

**THE BUMPY ROAD OF HOME STATES’ REGULATION OF GLOBALISED BUSINESSES –
LEGAL AND INSTITUTIONAL DISRUPTIONS TO SUPPLY CHAIN DISCLOSURE UNDER THE
MODERN SLAVERY ACT**

In response to the paradigm shift from territorial corporations to global businesses and supply chains, States are increasingly engaging in regulating extraterritorial business activities, supply chain disclosure regulation being a primary example. Much ink has thus far spilled on the intrinsic doctrinal and conceptual aspects of this regulatory approach, with its interactions to the external regulatory and institutional environment explored far less to date. This article seeks to correct the scholarly imbalance by critically examining how s.54 of the UK Modern Slavery Act (MSA) – a prominent attempt among state-level initiatives designed to promote human rights protection within global supply chains – fits with other extraterritorial initiatives and the broad supply chain environment in which it operates. An exploration of the likely disruptive effects on the enforcement of supply chain disclosure regulation follows thereafter. The paper intends to bring to light the doctrinal, contextual and practical complexities faced by current home-state lawmaking endeavours, in the hope of generating further insights into the intricate but significant issue of imposing human rights responsibilities on globalised businesses.

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INTRODUCTION

“*Home from home*” – in point of regulation, this idiomatic expression is becoming an increasing reality for focal companies and their subordinates in multinational groups.¹ Facing novel sustainability challenges posed by labour and environmental exploitation in the globalised business context, and with the power of MNEs greatly outpacing the growth of the international regulatory frameworks that control them,² it is no longer unusual for a home state to fill governance gaps and hold a focal company responsible for activities in its supply chains beyond its national borders.³

To take business and human rights as an example, in line with the current international regulatory framework and an overall expectation on home states as key performers/duty-bearers in human rights protection, two approaches currently form the polar extremes of a home state’s regulatory taxonomy, reflecting the ostensibly irreconcilable impasse between human rights advocacy groups and businesses.⁴ At one end of the spectrum is a hard law regime imposing substantive duties on corporations, with the 2003 UN Norms being a typical instance of this.⁵ Towards the other end lies the much softer UN Protect, Respect and Remedy framework, which defined the nature of businesses’ responsibility to respect human rights as a social norm over and above “*compliance to laws and regulations*”,⁶ different from the 2003 “hard” duty recommendation.⁷ Despite the fact that the 2003 UN Norms experienced a gloomy fate in practice,⁸ this espousal of progressively hard laws to ensure that businesses uphold human rights has received a good deal of sympathy in a number of jurisdictions. For instance, English law recently held holding companies to owe at least some duty to sustainability victims harmed by their overseas subsidiaries, with the possibility of extending this wide accountability to related institutions in global supply chains. Meanwhile, one may also see an assortment of international/national governance initiatives embodying the

¹ In this article, the term “holding company” is used to denote a company created to buy and own the shares of other companies, which it then controls in a group context. The term is often used interchangeably with the concept of “parent company”. The term “focal company” refers to a business entity that governs the supply chain and has bargaining power over its business partners. The latter may well include holding companies.

² International law only recognises individuals and states as possible perpetrators of certain human rights abuses, and does not accept private business defendants. Uta Kohl, Corporate Human Rights Accountability: The Objections of Western Governments to the Alien Tort Statute, (2014) 63(3) *International and Comparative Law Quarterly* 665, 670.

³ “Governance gaps” associated with the expansion of globalised businesses are defined as “(the gap) between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences”. John Gerard Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc A/HRC/8/5 (7 April 2008). Glen Whelan, Jeremy Moon & Marc Orlitzky, “Human Rights, Transnational Corporations and Embedded Liberalism: What Chance Consensus?” (2009) 87 *Journal of Business Ethics* 367-383.

⁴ John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (WW Norton & Company, New York, 2013), xvi, 68 & 76.

⁵ The UN Norms stipulate that transnational firms and other business enterprises have corresponding legal duties within their spheres of activity and influence, compliance be monitored by a rigid enforcement mechanism, and victims be provided with effective remedies. *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003). at paras 1 & 15-18.

⁶ United Nations Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect, and Remedy” Framework*, (United Nations, New York, 2011), Principle 11 Commentary.

⁷ *Ibid.*

⁸ The Norms encountered fierce opposition from various States and the business community. The UN Commission on Human Rights eventually declared that although the document contained some useful elements and ideas, it was only a draft proposal and had no legal standing. John Gerard Ruggie, “Business and Human Rights: The Evolving International Agenda” (2007) 101 *American Journal of International Law* 819, 821.

essence of the soft Protect, Respect and Remedy framework, a prominent example being the latest version of s.54 of the UK Modern Slavery Act (MSA), a supply chain disclosure requirement that “*merely provide(s) statutory endorsement to existing voluntary Corporate Social Responsibility (CSR) reporting initiatives*”.⁹ Practice has thus far brought to life a wide usage of both regulatory approaches, intensifying a need of examining their doctrinal and pragmatic compatibilities. This is the analysis to which this paper turns.

This paper aims to utilise the corporate disclosure requirement enshrined in s.54 of the UK MSA¹⁰ as an example of latest home states’ soft corporate responsibility lawmaking efforts to foster business self-regulation, and explore its interactions with other progressively hard law means with extraterritorial impacts. While s. 54 of the MSA has thus far been under intensive scholarly spotlight, the existing literature has concentrated on the intrinsic doctrinal and conceptual features of this latest regulatory approach,¹¹ with its fits to the external regulatory and institutional environment explored far less to date. Building upon and complementing existing research on social disclosure regulation, the paper intends to fill the current literature void by investigating the regulatory interactions between s.54 and recent common law developments on companies’ duty of care and extraterritorial jurisdiction,¹² the institutional compatibility of s.54 to the broad supply chain environment that it operates in, as well as the resulting impacts on the enforcement of s.54.

This consideration of the legal and institutional disruptions in the application of s.54 of MSA is also one aspect of a much broader reappraisal of the regulatory paradigm of booming global outsourcing and transnational business activities. Although globalisation has, in the eyes of some, made the Westphalian sovereignty belief somewhat archaic,¹³ it would not be right to simply assume that globalisation erodes the frontiers of national sovereignty. As presented by the UNCTAD, diverse societies are still reasonably expected to have diverse interests and different capacities to discharge international law obligations.¹⁴ In the absence of a widely adopted international legal framework, national and regional regulation plays a particularly important role in responding to “*the peaks and troughs in the international regulatory landscape*”,¹⁵ with the field of business and human rights being a typical instance. Up to the present, states remain the primary duty bearers of human rights. Both horizontal (actions between private actors) and vertical (states’ violations of private actors’ rights) applications of international human rights law still depend

⁹ Genevieve LeBaron & Andreas Rühmkorf, “The Domestic Politics of Corporate Accountability Legislation: Struggles over the 2015 UK Modern Slavery Act” (2017) *Socio-Economic Review* 1, at 3.

¹⁰ S.54 of the UK MSA.

¹¹ E.g., Shuangge Wen, “The Cogs and Wheels of Reflexive Law: Business Disclosure under the Modern Slavery Act” (2016) 43(3) *Journal of Law and Society* 327; Iris H-Y Chiu, Unpacking the Reforms in Europe and UK Relating to Mandatory Disclosure in Corporate Social Responsibility: Instituting a Hybrid Governance Model to Change Corporate Behaviour? (2017) 14(5) *European Company Law* 193; Rae Lindsay, Anna Kirkpatrick & Jo En Low, Hardly Soft Law: The Modern Slavery Act 2015 and the Trend towards Mandatory Corporate Reporting on Human Rights (2017) 18(1) *Business Law International* 29.

¹² See *infra* notes 51-101 and relevant texts.

¹³ A. Claire Cutler, “Critical Reflections on the Westphalian Assumptions of International Law and Organisation: A Crisis of Legitimacy” (2001) 27 *Review of International Studies* 133-150.

¹⁴ United Nations Conference on Trade and Development (UNCTAD), *The Social Responsibility of Transnational Corporations* (United Nations, New York and Geneva, 1999), at iii.

¹⁵ Ryan J. Turner, “Transnational Supply Chain Regulation: Extraterritorial Regulation as Corporate Law’s New Frontier” (2016) 17 *Melbourne Journal of International Law* 1, at 16.

heavily on the contextualisation of domestic laws and regulations.¹⁶ Discussions of s.54 of the MSA and its interactions with other extraterritorial regulatory initiatives and institutional factors, additional to its significance in securing fundamental human rights in transnational business practice, thus also touch on the wider ramifications of supply chain management in the contemporary world, and even on the broad sustainability agenda underpinning all societies and economies.¹⁷

In the meantime, delineating the detailed regulatory fabric of corporate responsibilities in relation to human rights within such a broad ambit, loosely defined as a corporation's sphere of influence,¹⁸ is, to say the least, a difficult job for a home state. Despite their mutual ambition of eradicating human rights abuses in MNE operations, even a cursory look at the above-mentioned soft and hard regulatory initiatives reveals huge variations in their jurisprudence and institutional designs, reflecting a variety of distinct ideological and national-contextual underpinnings; it also shows deep divisions surrounding the interests and preferences of stakeholders impacting and affected by relevant rule-making.¹⁹ A large number of NGOs, sceptical of the merits of *laissez-faire* capitalism, expressed limited confidence in the effectiveness of soft CSR initiatives in improving corporate performance.²⁰ Considerable doubt has since been thrown upon soft human rights initiatives, including those developed by MNEs (multinational enterprises), with the most critical voices even describing these business giants as modern day "leviathans".²¹

Despite substantial suspicion from NGOs, soft corporate responsibilities to "respect" human rights manage to obtain considerable support from influential members of the business community, including the International Chamber of Commerce, the International Organisation of Employers, and the Business and Industry Advisory Committee to the OECD.²² At the time

¹⁶ David Kinley & Junko Tadaki, "The Emergence of Human Rights Responsibilities for Corporations at International Law" (2003-04) 44(4) *Virginia Journal of International Law* 931, at 935; United Nations Economic and Social Council, *Report of the United Nations High Commissioner on Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with regard to Human Rights*, 15 Feb, 2005, at 12.

¹⁷ E.g. P. Beske & S. Seuring, "Putting Sustainability into Supply Chain Management" (2014) 19(3) *Supply Chain Management: An International Journal* 322-331; Galit A Sarfaty, "Shining Light on Global Supply Chains" (2015) 56 (2) *Harvard International Law Journal* 419; Steve John New, *Modern Slavery and the Supply Chain: the Limits of Corporate Social Responsibility*, (2015) 20(6) *Supply Chain Management: An International Journal* 697.

¹⁸ The UN Global Compact asked the corporate participants to "embrace, support and enact, within their sphere of influence" principles relevant to human rights protection and promotion. The sphere of influence may be interpreted as a set of concentric circles mapping out stakeholders in a company's value chain, with company workplace at the core, moving outwards to supply chains, the market place, the community and the government. John Ruggie, *Clarifying the Concepts of "Sphere of Influence" and "Complicity"*, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, A/HRC/8/16 (Human Rights Council, 15 May 2008), at para 8.

¹⁹ For instance, LeBaron & Rühmkorf, *supra* note 9, compared the lawmaking process of the UK MSA with the Bribery Act, and concluded that the weak force of s. 54 of the MSA was largely due to industry actors' less direct but successful opposition to public regulation, which was done by way of supporting statutory endorsement to existing voluntary CSR initiatives and reporting.

²⁰ For instance, Amnesty International expressly gave support to extraterritorial hard law measures, believing they "can be developed to address (the) lacuna (of business and human rights)." Amnesty International, *Submission to the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, July 2008, available at <https://www.amnesty.org/download/Documents/40000/ior800032010eng.pdf>. Much scholarly ink has also been spilled in the legal community, voicing similar concerns and suggesting the development of legally binding instruments regarding human rights violations. E.g., Aurora Voiculescu, "Human Rights and the New Corporate Accountability: Learning from Recent Developments in Corporate Criminal Liability" (2009) 87(S2) *Journal of Business Ethics* 419-432; Justine Nolan & Luke Taylor, "Corporate Responsibility for Economic, Social and Cultural Rights: Rights in Search of a Remedy?" (2009) 87(S2) *Journal of Business Ethics* 433-451.

²¹ Alfred D. Chandler, Jr. & Bruce Mazlish, "Introduction" in Chandler & Mazlish (eds) *Leviathans: Multinational Corporations and the New Global History* (CUP, 2005), at 1-18.

²² Whelan *et al.*, *supra* note 3, at 377.

of writing, the business community, scholars and NGOs have been far from speaking with one voice regarding the most suitable regulatory method to tackle business and human rights at the home state level. This division has led to a simultaneous adoption of various regulatory means with extraterritorial reach. Resulting disparities in the levels of stringency of these different regulatory instruments further lead to reciprocal disturbance in their concurrent application, providing compelling reasons for thinking again about the issue of regulatory interaction and compatibilities.

This paper is therefore also set against the backdrop of an ongoing movement towards regulating MNEs by virtue of home state regulation, to see how transnational norms with the aim of promoting corporate accountability are being shaped and interacting with domestic legislative frameworks. The argument will suggest that although recent UK extraterritorial regulation developments constitute a significant step forward in improving sustainability and human rights protection in global supply chains, in terms of both extending “*hard law*” protection to victims and strengthening corporate social responsibility efforts, they lack coherence in both logic and institutional design. Contradictions in their doctrinal underpinnings and disparities in their levels of stringency lead to reciprocal disruptions in application.

To further clarify, it is not our aim to refute these regulatory endeavours to tackle business and human rights challenges, with whose fundamental premises and ideals we fully agree. Rather, we intend to bring to light the doctrinal, contextual and practical difficulties faced by current home-state lawmaking endeavours, particularly in the form of supply chain disclosure regulation, in the hope of generating further insights into the complex but important issue of imposing human rights responsibilities on MNEs. We thus hope to build a bridge between law and other disciplines involved in the study of supply chain management, from which a valuable mutual discourse could ensue. This will not only be of interest to policymakers, industry actors and anti-slavery activists who “*have heralded this wave of legislation as a game-changer*”,²³ but also responds to mounting awareness and concerns among consumers, investors and other stakeholders.

The paper is structured as follows: Part I identifies the major approaches adopted by home states in responding to the regulatory challenges created by global outsourcing and MNEs’ activities. The UK is utilised as a primary example, with s.54 of the MSA embodying CSR ideals and recent case law imposing a hard law duty of care upon holding corporations occupying the polar extremes of its extraterritorial regulatory taxonomy on business and human rights. Part II discusses in detail the interactions between these regulatory means in the course of their implementation, as well as their likely disruptive effects on the enforcement of s.54. Part III further highlights institutional impediments to the effective implementation of s.54, implicating its restricted practical effects in increasing corporate transparency and eliminating modern slavery offences in global chains. The discussions in Parts II and III are supported by data-based evidence presented in Part IV. Part V puts forward some suggestions for future regulatory reform, and the last section concludes the paper.

²³ LeBaron & Rühmkorf, *supra* note 9, at 2.

I. REGULATORY CHALLENGES BROUGHT ABOUT BY GLOBAL OUTSOURCING

A. Global Outsourcing and Resulting Discrepancies between the Corporate and Legal Worlds

Global outsourcing – the practice of sub-contracting business to third parties in other countries²⁴ – has become a contemporary source of institutional innovation and operational transformation, rather than a mere means of price arbitrage.²⁵ Typical players involve integrated MNEs in the form of group companies and transnational contractual network enterprises. While their global outsourcing activities significantly promote economic development and are seen as a trigger for the next industrial revolution,²⁶ their power and control arrangements that defy territorial boundaries also pose novel challenges to existing frameworks of company law, which are predominantly State-based.

Under conventional company law, the above-mentioned two ways by which MNEs manipulate capital boundaries reduce or eliminate the potential legal liabilities of the holding company or the focal company, which is legally isolated from other production units within the corporate group/network, owing to the domestic nature of corporate laws and the separate legal personality orthodoxy.²⁷ The difficulty of distributing legal responsibility on a corporate group basis, and the jurisdictional concern of the holding (or focal) company often being situated in a different jurisdiction from that in which the harm occurs, lead to accountability failures by these entities. The burgeoning of outsourcing activities under the separate legal personality principle – the fundamental cornerstone of corporate law in almost every jurisdiction – while perhaps not intending to, thus practically serves the purpose of expanding MNE immunity from legal liability, concealing “*the reality of economic integration of interdependence*”.²⁸ At the very least, integral corporate operations through external contractual relations with other companies, or through subsidiaries in modern supply chains, lead to transaction cost reductions as well as unjustifiable limits upon business entities’ legal responsibility. Just as remarked by Templeman LJ,

*“English company law possesses some curious features, which may generate curious results. A parent company may spawn a number of subsidiary companies, all controlled directly or indirectly by the shareholders of the parent company. If one of the subsidiary companies, to change the metaphor, turns out to be the runt of the litter and declines into insolvency to the dismay of its creditors, the parent company and the other subsidiary companies may prosper to the joy of the shareholders without any liability for the debts of the insolvent subsidiary.”*²⁹

²⁴ Sarfaty, *supra* note 17, at 425.

²⁵ Deloitte Consulting LLP, 2016 *Global Outsourcing Survey: Outsourcing Accelerates Forward*, June 2016, 3.

²⁶ Alan S. Blinders, “Offshoring: The Next Industrial Revolution?” *Foreign Affairs* (Mar./Apr. 2006), available at <https://www.foreignaffairs.com/articles/2006-03-01/offshoring-next-industrial-revolution>.

²⁷ *Adams v Cape Industries plc* [1990] Ch 433. Also *Prest v Petrodel Resources Ltd* [2013] UKSC 34, showing the reluctance of English courts to acknowledge “*piercing the corporate veil*” as a general doctrine of law.

²⁸ Hugh Collins, “Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration” (1990) 53(6) *Modern Law Review* 731, at 742.

²⁹ *Re Southard & Co Ltd* [1979] 1 WLR 1198, 1208, *per* Templeman LJ.

B. Economic Integration Complications in Supply Chains

Viewed from an economic perspective, the variety of business integration forms further adds to the difficulty of imposing legal liability on transnational corporate players. Conventional English law used to recognise ownership and resulting control as major forms of bonding between economically integrated organisations, on the basis of which they may be regarded as one group rather than separate individual entities for responsibility purposes.³⁰ In the context of global supply chains, patterns of group company integration often exceed connections based upon ownership and follow-on control. A typical pattern of integration is dynamically hierarchical, with a focal company surrounded by a number of satellites at various levels of trade, comprising both upstream suppliers and downstream distributors.³¹ In practice, this pattern of outsourcing activities has been constantly expanding, ranging from product design to assembly, and from research and development to marketing, distribution and after-care service.³² As this pattern of core and periphery, which often ignores national boundaries, gradually stabilises through the practice of repetitive contracting, a steady authority relation will be formed under the mantle of a MNE and its smaller overseas business partners. Such authority relations in supply chains are no longer necessarily tied to the same forms of ownership which are found in group companies. As remarked by Collins, they may arise “*wherever the economic dependence of one party upon the other effectively requires compliance with the dominant party’s wishes.*”³³ A major MNE may acquire sufficient leverage over a supplier in an emerging economy to be in a position to determine its business behaviour in practice. Its massive purchasing power, huge market share and the relatively competitive labour and product prices it can offer³⁴ often bolster this authority. From the perspective of institutional economics, these group organisations built upon contracts and authority are often stable, potentially even reaching the bonding status of quasi-firms in business reality, with individual units comprising distinct legal identities in law.³⁵ However, from the legal perspective it is difficult to treat such a group of business organisations as one unit, or hold a focal company

³⁰ E.g. *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* [1976] 1 WLR 852; *Antonio Gramsci Shipping Corporation and Others v Stepanovs* [2011] EWHC 333; and *Atlas Maritime v Avalon Maritime (No.1)* [1991] 1 Lloyd’s Rep. 563, at 571, *per* Staughton LJ: “*The creation or purchase of a subsidiary company with minimal liability, which will operate with the parent’s funds and on the parent’s directions but not expose the parent to liability, may not seem to some the most honest way of trading.*” However see *Adams v Cape Industries plc* [1990] Ch 433; *VTB Capital Plc v Nutritek International Corp and Others* [2013] UKSC 5, and *Prest v Petrodel Resources Ltd* [2013] UKSC 34, which have since placed *DHN* and similar judicial attempts on shaky ground.

³¹ Raja Kali & Javier Reyes, “The Architecture of Globalisation: A Network Approach to International Economic Integration” (2007) 38(4) *Journal of International Business Relations* 595, at 595.

³² Gene. M. Grossman & Elhanan Helpman, “Outsourcing in a Global Economy” (2005) 72 *Review of Economic Studies* 135, at 135.

³³ Collins, *supra* note 28, at 734. *Cf.* Dani Rodrik, “How Far Will International Economic Integration Go?” (2000) 14(1) *Journal of Economic Perspectives* 177, at 180, arguing that implicit contracts which are often embedded in domestic social networks are scarce in international contexts.

³⁴ Compared to the labour and material costs in domestic markets, the labour and product prices in emerging economies are much more modest. There is also evidence that various patterns of economic integration occur to take advantage of possible savings in this regard. According to the World Trade Organisation in 1998, the production of a particular “American” car generated only 37% of the production value in the United States, with the rest generated in various foreign countries, including Japan, Germany, Taiwan, the UK, Ireland and Barbados. World Trade Organisation, *Annual Report 1998* (Geneva: World Trade Organisation), at 36. This percentage is likely to be even lower twenty years later. See also Collins, *supra* note 28, at 733 and footnote 12.

³⁵ Robert G. Eccles, “The Quasifirm in the Construction Industry” (1981) 2 *Journal of Economic Behaviour and Organisation* 335; Collins, *ibid.*, at 734. This organisational form also to a large extent resembles the “inside contracting system” described by Williamson. See Oliver E. Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications* (Free Press, New York, 1975), at 96.

liable for the conduct of its satellite companies, despite their close ties in business practice. Not least owing to this reason, the liability regime within a corporate group led by a focal corporation is regarded as “one of the great unsolved problems of modern company law”.³⁶

C. Home State Regulatory Developments in Response to Global Outsourcing

While conventional laws that construct “an atomistic conception of social relations”³⁷ and delimit one’s legal responsibilities in relation to one’s own acts and omissions struggle to encompass the complex patterns of economic integration in the global ambit, novel attempts are increasingly being implemented in response to the challenges created by global outsourcing. These so-called neo-evolutionary paths presuppose that conventional territorially-based law is static and ill-equipped for regulating rapidly changing and increasingly complex social spheres,³⁸ collectively calling for further differentiation of law into specialised areas of social ordering. The artificiality of an entity’s domicile as a basis for regulation is increasingly recognised, and the reach of national legislation, particularly of home states in relation to their own business entities with operations in foreign jurisdictions, has been extending on the basis of business rather than territorial connections.

However, these home state regulatory initiatives are not necessarily integrated. Taking the theme of business and human rights in the UK as an example, there are discrepancies between mandatory corporate accountability to protect human rights and voluntary corporate responsibility to respect human rights, on the basis of which different regulatory means have evolved. For instance, s.54 of the UK MSA, which requires commercial organisations to disclose in their annual slavery statement whether they have made efforts to ensure that slavery and human trafficking are not taking place in their global supply chains, and if so, requiring a statement of the detailed steps taken,³⁹ could be seen as part of a pioneering attempt to advocate businesses’ soft responsibility to respect human rights, as proposed by the UN Guiding Principles on Business and Human Rights.⁴⁰ Its general aim is to invite multiple stakeholders in global supply chains to assume a regulatory role, setting standards and action protocols for human rights protection in their own corporations’ global supply chains.⁴¹ Towards this end, general norms are set in order to steer primary actors but simultaneously leave them with a substantial zone of freedom to engage in self-regulation; this is evidenced by s.54 leaving substantive discretion to corporate actors to determine their own business undertakings, including the extent and ways in which they control modern slavery in the course of their operations.⁴²

On the other hand, hard-law duties are inclining in the other direction, towards imposing

³⁶ Clive M. Schmitthoff, ‘Banco Ambrosiano and Modern Company Law’ [1982] *Journal of Business Law* 363.

³⁷ Collins, *supra* note 28, at 731.

³⁸ Gunther Teubner, “Substantive and Reflexive Elements in Modern Law” (1983) 17(2) *Law & Society Review* 239, at 274.

³⁹ S.54 (4) of the MSA.

⁴⁰ United Nations Human Rights Office of the High Commissioner, *supra* note 7.

⁴¹ Dara O’Rourke, “Multi-Stakeholder Regulation: Privatising or Socialising Global Labour Standards?” (2006) 34(5) *World Development* 899, at 900.

⁴² Michael C. Dorf, “The Domain of Reflexive Law” (2003) 103(2) *Columbia Law Review* 384, at 384; Wen, *supra* note 11, at 347-349.

substantive liabilities upon a holding/focal company where necessary, so as to “leave the realm of voluntary corporate responsibility for the one of pure accountability”.⁴³ For instance, a number of recent case judgements in the UK hold that a focal company might be held directly responsible if shown to be itself at fault for sustainability or human rights violations committed by a subsidiary, without affecting the company law cornerstone of separate legal personality.⁴⁴ In the context of global supply chains, this arguably makes it possible to hold a focal firm liable for overseas activities of a subsidiary, or another member of the same multinational group of companies which is in the downstream of a supply chain.

As will be discussed below, while these two distinct regulatory approaches have a mutual aim of enhancing human rights protection in their home corporations’ global ambit of influence, they lack logical and implementational coherence to “defeat the power of capital to organise itself in ways which reduce or eliminate liabilities arising from productive activities.”⁴⁵ This calls for a more systematic treatment of the limits of legal responsibility by reference to the boundaries of capital units.

II. REGULATORY INTERACTION AND DISRUPTIONS TO SUPPLY CHAIN DISCLOSURE

The latest legal developments in supply chain transparency and benchmarking initiatives, represented by s.54 of the UK MSA, offer a novel solution to the capital boundary problem. S.54 captures the idea of integral economic control which binds a group of companies together, without rendering the concept of legal entity useless. One primary legislative aim of this type of supply chain disclosure laws, as identified by Sarfaty, is to “deploy multinational companies to regulate themselves and indirectly regulate other firms in their supply chain”.⁴⁶ On 4 October 2017 the UK Government released Updated Guidance on the corporate reporting obligation in the MSA, which is fully demonstrative of the ‘best practice’ approach represented by s.54, i.e. encouraging rather than obligating companies to produce more detailed and practical MSA statements.⁴⁷

Laudable legislative intent notwithstanding, it appears that the construction of s.54 is based upon two premises, which are both to a large extent assumptions. First, as noted in Justice Brandeis’ famous line “Sunshine is the best of disinfectants”,⁴⁸ lawmakers believe that it will be more difficult for commercial organisations to deny their own guilt or overlook their own idleness if they openly disclose their affairs and place them under market and public scrutiny, thereby obliquely facilitating the enhancement of human rights protection at the institutional level.⁴⁹ Second, there

⁴³ Ramona Elisabeta Cirlig, “Business and Human Rights: From Soft Law to Hard Law” (2016) 6(2) *Juridical Tribune* 228, at 228.

⁴⁴ The most notable is *Chandler v Cape Plc* [2012] EWCA Civ 525; [2012] 1 W.L.R. 3111. See also *infra* notes 51-64 and relevant texts.

⁴⁵ Collins, *supra* note 28, at 738.

⁴⁶ Sarfaty, *supra* note 17, at 435.

⁴⁷ Wen, *supra* note 11, at 347-9.

⁴⁸ Louis D. Brandeis, *Other People’s Money and How the Bankers Use It* (1914, reprinted by Martino Fine Books, 2009), at 92.

⁴⁹ As in the words of Arnold Schwarzenegger, the California State Governor, when promoting the California Transparency in Supply Chain act: “This will increase transparency, allow consumers to get more information and make more choices and motivate businesses to ensure humane practices... Of course this is not a silver bullet, by any means, but what it does is, it really makes government and businesses work together.” Governor Highlights Legislation to Combat Human Trafficking, available at <https://www.gov.ca.gov/news.php?id=16215>.

is also an inherent belief that businesses would be incentivised to disclose their efforts to combat modern slavery, as this information would demonstrate their proactive efforts to eradicate this social ill and thereby generate more reputation-related benefits.⁵⁰

Leaving aside the first assumption, which is outside the scope of this paper, it is possible to take issue with the second assumption. When information about combating modern slavery in a group context might lead to civil claims for reparation, or even claims on criminal grounds, it is hard to imagine that any business would accept this risk and make a full disclosure. Taking into consideration recent common law developments on corporations' tort liability in the context of group companies, such risks may well turn into reality. In respect of tortious liability, English courts have recognised that the modern degree of economic integration merits the adoption of a more flexible approach to territorial jurisdiction and even group responsibility, using a pattern of authority and domination to overcome the capital boundary problem. As will be examined below, this separation from the conventional requirement of ownership opens up the possibility of charging liabilities not only in parent-subsidiary relations but also between companies without share ownership links, which are often observed in supply chain contexts.

A. Potential Tort Liability for Focal Companies in Global Supply Chains

Distinguishing territory from jurisdiction is not completely new under English law. As evidenced in the trajectory of tort liability for focal companies, it began with *Lubbe and others v Cape plc*,⁵¹ and reached maturity in *Chandler v Cape*.⁵² The claimant Mr. Chandler was employed by Cape Building Products Ltd, a subsidiary of the defendant company Cape Plc (hereinafter Cape). The claimant, who worked in a factory with open sides which emitted dust, contracted asbestosis fifty years later. Both the High Court and the Court of Appeal supported Mr. Chandler's claim that there was a duty of care on the part of Cape to the employees of the subsidiary company to advise on, or to ensure, a safe system of work for them, on the basis of an assumption of responsibility derived from the three-stage test in *Caparo*.⁵³ Given (1) that the business of the holding company and subsidiary are in all relevant respects the same; (2) the state of Cape's knowledge about the subsidiary's work; (3) Cape's superior knowledge of the nature and management of asbestos risks, and; (4) that Cape knew, or ought to have foreseen, that the subsidiary or its employees would rely on it using its superior knowledge for the employees' protection,⁵⁴ it was held that the claimant had established a sufficient degree of proximity to the

⁵⁰ As stated by Andrew Wallis (CEO of Unseen UK) during the Parliamentary debate: "Fundamentally, (the requirement of slavery disclosure statement) should be viewed not as red tape but as a measure to protect British business." Andrew Wallis, *House of Commons Committee Debate First Sitting*, 21 July 2014.

⁵¹ [2000] 1 WLR 1545.

⁵² *Chandler v Cape Plc* [2012] EWCA Civ 525; [2012] 1 W.L.R. 3111.

⁵³ *Caparo Industries plc v Dickman* [1990] 2 AC 605. The three ingredients for determining whether a situation gives rise to a duty of care include that the damage should be foreseeable, that there should exist a relationship of proximity between the party owing the duty and the party to whom it is owed, and that the situation should be one in which the court considers it fair, just and reasonable to impose a duty of a given scope upon the one party for the benefit of the other. *Ibid.*, at 618, *per* Lord Bridge.

⁵⁴ This was satisfied on the basis of the fact that throughout the claimant's employment period Cape had employed a group medical advisor and a scientific officer in seeking ways of suppressing asbestos dust, and many aspects of the subsidiary's production process had been discussed and authorised by the defendant's board.

defendant company for it to be fair, just and reasonable to impose a duty of care on Cape to protect the claimant from harm from asbestos in the atmosphere.⁵⁵ In particular, the Court of Appeal emphasised that it was not necessary to show that the holding company was in the habit of intervening in the health and safety policies of the subsidiary; evidence showing “*that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues*” would suffice for the purpose of (4).⁵⁶

In point of fact, *Chandler* is often held as a precedent or “*a source of inspiration*” for the imposition of a duty of care on the focal company of a multinational for the health and safety of employees and others affected by the acts and omissions of an overseas subsidiary.⁵⁷ This has been realised by the courts’ elastic interpretation of proximity in business relations. As Arden LJ stated, the development of the law of negligence has to be incremental.⁵⁸ The conceptual elasticity of “*proximity*” has already been explicitly acknowledged on several occasions in English law. As Lord Oliver pointed out in *Caparo*: “*Proximity*’ ... *embraces not a definable concept but merely a description of circumstances in which, pragmatically, the courts conclude that a duty of care exists.*”⁵⁹ In *Chandler v Cape*, the Court of Appeal explicitly rejected the defendant’s argument that the duty of care can only exist if the parent company has absolute control of the subsidiary,⁶⁰ implying the enlarged scope of the duty and the far-reaching potential of the *Caparo* test.⁶¹ The possibility of a wider scope of application of the *Caparo* test was further reaffirmed by Tomlinson LJ in *David Thompson v the Renwick Group plc*,⁶² where he stipulated that “[i]t is clear that Arden LJ intended this formulation to be descriptive of circumstances in which a duty might be imposed rather than exhaustive of the circumstances in which a duty may be imposed.”

The legitimate provenance of finding a focal company tortiously liable for its subsidiaries, who may well be its suppliers in a global supply chain, is further extended by the *Lungowe* judgement.⁶³ The Court of Appeal stipulated in this case that a UK holding company’s duty of care may, in certain circumstances, extend not only to employees of a subsidiary but also to third parties affected by a subsidiary’s operations, including subsidiaries that are not wholly owned. Although it remains to be seen how these claims will be determined on their merits, the Court explicitly emphasised that the fact that there had never been a reported case in this regard did not make such a claim unarguable.⁶⁴

⁵⁵ *Chandler v Cape Plc* [2012] EWCA Civ 525; [2012] 1 W.L.R. 3111, at [80], *per* Arden LJ.

⁵⁶ *Ibid.*

⁵⁷ Ugljesa Grusic, “Responsibilities in Groups of Companies and the Future of International Human Rights and Environmental Litigation” (2015) 74(1) *Cambridge Law Journal* 30, at 33.

⁵⁸ *Chandler v Cape Plc* [2012] EWCA Civ 525; [2012] 1 W.L.R. 3111, at [63], *per* Arden LJ.

⁵⁹ *Caparo Industries plc v Dickman* [1990] 2 AC 605, 633, *per* Lord Oliver.

⁶⁰ *Chandler v Cape Plc* [2012] EWCA Civ 525; [2012] 1 W.L.R. 3111, at [66], *per* Arden LJ.

⁶¹ As stated, “[i]t is simply not possible to say in all cases what is or is not a normal incident of that relationship... The question is simply whether what the ... company did amounted to taking on a direct duty (of care)...” *Ibid.*, at [67] and [70], *per* Arden LJ.

⁶² [2014] EWCA Civ 635, para 33, *per* Tomlinson LJ. The claimant’s claim was only rejected in this case on the grounds that the holding company did not carry on any business at all apart from holding shares in other companies, and that there was no evidence that the holding company either did have or should have had any knowledge of the risk superior to that which the subsidiaries could be expected to have. *Ibid.*, para 38, *per* Tomlinson LJ.

⁶³ *Lungowe v Vedanta Resources plc* [2017] EWCA Civ 1528; [2018] 1 W.L.R. 3575.

⁶⁴ “If it were otherwise the law would never change.” *Ibid.*, at [88], *per* Simon LJ.

B. Regulatory Interactions between Tortious Liabilities of the Focal Company and Supply Chain Disclosure

While the *Caparo* test has only been successfully applied thus far to holding companies in relation to their subsidiaries' health and safety offences, this is significant enough to cause disruption in the enforcement of s.54, given that group companies are a common pattern in global outsourcing. The ascription of responsibility application would also likely have significant implications for supply chain management, which often involve similarly subtle arrangements of agency and collateral contracts. In particular, the four elements that Arden LJ emphasised in affirming the assumption of responsibility could equally apply to supply chain relationships, particularly in big MNEs which have power and “*a practice of intervening in the trading operations*”⁶⁵ of their trading partners within supply chains. It is at least arguable that within a supply chain, a company with strong influence/control upon its upstream subsidiary suppliers may owe a duty of care to victims if its suppliers commit modern slavery offences, upon the satisfaction of the three-part *Caparo* test of foreseeability, proximity and reasonableness. S.54 of the MSA suggests that a qualifying corporation should disclose information on “*the organisation's structure, its business and its supply chains*”⁶⁶ and “*the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk*”.⁶⁷ This disclosure would conveniently constitute direct evidence for potential claimants against the focal company in proving foreseeability and proximity, given that the suppliers, under repetitive contracts with and the authority of the focal company, will also likely rely upon the focal company deploying its superior knowledge or expertise in avoiding modern slavery.⁶⁸

The evidential significance of sustainability reports published by corporations, including reports involving modern slavery information, in establishing proximity and reasonableness was clearly stipulated by Lord Bingham in *Lubbe and others v Cape plc*.⁶⁹ As mentioned, the main issue of determining the liability of a parent company involves the control that it exercises over and the advice it gives to its subsidiary company. Much of the evidence presented to any such enquiry would, in the ordinary way, “*be documentary and much of it would be found in the offices of the parent company, including minutes of meetings, reports by directors and employees on visits overseas and correspondence*.”⁷⁰ Considering the four factors that the Court of Appeal explicated in *Chandler v Cape*, one would expect that the last three of the required elements, including the parent's superior knowledge of the risk, are all likely to be satisfied if the parent corporation provides details about “*the parts of its business and supply chains where there is a risk of slavery and human trafficking*

⁶⁵ *Chandler v Cape Plc* [2012] EWCA Civ 525; [2012] 1 WLR 3111, at [80], *per* Arden LJ.

⁶⁶ S. 54(5)(a) of MSA.

⁶⁷ S. 54(5)(d) of MSA.

⁶⁸ While some might challenge on the ground that England and Wales is not the proper place in which to bring such a claim, the argument can often be refuted on the ground that the claimant(s) cannot obtain access to justice in the forum where the foreign subsidiary/supplier is located. For instance, *Lungowe v Vedanta Resources plc* [2017] EWCA Civ 1528; [2018] 1 WLR. 3575, at [103]-[107], *per* Simon LJ; also *supra* notes 31-36 for discussions on the authority of a focal firm in supply chain contexts.

⁶⁹ *Lubbe and others v Cape plc*, [2000] 1 WLR 1545, at p. 1555G, *per* Lord Bingham.

⁷⁰ *Ibid.*

taking place, and the steps it has taken to assess and manage that risk” as required by s.54 of the MSA.⁷¹

Practice has already seen real reparation claims following corporations’ modern slavery disclosures. A recent class action suit was filed by a consumer against the US retailing giant Costco and several of its suppliers, claiming that the presence of forced labour in its seafood supply chain is contradictory to the statements made under the provisions of the Supply Chain Transparency Act.⁷² A similar class action was also brought against Nestlé.⁷³ Under such circumstances, the realisation of the legislative intent of supply chain disclosure regulation is likely to be disrupted, and corporations’ incentives to disclose comprehensive and extensive information would be reduced; when a detailed disclosure of supply chain management and control of modern slavery might potentially lead to direct liability in supply chains, it is predictable that focal companies subject to s.54 will be tempted to make a tick-the-box disclosure only, or even simply deny any action on or knowledge of modern slavery in their supply chains. In both cases they will have fulfilled their statutory duty of disclosure as a commercial organisation, and will be regarded as having properly disclosed under s.54 by simply stating that they have taken no relevant action during the financial year.⁷⁴ Given the additional risk of reputational damage, commercial organisations and people who are the directing mind and will of these companies⁷⁵ will, at the very least, be cautious about what to disclose when the information might be used as evidence, thereby putting themselves at future risk. As stated by New, “*Forced labour is an issue of such legal gravity that continued, knowing engagement could constitute direct complicity in criminal behaviour, a much more serious situation for the firm than ‘mere’ reputational damage.*”⁷⁶ One may thus see potentially perverse incentives for corporations not to regulate their supply chains, or fear of generating the factum for a cause of action in tort, although as a matter of policy the law does not intend to encourage such wilful passiveness among corporations.⁷⁷

C. Developments on Cross-Border Corporate Sustainability and the Evidential Implications of Supply Chain Disclosure

1. The Evidential Value of Corporate Disclosure Documents

A line of recent case judgements,⁷⁸ in particular *Lungowe v Vedanta Resources plc*⁷⁹ and *Okpabi v.*

⁷¹ S.54 (5)(d) of MSA.

⁷² *Sud v Costco Wholesale Corporation* (ND Cal. No 15-cv-03783-JSW, 15 January 2016). SK Rathke, “Litigation Fallout from All This Supply Chain Transparency Legislation (or, These Things Have Teeth!) (or, the Cycle of Misfortune)” (2015) *National Law Review* August 27th

⁷³ *Barber v Nestlé USA Inc.* (CD Cal. No SACV15-01364-CJC (AGRx). 9 December 2015. These two legal actions did not make substantive headway.

⁷⁴ S.54 of MSA.

⁷⁵ *Tesco Supermarkets Ltd. v Natrass* [1971] UKHL 1.

⁷⁶ New, *supra* note 17, at 698.

⁷⁷ Turner, *supra* note 15, at 10.

⁷⁸ In *AAA & Others v Unilever Plc & Anor* [2018] ECWA Civ 1532, regardless of the High Court Judge Elisabeth Laing J’s decision that there was a sufficient degree of proximity, and although there was inadequate foreseeability or reasonableness to establish viable claims against Unilever, the Court of Appeal unanimously agreed that the appeal should be dismissed by reason of the proximity point in relation to Unilever, and it is pointless to consider issues of foreseeability and reasonableness in terms of the imposition of a duty of care.

Royal Dutch Shell plc,⁸⁰ further consolidate the significant evidential effect of public documents on cross-border corporate sustainability. These cases currently concern the establishment of jurisdiction only: overseas claimants, as third parties allegedly harmed by a subsidiary's local operations, are trying to establish the English courts' jurisdiction to try claims against parent companies and their overseas subsidiaries. However, these jurisdiction claims merit an examination of the substance of the case, and thereby require consideration of whether there was some plausible case between the overseas claimants and the holding company,⁸¹ involving a purportedly simple question of law that *Caparo* and *Chandler* were trying to solve: whether an English parent company owes a duty of care to those affected by a subsidiary's overseas operations.⁸²

In both *Lungowe* and *Okpabi* the claimants relied on the sustainability reports disclosed by the defendants, implicating the potential evidential effects of the modern slavery reports required by s.54 in establishing the human rights liabilities of parent corporations. For instance, in *Lungowe* the public report issued by the Vedanta company, entitled "*Embedding Sustainability*", contained information about the Board of Vedanta exercising oversight of all Vedanta's subsidiaries, and referred to problems with discharges into water as an example.⁸³ There were also highlights in Vedanta's public statements regarding its commitment to address environmental risks and technical shortcomings in the subsidiary's mining infrastructure. These are the kind of standardised statement that one often finds in corporate reports on sustainability issues – for instance, the statement that "*we have a governance framework to ensure that surface and ground water do not get contaminated by our operations*".⁸⁴ However, they were relied upon by the plaintiff, and supported by the Court of Appeal, as part of the evidence that the parent company Vedanta had either taken direct responsibility or had controlled the operations which had given rise to the claim.⁸⁵

Likewise, in *Okpabi* the claimants relied on the contents of several Sustainability Reports published by the defendant company, highlighting the commitment of the parent company to control and direct the subsidiary's environmental performance. Although the Court of Appeal rejected the claimants' argument by a 2-1 majority, the evidential value of public reports issued by the defendant company was explicitly acknowledged by all appellate judges. Simon LJ, who was among the majority, emphasised that he "*would accept that statements made in the ... Sustainability Report were particularly relevant to the existence of the duty of care relied on by the claimants.*"⁸⁶ Likewise, Sir Geoffrey Vos opined that the regulatory text (that puts forward disclosure standards) means that such statements "*are more likely to be true, and so should be accorded greater evidential weight.*"⁸⁷

⁷⁹ [2017] EWCA Civ 1528.

⁸⁰ [2018] EWCA Civ 191.

⁸¹ "*In general, a real issue between the relevant parties is to be equated with a properly arguable case or serious question to be tried... The more doubtful the point of law, the more cautious the court should be, since the question of law goes to the existence of the jurisdiction*" *Lungowe v Vedanta Resources plc* [2017] EWCA Civ 1528; [2018] 1 WLR 3575, at [63], *per* Simon LJ.

⁸² Such a duty of care may arise where the parent company: (a) has taken direct responsibility for devising a material health and safety policy; or (b) controls the operations which give rise to the claim. In these cases the Court of Appeal used the three-part formulation (foreseeability, proximity, and reasonableness) set out by the House of Lords in *Caparo Industries plc v Dickman*, to see whether a properly arguable claim that a duty of care was owed in the particular case could be established.

⁸³ *Lungowe v Vedanta Resources plc* [2017] EWCA Civ 1528; [2018] 1 W.L.R. 3575.at [84](1), *per* Simon LJ.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*, at [84]-[90], *per* Simon LJ.

⁸⁶ [2018] EWCA Civ 191, at [67], *per* Simon LJ.

⁸⁷ *Okpabi v Royal Dutch Shell Plc* [2018] EWCA Civ 191, at [188], *per* Sir Geoffrey Vos. These two judges only declined

Furthermore, as evidenced in *Okpabi*, it still remains debatable as to the extent to which the disclosed information would be deemed specific enough to establish proximity between the entities, and the evidential value of corporate disclosure, including modern slavery reports, in establishing the focal company's duty of care might turn out to be even more significant. For instance, based on exactly the same facts on which Simon LJ and Sir Geoffrey Vos rejected the appeal, Sales LJ adopted a more contextual approach when considering the issue of proximity and was in favour of allowing an appeal:⁸⁸ “...on the facts of a particular case, the issuing of mandatory instructions combined with close monitoring, intervention and enforcement, may show that there has been a material assumption of responsibility.”⁸⁹ In Sales LJ's opinion in *Okpabi*, the group-wide instructions issued by RDS provided a practical means for RDS to disseminate expertise and to control at least some aspects of the management of its operating companies, which helped the claimants to assert an arguable claim that RDS assumed a material degree of responsibility in relation to the management of the pipeline and facilities according to the criteria in *Chandler* and *Lungowe*. In particular, the fact that the losses due to oil spillage in Nigeria were singled out in the Shell Sustainability Report 2014 was construed as strong evidence that the parent “had a particularly strong interest in ensuring that the management of the pipeline and facilities was conducted effectively and thus was proactive in assuming control of the operational decisions about how to manage the risk of oil and spillage from them”.⁹⁰

2. Extended Corporate Proximity from Ownership to Authority

In the *Okpabi* case, the fact that the parent company did not directly hold shares in the subsidiary was considered irrelevant in establishing the duty of care of the parent company, since the parent could still exert practical control over the subsidiary.⁹¹ This is an explicit sign of English courts starting to depart from the conventional emphasis on ownership in groups towards authority when establishing proximity, and focusing more on whether the group is managed integrally along functional lines. For instance, the existence of global standards within a company group was considered by Sales LJ as capable of providing a mechanism for the projection of real practical executive control by the parent's CEO and key organs over the affairs of the subsidiary, if they wished to assume such control.⁹² This is an additional warning sign to corporations operating using forms of authority bonding, which often occurs in supply chains. Predictably, the evidential value of public information disclosed by the company in establishing a holding company's duty of care largely remains a matter of detailed factual analysis, which will only make MNEs more careful in choosing and formulating their methods and the content of their

to allow the claim because they felt the disclosed corporate policies and documents were not specifically targeting the subsidiary company, and thus only showed that a parent company had taken steps to ensure that there were proper control mechanisms in place over all subsidiaries. Nevertheless, there might be an arguable case if relevant corporate policies and processes were more specific, demonstrating the parent's endeavours to exercise control over a particular subsidiary.

⁸⁸ [2012] EWCA Civ 525; [2012] 1 WLR 3111.

⁸⁹ [2018] EWCA Civ 191, at [172], *per* Sales LJ.

⁹⁰ *Ibid.*, at [162], *per* Sales LJ.

⁹¹ *Ibid.*, at [172], *per* Sales LJ.

⁹² [2018] EWCA Civ 191, at [161], *per* Sales LJ.

disclosure, thereby largely thwarting the legislative purpose of s.54.

This area of law is far from being consolidated, since the claimants in *Okpabi* and the defendants in *Lungowe* are both seeking to appeal to the Supreme Court. In the meantime, however, based on existing case judgements it seems that the more a company becomes involved in the control and publication of information about its overseas connected companies' operations, the more likely it is to be plunged into litigation and held liable for negligence by overseas subsidiaries and companies connected through supply contracts. Thus far, connections acknowledged by judicial authorities have been confined to those between parents and subsidiaries, but this type of parent-subsidiary connection often exists in supply chains. There even remains the possibility of this type of connection extending to close upstream-downstream supply chain partners, if it is possible to demonstrate the necessary degree of foreseeability, proximity and reasonableness.⁹³

3. The Enforcement Tension between the Extraterritorial Duty of Care and Supply

Chain Disclosure

A significant tension is therefore evident in the trajectory of the latest case law developments: MNEs in general, and particularly under supply chain disclosure regulation, are encouraged to construct and implement measures to prevent their suppliers/subsidiaries from engaging in human rights abuses. However, there also exists a risk that the imposition and enforcement of such measures could be construed as the focal companies' control of and/or acceptance of responsibility for the operations of that subsidiary/supplier.⁹⁴ Existing laws on the duty of care for parent corporations place significant emphasis on the nature of the working relationships between business entities, in which documentary evidence issued by the entities plays an important role. In this regard, *Lungowe* and *Okpabi* provided clear examples of how detailed sustainability disclosure can backfire; the evidence, in which Sustainability Reports played a key part, was considered to support the case that "*there was a pattern of distribution of expertise and control in relation to the handling of the risk of oil spills in (Nigeria)*".⁹⁵

To make things even more complicated, the disputable status of the law increases the likelihood of similar future claims against MNEs, seeking to rely on documents issued by the corporations themselves which are available in the public domain. Hopes have been raised that claims originally brought against subsidiaries may be brought before the courts of their parent companies' home states and remedies may be sought in that jurisdiction. Although judgements in

⁹³ *Okpabi v Royal Dutch Shell Plc* [2018] EWCA Civ 191, at [24], per Simon LJ, "It is clear that the three-part test set out in the *Caparo* case is not a forensic equation to which values may be attached that yield the answer to whether or not a duty is owed".

⁹⁴ Chris Owen & Adam Bristow, *Okpabi v Shell Appeal Highlights Important Points regarding Parent Company Liability*, 28 February 2018, available at <http://www.elexica.com/en/legal-topics/dispute-resolution-commercial/260218-okpabi-v-shell>.

⁹⁵ [2018] EWCA Civ 191, at [165], per Sales LJ. Sales LJ also explained why judges tend to attach significance to public disclosure – it has evidently not been easy for claimants to find internal witnesses (from the defendant company) who were willing to act in a certain sense as whistleblowers. *Ibid.*, at [168].

the Court of Appeal⁹⁶ in two recent cases denied access to courts in parent companies' home states for the victims of extraterritorial human rights violations, the evidential value of public reports including sustainability information was widely appreciated. It is likely that as long as the law is not completely clarified and the possibility of focal companies being dragged into lawsuits remains, MNEs will continue to be deterred from issuing detailed sustainability reports with details, since such hearings are costly in terms of both time and expenditure. Lord Neuberger warned in *VTB Capital plc v Nutritek International Corp*⁹⁷ about the risk of vexatious litigations if a hearing is expensive and time-consuming.⁹⁸ Unfortunately, the expenditure of time, effort and financial resources in recent jurisdiction disputes has been significant, to the extent that they became “*wholly self-defeating*”⁹⁹. For instance, in the *Okpabi* case the total length of the witness statements ran to over 2000 pages of material, and the parties' ‘skeleton arguments’ ran to 259 pages.¹⁰⁰ The cost and effort burdens on MNEs will incentivise them to avoid this type of litigation, and information disclosed in public documents which might be used as evidence against them will therefore be brief and concise. Given that s.54 of the MSA imposes no penalty for poor-quality disclosure, corporations that wish to avoid public disapproval are likely to disclose minimal or selective information in an indirect and non-confrontational manner, rather than straightforward opposition and failure to disclose.¹⁰¹

III. INSTITUTIONAL BARRIERS TO SUPPLY CHAIN DISCLOSURE

A. Structural and Compositional Intricacies of Supply Chains

As well as its incompatibilities with regulatory approaches to extraterritorial tortious liability, s.54 of the MSA is also restrained in practice by institutional barriers, not least the structural and compositional complications of supply chains. Most of the supply chain and modern slavery literature concentrates on criminal behaviour occurring in goods and services supply chains. Likewise, s.54 in its current form does not distinguish between product supply chains and labour supply chains. However, the complex channels of labour supply – contract employment agencies, local gangmasters, and the fact that they often provide people to work for a company without being counted as direct employees – tend to get around supply chain governance and labour standards, taking advantage of legislative ambiguity in the terms “supplier” and “employee”.¹⁰² Under pressure to engage in responsible business practices, many companies spend vast sums of money on tracing the source of their products and making their product supply chains transparent. However, the stark reality is that labour chains remain invisible for the most part. As shown by empirical evidence in the field, many businesses experience pragmatic difficulties in detecting modern slavery practices in their labour chains.¹⁰³ The high structural volatility of

⁹⁶ *Okpabi v Royal Dutch Shell Plc* [2018] EWCA Civ 191; *AAA & Others v Unilever Plc & Anor* [2018] ECWA Civ 1532.

⁹⁷ [2013] 2 AC 337, at [82].

⁹⁸ As emphasised, it is important that “...*bearings concerning the issue of appropriate forum should not involve masses of documents, long witness statements, detailed analysis of the issues and long argument...*” [2013] 2 AC 337, at [82].

⁹⁹ [2018] EWCA Civ 191, at [21], *per* Simon LJ.

¹⁰⁰ *Ibid.*, at [17], *per* Simon LJ.

¹⁰¹ Also LeBaron & Rühmkorf, *supra* note 9, at 8-10, arguing that s.54 of the UK MSA itself was a result of corporations' displacement efforts during the policy-making process.

¹⁰² New, *supra* note 17, at 699. For instance, the precise conceptual boundaries of forced labour may vary, the extremist view being that all workers under a capitalism regime are wage slaves. Marxism is the stereotypical example of this.

¹⁰³ In Crane and LeBaron's research into modern slavery, a senior executive of a major British hotel chain admitted

global value chains has already been shown to have a significant impact on the actual operating effects of corporate policies, in some circumstances even rendering them unfit for purpose.¹⁰⁴ In the meantime, multi-tier supply chains, and the complex systems of transnational managerial control through which they operate, were ignored in the legislative drafting of s.54, deliberately or otherwise. If one takes a close look at the wording of s.54 of the MSA, the term ‘supply chain’ is not clearly defined for the purpose of this provision, with the consequence that the scope of the suppliers covered by corporate policies and actions is not at all clear.¹⁰⁵

In this regard, a comparable provision – s. 1714.43(a)(1) of the Californian Civil Code – avoids confusion by clearly targeting a “direct supply chain for tangible goods offered for sale”. Some argue that s.54’s omission of the adjective “direct” implicates the UK legislators’ intention to accommodate a broader reach than the Californian peer.¹⁰⁶ Indeed, practice has thus far supported the need to expand legislative reach; modern slavery problems frequently occur upstream at the less visible sub-supplier levels, rather than at the focal company or among the first-tier suppliers with whom a focal firm has direct contractual relationships.¹⁰⁷ However, this is only scholarly speculation rather than an authoritative interpretation. The enforceability of s.54, at least at present, is significantly undermined by these conceptual and scope ambiguities. As commented by O’Neill, proclamations about combating crimes including modern slavery without establishing or identifying institutions where corresponding claims for rights or redress may be lodged are, at best, “*a premature rhetoric of rights (that) may have political point and impact ... (and) at worst a rhetoric of rights can inflate expectations while masking a lack of claimable entitlements.*”¹⁰⁸

B. Limits of the Focal Company in Sustainable Chain Management

Behind the supply chain governance initiatives and the growing body of research suggesting that focal companies should expand their sustainability strategies to the sub-suppliers’ level¹⁰⁹ lies another implicit assumption, which is that focal companies are able to affect or even manage their sub-suppliers’ practices.¹¹⁰ From the perspective of buying firms, this “*chain liability effect*”¹¹¹ demands that their sustainability management strategies penetrate as far as second-tier suppliers

bitterly that “*I can tell you the farm where the steak on your plate came from. Probably even the name of the cow. But we have no idea where the workers came from that work in our kitchens.*” Andrew Crane & Genevieve LeBaron, *Why Businesses Fail to Detect Modern Slavery*, *The Conversation*, Sept. 11, 2017, available at <http://theconversation.com/why-businesses-fail-to-detect-modern-slavery-at-work-82344>.

¹⁰⁴ Sarfaty, *supra* note 17.

¹⁰⁵ New, *supra* note 17, at 700.

¹⁰⁶ Turner, *supra* note 15, at 8.

¹⁰⁷ JL Glover, D Champion, KJ Daniels & AJD Dainty, “An Institutional Theory Perspective on Sustainable Practices across the Dairy Supply Chain” (2014) 152 *International Journal of Production Economics* 102-111, highlighting various infrastructural challenges to sustainable supply chain management.

¹⁰⁸ Onora O’Neill, *Towards Justice and Virtue: A Constructive Account of Practical Reasoning* (CUP, 1996), at 133.

¹⁰⁹ E.g. Miriam Wilhelm, Constantin Blome, Ellen Wieck & Cheng Yong Xiao, “Implementing Sustainability in Multi-Tier Supply Chains: Strategies and Contingencies in Managing Sub-Suppliers” (2016)182 *International Journal of Production Economics* 196-212, at 197; Thomas Choi & Tom Linton, “Don’t Let Your Supply Chain Control Your Business” (2011) *Harvard Business Review* 112-117.

¹¹⁰ E.g. Fiona Mactaggart MP commented on the disclosure obligation that “*in enabling public information to be provided... [it] aims to use the power of the purchaser to prevent slavery and exploitation.*” United Kingdom, *Parliamentary Debates, House of Commons*, 28 February 2012, vol 541, col 174 (Fiona Mactaggart); also Carlos Mena, Andrew Humphries & Thomas Y. Choi, “Toward a Theory of Multi-Tier Supply Chain Management” (2013) 49(2) *Journal of Supply Chain Management* 58-77, at 59.

¹¹¹ R van Tulder, J van Wijk & A Kolk, “From Chain Liability to Chain Responsibility” (2009) 85(2) *Journal of Business Ethics* 399-412.

and even beyond. This assumption should not be taken for granted, as the complexity of supply chains also affects the capacity and quality of sustainable supply chain management by the focal company. To begin with, the lack of contractual relationships between a buying firm and its second-tier suppliers, coupled with asymmetric information on the exact number or identity of its sub-suppliers,¹¹² often render the focal company's practice of implementing sustainability strategies at sub-supplier levels difficult. Focal companies are usually located in developed economies, whereas sub-suppliers are in emerging economies. The multi-dimensional geographical, regulatory and cultural distances between a focal company and its sub-suppliers, combined with limited resource availability at the first-tier supplier's level, which often serve as agent of the focal company, further compound the challenge of achieving sustainable goals in supply chains.¹¹³ Up to the present, managing sub-suppliers in the context of sustainability and human rights protection is still the exception rather than the norm,¹¹⁴ and the extent of supply chain management also varies significantly, affected by power asymmetries as well as dependencies between supply chain members for critical resources or components.¹¹⁵

Second, the strategies that focal companies use to manage sub-suppliers also differ significantly, ranging from delegating authority to tier 1 suppliers where there is no direct connection between the buying firm and the tier 2 supplier,¹¹⁶ to working with third parties in extending sustainability to sub-suppliers,¹¹⁷ and to forming "closed triads" in which buying firms directly manage sub-suppliers.¹¹⁸ The holistic implementation of practices beyond the boundaries of a buying firm is thus characterised by wide diversities in the focal company's power, the industry in which the supply chain resides, the number and location of production facilities, infrastructural characteristics in transportation and telecommunications, the extent of public scrutiny, and the extent of dependency and distance between supply chain members, which will need to be taken into account in future law-making.¹¹⁹

C. Impacts of the General Socio-Economic Environment

Other than the complexities of supply chains discussed above, the social complexities and dangers that might be involved in disclosing modern slavery in the global context may also deter

¹¹² Wilhelm et al., *supra* note 109, at 196; Thomas Y. Choi, Kevin J. Dooley & Manus Runtusanatham, "Supply Networks and Complex Adaptive Systems: Control versus Emergence" (2001) 19(3) *Journal of Operations Management* 351, at 358.

¹¹³ Miriam Wilhelm, Constantin Blome, Vikram Bhakoo, & Antony Paulraj, "Sustainability in Multi-tier Supply Chains: Understanding the Double Agency Role of the First-tier Supplier" (2016) 41 *Journal of Operations Management* 42-60, at 53;

¹¹⁴ Elcio M. Tachizawa & Chee Yew Wong, "Towards a Theory of Multi-Tier Sustainable Supply Chains: A Systematic Literature Review" (2014) 19(5) *Supply Chain Management* 643, at 643; Joe Miemczyk, Thomas E. Johnsen & Monica Macquet, "Sustainable Purchasing and Supply Management: A Structured Literature Review of Definitions and Measures at the Dyad, Chain and Network Levels" (2012) 17(5) *Supply Chain Management: An International Journal* 478, which, after an empirical study, uncovers two distinct trends in the type of research relevant to sustainable purchasing and supply management. "First, internal or dyadic issues are in focus and second, a tendency to deal with environmental, as opposed to social, sustainability." *Ibid.*, at 478.

¹¹⁵ Wilhelm et al., *supra* note 109, at 196-7; Andrew Crane & Genevieve, "Why Businesses Fail to Detect Modern Slavery" *The Conversation* Sept. 11, 2017, available at <http://theconversation.com/why-businesses-fail-to-detect-modern-slavery-at-work-82344>.

¹¹⁶ Mena et al., *supra* note 110, at 60; Wilhelm et al., *supra* note 113.

¹¹⁷ Wilhelm et al., *supra* note 109, at 197.

¹¹⁸ *Ibid.*, at 205.

¹¹⁹ Tachizawa & Wong, *supra* note 114, at 657.

efficient and full disclosure. Modern slavery, particularly in the form of human trafficking and forced labour, is a process rather than an isolated event, often involving the participation of criminal gangs who may use threats and various means of violence to prevent their crimes from being disclosed.¹²⁰ Just as acutely noted by Quirk, “(*modern slavery*) does not denote a uniform condition, but covers a spectrum of practices, involving varying degrees of consent, coercion, treatment, and autonomy”.¹²¹ Rather than seeing modern slavery as an exogenous problem that companies have to address, it should be seen as an endemic feature of socio-economic systems that are partly constituted by the companies themselves.¹²² Imposing disclosure obligations on companies without tackling the socio-economic contexts in which modern slavery develops will not help much in fully eradicating the social ill.

IV. DATA-BASED EVIDENCE

Given the multi-faceted elements that interact with and disrupt the implementation of statutory disclosure requirements, it is unlikely that s.54 of the MSA will have a substantial effect in incentivising focal companies to make detailed and accurate disclosure about their anti-slavery performance in supply chains. This has been proved by empirical evidence. Up to 16 October 2018, of the 18,299 UK companies exceeding the £36 million annual turnover threshold,¹²³ less than one third – 5893 companies – submitted reports to the Modern Slavery Registry, and only 19% of the submitted reports met all the minimum requirements set out in the MSA.¹²⁴ If these disappointing figures can to a certain extent be excused by the fact that it is not mandatory to disclose on the Registry’s website, a closer look at the contents of MSA reports is just as unsatisfactory. The Business and Human Rights Resource Centre (BHRRRC) assessed the first year’s MSA Reports released by FTSE 100 companies, and concluded that “(*while*) there is a welcome cluster of leading companies taking robust action ... the majority show a lacklustre response to the MSA at best”. In other research targeting reports submitted by companies operating in sectors that are widely recognised as a heightened risk, almost two thirds did not make reference to the specific risks of slavery and human trafficking in relevant supply chains or specific sectors.¹²⁵ Without correct identification of the risks, it will be difficult for firms to take effective action to address those risks. Many statements are not even compliant with the basic requirements of the legislation, with the majority not addressing the six topic areas listed in s.54 in any detail.¹²⁶ In general, firms tend to allege that they are against modern slavery and forbid their suppliers from engaging in it. In many cases, firms assert that their prohibition must be cascaded down the chain of production, going beyond the first tier of supplying firms. However, this kind of assertion tends to be restricted to the policy level – few companies thus far have disclosed their or their suppliers’ previous involvement in modern slavery, even if passive or unrecognised. Company policies also tend to be highly uniform and relatively abstract, revealing little information about their actual

¹²⁰ New, *supra* note 17, at 698.

¹²¹ Joel Quirk, “The Anti-Slavery Project: Linking the Historical and Contemporary” (2006) 28 *Human Rights Quarterly* 565, at 576.

¹²² *Ibid.*, at 577, describing modern slavery as effectively a “*multi-faceted continuum*”. Also see New, *supra* note 17, at 698.

¹²³ Extracted from FAME, data remains with the author.

¹²⁴ Further details are available at <https://www.modernslaveryregistry.org/>, visited on 16 October, 2018.

¹²⁵ E.g., garment production; hotels and accommodation; construction; football clubs and outsourcing companies. CORE Coalition, *Risk Averse? Company Reporting on Raw Material and Sector-Specific Risks under the Transparency in Supply Chains clause in the UK Modern Slavery Act 2015* (September 2017), at 6.

¹²⁶ *Ibid.*, at 8.

performance. This has been described by Coombs and Halladay as a “*pseudo-panopticon*”.¹²⁷ The conventional corporate policy and monitoring regime has thus far proved only to provide room for manipulation and game-playing¹²⁸ in responding to less challenging environmental issues in supply chains, not to mention dealing with the much more severe problem of modern slavery.

V. SUGGESTIONS

Although the ascription of responsibility has thus far primarily focused on group companies and depends on the individual circumstances in each case, including the nature, scope and extent of the holding company’s control, these legal developments still have significant implications for supply chain management, which often involve similarly subtle arrangements of agency and collateral contracts. From the home state regulatory perspective, this requires the acknowledgement of modern forms of corporate integration, so as to develop a coherent regulatory approach that defines the extent of the human rights responsibilities (accountability) of focal companies. In order to solve the regulatory and institutional tensions discussed above, the experiences of several other jurisdictions might be of referential value to the UK, both in reconciling corporate disclosure and other regulatory initiatives, and in enhancing the extraterritorial reach of home states towards their companies’ overseas supply chains, as explicated below.

To begin with, eradicating modern slavery not only requires the improvement of regulatory standards in relation to disclosure, wages, working conditions and collective bargaining rights in both home and host countries, but also demands the effective detection of modern slavery in the first place. S.54 of the MSA does not dictate the content of corporate disclosures, instead merely providing guidance as to what information may be included in an organisation’s slavery and human trafficking statement,¹²⁹ which enables corporations to formulate their statements in ways beneficial to them. In this regard, the transparency required by the Californian Act seems to be more robust – each eligible retail seller or manufacturer **must**, at a minimum, disclose to what extent, if any, that he does each of the following: the verification of product supply chains to evaluate risks of slavery; conducting audits of suppliers to evaluate supplier compliance with corporate standards; requiring direct suppliers’ certification of material compliance; maintaining internal accountability standards for employees or contractors, as well as procedures for those who fail to meet the standards; and the provision of training for employees and managers who have direct responsibility for supply chain management.¹³⁰ Of course, corporations can tick “no” to all the above questions, but then the disclosure statement will presumably become evidence in a “*name and shame*” exposure.

Complex patterns of economic integration in contemporary groups and supply chains also consist of more than one form of bond – for example, ownership, authority and contract –

¹²⁷ W Timothy Coombs & Sherry J. Holladay, “The Pseudo-Panopticon: the Illusion Created by CSR-Related Transparency and the Internet” (2013) 18(2) *Corporate Communication: An International Journal* 212-217.

¹²⁸ New, *supra* note 17, at 700; K Parella, “Outsourcing Corporate Accountability” (2014) 89 *Washington Law Review* 747-1035.

¹²⁹ S.54 (5) of the MSA.

¹³⁰ SEC. 3(c) of the California Transparency in Supply Chains Act of 2010; SEC.1714.43(c) of the Civil Code of the State of California.

which the law needs to take into full account in order to develop principles accordingly. For instance, a repetitive pattern of contracting for essentially the same goods or services should suffice as evidence of a significant degree of economic integration which may warrant a disclosure. Furthermore, this should not be limited to repetitive bilateral contracts, since multiple relations may operate in these massively integrated networks.¹³¹ Further clarification is also necessary in terms of sufficient degrees of proximity and control in the *Caparo* test, so that disclosure regulation would well integrate with the hard law duty of care. In this regard, in France, disclosure of human rights protection activities has now become part of an integral framework of corporate duties that corporations must adhere to, rather than an isolated undertaking that corporations have the discretion to ignore.¹³² An amendment to the French Commercial Code creates an obligation for companies to prevent and mitigate environmental, health and human rights harms resulting from their activities, including those carried out by their subsidiaries and supply chains.¹³³ This duty is composed of three elements (stages), including elaboration, disclosure, and the effective implementation of a ‘vigilance plan’,¹³⁴ which should include “reasonable vigilance measures to adequately identify risks and prevent serious violations of human rights ... health and safety and the environment”.¹³⁵ In a corporate group, the duty could be imposed on the holding company to monitor and ensure that the vigilance plan is complied with within the sphere of influence. Policies and measures to address extraterritorial challenges should appear in the vigilance plan in order to avoid unnecessary risks, including potential tort liability. Good corporate practice of more information gathering and sharing would therefore not necessarily affect the arm’s length relationship between companies and their suppliers.

Given their increasingly important role in global governance, a regulatory environment incentivising MNEs to engage in self-observance and the effective governance of human rights in their extraterritorial activities will also be necessary, until such time as (and even after) MNEs become directly legally accountable for their human rights abuses. In this regard, the Illegal Logging Prohibition Act 2012 (ILP Act) in Australia provides a novel supplementary regulation mode. Instead of directly targeting wrongdoers who are engaged in illegal logging activities in a foreign jurisdiction and thereby risking accusations of the abuse of jurisdiction, the ILP Act provides a mechanism for the prosecution of downstream activities ancillary to the illegal logging (i.e. importation and processing).¹³⁶ By reducing the markets for unlawful goods and services, this kind of downstream regulatory scheme in developed states can indirectly strengthen compliance with the law in developing states, without risking accusations of cultural invasion¹³⁷ and thereby reconciling relationships between home and host states in jointly tackling human rights abuses in global supply chains.

In addition to more effective punishments or sanctions to deter non-disclosure or poor-quality disclosure, the creation of incentivising structures within the law would also help. For example,

¹³¹ Collins, *supra* note 28, at 743.

¹³² Sandra Cossart, Jerome Chaplier & Tiphaine Beau De Lomenie, “The French Law on Duty of Care: A Historic Step Towards Making Globalisation Work for All” (2017) 2 *Business and Human Rights Journal* 317, at 317 & 323.

¹³³ M. B. Taylor, “Due Diligence: A Compliance Standard for Sustainable Companies” (2014) 11 *European Company Law* 86. Art. L. 225-102-4 of the French Commercial Code.

¹³⁴ Cossart *et al.*, *supra* note 132, at 317 & 323. See also Art. L. 225-102-4-1 of the French Commercial Code.

¹³⁵ Art. L. 225-102-4-1 of the French Commercial Code.

¹³⁶ Illegal Logging Prohibition Act 2012, ss 15 & 17; also Turner, *supra* note 15, at 20.

¹³⁷ Turner, *supra* note 15, at 20.

public procurement guidelines based on corporate social responsibility standards¹³⁸ could potentially form the basis of incentivising governance methods.

CONCLUDING REMARKS

The “*non-territorial spaces and management systems*”¹³⁹ of MNEs and the global regulatory gaps that spring from them have provided the impetus for intense academic and strategic attention, and a consequent range of regulatory attempts. In transnational supply chains, business entities are able to capitalise on the labour practices of contractors and suppliers in foreign states with whom they have an arm’s-length relationship.¹⁴⁰ The opacity of supply chains further makes it possible to straddle a thin line between lawful employment and slavery or forced labour.

As global governance initiatives to encourage due diligence and combat exploitation in multinational supply chains proliferate, home state regulation of the global supply chains of corporations and the outsourcing activities of other multinational business entities is increasingly gaining momentum. The UK has been a pioneer as regards global supply chain regulation, and has made some commendable attempts – both in case law, which embodies a hard law duty of care owed by focal companies towards parties affected by their overseas subsidiaries, and in statutory requirements embedded in the MSA. However, after an examination of the interactions between these regulatory methods, particularly the legal and institutional factors hindering companies from making detailed and substantial disclosures under s.54 of the MSA, we have identified an urgent need for a more fine-grained and coherent regulatory framework, which can effectively reflect the volatile regulatory, normative, and cultural environments that global supply chains encompass. Clear lines need to be drawn as regards a corporation’s sphere of accountability in the globalised context. Furthermore, the statutory steering of CSR, particularly supply chain disclosure laws, should not be the major regulatory method to improve labour practices in transnational supply chains. It should be part of a comprehensive strategy, within a framework that is designed to both incentivise supply chain sustainability and penalise business entities with supply chains that involve illicit labour practices.¹⁴¹ This will require coherent and compatible progression along several paths – extraterritorial jurisdiction, an extended duty of care for focal companies, and even downstream regulatory schemes, to name but a few.

While home state regulation has to a certain extent offset the regulatory gap in international law by way of forming an “*expanding web of liability*”,¹⁴² the “*geopolitical and geo-economic*” tension implicated in regulating transnational business enterprises should not be overlooked.¹⁴³ To end

¹³⁸ For instance, the procurement practices and decisions of wholesalers and retailers could limit the ability of consumers to purchase slavery-tainted goods and services. Turner, *supra* note 15, at 3 & 9.

¹³⁹ John Gerard Ruggie, “Reconstituting the Global Public Domain – Issues, Actors, and Practices” (2004) 10(4) *European Journal of International Relations* 499-529, at 503.

¹⁴⁰ Turner, *supra* note 15, at 21.

¹⁴¹ *Ibid*, at 22.

¹⁴² Robert C Thompson, Anita Ramasastry & Mark B Taylor, “Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes” (2009) 40 *George Washington International Law Review* 841.

¹⁴³ Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, *Written Statement Submitted by Law Society of England and Wales*, 1st Sess, UN Doc A/HRC/WG. 16/1/NGO/6 (2 July 2015), at 13, available at

this institutional scourge and encompass MNEs within coherent home state and extraterritorial regulatory regimes requires movements both at and beyond the regulatory level. For example, the complexity of institutional environments necessitates adaptations to “*some of the most prominent features of the current world polity and economy*”:¹⁴⁴ the structural and compositional complications of global chains, national competition for markets and foreign investment, state sovereignty, coherence between human rights law and corporate law, the highly contested legitimacy of extraterritorial jurisdiction – the list goes on. Indeed, as commented by Ruggie, while our hearts drive our instinct to eradicate modern slavery in supply chains, we still need our heads to develop suitable strategies to steer the heart “*through the very difficult global terrain on which we are travelling*”.¹⁴⁵

<https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session1/Pages/Session1.aspx>.

¹⁴⁴ Ruggie, *supra* note 4, 170–171.

¹⁴⁵ *Ibid.*, at 1.