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Recent Nordic Trends in Developing Value Chain Sustainability

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Abstract

Over the last few decades, global value chains have become the dominant form of economic production. Law has been slow to respond to this change. We have only recently begun to comprehend and regulate global value chains organized as corporate groups and the recent move towards contractually organized value chains pushes law even further away from its comfort zone. In particular, the current state-of-the-art of value chain regulation cannot effectively tackle issues of sustainability in contractually organized value chains. At the same time, several global trends related to private governance, private law litigation and public regulation are driving the development of sustainable value chain governance and developing law's responses to contractually organized production. In this paper, I look at recent Nordic versions of these global development trends under private governance, private law litigation and public regulation and set them in the global context that they aim to regulate. While on the outset it seems that the Nordic approach tries to go beyond the global state-of-the-art, a key challenge remains in how the local economic interests that are an important driver of Nordic approaches to sustainability are balanced with a more global perspective on sustainability.

1. Introduction—Law and the New Realities of Global Production

Over the last two hundred years, two major shifts have changed the way goods are produced.[1] First, during the 19th century technological innovations such as steam ships and railroads made possible the distribution of goods over vast distances, allowing production to be physically separated from consumption. This, coupled with a drive towards increased returns on investment via bureaucratic efficiency led to the rise of centralized mass production and fragmented distribution chains. Second, during the 20th century, advances in communication technology enabled the efficient control of production over long distances. Thus it was no longer necessary for bureaucratic efficiency that all aspects of production would be bundled together into one centralized mass production complex. Organizational focus shifted towards so-called 'core competences': companies focused on higher value producing aspects of production, such as intellectual property rights, design,

[1] Richard Baldwin, "Trade and Industrialization after Globalization's 2nd Unbundling: How Building and Joining a Supply Chain Are Different and Why It Matters" (2011) *National Bureau of Economic Research Working Paper 17716*.

marketing, and research and development, while outsourcing less value producing aspects of production, such as manufacturing and various administration functions.[2]

The end result of these technological and management developments are centrally governed but globally dispersed production networks that can be referred to as global value chains.[3] The United Nations Conference on Trade and Development (UNCTAD) estimated in 2013 that 80 % of international trade takes place in global value chains that are organized and governed by so-called "lead firms" under contractual and corporate principles.[4] But while global value chains enable efficiency on an unprecedented scale, they have also become emblematic of the many problems of global trade and production, ranging from appalling labour conditions to environmental degradation and tax evasion.[5] If lead firms outsource production to subsidiaries and suppliers located in other jurisdictions, they may, for example, simultaneously outsource resource extraction and greenhouse gas emissions to jurisdictions that are less well able to cope with them.

At the same time, global value chains are dependent on legal infrastructure.[6] In particular, the basic building blocks of private law, contract and corporation, have provided lead firms with the possibility of externalising liabilities, first in the form of multinational corporate groups and more recently in the form of contractually organized global value chains. Current approaches to regulating global value chains, from private governance to private litigation and public regulation, have barely begun to comprehend multinational groups of companies as unified entities, to say nothing of contractually organized value chains.[7]

At the same time, it is clear that a hundred years ago law did develop effective responses to the liability deficits inherent in the first shift in global production practices, the move towards centralized mass production and fragmented distribution chains. For example,

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[2] Coimbatore Krishnarao Prahalad and Gary Hamel, "The Core Competence of the Corporation" (1990) 68 *Harvard Business Review* 79.

[3] Gary Gereffi, "Global value chains in a post-Washington Consensus world" (2014) 21 *Review of International Political Economy* 9. In many ways, the value chain can be seen as synonymous to other concepts such as supply chain or commodity chain, even if the different terms relate to distinct research traditions. I opt to use the term value chain because of its conceptual openness and the governance model developed under it. See Jennifer Bair, "Global Commodity Chains: Genealogy and Review" in Jennifer Bair (ed), *Frontiers of Commodity Chain Research* (Standford University Press 2009).

[4] UNCTAD, *World Investment Report 2013* (2013). For governance, see Gary Gereffi, John Humphrey and Timothy Sturgeon, "The governance of global value chains" (2005) 12 *Review of International Political Economy* 78. For different types of lead firms, see Gary Gereffi, "Shifting Governance Structures in Global Commodity Chains, With Special Reference to the Internet" (2001) 44 *American Behavioral Scientist* 1616.

[5] IGLP Law and Global Production Working Group, "The role of law in global value chains: a research manifesto" (2016) 4 *London Review of International Law* 57.

[6] IGLP Law and Global Production Working Group (n 5).

[7] Jaakko Salminen, "Sustainability and the Move from Corporate Governance to Governance Through Contract" in Beate Sjåfjell and Christopher Brunner (eds), *Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (forthcoming Cambridge University Press 2019).

product liability was developed to overcome the lack of a direct relationship between manufacturers and users of goods in a contractually organized distribution chains, provide claimants with more beneficial burdens of proof in relation to allocating liability for damage caused by defective products in complex production complexes, and provide manufacturers with select defences designed to encourage them to keep up with technological advances related to product safety.[8]

Current approaches to lead firm liability for damage caused by the inadequate governance of their global value chains to third parties, such as labour and environmental interests, seem to be in a state of development comparable to early phases of product liability law a hundred or so years ago.[9] These approaches, fuelled by societal debate, play out on at least three levels: private governance, private law litigation, and public regulation. In this paper, I will briefly tackle recent Nordic trends coupled to these topics based on recent examples of how Nordic law has begun to respond to the liability deficits posed by the inadequate governance of global value chains.

2. Private Governance and the *Bangladesh Accord*

Private governance lies at the heart of global value chains. Richard Baldwin's hypothesis that the development of advanced communication technology is a prerequisite for the fragmentation of production entails that the *possibility* of effective control of fragmented production is a condition precedent for fragmentation.[10] In many cases, effective control is a derivative of regulation: within a jurisdiction a lead firm knows that law generally requires similar product safety, labour and environmental standards from most if not all actors. This may also apply in transnational situations, for example where lead firms operating in one jurisdiction wish to comply with the requirements of the target market in relation to product safety or emission standards.[11]

However, in both cases public regulation may not always be able to effectively regulate all relevant actors. Outsourcing production within a jurisdiction may allow lead firms to escape regulations that target specific actors, for example by using labour-hire firms to avoid sector-specific labour regulations or collective agreements.[12] In transnational contexts regulation and enforcement frameworks may differ radically among jurisdictions, and thus for example a lead firm outsourcing production to another country may be confronted with a very

[8] Generally, see Jane Stapleton, *Product Liability* (Butterworths 1994) and Simon Whittaker (ed), *The Development of Product Liability* (Cambridge University Press 2010).

[9] Jaakko Salminen and Vibe Ulfbeck, "Developing Supply Chain Liability: A Necessary Marriage of Contract and Tort?" in Vibe Ulfbeck, Alexandra Andhov and Katerina Mitkidis (eds) Law and Responsible Supply Chain Management: Contract and Tort Interplay and Overlap (Routledge 2019).

[10] Baldwin (n 1).

[11] Dan Danielsen, "Local Rules and a Global Economy: An Economic Policy Perspective" (2010) 1 *Transnational Legal Theory* 49.

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

different level of building code enforcement or environmental standards than in its home jurisdiction.[13] In many cases, effective control thus requires lead firms to be proactive, either on their own or in cooperation with other private and public actors. These situations can range from compliance with target market standards, for example in relation to product quality, maintaining cost-effectiveness and research and development throughout the lead firm's value chain, or for ethical reasons, such as ensuring labour and environmental compliance throughout the value chain.[14]

Various private governance mechanisms can be used to extend control in a chain of contracts.[15] Standards and monitoring provide one starting point, with lead firms requiring compliance with specific standards throughout the value chain and then monitoring compliance for example via audits. In many cases, however, merely requiring suppliers to comply with set standards is not enough as suppliers may not have the financial, technical, social or other capabilities to implement standards. Instead, in order to ensure compliance lead firms may have to put in place capability building mechanisms to help suppliers develop compliance. Even capability building may fall short and more intensive cooperation, for example in the form of partnering between lead firms and suppliers, has been proposed.

All forms of private governance, however, share one fundamental deficit: ultimately they rely on lead firm benevolence.[16] Private governance related to the so-called externalities of production, such as labour, environmental and social interests, has often been developed only *after* a crisis.[17] The use of forced labour, mismanagement of toxic waste, a factory burning down or collapsing or climate change may all turn into global media events that force the hand of lead firms in developing more adequate forms of private governance. Furthermore, it is unclear to what extent private responses to such catastrophes are

[13] Thus for example in Bangladesh transnational private initiatives seem necessary to ensure the enforcement of public building codes. Beryl ter Haar and Maarten Keune, "One Step Forward or More Window-Dressing? A Legal Analysis of Recent CSR Initiatives in the Garment Industry in Bangladesh" (2014) 30 *International Journal of Comparative Labour Law & Industrial Relations* 5.

[14] For some examples, see Peter Kajüter and Harri I Kulmala, "Open-book accounting in networks: Potential achievements and reasons for failures" (2005) 16 *Management Accounting Research* 179; Ronald J Gilson, Charles F Sabel and Robert E Scott, "Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration" (2009) 109 *Columbia Law Review* 431; Richard M Locke, *The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy* (Cambridge University Press 2013).

[15] For one typology, see Jaakko Salminen, "From Product Liability to Production Liability: Modelling a Response to the Liability Deficit of Global Value Chains on Historical Transformations of Production", forthcoming in *Competition and Change* (2019).

[16] Robert B Reich, *Supercapitalism: The Transformation of Business, Democracy, and Everyday Life* (Knopf 2007).

[17] For the proverbial example of labour conditions at Nike's foreign suppliers in the early 1990s, see Locke (n 14).

intended as efficient remedies or merely stop-gap efforts to influence customers, financiers, regulators and other relevant actors.[18]

At the same time, it is clear that if a lead firm sees private governance as crucial to its bottom-line, the creativity and effect of such mechanisms knows no bounds. For example in relation to value-chain-wide cost-management and research and development, lead firms are known to have created mechanisms that easily transgress contractual and corporate boundaries, that precisely map complex value chains and that provide mechanisms for intervention in the form of cooperative capability building, the costs and profits of which are mutually shared on a case-by-case basis.[19] Such mechanisms, however, are typically closely guarded business secrets and there is comparatively little publicly available information on how lead firms can and do govern their value chains.[20] Divulging private governance mechanisms may open up liabilities and is typically only done in any detail when there are clearly beneficial reasons to do so, for example to turn a tide of negative media attention.[21]

The possibilities and problems of private governance can be exemplified by what seems to be the current *publicly available* state-of-the-art of private governance: the Accord on Fire and Building Safety in Bangladesh ('Bangladesh Accord'). The Bangladesh Accord (both the five year term of the original 2013 version and its second iteration from 2018) is a governance contract arising out of the ashes of the 2013 Rana Plaza disaster where unenforced building codes contributed to the collapse of a building in Savar, Bangladesh. While the building had been partially evacuated due to clear signs of structural weakness, managers ordered workers to return to work in factories housed in the upper stories of the building, soon after which the building collapsed causing the deaths of over a thousand workers. This caused a global media backlash that resulted in two novel governance mechanisms: the Bangladesh Accord, which can be seen as the more advanced alternative, and the Alliance for Worker Safety in Bangladesh (Bangladesh Alliance), which can be seen as less advanced.[22] While the less advanced Bangladesh Alliance was primarily championed by North American firms, the more advanced Bangladesh Accord has to a considerable degree been championed by European and Nordic companies, in particular the Swedish firm Hennes & Mauritz.[23]

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[18] Jaakko Salminen, "The Accord on Fire and Building Safety in Bangladesh—A New Paradigm for Limiting Buyers' Liability in Global Supply Chains?" (2018) 66 *American Journal of Comparative Law* 411.

[19] E.g. Kajüter and Kulmala (n 14) 186–190.

[20] In addition to Kajüter and Kulmala, see, for example, Gereffi, Humphrey and Sturgeon (n 4); Locke (n 14).

[21] Salminen, "The Accord on Fire and Building Safety in Bangladesh—A New Paradigm for Limiting Buyers' Liability in Global Supply Chains?" (n 18).

[22] E.g. ter Haar and Keune (n 13), Mark Anner, Jennifer Bair and Jeremy Blasi, "Toward Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks" (2013) 35 *Comparative Labor Law & Policy Journal* 1.

[23] Ter Haar and Keune (n 13); Anner, Bair and Blasi, (n 22); Salminen, "The Accord on Fire and Building Safety in Bangladesh—A New Paradigm for Limiting Buyers' Liability in Global Supply Chains?" (n 18).

In a nutshell, the Bangladesh Accord connects two ends of a value chain, lead firms representing global brands and the global and local representatives of supplier employees in Bangladesh, with a governance contract.[24] The aim of the agreement is to increase the capabilities of suppliers in a way that accounts for the interests of the whole value chain—the focus of the contract is thus not limited to the parties to the agreement themselves, but provides a mechanism for the parties to extend governance in a mutually beneficial way to all involved value chain actors . Towards this, apart from putting in place a complex governance mechanism, the agreement also grants specific benefits to supplier employees and places on lead firms obligations to collectively help fund and organize factory inspections and repairs. In many ways the agreement resembles what appears to be the state-of-the-art of private governance in more established (and more secretive) fields such as value chain wide cost-management and research and development, and from a transnational labour sustainability perspective the result has been hailed as ground-breaking.

There is, however, a dark side to the Bangladesh Accord. First, it operates in the shadow of the law: it is the *private* result of the failure of publicly regulating global value chains. Because of this, while being ground-breaking and apparently efficient, it is limited to a very specific set of problems in a specific sector of production in a single jurisdiction. Second, it externalizes control to a contractual mechanism that can be used not only to develop governance but also specifically to limit liabilities arising out of inadequate governance. In both ways the end result depends on lead firm benevolence: first, it is up to lead firms whether they wish to engage in effective governance mechanism in a specific context, and second, it is up to lead firms to decide on the contents of the mechanism and to what extent it can be used to not only expand governance but to limit any liabilities arising out of it.[25] Neither is the result easily standardized. Having all global value chains governed solely by such private agreements would probably lead to considerable confusion in understanding the differences and individual benefits of each separate initiative.

At the same time, the Bangladesh Accord does provide an important and public example of what companies can do together with interest groups to govern global value chain sustainability. This example can no doubt be transplanted into other than labour contexts, such as in relation to environmental interests and, in particular, the governance of greenhouse gas emissions in global value chains.[26] Thus, instead of seeing such mechanisms as examples of how *good* lead firms act, they should perhaps be seen as examples of how *all* lead firms *could* act. The best practices portrayed by governance mechanisms such as the Bangladesh Accord could be used as a general standard of care in private law and public

[24] Salminen, "The Accord on Fire and Building Safety in Bangladesh—A New Paradigm for Limiting Buyers' Liability in Global Supply Chains?" (n 18).

[25] Salminen, "The Accord on Fire and Building Safety in Bangladesh—A New Paradigm for Limiting Buyers' Liability in Global Supply Chains?" (n 18).

[26] Jaakko Salminen, "Sustainability in Contractually Organized Supply Chains: Coordinating Transport" in Ellen Eftestøl-Wilhelmsson, Suvi Sankari and Anu Bask (eds), *Sustainable and Efficient Transport: Incentives for Promoting a Green Transport Market* (forthcoming, Edward Elgar 2019).

regulation in relation to governing value chain externalities, thus guaranteeing their general application. A similar approach is already in place for example under product liability law.[27]

3. Value Chain Litigation and *Arica Victims KB* v *Boliden Mineral AB*

In several cases claimants have tried to impose liability on lead firms for inadequate value chain governance under private law doctrines such as contract and tort. Scenarios range from substandard and even dangerous working conditions, such as in the Californian *Doe* v *WalMart* and Canadian *Das* v George Weston cases,[28] to environmental degradation, such as in the English *Trafigura* and Dutch *Shell* cases,[29] to climate change.[30] Claims have been based on contract, tort and other causes of action, set in both domestic and transnational contexts and have focused on lead firm governance in both parent–subsidiary and buyer–supplier relationships. While many cases have not been successful, others have resulted in important precedent, such as the *Chandler* v *Cape* ruling,[31] or large settlements, such as in *Trafigura*.

It is difficult to adequately summarize the current status of global value chain litigation related to inadequate lead firm governance.[32] However, it can be noted that due to the practicalities of current cases and reigning ideas of private international law, most current cases seem to focus on the common law.[33] These cases, in turn, have focused on transposing the precedent set in *Chandler* v *Cape*, which centred around a domestic parent–subsidiary relationship, into a transnational buyer—supplier context. Examples include cases such as *Das* v *George Weston*, currently under appeal in Canada, and *Jabir* v *KiK*, which was in January 2019 dismissed by a trial court in Germany due to a Pakistani statute of limitations but which may yet be appealed.[34]

Focus on the common law and the *Chandler* precedent causes a number of challenges for litigation at present. In particular, under *Chandler* it is required *both* that a lead firm controls its subsidiaries or suppliers, *and* that this control was negligent. Thus if a lead firm does not govern its suppliers, there seems to be little chance of liability. This deficit may to some extent be offset by lead firms potentially being liable also in cases where they knowingly

[27] For the standard of care under product liability law, see Stapleton (n 8), e.g. at Chapter 10.

[28] *Doe* v *Walmart*, United States Court of Appeals, 9th Circuit, 08-55706, July 10, 2009 and *Das* v *George Weston Ltd*, ONSC 4129, Ontario Superior Court of Justice, July 5, 2017 (under appeal).

[29] For *Trafigura* and *Dutch Shell*, see e.g. Liesbeth Enneking, *Foreign Direct Liability and Beyond* (Eleven International Publishing 2012) 102–107.

[30] Generally Geetanjali Ganguly, Joana Setzer and Veerle Heyvaert, "If at First You Don't Succeed: Suing Corporations for Climate Change" (2018) 38 *Oxford Journal of Legal Studies* 841.

[31] *Chandler* v *Cape*, [2012] EWCA 525. See Martin Petrin, "Assumption of Responsibility in Corporate Groups: Chandler v Cape plc" (2013) 76 *Modern Law Review* 603.

[32] For one approach, see Salminen, 'From Product Liability to Production Liability: Modelling a Response to the Liability Deficit of Global Value Chains on Historical Transformations of Production' (n 15).

[33] Salminen and Ulfbeck (n 9).

[34] *Jabir* v *KiK Textilien und Non-Food GmbH*, LG Dortmund, 7 O 95/15, January 10, 2019 (Germany).

outsourced production to incompetent actors, such as in the *Trafigura* scenario. This possible exception to the *Chandler* rule, however, seems for now limited and uncertain. For example, in *Das* v *George Weston* a Canadian trial court found that requiring suppliers to follow standards set by and monitored by a lead firm was not enough to ground liability. This would imply that *Chandler* is applicable only in select cases where lead firms specifically interfere with or extend governance to specific value chain actors, for example through advanced private governance mechanisms such as those related to capability building or partnering referred to in Section 2. Furthermore, showing such control is not easy for claimants when governance is generally a closely guarded business secret.

It has been argued that claims would be easier in civil law contexts.[35] The recent Swedish case of *Arica Victims KB* v *Boliden Mineral AB* (under appeal) might corroborate this.[36] In *Arica* v *Boliden*, claimants allege that the Swedish mining and smelting company Boliden outsourced the treatment of toxic sludge to a Chilean company that was incapable of properly taking care of the sludge which was stored outdoors so that desert winds spread toxic substances into nearby settlements, poisoning several hundred inhabitants.

While it is impossible to generalize solely on the basis of the current district court decision in *Arica*, in particular as the appeal is still being heard, it is nonetheless interesting that the court comparatively easily seemed to find Boliden was negligent in selling sludge to the Chilean company for processing. Unlike in *Chandler*, there was little need to show that Boliden had extensive control over the Chilean supplier or even tried to govern it. Instead, the Swedish court focused primarily on the fact that some Boliden personnel had been aware that the sludge would be stored uncovered in the open so that prevailing desert winds could carry toxic substances to nearby settlements. This awareness of conditions at the supplier's facilities was enough to ground negligence. Ultimately, though, despite negligence on Boliden's part the court did not rule for the claimants because questions of causation and damage were left unclear. In particular, the court was uncertain of whether the elevated arsenic content in the claimants' blood could found a claim for damages or not.

Furthermore, it is up for debate whether *Arica* v *Boliden* should in its current form be seen more generally to corroborate a less rigorous standard of lead firm control than *Chandler* or merely be seen to represent the line of cases similar to *Trafigura* that seem to provide an exception to *Chandler's* requirements of control. Hopefully this uncertainty will be clarified in the upcoming appeal court's ruling.

Nonetheless, it seems very much possible that in cases where civil law approaches to negligence are applied, such as in jurisdictions like France, Germany, the Netherlands and the Nordic countries, lead firms could more easily be found liable for the inadequate

[35] Cees van Dam, "Tort Law and Human Rights: Brothers in Arms On the Role of Tort Law in the Area of Business and Human Rights" (2011) 2 *Journal of European Tort Law* 221, 243–244.

[36] *Arica Victims KB* v *Boliden Minerals AB*, Skellefteå tingsrätt, T 1021-13, March 8, 2018 (Sweden, under appeal). For discussion prior to the district court ruling, see Rasmus Kløcker Larsen, "Foreign Direct Liability Claims in Sweden: Learning from Arica Victims KB v. Boliden Mineral AB?" (2014) 83 *Nordic Journal of International Law* 404.

governance of their value chains than under the common law. For one, our developing understanding of how lead firms can and do use private governance mechanisms to control third party externalities, as discussed in Section 2 above, contributes to notions of what lead firms can be held liable for under law. For another, civil law cases could be on the rise due to increased focus on *mandatory rules of private international law* in public regulation focusing on standards of global value chain governance, as discussed next in Section 4.

4. Public Regulation of Global Value Chains and the Finnish Campaign for a Corporate Responsibility Law

Until recently, the regulation of production has generally not extended beyond national borders except in specific cases, such as the 1977 US Foreign Corrupt Practices Act focusing on corruption in global value chains.[37] This does not mean that local regulations, focusing for example on import restrictions or local emission standards, do not have transnational effects.[38] It does, however, mean that nation states have been very reluctant to directly regulate those parts of global value chains that are situated in other jurisdictions. Instead, transnational regulation has been seen to be the domain of international public law, private governance, or a combination of both.[39] While several public international law instruments have been enacted, such as the UN Guiding Principles and the OECD Guidelines for Multinational Enterprises, these are ultimately non-binding soft law. And while there is increasing momentum for a hard business and human rights treaty,[40] any such treaty faces an uphill battle at least as hard as that of the climate change related Paris Accord.

The problems associated with private governance, public international regulation, and private litigation have all driven states to focus on local hard laws that aim to require or motivate lead firms in their territory to aim governance measures at those parts of their global value chains that lie in other jurisdictions. Over the last ten years, several such regulations have sprouted up, in particular in the United States, Australia and Europe. These regulations are in many ways experimental in nature and face several challenges that cannot be discussed in detail here, but a brief overview of the main challenges can be provided.[41]

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[37] David Kennedy and Dan Danielsen, *Busting Bribery: Sustaining the Global Momentum of the Foreign Corrupt Practices Act* (Open Society Foundations 2011).

[38] Danielsen (n 9).

[39] Kenneth W. Abbott and Duncan Snidal, "Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit" (2009) 42 *Vanderbilt Journal of Transnational Law* 501.

[40] See e.g. "Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises", *Zero Draft* 16.7.2018. Available at (accessed December 3, 2018): www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf. For discussion, see e.g. Olivier De Schutter, "Towards a New Treaty on Business and Human Rights" (2016) 1 *Business and Human Rights Journal* 41.

[41] For some examples and discussion, see Salminen, "Sustainability and the Move from Corporate Governance to Governance Through Contract" (n 7).

First, in many cases the regulations tend to focus on corporate governance instead of contractually organized value chains. This highlights the general problems of conceptualizing governance in contractually organized value chains, which is a comparatively new topic from both a legal and non-legal perspective, as opposed to the already well-established legal and non-legal literature on corporate governance.[42] Thus in some cases, such as in relation to a proposed Swiss law on corporate social responsibility, there is a clear legal division between corporate governance and governance through contract.[43] Under the current Swiss proposal for a corporate sustainability law, lead firms are on the one hand required to extend due diligence throughout their value chains notwithstanding whether these are structured contractually or as a corporate group. On the other hand, under the proposed Swiss law lead firms can be held liable only for the inadequate governance of their subsidiaries, not for contractual suppliers. Naturally, such an approach would leave a great deal of a lead firm's value chain outside the scope of liability. Thus there is a clear need to develop a general duty of care that applies to both corporate groups *and* contractually organized value chains.

Second, instruments may differ greatly in relation to their personal and material scope. Many of the earlier sustainability laws focused on narrow topics, such as modern slavery under the UK Modern Slavery Act's Transparency in Supply Chains provisions or conflict minerals under the US Federal Section 1502 of the Dodd Frank Act, and restricted their applicability primarily to large actors, based for example on turnover or employee count.[44] Some more recent approaches, such as the new French law on a corporate duty of care,[45] the EU Non-Financial Reporting Directive,[46] and the proposed Swiss corporate sustainability law,[47] have adopted material scopes that more broadly cover human and environmental rights. Even these statutes, however, are still restricted in personal scope to larger lead firms or those operating in sectors that are particularly prone to abuse.

Third, many of the instruments focus on requiring lead firms to undertake human rights due diligence and to publicly present reports of their due diligence measures. However, there is considerable variation in reporting standards, ranging from the comparatively strict and detailed, as under the French law on a corporate duty of care, to potentially extremely lax, as under the UK Modern Slavery Act's Transparency in Supply Chains provisions, under

[42] Salminen, "Sustainability and the Move from Corporate Governance to Governance Through Contract" (n 7).

[43] See Nationalrat (Schweiz), "Zusatzbericht der Kommission für Rechtsfragen vom 18. Mai 2018 zu den Anträgen der Kommission für einen indirekten Gegenentwurf zur Volksinitiative «Für verantwortungsvolle Unternehmen – zum Schutz von Mensch und Umwelt» im Rahmen der Revision des Aktenrechts" (2018).

[44] For examples of both, see the United Kingdom Modern Slavery Act 2015, c. 30 and Section 1502 of the US Federal Dodd-Frank Wall Street Reform and Consumer Protection Act, H. R. 4173.

[45] Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, JORF n°0074, 28.3.2017.

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

[47] See Nationalrat (n 43).

which lead firms may simply report that they do not report on human rights due diligence. And even where comparatively strict reporting requirements are in place, there may nonetheless be considerable variation in how and what lead firms report.[48] There is a major need for developing unified and functional standards in order for reporting and transparency to work.

Fourth and finally, the relationship of the different regulations to liability under private law is in many cases unclear. Some regulations merely acknowledge that they do not rule out any liability that might arise on grounds of the general principles of e.g. tort law, as under the French law on a corporate duty of care. Other regulations put in place specific sanctions, such as criminal penalties under the UK Modern Bribery Act and the penalties related to filing reports in bad faith under Section 1502 of the US Federal Dodd Frank Act. In this regard the proposed Swiss law is highly interesting as it clearly places on lead firms liability for inadequate governance, even if only in relation to subsidiaries, not suppliers.[49] The Swiss proposal would also include a defence against liability in case lead firms have adequately governed value chain externalities.

More interestingly, the Swiss proposal also accounts for questions of private international law. If no effective remedies would be found under a foreign law applicable to a dispute under the rules of private international law, then the mandatory overriding rules included in the Swiss proposal might make Swiss law applicable instead if it would provide better access to remedies.[50] Such an approach could make litigation much easier from a procedural perspective as claimants could rely on the law governing the lead firm instead of the law of the place where the damage occurred, as the latter would typically be the law of a supplier's or subsidiary's domicile instead of the law of the lead firm responsible for governing its value chain.

Generally, the legal conceptualization of contractually organized value chains is perhaps the biggest legal-technical problem faced by the growing wave of regulation. The other challenges are related to political issues, such as extending the material and personal scope of the laws to cover all lead firms instead of just larger ones, to the technicalities of regulation, such as developing reporting standards, and legal-procedural challenges, such as developing the procedural parameters of litigation under private international law. Additional challenges might be related to shifting burdens of proof more in favour to claimants, as happened historically in relation to product liability law, and questions of whether select defences could exempt lead firms from liability if they put in place adequately stringent governance measures, as also happened under product liability law.[51]

[48] Galit A Sarfaty, "Shining Light on Global Supply Chains" (2015) 56 *Harvard International Law Journal* 419.

[49] See Nationalrat (n 43).

[50] See Nationalrat (n 43).

[51] Stapleton (n 8).

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In particular, narrow but nonetheless applicable defences might motivate lead firms to continuously develop governance in light of best available techniques.[52]

Currently there is no single approach that would provide an overarching regulatory approach accounting for all these challenges. Current Finnish debate on a corporate sustainability law *proposes* to do so by basing the regulation on best practices gathered through a comparison of existing regulations.[53] Of course, while there is currently considerable and growing public and political support for such a law in Finland, the end result, if any, will probably depend on political compromise. Thus, instead of looking in detail at the ways in which a possible Finnish law might overcome the challenges listed above, it might be more fruitful at pointing out the possible *political justifications* supporting such an extensive regulatory approach. A key factor here is that legislative development is supported by several actors in Finland: industry, labour, and consumers.[54]

Of these, consumer interest is probably the most obvious as consumers wish to have a good conscience when buying foreign goods: they do not want to buy products that contribute to forced labour or environmental degradation. Industry and labour interests, however, may be seen as more sinister: in effect, both are interested in maintaining a competitive advantage *against* foreign actors. Requiring strict compliance in e.g. labour and environmental standards would no doubt help secure labour, environmental and other interests globally. However, doing so in relation to foreign lead firms entering local markets will also raise the bar in relation to whether foreign actors can enter local markets in the first place. This entails a delicate balancing of global labour and environmental standards, local interests related to market access, and the ebbs and flows of globally intertwined production and free trade.

5. Conclusion: The New Trends of Nordic Law and Their Relation to Global Interests

From a Nordic perspective, it would seem that there is interest in considerably raising the bar from current standards in relation to the governance required from lead firms over their global value chains. This is visible in the development of novel private governance mechanisms, new approaches to private litigation, and new local public regulations, all focusing on the governance of global value chains and placing on lead firms a concrete measure of liability over the inadequate governance of labour, environmental and other contingencies related to their value chains. Such an approach is no doubt necessary to ensure that the world remains within the planetary boundaries required for a sustainable future.

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[52] For all these issues, see Salminen, "From Product Liability to Production Liability: Modelling a Response to the Liability Deficit of Global Value Chains on Historical Transformations of Production" (n 15).

[53] See www.ykkösketjuun.fi and Finnwatch, "Laki yritysten ihmisoikeusvastuusta: Vertaileva katsaus eri maiden lakihankkeisiin ja parhaisiin käytäntöihin" (2018).

[54] See www.ykkösketjuun.fi.

However, this positive trend does not come without a dark side. Together, the *local* developments described above are global in nature. They directly touch global flows of trade and production in today's world of global value chains. They are a reaction to the problems of unhinged global production and can be seen as necessary developments for the global governance of labour, environmental and other interests. At the same time, they in turn raise delicate questions related to market access and protectionism against global competition. These questions need to be balanced from a global and not just a Nordic perspective to ensure a sustainable future for all.