, and the public outcry after the workers in the factory were unable to escape the flames precipitated labor law change.\textsuperscript{20} Likewise, the more recent collapse at Rana Plaza in Bangladesh temporarily incited consumer outrage and a renewed interest in reforming labor conditions in the manufacturing sector.\textsuperscript{21}

However, manufacturing is no longer contained within the borders of a single state, and laborers and consumers are no longer constituents of the same politicians. Since the manufacturing sector is now largely outsourced to suppliers abroad, the developed world’s consumer base—

\begin{itemize}
  \item \textsuperscript{15} Locke, supra note 14, at 14; Castillo Fernandez & Sotelo Valencia, supra note 8.
  \item \textsuperscript{16} See Kolben, supra note 9, at 438.
  \item \textsuperscript{17} See Kaufman, supra note 14.
  \item \textsuperscript{18} See Kolben, supra note 9, at 438; see, e.g., BBC, Rana Plaza: A lesson forgotten?, BBC WORLD SERVICE: IN THE BALANCE (June 9, 2015), [https://perma.cc/8BAQ-TAXK] (archived Feb. 27, 2017).
  \item \textsuperscript{19} D. Berliner ET AL., LABOR STANDARDS IN INTERNATIONAL SUPPLY CHAINS: ALIGNING RIGHTS AND INCENTIVES 1 (2015).
  \item \textsuperscript{20} Id. at 1, 5; Kaufman, supra note 14 (explaining that consumer outrage after the Triangle Shirtwaist fire yielded stronger fire safety codes, building codes, and workplace safety requirements and marked a turning point for American labor conditions).
  \item \textsuperscript{21} Rana Plaza: A lesson forgotten?, supra note 18.
\end{itemize}
and thereby voter base—has considerably less leverage to force labor reforms in key jurisdictions.22

The increased complexity and the international character of manufacturing as a result of outsourcing have demanded a creative solution to raise labor standards. Over the past two decades, the consumer push for corporate social responsibility has produced several private methods of ensuring labor law compliance, such as voluntary codes adopted by individual firms, collective standards adopted by a consortium, and non-profits dedicated to certifying corporations and inspecting foreign suppliers.23 The Worker Rights Consortium (WRC) published a model code of conduct that requires its licensees to promote freedom of association at their supply chain factories.24 Non-profits like “B Lab” assess traditional corporations dedicated to considering the interests of “stakeholders” in business decisions.25 Worldwide Responsible Accredited Production (WRAP), the Fair Labor Association (FLA), and similar organizations inspect and certify factories abroad that comply with certain workplace safety and worker rights standards.26 Through this certification mechanism, brands can advertise to their consumers that they only outsource to suppliers with certain labor standards.27

While these developments in non-profit oversight and certification seemingly align the interests of suppliers, principal corporations, and workers, actors have conceived of ways to game the certification systems.28 Principal firms have little reason to directly intervene when

22. BERLINER ET AL., supra note 19, at 5.
23. Bartley, supra note 9, at 518.
25. Frequently Asked Questions: What Are Stakeholders? Why Do They Matter?, B LAB, http://www.bimpactassessment.net/how-it-works/frequently-asked-questions/the-basics#what-are-stakeholders?-why-do-they-matter [https://perma.cc/X7ME-CD44] (archived Oct. 27, 2017) (“Stakeholders are the individuals that are most closely affected by a business’s activities. These may include workers, customers, suppliers, shareholders, community members and others.”).
28. See, e.g., Blair, O’Hara O’Connor & Kirchhoefer, supra note 5, at 281 n.55 (explaining that a factory in the Dominican Republic was able to receive labor standard
the compliance monitoring mechanisms in place insulate them from backlash to a failure in supplier compliance. And the laws of the countries in which firms are incorporated do not impose liability on parent companies for the misdeeds of their manufacturing subcontractors abroad.

Moreover, not all component parts are manufactured and sold directly to the parent company. Supply chains are often comprised of multiple stages of production in several factories that supply one another—hence the “chain” moniker. Some suppliers may, as a business practice, obscure the names of subcontractors or other upstream suppliers to ensure that buyers do not make dealings without the first-tier supplier. As a result, there is no incentive for the suppliers or buyers to ensure that the factory preceding them in the chain has adequate labor protections.

If an upstream supplier has labor violations in its factory, the first-tier supplier and buyer can plead ignorance.

Supply chain contracts between parent companies and suppliers have also undergone a transformation in response to consumer outrage over preventable industrial accidents. It is now commonplace for certification from a non-profit organization by partitioning off the workers whose employment conditions did not meet the non-profit’s certification standards).

30. See, e.g., Doe v. Wal-Mart Stores, Inc., 572 F.3d 677 (9th Cir. 2009) (affirming the dismissal of contract claims filed by employees of Wal-Mart’s international suppliers on the grounds that violations of the minimum labor conditions specified in the code of conduct as part of supply chain contracts were not enforceable against Wal-Mart).
31. LOCKE, supra note 14, at 4–9.
32. See id.
33. First-tier suppliers or brokers will use “back-to-back” letters of credit in order to hide the identity of an upstream subcontractor. A back-to-back credit is a financing instrument using two separate letters of credit. The first letter of credit is issued from the buyer’s bank to the supplier’s or broker’s bank. The second letter of credit is issued from the first-tier supplier’s or broker’s bank to the subcontractor’s bank. In effect, the buyer is either unaware that the purchased goods were manufactured by a subcontractor or simply not privy to the subcontractor’s identity. The first-tier suppliers have vested interests in keeping the subcontractor’s identity from the buyer, because they fear that the buyers would contract directly with the subcontractors—making the first-tier suppliers and brokers obsolete. DANIEL C. K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS, 229–30 (3d ed. 2015).
34. LOCKE, supra note 14, at 10.
35. See, e.g., Matea Gold et al., supra note 1 (quoting an Ivanka Trump brand spokeswoman who assured that the brand’s suppliers uphold “the highest standards” and that Ivanka only used the most reputable suppliers); see also Associated Press, supra note 3 (explaining that Ivanka Trump’s brand had no comment when sweatshop labor conditions were revealed at the same company factories she praised earlier and workers helping investigate the factory were arrested); Drew Harwell, Workers at Chinese factory used by Ivanka Trump’s clothing maker endured long hours, low pay, CHI. TRIB. (Apr. 25, 2017), http://www.chicagotribune.com/business/ct-ivanka-trump-chinese-factory-20170425-story.html [http://perma.cc/N4CJ-H2PB] (archived Nov. 5, 2017) (showing that Ivanka Trump praised an FLA-certified manufacturing company with an exclusive license to produce her clothing line for “distinguish[ing] itself as a trusted partner”).
supply chain contracts to contain labor provisions.\textsuperscript{36} Parent companies have, in effect, attempted to supplement or layer public labor regulation with private contract provisions.\textsuperscript{37} Whether these provisions are actually enforced between principal and supplier to raise the standards of workforce safety and improve worker treatment remains to be seen.\textsuperscript{38} Labor provisions and non-profit certifications may very well serve to absolve a parent company of wrongdoing in the court of public opinion in the event of an accident or an exposé revealing sweatshop conditions in the parent company’s supply chain.\textsuperscript{39}

A clear trend has emerged in response to public outcry over supply chain labor conditions: private actors are assuming the role of regulator where public governance used to reign supreme.\textsuperscript{40} The emergence of non-profit oversight of supply chain labor practices and the addition of labor provisions in supply chain contracts raises new questions with regard to transnational labor governance. Scholarship over the past decade indicates that private labor regulation alone cannot replace labor law enforcement by strong public institutions.\textsuperscript{41} The principal query is no longer whether those private governance mechanisms have been more effective than public governance mechanisms in raising labor standards across supply chains.\textsuperscript{42} Rather, the new challenge in eradicating the pernicious problem of supply chain labor management is outlining the ways in which public


\textsuperscript{37} Bartley, supra note 9, at 520–22; Vandenbergh, supra note 36, at 2083.

\textsuperscript{38} Dara O’Rourke, Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring, 31 POLY STUD. J. 1, 10 (2003) (reporting that little research has been performed on the efficacy of codes of conduct in raising labor standards, although certain brands have severed ties with factories that repeatedly violate the labor provisions in the brand’s code of conduct). But see Doe v. Wal-Mart Stores, Inc., 572 F.3d 677 (9th Cir. 2009) (plaintiffs alleged that Wal-Mart declined to exercise its right of inspection to ensure compliance with the labor provisions provided in supply chain contracts with its supplier factories around the world).

\textsuperscript{39} See Sophia Chabbot, Everything You Need to Know About the Allegations Against Beyoncé’s Ivy Park Line, GLAMOUR (May 16, 2016), http://www.glamour.com/story/sweatshop-allegations-against-beyonce-ivy-park-line [https://perma.cc/H7UE-7G3L] (archived Feb. 27, 2017) (quoting an Ivy Park spokesperson who deflected criticisms of the sweatshop labor conditions discovered in its Sri Lankan supplier factories by pointing to the fact that the brand only contracts with certified compliant suppliers); Declan Walsh & Steven Greenhouse, Inspectors Certified Pakistani Factory as Safe Before Disaster, N.Y. TIMES (Sept. 19, 2012) (pointing out that a Pakistani garment factory was certified under Social Accountability International safety standards only weeks before 300 workers were killed in a factory fire when the exit doors were locked).

\textsuperscript{40} Kolben, supra note 9, at 436.

\textsuperscript{41} LOCKE, supra note 14, at 156–57.

\textsuperscript{42} See id. at 172.
governance and private governance can complement and reinforce one another.\textsuperscript{43}

This Note analyzes the functions and failures of public and private governance tools in the supply chain labor context. The proffered solution harnesses the various actors’ interests in each link on the chain to raise labor standards through complementary public and private governance mechanisms. In Part II, this Note discusses the characteristics of the countries ripe for outsourcing contracts and the state of labor standards in supply chain factories across the globe. Part III analyzes the shortfalls of both public and private governance mechanisms designed to raise supply chain labor standards. Part IV proposes an approach that each actor in the supply chain can take to reinforce the notion that worker rights are human rights and empower workers on an international scale.

II. THE PRIME CONDITIONS FOR SUPPLY CHAIN CONTRACTING

A. The Macro Level

Corporate firms consider various criteria to assess a country’s potential as a location for outsourcing. Latin America, for example, is notorious for flexible labor laws that permit long work hours, limited working class power, short vacation time, high labor turnover, and poor workplace safety standards.\textsuperscript{44} Latin American countries’ geographic location, access to cheap natural resources, and low-cost materials also make them attractive for offshore contracting.\textsuperscript{45} Firms tend to place a premium on access to certain resources in considering an offshoring candidate. For example, in a study of North American corporations, 69 percent reported that they consider the labor costs, 49 percent contemplated the country’s technology and infrastructure, 48 percent considered the availability of a qualified labor force, 44 percent looked at the country’s economic stability, and 41 percent weighed the country’s language dominance.\textsuperscript{46}

Competition among developing countries to attract outsourcing contracts is cutthroat. This is driven by the fact that “international firms go to a great deal of trouble to spot even minute cost differences.”\textsuperscript{47} In order to gain a competitive advantage in the race for outsourcing contracts, developing countries’ governments have

\textsuperscript{43} Id. at 156–81.
\textsuperscript{44} Castillo Fernandez & Sotelo Valencia, supra note 8, at 16.
\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{47} Jones, Kierzkowski & Lurong, supra note 1, at 308.
commoditized their workforces.\(^4^8\) To attract foreign investors, governments undermine workers’ legal protections and neutralize labor unions. Since outsourcing corporations aim to avoid investing in infrastructure or operation costs and seek a flexible workforce, cooperative regulators are an essential component when choosing an offshoring locale.\(^4^9\) Mexico and Brazil, for example, experienced labor reforms and a general compromise on worker protections in the wake of the outsourcing boom.\(^5^0\) Brazil has instated “pro-business reforms, reduced wages, increased factory automation, and layoffs” at the expense of domestic workers.\(^5^1\) Similarly, Mexican workforce management strategies have been overhauled, resulting in dilution of worker rights, decline in work safety conditions, and reduction in wages.\(^5^2\)

Supply chains grow more complex as countries’ comparative advantages fluctuate. Formerly, the divide between parent corporations and supplying manufacturers was cleanly separated by entities based in developed countries and developing countries.\(^5^3\) The difference can no longer be fairly characterized through this dichotomy. China and India, although still considered “developing,” contain both downstream multinational corporations (MNCs) and upstream suppliers—meaning they have actors at every point of the supply chain.\(^5^4\)

A picture of the complex manufacturing operations in a global economy can be seen through the journey of a single pair of athletic shoes. In the early 1900s, some of the first athletic shoes were both marketed and manufactured in the United States.\(^5^5\) By contrast, 85 percent of the world’s shoe exports are now sourced from Asia.\(^5^6\) A single Nike cross-trainer was tracked throughout its downstream manufacturing tour. The shoe was put together in Tangerang, Indonesia at a Korean-owned factory.\(^5^7\) Its component parts, however, were sourced from various locations. First, the design and product specifications were shipped from Nike’s Oregon headquarters to a Taiwanese design firm.\(^5^8\) The Taiwanese designers fleshed out the

\(^4^8\) Castillo Fernandez & Sotelo Valencia, supra note 8, at 16.
\(^4^9\) Id. at 17–18.
\(^5^0\) Id. at 21–22.
\(^5^1\) Id. at 21.
\(^5^2\) Id. at 22.
\(^5^4\) Id.
\(^5^5\) Locke, supra note 14, at 4.
\(^5^6\) Id. at 4–5.
\(^5^7\) Id. at 5.
blueprints and sent those to South Korean engineers.\textsuperscript{59} The Korean firm then outsourced the production of the shoes to Indonesia.\textsuperscript{60}

The Nike cross-trainers were composed of three parts: the upper sole, the midsole, and the outsole.\textsuperscript{61} The upper sole was made from leather from cattle slaughtered and skinned in Texas and sent to South Korea for tanning.\textsuperscript{62} After the thirty-stage tanning process, the leather of the upper sole was sent to the Indonesian factory for assembly.\textsuperscript{63} The midsole was composed of ethylene vinyl acetate (EVA) foam, which originated in Saudi Arabia in the form of refined petroleum.\textsuperscript{64} The petroleum was shipped from Saudi Arabia to Korea for further refinement and transformation to foam form.\textsuperscript{65} The EVA foam was subsequently shipped to the Indonesian factory for final assembly.\textsuperscript{66} Finally, the outsole, made of rubber—a byproduct of petroleum—was refined in South Korea and shipped to Taiwan to be processed into rubber sheets before it was sent to the Indonesian factory.\textsuperscript{67} Throughout the entire manufacturing process, an estimated 200 people had a role in assembling just one pair of athletic shoes.\textsuperscript{68}

\textbf{B. The Micro Level}

The anti-sweatshop movement of the 1990s publicly revealed the stark truth about the manufacture of consumer products. Namely, the movement demonstrated that the products were manufactured in factories abroad characterized by low wages, poor working conditions, long hours, and often child labor. As the cost of production came to light, consumers recognized the steep markups that apparel companies applied to their products in the developed markets. By one estimate, Macy’s had been marking up bras, produced in Mexico at a total cost of $6.50, by 300 percent.\textsuperscript{69} Similarly, an $80 pair of Nike shoes cost only twelve cents for labor in Indonesia.\textsuperscript{70}

Firms with exposed sweatshops in their supply chains warned that an increase in labor standards would be followed by a corresponding

\begin{itemize}
\item \textsuperscript{59} Id.
\item \textsuperscript{60} Id.
\item \textsuperscript{61} Id.
\item \textsuperscript{62} Id.
\item \textsuperscript{63} Id.
\item \textsuperscript{64} Id.
\item \textsuperscript{65} Id.
\item \textsuperscript{66} Id.
\item \textsuperscript{67} Id.
\item \textsuperscript{68} LOCKE, supra note 14, at 6.
\item \textsuperscript{70} Id.
\end{itemize}
increase in price. However, a significant number of consumers polled said that they would be comfortable paying 10 percent more for a product if they were assured that the products were produced by workers making a living wage. Since the anti-sweatshop movement of the 1990s, little headway was made to ensure that workers in supply chains received a living wage.

The maquiladora industry in Honduras, Guatemala, and El Salvador comprises 65 percent, 55 percent, and 42 percent, respectively, of its exported products to the United States. The maquiladoras employ approximately 120,000 Hondurans, 150,000 Guatemalans, and 80,000 El Salvadorans. These employees are reported to receive, as a daily wage, on average 13 percent of the federal minimum wage in the United States. Only a handful of multinational corporations are the main contractors to these factories—Hanes, Fruit of the Loom, Nike, Adidas, and Gildan Activewear—but these companies have the negotiating power to affect minimum wages across Central America.
The wages received by workers in Honduras, Guatemala, and El Salvador fall woefully short of the salaries necessary for basic necessities in each of the countries.\textsuperscript{79} Even so, maquiladora workers in these three countries have been pushed to be more flexible in order to meet the low wage competition from China and the deceleration of the United States’ economy.\textsuperscript{80} Critics argue that even though supply chain employees make a fraction of the developed world’s minimum wage, supply chain factory jobs offer a higher paid alternative to other non-maquiladora jobs.\textsuperscript{81} In the wake of the 2008 global financial crisis, however, wages for maquiladora workers fell below those of non-maquiladora workers.\textsuperscript{82} The gap between wages of maquiladora workers and non-maquiladora workers has only continued to widen since then.\textsuperscript{83}

Newspaper articles exposing “modern slavery” in textile and apparel factories are still common, especially in factories that produce celebrities’ fashion lines.\textsuperscript{84} Notables from Beyoncé to Ivanka Trump have been accused of contracting sweatshop factories abroad to manufacture their products.\textsuperscript{85} Beyoncé’s Ivy Park “athleisure” line came under fire after a Šri Lankan factory contracted by the brand allegedly employed sweatshop labor practices.\textsuperscript{86} A spokesperson for the Ivy Park brand reported that the factory was owned by MAS Holdings, which had been vetted, and the brand assured that it audited and inspected the factories to make sure they met the standards set in its code of conduct.\textsuperscript{87} Ivanka Trump, on the other hand, declined to comment on the workers’ accounts of inhumane work hours and meager wages at Xuankai Footwear Limited in China, where her shoe lines are manufactured.\textsuperscript{88}

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\textsuperscript{79}. Id.
\textsuperscript{80}. Id. (explaining that maquila workers’ wages have been stagnated in order to accommodate factory owners in the wake of the U.S. market contraction).
\textsuperscript{82}. Crossa, supra note 73.
\textsuperscript{83}. See id. (showing that in 2008, the Honduran government approved a 60 percent wage increase for all workers except maquila workers, which made the minimum wage for non-maquila workers significantly higher than maquila workers’ minimum wage).
\textsuperscript{85}. Chabbot, supra note 39; Walano, supra note 84.
\textsuperscript{86}. Chabbot, supra note 39.
\textsuperscript{87}. Id.
\textsuperscript{88}. Compare Gold et al., supra note 1 (noting that Ivanka Trump’s brand relies on its suppliers to follow the company’s code of conduct, but declined to reveal the pertinent language in its code of conduct that prohibits physical abuse and child labor),
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Perhaps the most notorious stories of factory worker abuse, on behalf of the developing markets’ demand, arise from the Foxconn Technology Group’s factories. The Foxconn factories are noted for their contracts with Apple to assemble the technology giant’s iPhones. In the Henan province, Foxconn employs a whopping 190,000 workers in the Zhengzhou factory alone. Numerous workers in Foxconn’s Chinese factories have committed suicide; other factories have experienced explosions; and still others have been rocked by employee riots, with participants numbering in the thousands. Apple, the Cupertino, California-based company, claims that Foxconn meets the rigorous labor standards it sets for its 1.1 million employees. After more than a dozen suicides in Chinese factories in 2010, Foxconn contracted with a third party auditor to monitor the working conditions at its factories. And yet, more than eight years later, workers continue to take their own lives, wages have been depressed as demand for iPhones has decreased, and it has become more difficult for factory workers to meet the standards required to receive overtime pay.

The conditions in supply chain factories are particularly dangerous for women workers. Gender-based violence perpetrated on the part of employers is particularly common in Mexican maquilas. Luz Estela Castro, Director of the Center for Human Rights for Women of Chihuahua, notes that the crimes committed against female maquiladora workers often go uninvestigated, allowing employers to

and Walano, supra note 84 (claiming that multiple brands, including Ivanka Trump’s, have declined to comment on repeated allegations of worker abuse at a Chinese factory contracted to supply their products), with Gold et al., supra note 1 (showing that H&M threatened to pull its business from a factory unless the factory reinstated workers fired for organizing a strike and factory owners dropped criminal complaints against the workers for striking), and O’Rourke, supra note 38, at 10 (explaining that Nike has canceled contracts with supplier subcontractors with persistent labor violations). 89. See, e.g., Eva Dou, Deaths of Foxconn Employees Highlight Pressures Faced by China’s Factory Workers, WALL ST. J. (Aug. 22, 2016), http://www.wsj.com/articles/deaths-of-foxconn-employees-highlight-pressures-faced-by-chinas-factory-workers-1471796417 [https://perma.cc/844T-FXH] (subscription required).
90. Id.
92. Id.
93. Dou, supra note 89; Greene, supra note 91.
94. Dou, supra note 89.
95. Id.; Greene, supra note 91.
sexually abuse and physically abuse employees with impunity. Mexico, of course, is not the only site of sexual assault in supply chains. In fact, sexual assault is commonplace in Bangladeshi, Cambodian, Indian, Pakistani, Turkish, Thai, and Vietnamese factories.

III. A TUG OF WAR OVER SUPPLY CHAIN MAINTENANCE BETWEEN PRIVATE AND PUBLIC GOVERNANCE REGIMES

In the wake of reports of supply chain accidents and worker mistreatment, global activists and labor organizations have pressured Multinational Corporations (MNCs) to provide remedies for the regulatory weaknesses in their suppliers’ countries of origin. These “governance deficits” occur when “consumers, the state, and global civil society demand labor regulations that are higher, different, or better enforced than the state where the supplier is located is either willing or able to supply.”

MNCs have responded to governance deficits and stakeholder demand for gap-filling through a number of private governance solutions. For example, some MNCs have employed internal compliance departments, contracted with third parties to monitor factory compliance, or joined consortiums that publish labor codes of conduct to respond to governance deficits. Other private regulatory compliance mechanisms, completely free of corporate involvement, have cropped up to address state regulatory failures. Independent and private supply chain oversight systems include instances where universities, consumer groups, and transnational activists monitor MNCs’ supply chains for compliance with labor law. Both the corporate-controlled and independent private monitoring efforts are termed “transnational private labor regulation” (TPLR).

Private governance methodologies have become a popular solution to deficiencies in public governance of supply chain labor, although this is not to say that the role of public governance has been wholly displaced. Legislators in suppliers’ countries continue to pass labor

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99.  Kolben, supra note 9, at 426.
100. Id. at 435.
101. O'Rourke, supra note 38, at 7, 10–11.
102. Kolben, supra note 9, at 427.
103. Id. at 428.
104. Id. at 427.
laws and enforce them with more or less success even in cases where private regulatory initiatives exist to monitor labor violations. And just as public governance has fallen short in enforcing labor standards, private governance also has its shortcomings. The existence of these two imperfect regulatory regimes—both private and public—exercising control over the same factories and even purporting to enforce the same laws, begs the question of how the two regimes coexist. This subpart recognizes the shortcomings and weaknesses of each regulatory actor, which can provide an opportunity for coordination between the regimes to increase the effectiveness of both.

A. The Achilles Heel of Public and Private Transnational Labor Governance

Traditional state-centered labor regulation model—in developing countries especially—does not withstand the challenges posed when “market actors engage in cross-border economic activity in the absence of strong regulatory institutions with clear jurisdiction.” Private governance mechanisms are needed to supplement public governance, although TPLR faces challenges of its own in proving its effectiveness, sustainability, scope, and democratic legitimacy.

1. Public Governance

Even in countries where public institutions are strong and regulatory enforcement of labor standards is rigorous, unilateral public governance solutions to transnational supply chain management can prove disastrous. The United States’ Securities and Exchange Commission’s (SEC) Rule for Conflict Mineral Supply Chain Disclosure exposes how purely public governance to address a transnational supply chain problem can ultimately backfire. Section 1502 of the

105. Id.
106. See id. at 438 (explaining that private labor governance tends to be weak in demanding enforcement of the right of association and union building).
107. Id. at 427; Matthew Amengual, Complementary Labor Regulation: The Uncoordinated Combination of State and Private Regulators in the Dominican Republic, 38 WORLD DEV. 405, 412 (2010).
108. Kolben, supra note 9, at 428, 434.
109. LOCKE, supra note 14, at 31; Kolben, supra note 9, at 437–40.
Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) includes a provision that requires the SEC to promulgate a rule obliging issuers to disclose the country of origin of certain “conflict minerals” the issuer purchases. The purpose of the disclosure, based purely on social policy grounds, was to force issuers to conduct due diligence assessments of their supply chains.

“Conflict minerals” are elements that are commonly used in the manufacturing of a number of electronic devices. Tin, tungsten, tantalum, and gold are all included under the conflict mineral umbrella. Each of these minerals is commonly harvested in the Democratic Republic of the Congo (DRC). In Eastern DRC, militant groups mine, tax, and sell the conflict minerals on the black market. The militant groups, in turn, use the profits to finance the enslavement of the local population. The goal of the SEC’s conflict mineral disclosure rule is “to elicit public pressure on companies to ensure that their products are conflict free.” As a result, the rule would constrict the financing of brutal Eastern DRC armed groups and decrease the oppression suffered by the Congolese people—a laudable goal to be sure.

Despite US lawmakers’ best intentions, however, the rule caused further militarization of the mining industry in the DRC. As a consequence of the SEC’s conflict mineral disclosure rule, companies began to refuse to buy Congolese tin because the cost of investigating, reporting, and disclosing under the new rule was prohibitive. The divestment in Congolese tin forced legitimate, artisanal miners out of the industry and into the arms of militant groups that mine gold, as gold is easier to smuggle than other conflict minerals. The options for out of work artisanal tin miners in Eastern DRC are limited to subsistence farming, joining the militia, or gold mining—all of which


113. See Smith, supra note 110, at 198 (requiring “due diligence measures [to be] taken to discover the source and chain of custody of its conflict materials”).

114. Id. at 197.

115. Id.

116. Id.

117. Id.


119. Smith, supra note 110, at 198; Conflict Minerals 101, supra note 118.

120. Smith, supra note 110, at 198.

121. Id. at 209.

122. Id.
pay a pittance, if at all. In a final tally, it was estimated that the proposed SEC rule for the disclosure of conflict minerals forced 5–12 million Congolese into economic hardship. The SEC’s conflict mineral disclosure rule serves as a cautionary tale for well-meaning developed nations that attempt to unilaterally remediate labor issues abroad absent the cultural context.

Developing nations’ governments, however, are particularly poorly suited to carry out the rigorous monitoring required to prevent labor abuses in global supply chains. As discussed above, there are a variety of factors that prevent developing regulatory states from meeting labor enforcement demands. For example, developing countries may struggle with “a lack of funding for enforcement bodies, political corruption, a lack of skills, and lack of will to regulate for fear of losing a competitive advantage in price-sensitive manufacturing sectors that are low on the value chain . . .” Since labor law is typically the exclusive domain of state governance, it is particularly detrimental to workers that supplier states have low capacities for enforcement, and it is typically ineffective to look to international organizations to fill those governance deficits. The implementation of private, non-state, and transnational governance tools has therefore been key to plugging the holes in developing countries’ regulatory labor deficits.

2. Private Governance

TPLR’s inability to deliver on its promises to raise labor standards in supply chain factories has put into question its viability as an alternative to public labor governance. A study conducted by Richard M. Locke, Brown University Provost and international labor rights scholar, revealed that private governance systems have failed to improve labor conditions in supply chains where consumers pressure downstream buyers by monitoring labor standard compliance at their upstream suppliers. Locke’s data showed that labor standards were higher in factories where the state takes steps to enforce the country’s labor law. Drawing from Locke’s study, Kevin Kolben identified four

123. Id.
124. Id.
125. Kolben, supra note 9, at 435.
126. See supra Part II(A).
127. Id.
128. Id.
129. See LOCKE, supra note 14, at 31; Kolben, supra note 9, at 437.
131. LOCKE, supra note 14, at 172–73. A finding that proves stronger public institutions ensure better labor law compliance in factories is not a novel discovery.
qualities that make private governance an inadequate substitute for public governance: effectiveness, sustainability, scope, and legitimacy.132

a. Effectiveness

Apart from the criticism that private labor regulation is second best to strong public enforcement, there are clear indications that private monitoring and self-monitoring are flawed.133 A former factory inspector at a third-party compliance inspection company recalled the mistakes, complications, and defects he witnessed while inspecting factories abroad.134 The inspector, T.A. Frank, explained that one or two inspectors would perform up to three inspections per day.135 One inspector might look over the factory's permits, employment, and payroll records for inconsistencies, while the other toured the factory floor.136 Afterwards, inspectors would conduct interviews with up to twenty employees.137 Many times the employees interviewed were vetted and coached to lie during questioning—covering up the fact that they worked far longer than their time cards indicated or that their employers had confiscated their identification documents.138 Some factories would go as far as producing “[f]alse time cards and payroll records, [spend] whole days . . . coaching employees on how to lie during interviews, and even rename certain factory buildings in order to create a smaller Potemkin village” in order to fool inspectors.139

Frank explained that inspectors inevitably missed signs of noncompliance and abuse.140 For instance, Frank recalled that at a follow-up inspection on a factory in Bangkok, a second inspector

There is no denying that in an ideal world, all countries would have strong public institutions to rigorously enforce labor standards. But unfortunately, that is not the case, and in some countries, making strong public institutions is not even on the political agenda.

133. Factory inspections performed by public entities, if they occur at all, are similarly flawed. Even when they are conducted in earnest, the inspection process is inherently predisposed to human error and deception. Regardless, private inspections pose a bevy of different complications, because there are often language barriers or cultural barriers between inspectors and the factory employees. Additionally, when inspectors for private certifiers are foreign or contracted by foreign buyers, the factory employees may assume that the inspectors’ allegiance lies with management rather than with the employees. See Amengual, supra note 107, at 407–08.
135. Id. at 35.
136. Id.
137. Id.
138. Id.
139. Id.
140. Id. at 36.
discovered pregnant workers hidden on the factory roof and Burmese migrant workers earning criminally low wages. An inspector at one factory in the Dominican Republic explained that workers were afraid to complain about working conditions to multinational inspectors for fear that they would lose their jobs, either because the inspector would tell management, or because the factory would close after the buyer looked elsewhere for a compliant supplier.

Frank reported that the biggest challenge as an inspector was detecting what portions of the inspections were accurate depictions of factory conditions and which were performance and façade used to manipulate inspectors into certifying noncompliant suppliers. While it seems inevitable that some poor factory conditions will avoid detection, the consequences for certifying a noncompliant factory are serious considering that one supplier factory can serve up to thirty-two different buyers.

Another challenge posed by supply chain factory inspections is the mere fact that the production of apparel and technological gadgets is “decomposable.” Decomposability, as it pertains to manufacturing, refers to a process in which the stages of production can be “separated from each other and sequenced, with each one completed or nearly-completed before it is passed along to become an input into the next step.” This presents itself as a problem in supply chain certification when a single business entity partitions itself into modules in the production process. For example, a WRAP inspector visited a factory in the Dominican Republic that separated a single facility into the “cutting operation” and the “assembling operation” with a wall.

While two different firms owned the different operations on paper, WRAP inspectors suspected that both the cutting and assembling operation were owned and operated by the same parties. The partitioning of the operations effectively allowed the firm owners to have the cutting operation WRAP-certified without resolving the health and safety issues posed by the assembly operation. Nothing then precludes the cutting operations firm from obtaining sales contracts under the benefit of certification, while simultaneously subcontracting with the uncertified assembling operations, completely unbeknownst to the buyer.

141. Id. at 35.
142. Amengual, supra note 107, at 408.
143. Frank, supra note 134, at 35–36.
144. Stephanie Barrientos & Sally Smith, Do Workers Benefit from Ethical Trade? Assessing Codes of Labour Practice in Global Production Systems, 28 THIRD WORLD Q. 713, 719 (2007).
145. Blair, O’Hara O’Connor & Kirchhoefer, supra note 5, at 280.
146. Blair, O’Hara O’Connor & Kirchhoefer, supra note 5, at 281 n.55.
147. Id.
148. Id.
b. Sustainability

The sustainability of TPLR compliance regimes is also deficient, since the incentive to rigorously monitor waxes and wanes. The rise of private governance tools in the monitoring of labor conditions in supply chains was precipitated by consumer and stakeholder demand. Unfortunately, consumers have short attention spans. If downstream corporate buyers perceive that consumer and stakeholder demand for supply chain labor compliance is waning or attention has been placed elsewhere—say on environmental standards enforcement—there is little economic incentive to keep up with supply chain labor monitoring.

The inconsistency in consumer and stakeholder pressure on corporations to ensure supply chain labor compliance found in private governance regimes is less of a sustainability concern in active and functional state governments. In traditional public governance regimes, the momentum to continue labor regulation is driven primarily by the fear that workers will organize to oust the current management and the fear of ensuing economic and industrial instability. By contrast, in the context of the supply chain, the global consumers’ leverage over the buyer firm and suppliers is weak. Consumers are large in number and unable to easily organize to maintain continuous pressure on global brands to comply with labor standards after the shock of a factory disaster wears off.

c. Narrow Scope

TPLRs are generally narrow in their scope, which leaves certain types of labor initiatives untapped. Private actors, for example, tend to be better at improving the technical performance of suppliers—such as helping factories comply with health and safety standards, implementing codes of conduct, or providing a system by which employees are paid within the requirements of the rule of law. However, TPLRs are generally less adept at promoting freedom of

149. Kolben, supra note 9, at 438.
150. Gay W. Seidman, Beyond the Boycott: Labor Rights, Human Rights, and Transnational Activism 143 (2007); Kolben, supra note 9, at 438.
151. Kolben, supra note 9, at 438.
152. See id.
153. Id.
154. Id.
155. Id.
156. Id.
157. Id.
association rights, collective bargaining rights, and enforcing anti-discrimination laws.\textsuperscript{158}

Most buyer codes of conduct stipulate that their suppliers comply with local laws; however, codes tend to sidestep potential conflicts of law.\textsuperscript{159} The codes often reference the International Labor Organization’s (ILO) standards for freedom of association, but in countries where freedom of association is restricted by law—like China and Vietnam—there is a conflict between ILO standards and local laws.\textsuperscript{160} ILO Convention 87 provides that “workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorization.”\textsuperscript{161} Additionally, ILO Convention 87 declares that “[t]he public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof” and “the law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.”\textsuperscript{162} FLA standards do not directly address this conflict of laws, but merely assert that “employers shall bargain with any union that has been recognized by law . . . provided such agreement does not contravene national law.”\textsuperscript{163} Since FLA guidelines require participating firms to subsume local law regarding freedom of association, firms can comply with their certification standards while continuing to buy from nations that restrict freedom of association.\textsuperscript{164}

The consumers and stakeholders that act as the driving force behind TPLR regimes are criticized for emphasizing the victimization of workers, “rather than creating vehicles for negotiation and bargaining” between workers and their employers.\textsuperscript{165} For example, TPLRs tend to focus on causes that tug at the heartstrings, like child labor, labor trafficking, and health and safety risks posed in factories. It is fair to say that eradicating those conditions in global supply chains through TPLRs is important. However, they tend to be disproportionately represented when other, perhaps less scandalous, labor conditions need attention from private regulators.

\textsuperscript{158} Amengual, supra note 107, at 408; Kolben, supra note 9, at 438.
\textsuperscript{159} Bartley, supra note 9, at 535–36.
\textsuperscript{160} Id. at 535.
\textsuperscript{162} Id. arts. 3, 8.
\textsuperscript{164} Bartley, supra note 9, at 536.
\textsuperscript{165} Kolben, supra note 9, at 439 n.71.
d. Legitimacy

TPLR detractors often question how a private actor can legitimately regulate labor when public governance institutions exist to perform the same function.166 In contrast, public institutions are inherently vested, at least in theory, with democratic legitimacy and operate with legal authority, since they are accountable to the public for their action or inaction. Private institutions, on the other hand, must answer to their stakeholders—who are not necessarily the subjects of their regulation. Consequently, the “regimes of norm enforcement . . . are not necessarily responsive or accountable to the needs and wishes of the regulated parties, particularly workers.”167

While third party inspectors and buyer codes of conduct theoretically support factory employees’ right to unionize, they are resistant to encouraging and educating workers about those rights.168 In fact, in several factories where the buyer’s code of conduct was leveraged to make significant gains in worker unionization rights, the factories were later shut down or lost business.169 Closures at factories with outstanding labor records appear to workers as reprisals for high labor standards, confirming workers’ fears that those standards come at the cost of their jobs. One inspector warned: “you don’t want to be an advocate for unions”—likely because in some countries association with a union can prove fatal.170 Ultimately, private regulators’ interests appear detached from the workers’ interests, and therefore, have no effect where the workers still view their governments as neutral forums with which to file workplace grievances.171

3. Battle of the Norms: When Public and Private Governance Regimes Collide

Neither public nor private labor regulations operate in a vacuum. Both exist alongside one another, purporting to regulate the same factories and monitor their compliance with the same laws.172 But each regime has proven that it cannot operate alone to remedy gaps in transnational labor regulation.173 When actors in the two regimes

166. Id. at 439.
167. Id.
168. Amengual, supra note 107, at 410.
169. Bartley, supra note 9, at 539.
170. Amengual, supra note 107, at 410; see, e.g., Bartley, supra note 9, at 537–38 (describing the purges of union leaders in Indonesia during the 1990s); Gold et al., supra note 1 (explaining that three workers at a Chinese factory were arrested for investigating the facilities producing Ivanka Trump’s products and that dozens of Bangladeshi labor organizers were arrested for striking and demanding higher wages).
171. Amengual, supra note 107, at 411.
172. Kolben, supra note 9, at 443–44.
173. Amengual, supra note 107, at 406.
refuse to work together to complement the others’ weakness, their efforts are rudderless and duplicative. Interactions between stakeholders in the private and public regulatory regimes can be asymmetrical and antagonistic, but they need not be.\textsuperscript{174}

Some scholars argue that the private regulatory regime has wholly displaced the need for public regulation in transnational labor contexts.\textsuperscript{175} When the attitude of private regulators is to displace the extant public regime, the result is competition and rivalry between the regimes’ actors.\textsuperscript{176} While a competitive relationship is not necessarily negative—indeed the competition may increase labor enforcement—it can undermine the legitimacy of one or both regimes.\textsuperscript{177}

There are two levels at which public and private regimes can overlap in scope, but differ in content.\textsuperscript{178} The first level is on paper.\textsuperscript{179} Private standards can require that suppliers comply with national law and remain silent about the particular practices, require certain practices that exceed or fall below the requirements of national law, or require practices that are substantively similar to national law, resulting in \textit{de facto} overlap.\textsuperscript{180} The second level is how the different regimes apply their standards in practice.\textsuperscript{181} Whether the regimes complement one another or conflict can often be determined by how they respond to circumstances “that disrupt the apparent compatibility of the rules.”\textsuperscript{182} If a conflict in public law and private standards is met with a compromise-oriented solution, the regimes are likely complementary.\textsuperscript{183} When such a conflict results in the automatic deferral to one regime over the other, then the standards are likely in conflict.\textsuperscript{184}

Indonesian labor law provides an example of a circumstance in which a private regulator’s standards may match Indonesian law on paper, but the variations in enforcement on the ground could put public and private regimes at odds.\textsuperscript{185} As the law on the books stands, Indonesia has a robust set of labor protections; however, enforcement

\begin{itemize}
\item \textsuperscript{174} Kolben, supra note 9, at 442.
\item \textsuperscript{175} Amengual, supra note 107, at 405–06; see, e.g., SEIDMAN, supra note 150 (arguing that labor activists with push for the further privatization of regulation, because public regulation has largely retreated); Tim Bartley, Corporate Accountability and the Privatization of Labor Standards: Struggles Over Codes of Conduct in the Apparel Industry, 14 RES. IN POL. SOC. 211 (2005) (using empirical evidence to show how private regulation has displaced public regulation).
\item \textsuperscript{176} Kolben, supra note 9, at 443.
\item \textsuperscript{177} Id.
\item \textsuperscript{178} Bartley, supra note 9, at 525–26.
\item \textsuperscript{179} Id. at 525.
\item \textsuperscript{180} Id.
\item \textsuperscript{181} Id.
\item \textsuperscript{182} Id. at 526.
\item \textsuperscript{183} Id.
\item \textsuperscript{184} Id.
\item \textsuperscript{185} Id. at 538.
\end{itemize}
of labor law is weak and fragmented.\textsuperscript{186} Often discretion to enforce labor law is left with the employer and legacy unions—that is unions that have been traditionally favored by the government and are uncomfortably cozy with management.\textsuperscript{187}

At Panarub factory in Tangerang, Indonesia—an Adidas supplier—an insurgent union challenged the legacy union.\textsuperscript{188} As the conflict between the unions intensified, the leaders of the insurgent union were harassed or fired.\textsuperscript{189} Ultimately the two unions were unable to negotiate union verification terms and “Adidas declined to get directly involved in this process.”\textsuperscript{190} Global brands often claim that the interpretation and implementation of complex freedom of association laws from country to country fall outside the purview of corporate social responsibility.\textsuperscript{191} Adidas and private regulators missed an opportunity to collaborate with the public regime to create a meaningful mechanism to sort out labor union conflicts.

Another factory, PT Kasrie in East Java, had its certification challenged by a separate international NGO. The previous auditing firm ignored the fact that factory management had successfully quashed an insurgent union by firing its organizers.\textsuperscript{192} Social Accountability International (SAI), the accreditation body, investigated the faulty certification, but ultimately allowed the certification to stand.\textsuperscript{193} SAI argued that there was no path to remedy the original audit, since the insurgent union no longer existed at the factory.\textsuperscript{194} Once again, private regulators declined to act as a bulwark between the disjointed enforcement of Indonesian law on paper versus in practice.

\textbf{B. Taking Advantage of Synergistic Gains: Private and Public Working Together}

Three examples stand out as potential models for success when it comes to public and private labor regulation coexistence: the Dominican Republic, Jordan, and Brazil.\textsuperscript{195} Each of the programs in

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\textsuperscript{186} Id.
\textsuperscript{187} Id. at 539.
\textsuperscript{188} Id. at 540.
\textsuperscript{189} Id. at 539–40.
\textsuperscript{190} Id. at 540.
\textsuperscript{191} Id. at 536.
\textsuperscript{192} Id. at 540.
\textsuperscript{193} Id.
\textsuperscript{194} Id.
\textsuperscript{195} See generally Amengual, supra note 109; Kolben, supra note 9, at 444, 455–56; Anne Posthuma & Renato Bignami, ‘Bridging the Gap? Public and Private Regulation of Labour Standards in Apparel Value Chains in Brazil, 18 COMPETITION & CHANGE 345 (2014) (discussing Brazil’s recent initiative to make public and private regulators work together in the apparel industry). Note that Better Work Jordan was
these countries highlight the ways in which private and public labor regulators can be mutually supportive.\textsuperscript{196} This complementarity among regimes can take several forms: comparative advantage, reallocation of resources, and symbiosis. The following case studies provide examples of each form.

1. The Dominican Republic

A study of the interaction between public institutions and private labor regulation in the Dominican Republic revealed a complementary relationship. “[I]nstead of displacing state labor regulation or causing state institutions to atrophy, private regulation relieve[d] pressure on scarce resources and complement[ed] state action within the factories.”\textsuperscript{197} For example, private regulation focused on export-oriented factories, leaving more state resources to monitor sectors of the Dominican economy that manufacture products for the domestic market.\textsuperscript{198} Domestic production factories typically had even worse labor conditions than export-oriented factories.\textsuperscript{199} Private regulation alone was not up to the task of monitoring export-oriented factories absent state regulation; however, both regimes operate in those factories with an emphasis on the enforcement in which they have a comparative advantage.\textsuperscript{200} As a result, “their respective inputs [are] non-substitutable and result in positive-sum gains.”\textsuperscript{201}

A global apparel brand, dubbed ABC by researchers, and the Secretaría de Estado de Trabajo (SET), the state’s labor regulatory authority, were monitored to elucidate best practices for public and private regulatory complementarity.\textsuperscript{202} ABC’s audits were conducted once a year at factories in its Latin American division.\textsuperscript{203} Management was usually apprised of the visits beforehand, although some surprise auditing was implemented.\textsuperscript{204} ABC’s private inspectors took pains to ensure that the identities of the workers they interviewed were not known to management in order to foster trust between the workers and their multinational interviewers.\textsuperscript{205} ABC inspectors nevertheless recognized that workers still feared that they would suffer retaliation if they complained and that their inquiry had its limitations in

\textsuperscript{196} Kolben, supra note 9, at 443.  
\textsuperscript{197} Amengual, supra note 109, at 406.  
\textsuperscript{198} Id.  
\textsuperscript{199} Id.  
\textsuperscript{200} Id.  
\textsuperscript{201} Id.  
\textsuperscript{202} Id. at 407.  
\textsuperscript{203} Id.  
\textsuperscript{204} Id.  
\textsuperscript{205} Id.
ABC admitted that its audits did not focus on freedom of association, but where ABC’s monitoring lacked, SET’s audits specialized.207

SET’s monitoring and auditing mechanism is driven largely by complaints from workers and outside NGOs.208 Therefore, SET’s audits can be focused and reactive, while ABC’s tend to be more generalized and preventative.209 The result of the layered monitoring, in theory, was full coverage of potential violations.

SET’s and ABC’s simultaneous monitoring can even intersect in a symbiotic manner. ABC, for example, requires its factories to provide permits and documentation from SET in order to comply with its standards.210 A study reports that “demands for state inspectors from employers have, if anything, increased as a result of private regulators.”211 SET complaints filed by workers have also increased from 204,056 in 2002 to 293,073 in 2006—the same period during which private regulation expanded in the industry.212 Thus, contrary to scholarship arguing that private regulatory regimes threaten to uproot public labor regulation, private regulators not only leave room for public governance, but also can increase demand for it and legitimize it.213

2. Jordan

As a benefit of signing a peace treaty with Israel, the United States granted Jordan conditional tariff reductions and a free trade agreement.214 As a result, the Jordanian garment industry became economically viable in a country that had previously held no comparative advantage in the industry.215 Most of the fledgling industry’s workers were foreign migrants from Southeast Asian countries.216 The Institute for Global Labor and Human Rights shined a spotlight on the fact that workers were subjected to impossibly long work hours, beatings, sexual assault, routine theft of documents, and

206. Id. at 408.
207. Id.
208. Id. at 409.
209. See id. (“With SET’s focus on complaint-driven inspections, inspectors do not discover consensual violations of the law, such as long overtime hours and health and safety standards . . . [while] ABC is blind to violations that cannot be discovered in relatively short audits that require investigation beyond the factory walls, such as freedom of association violations.”).
210. Id. at 411.
211. Id.
212. Id.
213. Id.
214. Kolben, supra note 9, at 452.
215. Id.
216. Id.
atrocious living conditions.\textsuperscript{217} With the industry’s reputation at stake, the Jordanian government welcomed an ILO-run pilot program to provide assessment, advice, and training to employers at the factory level.\textsuperscript{218}

The program, “Better Work Jordan” (BWJ), is a hybrid of ILO, International Finance Corporation (IFC), and government efforts to improve labor law compliance in Jordan’s supply chains.\textsuperscript{219} The Jordanian government made participation in the program mandatory for garment factories and their subcontractors exporting to the United States or Israel.\textsuperscript{220} BWJ employees conduct a preliminary factory audit in participating factories to highlight where the factories fall out of compliance with domestic and international labor law.\textsuperscript{221} Auditors and factories then work through an improvement plan over the following four months to bring the factory into compliance. A second audit and progress report is published after four months. Employers participate in twelve month trainings developed by BWJ. Additionally, the data compiled through progress reports are summarized and made publicly available every six months in industry-wide “synthesis reports.”\textsuperscript{222}

BWJ seeks to harness the power of global buyers on supply chain maintenance. For a subscription fee, companies that buy from BWJ factories have access to the progress reports of participating factories.\textsuperscript{223} By 2015, American Eagle, Gap, Polo Ralph Lauren, LL Bean, New Balance, Sears, Walmart, Hanes, etc. had subscribed to the factory reports.\textsuperscript{224} Access to the data arguably provides two-fold benefits to suppliers by decreasing the risk of negative media coverage of supply chain conditions and harmonizing the various private monitoring reports throughout their supply chains.\textsuperscript{225}

The BWJ program has seen Jordanian domestic law change to meet international standards, where it formerly had no law or deficient law. Previously there had been no minimum standard for dormitory conditions, but in 2011 the Jordanian Ministry of Health passed such regulations.\textsuperscript{226} Jordanian law formerly prohibited non-citizens from participating in unions, but in 2010 those restrictions were lifted.\textsuperscript{227}

In Jordan, BWJ and the government intentionally interact to form a partnership of sorts. The Ministry of Labor (MoL) and the Ministry of Industry and Trade (MoIT) periodically meet to discuss the program,

\begin{itemize}
\item \textsuperscript{217} Id.
\item \textsuperscript{218} Id. at 454.
\item \textsuperscript{219} Id. at 453–54.
\item \textsuperscript{220} Id. at 455.
\item \textsuperscript{221} Id. at 454.
\item \textsuperscript{222} Id.
\item \textsuperscript{223} Id. at 455.
\item \textsuperscript{224} Id. at 455 n.143.
\item \textsuperscript{225} Id. at 454.
\item \textsuperscript{226} Id. at 457.
\item \textsuperscript{227} Id. at 458.
\end{itemize}
which signals that the public sector views labor law enforcement as a factor in its plan for economic growth and competitiveness. Additionally, BWJ and the MoL created a coordination plan that includes trainings for government factory inspectors, joint trainings to share best practices, and a reporting protocol in the event that BWJ discovers human rights violations during an inspection.

The trainings and best practices partnership between the MoL and BWJ appear to be positively impacting MoL’s reputation for diligence among factory owners. At the outset of the BWJ program, factory owners had a low opinion of MoL. They believed that certification from BWJ would have a greater impact on their brand in the international market than a blessing from the MoL. Now that BWJ has collaborated with MoL, some factory owners have noticed an improvement in MoL inspectors’ communication and diligence, thus reinforcing the idea that private regulation can legitimize formerly weak public institutions.

3. Brazil

After a surge in apparel imports, local Brazilian producers turned to smaller, informal sector manufacturing to maintain domestic competitiveness. The smaller workshops to which Brazilian producers outsource are cheaper and more flexible than large-scale factories, as small-scale workshops are more numerous and therefore more expensive and difficult to monitor. Approximately 73 percent of the Brazilian apparel industry was composed of firms with zero to nine employees in 2012. The workshops were generally sourced from domestic premises, which allowed them to largely fly under the regulators’ radar. During audits, the public labor inspectorate discovered slave labor throughout the small-scale workshops.

Recognizing the changes in the apparel industry, large apparel retail members of the Brazilian Trade Association of Textile Retailers (ABVTEX) and the City Council of São Paulo created a commission to investigate the prevalence of labor trafficking and slave labor in the São Paulo apparel industry. The State of São Paulo accounted for

228. Id.
229. Id. at 458–59.
230. Id. at 462.
231. Id.
232. Id.
233. Id.
234. Posthuma & Bignami, supra note 195, at 351.
235. Id. at 351.
236. Id. at 352 fig.1.
237. Id. at 352.
238. Id. at 353.
239. Id.
29 percent of Brazil’s total textile and garment industry output.\textsuperscript{240} In its report, the Commission emphasized that “apparel retailers are legally liable for working conditions throughout their entire value chain.”\textsuperscript{241} Retailers had formerly evaded responsibility for supply chain labor violations by referring to standard clauses in supplier contracts that require suppliers and subcontractors to comply with local labor laws.\textsuperscript{242} Rejecting this argument, the Commission emphasized that merely placing a boilerplate provision in supplier contracts does not absolve retailers of liability for labor law non-compliance in their supply chains.\textsuperscript{243} After the Commission’s report, retailers began conducting audits and publishing codes of conduct for suppliers.\textsuperscript{244} In addition to private audits, the public inspectors continued factory audits, which caused many buyers to forge legally binding Commitment to Conduct Adjustment Agreements or compliance commitments that required the firm to monitor their entire supply chains.\textsuperscript{245}

In 2013, the São Paulo State Legislature became serious about punishing firms for contracting with factories and workshops that employed worker abuse and slave labor to make its products.\textsuperscript{246} The Legislature passed the harshest labor law non-compliance sanction in the world.\textsuperscript{247} Law number 14,946 created a procedure to suspend a firm’s license to operate in the State of São Paulo for ten years in the event that slave labor is discovered in any tier of the buyer’s supply chain.\textsuperscript{248}

The members of ABVTEX also formed a Corporate Social Responsibility initiative of their own accord as a response to the stricter public regulations and the Commission’s report on slave labor.\textsuperscript{249} The Supplier Qualification Program (SQP) aimed to identify and audit every single supplier and subcontractor in members’ supply chains.\textsuperscript{250} Ultimately, the consortium intended to create a pool of pre-certified suppliers at every tier of production through SQP.\textsuperscript{251} First tier suppliers in SQP must, as a condition of certification, share a list of their subcontractors with their ABVTEX clients and only maintain contracts with compliant subcontractors.\textsuperscript{252} Retailers were tasked with ensuring that their suppliers and subcontractors actually complied with

\textsuperscript{240} Id. at 348.
\textsuperscript{241} Id. at 353.
\textsuperscript{242} Id. at 353–54.
\textsuperscript{243} Id. at 354.
\textsuperscript{244} Id.
\textsuperscript{245} Id.
\textsuperscript{246} Id.
\textsuperscript{247} Id.
\textsuperscript{248} Id.
\textsuperscript{249} Id. at 355.
\textsuperscript{250} Id.
\textsuperscript{251} Id. at 356.
\textsuperscript{252} Id. at 355–56.
SQP standards—usually through private monitoring audits. By 2014, almost six thousand suppliers and subcontractors had been registered and audited through SQP—73 percent of which had actually been approved.

IV. GOVERNING A CONSTELLATION OF INTERESTS

Both public and private actors have a role to play in enforcing labor standards in transnational supply chains. The complex and multinational nature of supply chain production presents a difficult case for traditional state-centered regulation where public institutions are weak. Yet private regulation has, over the past decade, demonstrated that it cannot shoulder the burden of transnational labor regulation alone. This Note argues that all the interested parties—importing countries, exporting countries, private regulators, buyers, and suppliers—must act in concert to orchestrate an effective transnational labor enforcement regime.

The compliance mechanisms mentioned above in the Dominican Republic, Jordan, and Brazil should be emulated elsewhere. The Dominican Republic example demonstrates that public and private monitors can complement and even reinforce one another. Similarly, the BWJ program in Jordan provided evidence that making labor compliance a mandatory goal for economic growth and competitiveness precipitates improvements in the labor laws. The severe penalties that accompany violations of São Paulo’s labor reform law give companies the proper incentive to monitor their factories and their subcontractors’ factories for compliance. Also, Brazil’s willingness to create liability for companies that fail to enforce their own labor codes is crucial to changing the current state of supply chain factory conditions and compliance enforcement.

A. Importing Countries

Typically, importing countries are developed nations with strong public institutions. The laws of importing countries pose a credible threat of enforcement against the entities that operate within them. It is in these countries that the parent companies incorporate and where the products produced on the global market are consumed. In order to

253. Id. at 356.
254. Id.
255. See supra Part III(B)(1).
256. See supra Part III(B)(2).
257. See supra Part III(B)(3).
258. See supra Part III(B)(3).
incentivize parent companies and international brands to properly vet their overseas suppliers and influence factory management throughout their supply chains to comply with labor standards, importing countries must punish labor violations in a way that resonates with buying companies.

The United States’ Foreign Corrupt Practices Act (FCPA), in its broad application to extraterritorial activity, provides a model federal statute for importing countries to emulate in crafting a statute for supply chain labor violation liability. The FCPA contains two main provisions: the Anti-bribery provision and the Accounting provision. The Anti-bribery provision penalizes entities and persons paying bribes to foreign public officials, while the Accounting Provision mandates certain internal control and record keeping requirements. Entities listed on an American stock exchange, employees, shareholders, agents, and officers of the aforementioned entities, domestic concerns, and other persons and entities acting within the United States are all within the FCPA’s purview.

A similar statute for labor law violations in entities’ supply chains would create the type of sustained pressure on parent companies to contract with labor compliant factories, both on paper and in practice. Global brands could no longer expect to evade liability or blame for worker abuse in their supply chains by inserting standard language requiring compliance with local labor laws in supplier contracts. Upon finding labor abuses in a global buyer’s supply chain, the company would be required to demonstrate its procedure for monitoring its suppliers’ and subcontractors’ compliance with the local and perhaps international labor law. While some companies already strive to collaborate with their supply chain factories to create better working conditions, these companies are the minority—their efforts fall short when they are confronted with a labor issue that could actually affect the company’s bottom line.

Under the FCPA, an entity can be penalized when its third-party contractors violate the statute’s anti-bribery provisions. As a result, companies subject to the statute are careful in choosing their

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261. Id.
262. Id. at 10–11.
263. See, e.g., Bartley, supra note 9, at 539–40 (explaining that Adidas declined to put pressure on a supplier to protect workers’ right to unionize when the law was ambiguous about the required protection).
264. A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICE ACT, supra note 269, at 21–23 (“The fact that a bribe is paid by a third party does not eliminate the potential for criminal or civil FCPA liability.”).
contractors abroad. An identical provision in the proposed labor liability statute has the potential to expand liability all the way through a company’s supply chain. In effect, the statute could force transparency between suppliers and buyers. Additionally, the statute would ensure compliance of suppliers further upstream than private governance tools can currently reach.

The business sector would surely balk at the thought of assuming liability for more extraterritorial activity under a new federal statute, although compliance with its provisions need not be as costly for the industry as the reporting requirements under the SEC’s Conflict Mineral Disclosure Rule. An enforcement mechanism that applies equally to all global buyers would eradicate the collective action problem that the handful of socially responsible brands face when consumers pressure them to clean up their supply chains. Some factories supply more than thirty different brands, and yet, only a few of those brands have been singled out by consumers as bad actors. Pooling global brands’ resources and influence could make supply chain labor maintenance cheaper for brands that currently pull most of the weight for factory monitoring and compliance.

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265. Id. at 60–61 (“DOJ’s and SEC’s FCPA enforcement actions demonstrate that third parties, including agents, consultants, and distributors, are commonly used to conceal the payment of bribes to foreign officials in international business transactions. Risk-based due diligence is particularly important with third-parties and will also be considered by DOJ and SEC in assessing the effectiveness of a company’s compliance program.”); see also Ernst & Young, Knowing Your Third Party: Asia-Pacific Fraud Survey, 7–8 (2013), http://www.ey.com/Publication/vwLUAssets/EY-Knowing-your-third-party/$FILE/EY-Knowing-your-third-party.pdf (archived Oct. 22, 2017) (emphasizing the importance of performing due diligence investigations into third parties when conducting business abroad).

266. See Smith, supra note 110, at 434 (claiming that the SEC’s Conflict Mineral Disclosure Rule was estimated to cost American businesses anywhere from $71.2 million to $7.93 billion annually).

267. See, e.g., Chabbot, supra note 39 (claiming that the manufacturing company used by Beyoncé’s Ivy Park brand and criticized for perpetuating sweatshop conditions also sold products to Speedo, Triumph, and Ultimo); Cole Kazdin, The Elite Clothing Brands Paying Sri Lankan Factory Workers Poverty Wages, Vice (May 19, 2016), https://broadly.vice.com/en_us/article/vv59wm/the-elite-clothing-brands-paying-sri-lankan-factory-workers-poverty-wages [https://perma.cc/SN9E-E2LH] (archived Oct. 22, 2017) (explaining that the deplorable working conditions discovered in a factory used to produce Beyoncé’s Ivy Park brand were ubiquitous in Sri Lankan factories used to produce products for Victoria’s Secret, GAP, H&M, Calvin Klein, Ann Taylor, and Spanx. Also stating that Lululemon contracts with the same manufacturer as Ivy Park to produce its athleisure line, but only Beyoncé’s brand has been criticized in headlines).

268. See Barrientos & Smith, supra note 144, at 719.

269. See, e.g., Gold et al., supra note 1 (stating that while nearly thirty North American apparel brands have spent millions on two initiatives to make Bangladeshi factories safer, Ivanka Trump’s brand, which uses some of the same Bangladeshi factories, has never contributed to the initiatives).
B. Exporting Countries

Exporting countries—the origin of consumer products and the site of supply chain factories—must form partnerships with existing private labor governance organizations. Ideally those partnerships would take the collaborative form of the BWJ program in Jordan. Participation in monitoring under the partnership should not be optional for factories and their subcontractors. Export licenses, like those in the BWJ program, ought to be made contingent on participation in labor monitoring, disclosure, transparency, and training.

As a more general matter, factory compliance with labor law ought to be viewed and treated as a key factor in an industry’s competitiveness in the global market. In conjunction with an FCPA-like statute for global buyers in developed nations, it would seem that buyers would indeed place a premium on factories with stellar compliance records and investment in countries dedicated to developing labor compliance programs.

Under the private-public governance partnerships, auditors should foster an educational relationship with factory owners. Too often, factory management abroad is portrayed as morally bankrupt and devoid of compassion for the factory employees. This narrative sours relationships between auditors and management at the outset. An emphasis must be placed on training factory management and developing factory improvement plans, rather than defaulting to sanctions any time a violation is discovered.

On the other hand, while sanctions should be a secondary remedy to education, punishment for intentional non-compliance should be severe. In circumstances where worker abuses or labor violations are deliberate, the factory’s license to operate should be revoked for a period, as required by São Paulo’s law. Transparency of the proposed punishments for non-compliance would be a key deterrent. Perhaps, the exporting government and private monitoring organizations could develop a sentencing guideline for factory labor violations.

C. Private Regulators

In addition to forging relationships with public governance bodies, private regulators should tap government licensing resources to compile a database of suppliers and subcontractors on a country-by-country basis. As a condition of achieving certification, first-tier suppliers ought to provide a list of their subcontractors to private

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270. See supra Part III(B)(2).
271. See supra Part III(B)(2).
272. LOCKE, supra note 14, at 126.
273. See supra Part III(B)(3).
regulators. Similar to Brazil's SQP Consortium, private regulators should aim to audit every supplier and subcontractor and to provide subscribing global buyers with a list of pre-certified suppliers at every tier of production in each participating country. Certified supplier progress reports should be made available to subscribing buyers. Additionally, buyers should be notified when their certified suppliers fall out of compliance and assist in carrying out the improvement plan at the non-compliant factory.

D. Global Buyers

The compliance department at global brands should consider supply chain labor maintenance a priority. Two large apparel companies—Timberland and Nike—admitted that certain buyer practices force otherwise compliant factories to violate labor laws.\(^{274}\) For example, the short expected turnaround time, the amount of different designs a factory is expected to be able to produce for a brand, and the submission of late or changed orders all contribute to forced overtime work in factories.\(^ {275}\) Buyers need to reassess the business practices that ultimately cause suppliers to fulfill orders that could not possibly be completed in humane working conditions. Large brands' unrealistic expectations for ever-faster production at ever-cheaper unit prices undermine factory management's ability to conform to the brand's own code of conduct.\(^ {276}\) A robust compliance program should be implemented to ensure that buyers are not sabotaging their own efforts to create clean supply chains.

E. Suppliers

To aid buyers in ensuring labor compliance at their supply chain factories, suppliers must be transparent and reveal any and all subcontractors they deal with in the course of production. If an FCPA-like statute were applied in suppliers' target markets, then suppliers' competitiveness could depend, in part, on their willingness to be forthcoming about their subcontractors and to improve factory worker treatment. The first step towards creating a comprehensive monitoring and compliance system in supply chain factories requires factory management to accept training and advice from auditing authorities, whether public or private. All interested parties, most importantly workers, will benefit when the relationship between the auditing authorities and factory management is characterized as collaborative, instead of adversarial.

\(^ {274}\) Id. at 128.
\(^ {275}\) Id.
\(^ {276}\) Id. at 129.
Labor rights activists struggled to find a substitute regulatory mechanism after it became clear that the traditional state-centered regulatory model could not reach workers in the labyrinth of international supply chains. Private regulation was touted as the alternative to public governance by both labor activists and global buyers. Over the past decade, however, private regulation has shown itself to be no panacea in the supply chain labor compliance context. Tragic news stories still report the death tolls caused by preventable factory accidents and exposés reveal horrendous worker conditions at factories that have been certified by reputable private auditors. Hybrid partnerships between public and private governance bodies have begun to form, in order to close the monitoring gaps that plague both systems. Although it may be too early to tell, it appears that collaboration between public and private entities will prove to be the most effective method to have comprehensive monitoring of labor conditions at all tiers of the supply chain. In order for a public-private compliance framework to thrive, the interested actors in the chain must leverage their respective authorities to influence compliance upstream.

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