

GLOBAL SUPPLY CHAIN GOVERNANCE: THE SEARCH FOR ‘WHAT WORKS’

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This article critically discusses the developing legislative framework for Corporate Social Responsibility (CSR) in global supply chains in the ‘home states’ of transnational corporations, that is, the countries where these companies are incorporated and have their headquarters. The article focuses on the interaction of private and public governance by examining how legislation can steer companies’ use of private CSR instruments such as Codes of Conduct. Following a critical review of empirical data relating to the Supplier Codes of Conduct of the top 30 listed German companies (DAX30), recent examples of ‘home state’ legislation of CSR are assessed. The article shows that most of these laws are not very stringent. The article argues that a hybrid regulatory approach towards CSR in global supply chains is necessary.

I INTRODUCTION

Corporate Social Responsibility (CSR) is currently a much-debated topic and a pressing issue for global supply chains. However, whereas global supply chains have been a traditional subject of research in disciplines such as management and political sciences, their analysis within legal studies is more recent. The traditional absence of legal research in this area means that legal perspectives play a limited role within debates about promoting greater CSR in global supply chains. This is surprising, given that contracts are at the very heart of relations between the different actors in supply chains and given that legislation already requires companies to report on their activities.

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This article will contribute to the developing discussion about the role of law in promoting greater supply chain responsibility. It will focus on the interaction between private and public governance of CSR, that is, the way in which legislation in the so-called ‘home states’ of transnational corporations steers those companies’ pursuit of CSR in their private governance relations with their suppliers. The article will critically analyse different approaches to public governance that are currently being used to direct transnational corporations towards accepting greater corporate responsibility.

The article is structured in the following way. It first highlights the limited role that legal perspectives have so far played in the literature on supply chain governance. The article then analyses empirical data relating to the Supplier Codes of Conduct of the top 30 listed German companies (DAX30). The data show that there are significant deficiencies in the approach of those leading listed companies towards CSR in their supply chain. These findings support the view that legal intervention is needed. The article then critically assesses recent examples of home state legislation passed with the intention of promoting CSR in global supply chains. The article argues that most of these laws fall short of steering the behaviour of corporations towards greater promotion of CSR in their private governance schemes. It makes the case for a hybrid regulatory approach towards CSR in global supply chains and concludes by making some tentative suggestions for the design of such an approach. It argues that discussions about greater supply chain responsibility now need to focus on the question ‘what works?’

II THEORY: THE LIMITED ROLE OF LAW IN GLOBAL VALUE CHAIN GOVERNANCE PERSPECTIVES

In general, a supply chain (also referred to as a ‘value chain’, particularly in management studies) consists of the parties that contribute to the product which is sold to the customer. It therefore encompasses the seller of the product as well as the manufacturer, retailers, transporters and sub-suppliers.¹ A global supply chain is a supply chain that extends over different countries. Many supply chains consist of different levels of suppliers, but the complexity of the chain can differ significantly according to the industry and country of production.

In the past two decades, global supply chains have, repeatedly, been in the public spotlight for allegations of gross violation of CSR principles. Examples

¹ Sunil Chopra and Peter Meindl, *Supply Chain Management: Strategy, Planning and Operation* (Pearson Publishing, 5th ed, 2013) 13.

of industry sectors that have been criticised for violations of CSR principles include the electronics industry (for example, in its use of forced labour),² the chocolate industry (in its use of child labour)³ and the textile industry (in its breaches of health and safety standards).⁴

A Theories of Supply Chain Governance

The planning and management of the activities that are part of the chain — such as sourcing, procurement and logistics — fall into the domain of supply chain management.⁵ And this is, in turn, closely linked to the issue of supply chain governance. The term ‘governance’ is widely used in a number of different disciplines and different definitions are used even in different sub-fields of political science.⁶ For the purpose of this article, governance is defined as ‘the setting and management of the political rules of the game, and, more substantially, with a search for control, steering and accountability’.⁷ The term is generally used to refer to the different methods of steering used by state and non-state actors.⁸

A distinction can be made between private and public governance. Vogel defines private governance (which he calls ‘civil regulation’) as involving ‘private, non-state or market-based regulatory frameworks’ which ‘govern multinational firms and global supply networks’.⁹ Characteristic of this kind of governance is its soft-law nature and the absence of public intervention in its processes.¹⁰ Codes of conduct are the most prominent form of private voluntary

² Kate Hodal and Annie Kelly, ‘Malaysia: Forced Labour Casts Dark Shadow over Electronics Industry’, *The Guardian* (online) 21 November 2016 <<https://www.theguardian.com/global-development/2016/nov/21/malaysia-forced-labour-casts-dark-shadow-over-electronics-industry>>.

³ Emiko Terazono, ‘Chocolate Industry Accused of Failure on Child Labour’, *The Financial Times* (online) 18 April 2018 <<https://www.ft.com/content/eb58ba84-425f-11e8-803a-295c97e6fd0b>>.

⁴ Hannah Murphy, ‘Concerns Rise for Wellbeing of Staff in Global Supply Chains’, *The Financial Times* (online) 13 September 2017 <<https://www.ft.com/content/3dca3f82-3fa9-11e7-82b6-896b95f30f58>>.

⁵ Robert M Monczka et al, *Purchasing and Supply Chain Management* (South-Western, 4th ed, 2009) 6.

⁶ Anne Mette Kjaer, *Governance* (Polity Press, 2004) 4.

⁷ Ibid 11.

⁸ Reinhard Steurer, ‘Disentangling Governance: A Synoptic View of Regulation by Government, Business and Civil Society’ (2013) 46 *Policy Science* 387, 388.

⁹ David Vogel, ‘The Private Regulation of Global Corporate Conduct’ (2010) 49 *Business and Society* 68, 69.

¹⁰ Luc Fransen and Brian Burgoon, ‘Introduction to the Special Issue: Public and Private Labor Standards Policy in the Global Economy’ (2017) 8 (S3) *Global Policy* 5, 7.

regulation, as well as, for example, the standards set by best practices, certifications and labels.¹¹ Regulation can be understood as ‘all mechanisms of social control or influence affecting behaviour from whatever source, whether intentional or not’.¹² As labels can influence the decision-making process of consumers (for example, consumers might decide to purchase a product that is labelled as being made without slave labour) they can affect behaviour and are therefore a form of regulation.

Unlike private governance, public governance is exerted by public actors, including governments at various levels within nation-states, and supranational organisations and, in the context of global value chains, also bilateral or multilateral trade agreements.¹³ Public governance in the form of government regulation is often mandatory, albeit with varying degrees of design and enforcement, depending on the respective country.¹⁴ The concepts of private and public governance are related to private and public regulation and, actually, appear to be used almost interchangeably in parts of the literature.¹⁵

The most prominent theoretical conceptualisation of the governance of global supply chains can be found in the global value chain (GVC) theory.¹⁶ This theory has, traditionally, concentrated its analysis on the relationship between

¹¹ Russell W Mills, ‘The Interaction of Private and Public Regulatory Governance: The Case of Association-Led Voluntary Aviation Safety Programs’ (2016) 35 *Policy and Society* 43. The literature has extensively studied the rise of private CSR standards, their design and governance structures. See for an overview David J Vogel, ‘Private Global Business Regulation’ (2008) 11 *Annual Rev Political Science* 261. See also the conceptual map by Abbott and Snidal with its ‘governance triangle’ that distinguishes between three major actors — the state, companies and non-governmental organisations which develop rules and standards, either separately or together: Kenneth W Abbott and Duncan Snidal, ‘The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State’ in Walter Mattli and Ngaire Woods (eds), *The Politics of Global Regulation* (Princeton University Press, 2009) 50.

¹² Julia Black, ‘Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a Post-Regulatory World’ (2001) 54(1) *Current Legal Problems* 103, 129.

¹³ G Gereffi and Joonkoo Lee, ‘Economic and Social Upgrading in Global Value Chains and Industrial Clusters: Why Governance Matters’ (2016) 133(1) *Journal of Business Ethics* 25, 31.

¹⁴ *Ibid.*

¹⁵ See, for example, the analysis in Mills, above n 11.

¹⁶ See Gary Gereffi, John Humphrey and Timothy Sturgeon, ‘The Governance of Global Value Chains’ (2005) 12(1) *Review of International Political Economy* 78; Gary Gereffi, ‘Global Value Chains in a Post-Washington Consensus World’ (2014) 21(1) *Review of International Political Economy* 9. See also, for a discussion of this theoretical conceptualisation in the context of CSR and law, Andreas Rühmkorf, ‘From Transparency to Due Diligence Laws? Variations in Stringency of CSR Regulation in Global Supply Chains in the “Home State” of Multinational Enterprises’ in Jean J du Plessis, Umakanth Varottil and Jeroen Veldman (eds), *Globalisation of Corporate Social Responsibility and its Impact on Corporate Governance* (Springer, 2018) 177.

corporate buyers and their suppliers and the creation of value in those chains.¹⁷ Its main focus has been on: 1) The use of power by lead firms (that is, the buyers at the top of the chain which include the Western transnational corporations), and 2) economic upgrading (that is, the move to higher value activities in production, improved technology, knowledge, skills and increased profits).¹⁸ However, ‘upgrading’ is now also understood to include social upgrading, which means that CSR can be included in the governance analysis of GVC theory.¹⁹ This is an important development, given how influential GVC theory is for the discourse about global supply chains. Under this broader understanding of upgrading, CSR is considered to be part of ‘synergistic governance’ where private governance, social governance and public governance interact.

A further approach to theorising the governance of supply chains can be found in global production network (GPN) theory which takes a broader perspective than GVC theory as it also takes into account the impact that a range of different stakeholders have on the running of those chains and relationships within them.²⁰

B A Role for Law in Supply Chain Analysis

At present, legal perspectives are not at the centre of either theory. They have been effectively marginalised since the study of supply chain governance was, and in many ways still is, primarily seen as an issue for management studies and political sciences. One of the main reasons why law has played such a limited role in the governance analysis of CSR is the view that, through global

¹⁷ See Gary Gereffi, ‘Global Value Chains in a Post-Washington Consensus World’ (2014) 21(1) *Review of International Political Economy* 9, 12.

¹⁸ See Gereffi, Humphrey and Sturgeon, above n 16, 85.

¹⁹ Gereffi and Lee, above n 13, 29. Barrientos notes that a GPN perspective would facilitate ‘examination of the social and institutional embeddedness of commercial operations’: Stephanie Ware Barrientos, ‘“Labour Chains”: Analysing the Role of Labour Contractors in Global Production Networks’ (2013) 49 *The Journal of Development Studies* 1058, 1065.

²⁰ Jeffrey Henderson et al, ‘Global Production Networks and the Analysis of Economic Development’ (2002) 9 *Review of International Political Economy* 436; Neil M Coe, Peter Dicken and Martin Hess, ‘Global Production Networks: Realizing the Potential’ (2008) 8 *Journal of Economic Geography* 271. For the purposes of this article, it is not necessary to adopt either of the two frameworks as the article focuses on the steering of corporate behaviour through public regulation which is an issue that can be encompassed by both framings. Bair and Palpacuer note that ‘the distinction between the GVC and GPN approaches as theoretical frameworks is overdrawn and its implications for empirical work overstated.’ See Jennifer Bair and Florence Palpacuer, ‘CSR beyond the Corporation: Contested Governance in Global Value Chains’ (2015) 15 *Global Networks* 1, 4.

supply chains, transnational corporations are not only able to outsource their production, but also their legal liability.²¹ It is argued that there is a ‘governance gap’ which allows transnational corporations at the top of global supply chains to operate with impunity whilst core CSR principles such as human rights are violated in their supply chains.²² This argument is based on legal concepts and principles such as the territoriality of the law and the low legal standards or weak enforcement systems in the countries where the production sites are located (the so-called ‘host states’).

However, whilst there are, in fact, significant barriers to holding the transnational corporation at the top of the chain legally accountable, it would be wrong to argue therefore that law has no role to play in the analysis of such chains. Quite to the contrary, law — specifically contract law — is central to the very existence of supply chains. It provides the tools that the parties operating in those chains use to construct their legal relations. The fact that law has, so far, been marginalised in the analysis of supply chain theories was recently criticised by the Institute for Global Law and Policy and Global Production Working Group.²³ This marginalisation needs to change, however, as law plays an increasing role in the governance of CSR in global supply chains, for example through the legislative requirement that companies report on CSR issues such as modern slavery.²⁴

The increasingly prominent law in this area has been referred to as ‘chain law’.²⁵ Chain law needs to be better recognised and further developed since law has much potential to provide tools to embed CSR into supply chain relations through a variety of regulatory techniques. These techniques range from disclosure laws to more traditional ‘command and control’-type regulation.

²¹ See Andreas Rühmkorf, ‘Global Sourcing through Foreign Subsidiaries and Suppliers: Challenges for Corporate Social Responsibility’ in Alice de Jonge and Roman Tomasic (eds), *Research Handbook on Transnational Corporations* (Edward Elgar, 2017) 198.

²² See for the ‘governance gap’: Luc Fransen and Brian Burgoon, ‘A Market for Worker Rights: Explaining Business Support for International Private Labour Regulation’ (2012) 19 *Review of International Political Economy* 236.

²³ The IGLP and Global Production Working Group, ‘The Role of Law in Global Value Chains: A Research Manifesto’ (2016) 4 *London Review of International Law* 57.

²⁴ See Genevieve LeBaron and Andreas Rühmkorf, ‘Steering CSR through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance’ (2017) 8 (S3) *Global Policy* 15.

²⁵ Bertram Teubner, ‘Supply-Chain Legal Pluralism: Normativity as Constitutive of Chain Infrastructure in the Moroccan Argan Oil Supply Chain’ (2016) 48 *The Journal of Legal Pluralism and Unofficial Law* 378, 386.

The previously limited role of legal contributions to debates on supply chain responsibility has a further explanation. The engagement of Western transnational corporations with CSR in their global supply chain was, and still is, largely based on private governance mechanisms which are characterised by their voluntariness and soft law character. In consequence, the governance of CSR within supply chains often still tends to be seen not as a legal issue, but rather as one that is at the discretion of the individual companies.

It is therefore necessary that the discussions about CSR in global supply chains now focus on the role and potential of law as an instrument to be used in promoting greater CSR in the supply chains of transnational corporations. Such an approach would recognise that the so-called lead firms have much bargaining power and that they can use this power to impose more responsibility on their supply chain. The argument of the research manifesto, referred to above, that ‘law resides at the heart of the GVC phenomenon’ is therefore fully supported here.²⁶

The developing legal regulation of CSR in global supply chains by the home states of transnational corporations has consequences also for another strand of the literature — the discourse about the interaction between public and private governance.²⁷ It is argued by some that private and public governance can be seen as substitutes for each other, with private regulation being used to displace public regulation.²⁸ Others argue that these two governance spheres can complement each other.²⁹ Irrespective of that controversy, the literature on the interaction of public and private governance in supply chains acknowledges that the role of the state in this context remains ‘largely underdeveloped’³⁰ and that there is a need for some form of state intervention to steer private governance. Commentators refer to a ‘multifaceted approach’, combining public with private governance.³¹

It is argued in this article that, in the context of CSR in global supply chains, it is now important to study in detail the different ways in which state-based

²⁶ See the IGLP and Global Production Working Group, above n 23, 61.

²⁷ See, for example, Vogel, ‘The Private Regulation of Global Corporate Conduct’, above n 9, 82; Kate Macdonald, *The Politics of Global Supply Chains* (Polity Press, 2014) 182; Richard M Locke, *The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy* (CUP, 2013) 177; Kenneth W Abbott and Duncan Snidal, ‘International Regulation without International Government: Improving International Organization Performance through Orchestration’ (2010) 5 *The Review of International Organizations* 315.

²⁸ See the overview of the debate in Franssen and Burgoon, above n 10, with further references.

²⁹ *Ibid.*

³⁰ Macdonald, above n 27, 184.

³¹ Locke, above n 27, 177.

regulation and non-state private governance schemes work together. In particular, there is still much need for empirical work on how public and private governance interact³² and what kind of regulatory instruments are effective in enhancing CSR in supply chains. The legal analysis of CSR in the governance of global supply chains has much potential to contribute to this debate by identifying ways in which the impunity of the lead firms — the transnational corporations at the top of the chain — can be removed if and when core CSR principles in their supply chains are violated by their suppliers and their sub-suppliers.

III EMPIRICAL DATA: THE CSR SUPPLY CHAIN POLICIES OF DAX30 COMPANIES SHOW ‘BUSINESS AS USUAL’

This Part analyses publicly available information about the supply chain policies of the top 30 listed German companies (the so-called ‘DAX 30’). This dataset provides support to the argument that stringent legal regulation of CSR in global supply chains is needed.

The data were gathered as part of a compliance transparency rating of the DAX30 to which the author of this article contributed.³³ The rating involved an assessment of publicly available documents of these 30 companies. The documents related to several compliance-relevant issues, and included the supplier code of conduct (a key component in the overall rating), the company code of conduct, and information about the compliance management systems.³⁴ The data were retrieved from the companies’ websites, for example from subpages on supply chain responsibility.

The data provide an up-to-date picture of the way in which these large companies deal with their supply chains in the present regulatory environment which, by and large, still leaves it to the companies to decide whether and, if so, in what way, they promote CSR in their supply chains. The supplier codes of conduct (or, in the absence of the codes, the information the companies published online about their supply chain responsibility) were assessed using the following six criteria. First, was the supplier code of conduct based on

³² See Fransen and Burgoon, above n 10, 8.

³³ The rating was organised and published by the German investor magazine *Fuchsbriefe*. The author of this article was part of a jury of four experts who contributed to the volume. See Ralf Vielhaber (ed), *Das Compliance-Rating der DAX-Unternehmen 2017* (Dr Hans Fuchs GmbH, 2017).

³⁴ The data were retrieved in July 2017. The other categories were (based on an external view): code of conduct, an assessment of the compliance management system, declaration of compliance with the corporate governance code, risk analysis and dealing with scandals

international conventions such as the UN Global Compact,³⁵ and how recently was the code established/updated? Second, which topics did the code cover (for example, human rights, bribery, health and safety in the workplace, freedom of association, forced labour, or environment) and in which languages was the code available? Third, how binding or vague were the provisions concerning the different issues? Fourth, were audit mechanisms included that were intended to ensure compliance by the suppliers with the CSR provisions (for example, self-audits, third party audits, or certifications)? Also, was there a whistleblower system for reporting violations of the code? Fifth, were there provisions regarding sub-suppliers? Sixth, did consequences follow from a violation and, if so, what were they?³⁶

The empirical data showed a rather mixed result in terms of the way these top 30 listed German companies were dealing with CSR in their supply chain policies.³⁷ The majority of these companies tended to have a rather unsatisfactory approach towards CSR in their supply chain and very few companies displayed 'best practice' approaches. Some companies made only very limited material about CSR in their supply chain available. Rather surprising for companies of this size and annual turnover, six of the DAX30 companies did not even publish their supplier code of conduct.³⁸

Most companies gained an average score of 15–20 out of 30 available points, meaning that, at best, their supplier code of conduct could only be considered to be average.³⁹ In many instances, their supplier code was found to be deficient for one or more of the following key reasons: the provisions were vague and indefinite; little information (if any) was provided about monitoring mechanisms (such as self-audits or third-party audits); little information was provided about sanctions; and in many cases almost no information was provided about dealings with sub-suppliers. In most cases, no reference was

³⁵ The UN Global Compact contains ten principles on human rights, labour standards, environmental protection and fighting corruption. It was launched in September 2000 by the then UN Secretary-General Kofi Annan. Members of the UN Global Compact are corporations, employers' organisations, trade unions, state institutions and civil society organisations. More information can be found at <<https://www.unglobalcompact.org/>>.

³⁶ See for the whole assessment: *Das Compliance-Rating der DAX-Unternehmen 2017* (Dr Hans Fuchs GmbH, 2017).

³⁷ See, for a brief overview of the results, Georgina Prodhon, 'Siemens Best in German DAX for Compliance, Vonovia Worst — Study' (Reuters, 30 August 2017) <<https://www.reuters.com/article/germany-companies-compliance/siemens-best-in-german-dax-for-compliance-vonovia-worst-study-idUSL8N1LG52K>>.

³⁸ These companies were, inter alia, Fresenius SE, ProSieben and Lufthansa.

³⁹ A maximum of five points could be achieved for each of the six categories regarding the supply chain.

made to a whistleblower protection system for the supply chain. That means that it is doubtful whether employees of suppliers are able to anonymously raise concerns about, for example, labour standards at supplier factories.

The limitation of the above analysis is the fact that only publicly available documents were accessed and examined. It is therefore possible that the companies do have better policies and mechanisms in place on these issues. However, one would usually expect companies that are part of the top 30 listed companies to publicise their CSR activities as this would enhance their reputation and thus give them a competitive advantage.

Further key deficiencies of the supplier codes of conduct were their often rather aspirational wording and a failure to deal with the way in which the CSR principles were addressed further down the chain by sub-suppliers. Legally, the privity of contract doctrine means that contract law only binds direct suppliers of Western transnational corporations.⁴⁰ Nevertheless the buyer at the top of the chain — through setting the tone regarding the handling of CSR — affects the governance of CSR in the sub-supply chain. Arguably, given their bargaining power in many supply chains, Western transnational corporations at the top of the chain are able to achieve meaningful behavioural change throughout their entire supply chain despite the limitations imposed by the privity of contract doctrine.

In summary, the picture that emerges from these empirical data is that, from an outside perspective, the supply chain policies of many DAX30 companies appear to be deficient, especially in regard to the issues of monitoring, enforcement, and the CSR of sub-suppliers. The approach of many companies seems to be patchy, incoherent and soft-touch. This result is rather surprising, not only because global supply chains have been in the public spotlight for several years now, but also because there is increasing pressure on governments to address these issues through legislation. The findings hint at a situation where many leading companies appear to be treating CSR in their supply chain with a ‘business as usual’ approach. This means commitment on paper, but a lack of enforcement in practice. The empirical data of this study therefore further support the widespread criticism that the private governance mechanisms of transnational corporations, aimed at improving CSR in their supply chain, often fail to achieve their aims. They therefore support the argument that it is time for legislative intervention to impose CSR in supply chains.

⁴⁰ See Ewan McKendrick, *Contract Law* (Palgrave Macmillan, 8th ed, 2009) 110; Neil Andrews, *Contract Law* (CUP, 2nd ed, 2015) 175.

IV THE DEVELOPING LEGAL FRAMEWORK: A SOFT APPROACH TO PROMOTING CSR IN SUPPLY CHAIN GOVERNANCE

The recent trend in home states of transnational corporations towards legally regulating CSR in global supply chains is motivated by a number of factors such as the absence of a binding international human rights framework governing transnational corporations.⁴¹ The home states of transnational corporations could potentially have a significant effect on supply chain practices worldwide, with the largest businesses being concentrated in a few countries. In the year 2014, 419 of the Fortune Global 500 Companies had their headquarters in just 10 countries including the United States (128), China (95), Japan (57), France (31), Germany (28) and the United Kingdom (28).⁴² It can therefore be argued that the recent legislation on CSR issues in global supply chains in countries such as France or the United Kingdom has the potential to promote more responsible supply chains throughout the world.⁴³ At the time of writing, further laws are in the legislative process in Switzerland and the Netherlands.⁴⁴

⁴¹ Peter Muchlinski, 'Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation' (2012) 22(1) *Business Ethics Quarterly* 145, 148.

⁴² Bloomberg BNA (15 December 2014) Daily Tax Report, 'The Changing Headquarters Landscape for Fortune Global 500 Companies' <[http://www.ey.com/Publication/vwLUAssets/EY-the-changing-headquarters-landscape-for-fortune-global-500-companies/\\$FILE/EY-the-changing-headquarters-landscape-for-fortune-global-500-companies.pdf](http://www.ey.com/Publication/vwLUAssets/EY-the-changing-headquarters-landscape-for-fortune-global-500-companies/$FILE/EY-the-changing-headquarters-landscape-for-fortune-global-500-companies.pdf)>.

⁴³ See, for a discussion of the increasingly legal nature of Corporate Social Responsibility, Reginee Pillay, *The Changing Nature of Corporate Social Responsibility: CSR and Development in Context — The Case of Mauritius* (Routledge, 2015); Adaye Okoye, *Legal Approaches and Corporate Social Responsibility: Towards a Llewellyn's Law-Jobs Approach* (Routledge, 2017); Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (CUP, 2007).

⁴⁴ In 2015, a coalition of Swiss civil society organisations launched a public initiative to hold Swiss companies to account for human rights abuses committed abroad. They proposed a law which requires Swiss-based companies to carry out human rights due diligence for all of their business relationships. Under the proposed law, companies would be liable for damage caused by companies under their control unless they could prove that they had carried out appropriate due diligence to avoid the harm. See N Bueno, 'The Swiss Popular Initiative on Responsible Business' in Enneking et al (eds), *Accountability and International Business Operations* (Routledge, forthcoming 2019) <http://www.bhrinlaw.org/bueno_2018.pdf>. The lower house of the Dutch Parliament adopted a law in 2017 (referred to as the 'Child Labour Due Diligence Law') which requires companies to determine whether child labour exists in their supply chains and set out a plan for combatting it. This law is still awaiting approval by the Senate; see MVO Platform, 'Frequently Asked Questions about the new Dutch Child Labour Due Diligence Law', <<https://www.mvoplatform.nl/en/frequently-asked-questions-about-the-new-dutch-child-labour-due-diligence-law/>>. See also the expert report for German law: Remo Klinger et al,

The existing laws on CSR in supply chain governance differ in terms of their level of stringency and regulatory technique. It can be argued that they can be seen as part of a continuum.⁴⁵ Within that continuum, the soft end of the spectrum is represented by ‘soft disclosure’ laws such as the ‘transparency in supply chains’ clause in the United Kingdom.⁴⁶ The middle ground of the continuum is covered by more prescriptive reporting regimes such as the US ‘conflict minerals’ legislation,⁴⁷ and the more stringent end is represented by liability-based laws such as the UK *Bribery Act*⁴⁸ and duty-based approaches such as the French *devoir de vigilance Act*.⁴⁹ It is beyond the scope, and is not the aim, of this article to assess all these different legislative interventions. Rather, a brief general critique will be made here as the basis for the main argument of the article, namely, that it is now time to pursue a hybrid regulatory approach towards promoting CSR in supply chains and to focus the debate on the question ‘what works?’

First of all, the problem with most of the existing laws on CSR in global supply chains is that they mandate primarily ‘light-touch’ reporting duties that leave much discretion to the companies as to the content of the reporting and the actual pursuit of CSR.⁵⁰ One example of such an approach is section 54 of the UK *Modern Slavery Act 2015* which contains a ‘transparency in supply chains’ clause. Subsection 4 of that section reads:

A slavery and human trafficking statement for a financial year is —

Gutachten: Verankerung menschenrechtlicher Sorgfaltspflichten von Unternehmen im deutschen Recht (2016) <<https://www.germanwatch.org/de/download/14745.pdf>>.

⁴⁵ Rühmkorf, above n 16.

⁴⁶ *Modern Slavery Act 2015* (UK) s 54(1).

⁴⁷ *Dodd-Frank Act of 2010*, Pub L No 111-203, § 1502, 124 Stat 1376–2223. This section requires companies that use conflict minerals to file a report with the U.S. Securities and Exchange Commission (SEC). This duty applies to listed US companies as well as foreign companies that are listed at the US stock exchange.

⁴⁸ *Bribery Act 2010* (UK) s 7(1).

⁴⁹ *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 du 28 mars 2017.

⁵⁰ See for a discussion of the transparency in supply chains clause in the UK *Modern Slavery Act 2015*: Adaeze Okoye, ‘Corporate Enterprise Principles and UK Regulation of Modern Slavery in Supply Chains’ (2017) 28 *International Company and Commercial Law Review* 196; T Iqbal, ‘The Efficacy of the Disclosure Requirement under s. 54 of the Modern Slavery Act’ (2018) 39 *The Company Lawyer* 3. See, for a discussion of the European ‘CSR Directive’, P Iglesias-Rodríguez, ‘The Disclosure of Corporate Social Responsibility in the EU after Directive 2014/95’ (2016) 37 *The Company Lawyer* 319.

(a) a statement of the steps the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place—

(i) in any of its supply chains, and

(ii) in any part of its own business, or

(b) a statement that the organisation has taken no such steps.

On closer inspection, it becomes apparent that this clause requires very little of companies.⁵¹ Subsection 5 of that section contains a list of factors that a company may report about, including its due diligence mechanisms, but there is no requirement that such information be included in the slavery and human trafficking statement. In fact, the criticism can be raised that, prior to the enactment of this transparency legislation, most large companies already operated some CSR policy on forced and child labour and reported about this within their voluntary CSR/sustainability report. The fact that the reporting duty in the *Modern Slavery Act* does not require much specific substance in the slavery and human trafficking statement arguably leads to a situation where large companies can continue with their existing private governance approach to modern slavery in their supply chain.

It is therefore doubtful whether the new statutory reporting duty will steer transnational corporations towards operating stronger CSR policies on modern slavery in their supply chain. This is particularly the case as this transparency clause even allows companies to report that they have not done anything. Moreover, the absence of key performance indicators and verification requirements, such as third party audits, turns this reporting duty effectively into a toothless instrument that is likely to achieve only little in terms of comparability and accountability.⁵²

Similarly, the recent EU Directive on nonfinancial information disclosure — often referred to as the ‘CSR Directive’ — is rather thin and soft on the issue of CSR in supply chains.⁵³ Recital 6 of the Directive states that companies should refer to their supply and subcontracting chains ‘where relevant and

⁵¹ See, for example, Genevieve LeBaron and Andreas Rühmkorf, ‘The Domestic Politics of Corporate Accountability Legislation: Struggles over the 2015 UK Modern Slavery Act’ (forthcoming) *Socio-Economic Review*, online first: <<https://academic.oup.com/ser/advance-article/doi/10.1093/ser/mwx047/4683730>>.

⁵² See LeBaron and Rühmkorf, above n 24.

⁵³ See for an analysis A Scheuch, ‘Soft Law Requirements with Hard Law Effects? The Influence of CSR on Corporate Law from a German Perspective’ in du Plessis, Varottil and Veldman (eds), above n 16, 203.

proportionate’,⁵⁴ which shows a discretionary approach towards supply chain reporting. Although information on the company’s ‘due diligence processes’ is required, no more specific requirement is placed on companies as to what their reporting ought to contain and no verification of the reported information is required. In the UK, this soft approach to due diligence reporting becomes even more apparent when one considers that the government’s response to the consultation on the implementation of the Directive does not even once refer to due diligence.⁵⁵

Whilst the corporate criminal liability for failing to prevent bribery by an ‘associated person’⁵⁶ that is provided for in the UK *Bribery Act 2010* is a much more stringent form of supply chain governance, this law has, so far, not been used as a model for controlling other pressing CSR issues in supply chains, such as modern slavery.⁵⁷ It is argued here that this is a missed opportunity as the *Bribery Act* indirectly imposes due diligence requirements on companies. Conducting due diligence is a way of showing that a company operates ‘adequate procedures’ — a defence to the criminal offence of not preventing an associated person from engaging in bribery.⁵⁸

More recently, the French *devoir de vigilance* legislation of 2017⁵⁹ has been embraced very positively by civil society as a legislative instrument that

⁵⁴ 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 [2014] OJ L 330, 15.11.2014, 1, Recital 6.

⁵⁵ See Department for Business, Energy and Industrial Strategy, *The Non-Financial Reporting Directive: The Government Response to the Consultation on Implementation of the Directive* (November 2016).

⁵⁶ The *Bribery Act 2010* (UK), s 8(1) defines an ‘associated person’ as a person who performs services for or on behalf of the company.

⁵⁷ The Joint Committee on the Draft Modern Slavery Bill considered three legislative options for legislation on modern slavery in supply chains: First, a model based on the corporate criminal liability in the UK *Bribery Act*, second an amendment of the reporting regime in the UK *Companies Act*’s strategic report and third a transparency clause in the *Modern Slavery Act*, based on the *Transparency in Supply Chains Act* in California. The legislative option of choice was, as mentioned in the article, the transparency clause. House of Commons and House of Lords, Joint Committee on the Draft Modern Slavery Bill, *Draft Modern Slavery Bill*, Report Session 2013–14 (HL Paper 166, HC 1019, 2014) 90–93.

⁵⁸ UK Ministry of Justice, *The Bribery Act 2010: Guidance about Procedures which Relevant Commercial Organisations Can Put in Place to Prevent Persons Associated with Them from Bribing* (2011) <<https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>>.

⁵⁹ *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 of 28 March 2017.

addresses CSR in supply chains.⁶⁰ This French law is a ‘command and control’-type legislation.⁶¹ The law requires France-based companies that have more than 5000 employees in France (including employees of French subsidiaries) or 10 000 employees worldwide (employed in both French and foreign subsidiaries) to establish a ‘plan of vigilance’. In this plan companies must identify risks of human rights, health and security or environmental violations that might arise from their business activities, as well as the activities of subsidiaries and companies that they control. The plan must also include the activities of suppliers and subcontractors with whom the company has an established commercial relationship. In addition to identifying the risks, the companies that are subject to this duty must also develop procedures for the evaluation of their business partners and their subsidiaries as well as undertake actions to mitigate risks and severe violations. The companies must also have mechanisms in place to ensure that they are alerted to violations of workers’ rights. The plan must be implemented ‘in an effective manner’ and be published in the management report of the company’s directors as well as be available to the shareholders at the annual general meeting.

Whilst this duty of vigilance was held to be constitutional by the French Constitutional Court, the sanctions for a violation of it that were originally included in the law were not upheld by the Court.⁶² The sanctions included a penalty of up to 10 million Euros for companies that violated this duty. Liability was based on ‘fault’ by the company and a causal link between this fault and the loss, in accordance with general tort principles. A company that was held to be liable to victims could have been subject to a civil fine of up to 30 million Euros. Whereas the duties introduced by the law remain the same, the removal of the sanctions represents a significant reduction of the stringency of the law. While there is still a statutory expectation placed on companies as to how they should deal with CSR in their supply chains, there is now little that follows legally in the case of non-compliance. Still, even after the judgment of the

⁶⁰ See, for a discussion, Sandra Cossart, Jérôme Chaplier and Tiphaine Beau de Lomenie, ‘The French Law on Duty of Care: A Historic Step towards Making Globalization Work for All’ (2017) 2 *Business and Human Rights Journal* 317.

⁶¹ Robert Baldwin and Martin Cave, *Understanding Regulation: Theory, Strategy and Practice* (OUP, 1999) 35.

⁶² See European Coalition for Corporate Justice, ‘Last Hurdle Overcome for Landmark Legislation: French Corporate Duty of Vigilance Law Gets Green Light from Constitutional Council’ (24 March 2017) <<http://corporatejustice.org/news/435-last-hurdle-overcome-for-landmark-legislation-french-corporate-duty-of-vigilance-law-gets-green-light-from-constitutional-council>>.

Constitutional Court, companies can be ordered by a court to publish, and to implement in an effective manner, their due diligence plan.⁶³

The requirements of the French law most closely resemble the concept of supply chain due diligence, as laid out in the UN Guiding Principles,⁶⁴ as they mirror the different steps outlined in the Principles.⁶⁵ It has been argued that the French *devoir de vigilance* law and the UN Guiding Principles ‘resonate strongly together’ and that it can be expected that the Guiding Principles will be used as a means to interpret the law’s requirements.⁶⁶ A final notable point about the French law is that it is specifically about supply chain due diligence and that it covers a broad range of issues that companies need to address. This is different from the focus on one issue only, as exemplified in the *Modern Slavery Act 2015* (UK) and the *Bribery Act 2010* (UK).

On the whole, the present legislative approach towards CSR in supply chains is primarily focussed on reporting duties. However, these are predominantly laws that leave much discretion to the companies as to how they pursue CSR and to what extent they report about their CSR policies. It is therefore questionable to what extent these laws are able to steer transnational corporations towards operating more stringent CSR policies in their private governance relations with their suppliers.

V PRIVATE-PUBLIC GOVERNANCE INTERACTION IN GLOBAL SUPPLY CHAIN GOVERNANCE

This developing regulatory framework appears to improve the status of CSR in supply chain governance by adding public governance mechanisms to protect it. However, the critical analysis of present legislative approaches towards regulating CSR in this article has shown that most of these laws are not very stringent and it is therefore unlikely that they will significantly impact on the way in which transnational corporations promote CSR in their supply chain relations. It remains to be seen what the real effects of the different pieces of legislation are. There is a genuine danger that soft reporting duties such as those

⁶³ See Cossart, Chaplier and Beau de Lomenie, above n 60, 322.

⁶⁴ *UN Guiding Principles on Business and Human Rights*, UN Doc A/HRC/17/31 (21 March 2011) annex (UNGPs).

⁶⁵ Anna Triponel and John Sherman, ‘Legislating Human Rights Due Diligence: Opportunities and Potential Pitfalls to the French Duty of Vigilance Law’ (17 May 2017) <<https://www.ibanet.org/Article/Detail.aspx?ArticleUid=e9dd87de-cfe2-4a5d-9ccc-8240edb67de3>>. The understanding of human rights due diligence can be found in Principles 17–21 of the *Guiding Principles*.

⁶⁶ *Ibid.*

contained in the UK *Modern Slavery Act* enable companies to comply with the law with little additional effort. Similarly, it was shown in the discussion above that the recent EU Directive on nonfinancial information disclosure, which has just been implemented in Member States such as the UK and Germany, contains few requirements for reporting on supply chains.

It is not suggested that reporting laws per se are unable to achieve greater corporate responsibility. There is much literature on the benefits of this communication-based regulatory technique, claiming, for example, that it 'regulate[s] behaviour by enriching the information available to the target audience'.⁶⁷ The audience of the company reports can thus make informed choices such as whether or not to purchase goods of a particular company. In turn, such behaviour can further the objects underlying the CSR regulation, steering corporations towards assuming greater corporate responsibility in supply chains. It is beyond the scope of this article to engage with the advantages and disadvantages of transparency as a regulatory technique, but it is argued here that reporting laws are more likely to achieve their aim of steering corporate behaviour if the relevant reporting requirements are stringent. When companies have to provide facts and figures on key aspects of their supply chain, the reporting is likely to achieve more comparability and accountability.

The argument that stringent public governance is likely to better steer corporations in their private governance is the subject of an article that the present author has recently co-authored. It contains a small-scale empirical assessment of supply chain documents of 25 FTSE100 companies.⁶⁸ The documents that were assessed in that study included supplier codes of conduct, CSR/sustainability reports and, where available, the terms and conditions under which these companies purchased goods and services. The study analysed the way in which these 25 companies deal with the issues of forced labour and bribery in their supply chains. All companies are subject to the 'transparency in supply chains' clause in the UK *Modern Slavery Act 2015*⁶⁹ and the corporate criminal offence in the UK *Bribery Act 2010*.⁷⁰ In brief, the main finding was that the way the companies deal with the two issues of bribery and forced labour appears to be hierarchical. Whereas bribery has clearly become a compliance issue (that is, companies appear to treat its prevention as a legal obligation that they need to comply with), this does not appear to be the case for forced labour.

⁶⁷ Bronwen Morgan and Karen Yeung (eds), *An Introduction to Law and Regulation: Text and Materials* (CUP, 2007) 96.

⁶⁸ LeBaron and Rühmkorf, above n 24.

⁶⁹ *Modern Slavery Act 2015* (UK), s 54(1).

⁷⁰ *Bribery Act 2010* (UK) s 7(1).

It seems, from the documents that we assessed, that forced labour is being dealt with in a much less stringent manner by the companies than is bribery. We have therefore concluded that hard, stringent laws such as the UK *Bribery Act* spur deeper changes in the behaviour of transnational corporations than light-touch, transparency laws such as the UK *Modern Slavery Act*.

VI THE WAY AHEAD: THE SEARCH FOR ‘WHAT WORKS’ IN A HYBRID SYSTEM OF CSR PROMOTION

Following on from the critical assessment of the legislative status of ‘chain law’, this Part now looks at the way ahead for the legal regulation of CSR by home states. It will make three tentative suggestions for further development.

First, it seems as if the present soft-touch reporting laws on CSR are not going to significantly impact on the private governance promotion of CSR by transnational corporations. In particular, it is doubtful that these laws will lead to companies operating stringent due diligence procedures on CSR vis-à-vis their suppliers. The simple legislative reference to due diligence processes, without a requirement that companies have the outcomes of their due diligence processes audited, is problematic. It means that companies can claim to operate such processes without having to prove this. Due diligence could thus effectively become a public relations concept in the sense that companies can publicly state that they would carry out due diligence for their supply chain in accordance with legislative requirements and thus create a positive business image without having to do much in order to comply with these laws.

Second, it was argued above, in the discussion of existing theoretical framings of supply chain governance, that law now needs to be placed at the heart of the debates about CSR in supply chain governance. But, more than that, the focus needs to be on the interaction between public and private governance, and on the question ‘what works?’ The question needs to be how legal regulation can best steer the behaviour of transnational corporations so that they better use their bargaining power to require CSR of their suppliers? In order to answer this kind of question, empirical (legal) research is needed to assess how companies react to different forms of ‘chain law’. Such research can then help to identify examples of ‘best practice’ which can be used to inform legislators in other jurisdictions. Given the challenges for CSR in global supply chains, such legislative developments in the home states of transnational corporations are a good opportunity to better steer both buyer and supplier companies towards pursuing CSR. It is therefore important that the effects of existing legislative approaches are clear so that decisions made by companies are informed decisions.

Third, this article argues that the ‘multifaceted approach’⁷¹ that Locke suggests as part of the right mix between public and private governance must be based on a hybrid regulatory system.⁷² The reference to a hybrid regulatory system means a system in which private law, public law, soft law standards (developed by private actors as well as international organisations) and private regulation by and between companies, all interact with each other. Heldeweg notes that the characteristic feature of such a system is ‘a mix of origins’.⁷³ Given the complexity of supply chain governance and the number of actors involved in those chains, it is unlikely that a single approach will be able to achieve the ultimate goal of making supply chains more economically, socially and environmentally responsible. However, such a hybrid system needs stringent legal regulation in order to promote the pursuit of CSR in the supplier relations of transnational corporations.

VII CONCLUSION

This article argues that it is high time for law to be put at the heart of discussions about CSR in global supply chains. The private governance approach has, so far, failed to lead to sustained improvements in CSR in these chains. The analysis of the supplier codes of conduct of the top 30 listed German companies (DAX30) shows that the majority of transnational corporations listed on the DAX seem to continue to apply a ‘business as usual’ attitude towards their supply chain. The ‘governance gap’ relating to supply chains means that transnational corporations often face little legal liability when CSR principles are violated in their supply chain.

Given the recurrent reports of gross violations of CSR principles in global supply chains, the recent trend towards legislative intervention by the home states of transnational corporations is, in principle, to be welcomed. Home state legislation (public governance) has the capacity to induce the use of private governance by companies at the top of supply chains. However, most of the existing legislation, such as the transparency in supply chains clause in the UK *Modern Slavery Act 2015*, lacks stringency. It does not require much more from companies than what many leading listed companies are already doing on

⁷¹ Locke, above n 27, 177.

⁷² See for a discussion of the term ‘hybrid’ in relation to regulation: Mirjan Vrieling, Cor van Montfort and Meike Bokhorst, ‘Codes as Hybrid Regulation’ in David Levi-Faur (ed), *Handbook on the Politics of Regulation* (Edward Elgar, 2011) 486.

⁷³ Michiel A Heldeweg, ‘Hybrid Regulation as a Legal Design Challenge’ in Nicolas Lemay-Hébert and Rosa Freedman (eds), *Hybridity: Law, Culture and Development* (Routledge, 2017) 105.

reputational grounds. The danger of this situation is that companies can operate a 'business as usual' approach whilst meeting legal regulations.

Such a situation is, in some ways, even worse than the present situation. Transnational corporations can try to prevent negative publicity by reference to their compliance with the relevant laws. It is therefore necessary that laws are passed that have the capacity to meaningfully change the behaviour of buyers in supply chains vis-à-vis their suppliers. Such laws should build on the strong bargaining power that many transnational corporations have. It is argued that stringent laws are more likely to induce companies to use this bargaining power for greater promotion of CSR. Research therefore now needs to focus on the issue of what kind of public governance instruments are best-placed to promote the use of private governance within a hybrid regulatory approach. Small-scale empirical research hints at the positive effects that more binding laws such as the UK *Bribery Act* have had on the way companies are dealing with this issue in their supply chain policies. The focus of the debate on supply chain responsibility should therefore now focus on the question 'what works?'