GLOBAL SUPPLY CHAINS AND THE CONSTRUCTION OF A LABOUR LAW WITHOUT BORDERS

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I. The centenary paradox

The "old lady" of the United Nations system, as the International Labour Organization (ILO) was known already in 1949, turns one hundred years in 2019. During this first century of existence, the ILO has demonstrated a very remarkable capacity in the promotion of its objectives, adapting itself to the very diverse historical, political and economic circumstances that have been occurring throughout the twentieth century. Its more than remarkable regulatory heritage, composed of no less than 190 international conventions, and the recognized objectivity, solidity and quality of its control system are proof of this, together with the unanimous recognition that this is the organization that has the competence, authority and legitimacy when it comes to the international treatment of rights associated with work.

But the ILO does not arrive at this centenary without injuries. Among them, the particular acute crisis in which its international standards production system is involved. Paradoxically, this crisis is taking place at a time in which not only social awareness regarding the need for international regulation to limit the increasingly intense competition between social systems driven by globalization has become universal, but we are witnessing a growing process of construction of instruments of a very diverse nature aimed at promoting the effective application of a basic core of fair labour conditions throughout the planet. In fact, neither has there ever been a greater concern for the universal validity of labour rights, nor a more wide construction process of tools aimed at ensuring it.

What happens is that the ILO and its standards production system are not, for the first time, at the centre of this dynamic, which is not expressed through international conventions and recommendations addressed to the States, but through a variety of instruments issued by a wide range of organizations and institutions, both public and private, all of which seek to project this guarantee to the universe of multinational enterprises' activities and their networks of subsidiaries, suppliers and contractors deployed around the planet. The driving force behind the respect for labour rights in the world seems to have shifted from the almost total monopoly of the ILO to a plurality of subjects, very different from each other. While their performance space seems to swing from the territory of the States to global value chains.

This situation distances us from many of the certainties of the past. We find ourselves in a moment of transit from "authoritarian, hierarchical, vertical" forms of power, such as those that inspired the construction of Labour Law in the 20th century, towards "negotiated, reticular, horizontal, consensual" formulas, possibly "more civilized", but also "more complex". [1] And, above all, of more uncertain effects and results. The great question that this transformation postulates is whether these new formulas of global governance, which seek to project the application of the rights proclaimed by the ILO on a space different from that of the State created by the dynamics of the global market, are in a position to contribute to the construc-

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[1] Ignacio Ramonet, *Géopolitique du chaos*, Gallimard, Paris, 1999, pp. 7-8.

tion of a Labour Law capable of transcending national borders that inspired the founders of the ILO in 1919 and that is today at the centre of our democratic societies' demands.

II. The deployment of global supply chains and the crisis of traditional Labour Law construction systems

What lies at the base of the demand for new instruments to guarantee labour rights on a planetary scale is the outline of a new international economic and productive reality at the end of the last century. This new reality is marked by the emergence of the multinational enterprise as a privileged actor in the globalization process and its adoption of a new structure, based on the replacement of its traditional vertical organization by modular formulas of articulation based on the creation of relationships of a preferably contractual nature with a variety of subjects located in various remote locations chosen according to the advantages they offer and not for the destination of the goods they produce. This is how *global value chains* appear as a predominant form of trade, investment and production organization of global capitalism, whose contradictory effects on employment and working conditions will cease to be felt in later years in the destination countries of their various links.

A. The new morphology of the multinational enterprise and its contradictory effects on employment and working conditions

Multinational enterprises are "formidable machines", not only "of producing externalities", [2] but also of avoiding the risks and responsibilities associated to them, obtaining the most advantageous combination of production factors possible in each case. This characteristic is the result of the double segmentation which defines their structure and the way their activities are organised. The first of these segmentations is linked to the personification differences that exist between the parent company and the companies that participate in its global production processes. If the evolution of contractual techniques allows the former to access the results produced by various groups of workers through a variety of subsidiary companies, contractors and suppliers, the "veil" of legal personality ensures that it does so without assuming any responsibility neither regarding those workers' labour conditions nor for those companies' behaviour or its consequences. The second segmentation relates to the State character of legal systems, which allows multinationals to locate its activities in territories subject to the empire of one or another, depending on the comparative advantages that each one can offer them. Among them, their level of labour standards and the extent to which they are applied. [3] As a result, these companies are in a position to lead global production processes, maximizing to their advantage the opportunities opened up by globalization without assuming any responsibility for the conditions in which they carry out its activities or the effects that these may produce.

The instrument used by multinationals to achieve this dual result is the global supply or value chain. In principle, this should be understood as "any cross-border organisation of activities necessary to produce goods and services and to deliver them to consumers", [4] whose creation and leadership is provided by a company which, in view of this circumstance is called a multinational enterprise. Global value chains are, however, more than a simple sequence of activities. In fact, among them it is possible to distinguish four different dimensions, whose interrelationship allows us to account about the complex organization and intricate function-

[2] Antoine Lyon-Caen, *Verso un obbligo legale di vigilanza in capo alle imprese multinazionale*, Rivista Giuridica del Lavoro e de della Previdenza Sociale, 2, 2018, p. 241.
[3] Antonio Baylos, *La responsabilidad de las empresas transnacionales en los procesos de externalización. Las cláusulas sociales internacionales*, in José Monereo (ed.), *La externalización productiva a través de la subcontratación empresarial*, Comares, Granada., 2018, p. 114.
[4] ILO, *Decent work in global supply chains* , Geneva, 2016, p. 1.

ing of global productive systems. These dimensions are related to: (a) the *subjects* involved in the production and/or distribution of a good or service; (b) the legal, economic and commercial *links* between them; (c) the geographical *location* of each and the legal *framework* to which they are subject; and (d) the *governance* structure established between their components. [5] These chains can thus bring together an indeterminate range of subjects located in the most varied countries, all of which are coordinated and directed, according to diverse formulas and varying intensities, by the company leading the activity in question. This means that the morphology of these chains can vary considerably not only from one sector to another but from one company to another and even from one stage to another within the evolution of the same. They are, as has been said, "complex, varied, fragmented, dynamic and evolving organizational structures", [6] which form "a heterogeneous business industrial complex" "with varying degrees of instability". This "does not dilute its significance or make its identification impossible", nor does it prevent distinguishing diverse typologies within it. [7]

With these features, global value chains play a crucial role both in the organization of production and trade on a global scale as well as in the international division of labour, and are decisive of the structure of labour markets in many countries. Quantifying their impact is a very difficult task, since they represent an operational reality from a material but not formalised point of view, that is capable of travelling the whole world and comprising successive links composed not only by the companies that collaborate directly with the parent company, but also by the contractors and suppliers of these, as well as all the subjects below them, and its even able to cover hidden situations. Even so, it has been pointed out that around 80% of world trade is related to them and that they concentrate more than 50% of the world's manufacturing production. [8] Available estimates of the volume of employment associated with them indicate that they absorb about 25% of jobs in emerging countries and 20% in developed countries, reaching more than 450 million jobs as early as in 2013. [9] However, this might be a conservative estimate, as others, from union sources, consider that they employ half of the world's salaried workers. [10]

But the notion of a global supply chain not only presents a descriptive value. It is also an instrument of critical analysis, through which it is possible to "penetrate the veil of fetishism" that surrounds these structures, due to the differences in the personification of their components, in order to discover "what is behind" and "what social and geographical relations" characterize them. [11] The tool for doing so is based on the examination of the relationships that are woven within them and the economic and social consequences that derived from them, particularly for less industrialized countries and the world of work. The consideration of the "value chains' governance" [12] allows to question the vision postulated by conventional economic theory, according to which these chains favour a growing productive and commercial integration that generates benefits for all those involved in them, showing how their formation is the result of careful economic and commercial strategies implemented by some

[5] Vando Broghi, Lidia Dorigatti & Lisa GRECO, *Il lavoro e le catene globali del valore*, Ediesse, Roma, 2017, p. 24.
[6] ILO, *Loc. Cit.*
[7] Isidor Boix & Víctor Garrido, *Proyecto ACT. Impulso global, sindical y empresarial, de negociación colectiva local*, in Wilfredo Sanguineti & Juan Vivero (eds.), *La construcción del Derecho del Trabajo de las redes empresariales*, Comares, Granada, 2019, pp. 397-398.
[8] ILO, *Op. Cit.*, p. 16; Richard Locke, *The Promise and Limits of Private Power*, Cambridge University Press, New York, 2013, p. 10.
[9] ILO, *Inception Report for the Global Commission on the Future of Work*, Geneva, 2017, pp. 8-10, 37-38.
[10] Isidor Boix, *Por un sindicalismo europeo que asuma su dimensión global*, Gaceta Sindical, 18, 2012, p. 308.
[11] Lisa Greco, *Capitalismo e sviluppo nelle catene globali del valore*, Carocci, Roma, 2018, p. 16.
[12] Gary Gereffi & Miguel Korzeniewicz (eds.), *Commodity Chains and Global Capitalism*, Praeger, Westport, 1994.

companies – the heads of multinational groups – whose central position allows them to impose their design, the type and duration of the relations they will have and the formulas for distributing benefits and risks to others. [13] The de-verticalization and globalization of production processes do not, therefore, translate into a lesser concentration of economic power and less hierarchical organizational relationships, since the networks to which they give rise are forged around the activity and needs of a unique type of companies that have the *de facto* power to prevail over them. This implies that the global supply chains are a "deeply political" phenomenon, that links dynamics of cooperation and competition and encloses deeply asymmetric power relations, whose ambivalent consequences on the economies and workers of less developed countries have been characterized as generating an "impoverishing growth". [14]

To grasp the meaning of this expression, it is necessary to take into account the logic that characterizes the geographical distribution of the activities of global supply chains. It is based on the retention of higher value-added tasks, which correspond to the initial or final stages of the processes, in developed countries, and the displacement of lower value-added ones, generally labour-intensive, to less developed countries with less demanding labour standards. The inverted parabola that characterizes the different value attribution of the activities that shape these chains, which has deserved the sarcastic name of "*smile curve"* due to the location of its peaks in the extremes of the process and the existence of a valley in the center, determines that lower value-added activities with greater need of labor force and with a greater possibility of adjustment as far as their labor costs are concerned, are located preferably in less developed countries. [15]

This circumstance is at the root of the contradictory effects that participation in global value chains has on the economies and labour systems of these countries. Thus, it seems undeniable that this participation opens up new opportunities for economic growth and an increase in employment, allowing many people to replace subsistence farming with paid occupations. [16] However, due to an obvious "market compulsion", [17] associated with the high competitiveness and great dynamism of the global economy, multinationals put intense pressure on their partners located in these countries to contract their activities at increasingly lower costs and under progressively more demanding conditions and deadlines. The result of these pressures is a quintuple adverse effect on working conditions, translated into: a) low wages associated with demanding quality standards; b) precarious forms of employment, easily adjustable downward or upward; c) long working hours with a tendency to expand when necessary; d) unsafe or dangerous workplaces; and e) hostility towards the trade union phenomenon and denial of the right to collective bargaining. [18] These adverse effects tend to be reinforced as one descends along the successive links of these chains, which are usually occupied at their lowest part by very small companies or by informal workshops and home-based workers, and in extreme cases they may even lead to forced labour and child labour exploitation. This is reflected in the *Resolution concerning Decent Work in Global Supply Chains,* adopted by the International Labour Conference in June 2016.

B. The triple governance deficit induced by the transnationalization of business activities

In an economic and productive reality such as the one that prevailed throughout most of the twentieth century, in which national economies, relatively closed to foreign competition, predominated, National States were in a position to regulate, with reasonable effectiveness

[13] Lisa Greco, *Loc. Cit.*.
[14] Vando Broghi, Lidia Dorigatti & Lisa Greco, *Op. Cit.*, p. 18.
[15] ILO, *Decent work in global supply chains*, p. 30.
[16] ILO, *Idem.*, pp. 1-2.
[17] BAYLOS GRAU, *Op. Cit.*, p. 120.
[18] ILO, *Op. Cit.*, pp. 2, 6-7, 20-26.

and without excessive pressure from outside, work conditions that had to be respected in their territories. The ILO's normative and institutional action represented an additional source of inspiration and technical advice rather than an instrument with the capacity to impose directional changes on States. Labour Law, as well as production processes, is national, and as such it is imposed on the actors located within its space of application.

The consolidation of global value chains has made this combination of national regulation and international persuasion inadequate. The reason is easy to understand: the increasinly accused irrelevance of the territorial dimension within production processes leads to a correlative irrelevance of the States' role for their regulation, since their main instruments have a national dimension. [19] The consequence of this asymmetry is the generation of a notorious *governance deficit* in the functioning of global value chains [20] which is expressed in three different domains.

The first of them affects the regulatory capacity of multinational enterprises' *home states*. They do not have the tools to organize the activities carried out by these companies on an international scale, as they take place in territories not subject to their jurisdiction. The principle of territoriality imposes a clear limit on this possibility, although as we shall see, it does not prevent it entirely.

It is the governance deficit affecting the ability of *destination States* to regulate the labour functioning of the activities in the value chains' links located in their territories that is of greater importance. This capacity of host States is depowered in the current international economic context by the concurrence of up to three factors. [21] The first is *political* and is linked to the local business sectors' greater influence on governmental decisions, interested in the existence of labour legislation and a control of its application as lax as possible. Furthermore, it is necessary to bear in mind the possibility that the weakness of protection is due to *technical* reasons, associated with the inability of the State to enforce its legislation, especially in the case of activities that go beyond the usual scale of operation of its administrative and judicial bodies. The underlying reason in most cases is *economic*. Today, global competition affects not only goods and services, but also legal systems, [22] which can be selected as destinations by multinationals depending on their greater or lesser protective intensity and imperativeness. It is clear that this possibility of *regulatory shopping* induces States of emerging countries to keep labour protection at very low levels and even encourages operations to reduce it.

The third expression of the governance deficit is linked to the limited capacity of *international institutions*, and particularly the ILO, to impose a set of labour standards on global economic actors that can be applied to the different links in their global supply chains. This weakness reflects the configuration of the international labour standards system, designed for a different economic and productive reality as well as the difficult position in which globalization has placed the subject on which the application of this system rests, namely the States. As is well known, the entire ILO system is based on the commitment of States, which are called upon to express their adherence to international conventions and to enforce them through legislative, administrative and judicial measures. Ultimately, the ILO has no weapons other than its "persuasive power" to enable compliance with its standards agenda, [23] and it is through "combined action of diplomacy and essentially moral incentives" how its supervisory

[19] Fabrizio Bano, *Sovranità regolativa e subordinazione del diritto del lavoro*, Lavoro e Diritto, 1, 2017, p. 17.
[20] Gary Gereffi & Frederick Mayer, *Globalization and the Demand of Governance*, OIT, Geneva, 2011.
[21] Kevin Kolben, *Transnational private labour regulation, consumer-citizenship and the consumer imaginary*, in Adelle Blackett & Anne Trebilcock (eds.), *Research Handbook on Transnational Labour Labour Law*, E. Elgar Publishing, 2015, p. 364.
[22] Fabrizio Bano, *Op. Cit.*, p. 33.
[23] Francis Maupain *L'OIT à l'épreuve de la mondialisation financière. Peut-om réguler sans contraindre?*, OIT, Genève, 2012, p. 2.

bodies seek to enforce international standards when difficulties appear. [24] Although the rise of protectionism and bloc politics made it possible for such a system to have a very extensive normative balance during the middle part of the 20th century, it has been blown up when the States do not dominate the rules of the game. International labour standards thus remain a source of authority and legitimacy, but are in need of new enforcement mechanisms.

C. The need to guarantee a basic core of labour rights in global production processes as an embryo of a Labour Law without borders

The triple governance deficit affecting labour regulation within global value chains makes it necessary to provide regulatory solutions adapted to the transnational scale where productive activities within these chains takes place.

The identification of the horizon of this regulation does not pose great difficulties. The main contribution of the ILO to global governance has been represented, precisely, by the definition of those principles or rights whose respect shall be guaranteed to workers on a universal basis. [25] This definition has been achieved through a series of steps that began with the adoption of the *ILO Declaration on Fundamental Principles and Rights at Work* in 1998, which concretized those four – including freedom of association and collective bargaining – that represent the minimum basis for the development of all others related to work. It continued with the launch of the notion of *decent work* in 1999,which added a series of additional premises that are essential for work to be carried out in conditions of freedom, equity, security and dignity, coinciding with the rights to a sufficient and dignified income, to the limitation of working time and to adequate protection in the field of occupational safety and health, as universally enshrined in articles 23 and 24 of the Universal Declaration of Human Rights and articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights.[26]

Given the central position that global value chains occupy within global capitalism and the very high number of workers that integrate them, the creation of instruments that allow a transversal application of this universal protection floor to all their links would represent a contribution of greatest relevance to the effectiveness of labour rights in the world. Hence the importance of exploring ways in which this possibility could be realized. These include the use of the value chains themselves as a instrument for irradiating this basic core of fundamental principles and rights.

III. The promise of private power and its limits

It is not necessary to add too many considerations to those already made to realize that today "the company represents the most powerful vector of transformation of the world, of the environment" and "of work". [27] This raises the question of whether this formidable transformation capacity can be channelled in favour of a better balance between the satisfaction of these companies' interests and the basic civilization rules applicable to the world of work. This question is of singular significance insofar as, if on one hand the only way to make respect for a basic nucleus of labour rights in the globalised economy possible is designing mechanisms that promote their application along global supply chains, today there is no pow-

[24] Jean-Michel Servais, *Les normes de l'OIT au XXI siècle: légitimité et effectivité*, in Isabelle Daugareilh (ed.), *La responsabilitè sociale de l'entreprise, vecteur d'un droit de la mondialisation?*, Bruylant, Bruxelles, 2017, p. 450.

[25] Francis Maupain, *Op. Cit.*, p. 278.

[26] José Monereo & B. López, *La garantía internacional del derecho a un 'trabajo decente*, Nueva Revista Española de Derecho del Trabajo, 177, 2015.

[27] Francis Maupain, *Recensión a Alain SUPIOT (Dir.), L'entreprise dans un monde sans frontières*, Revista Internacional del Trabajo, 2, 2015, p. 300.

er external to that of the companies themselves that create and manage these chains capable of submitting them to its jurisdiction.

A. Turn global supply chains into chains of control and improvement of working conditions

The answer to the question just raised is implicit in the formulation of the question itself. Given that multinational enterprises are the expression of calculated "power centralization strategies" and "responsibility dispersion" [28] and that there is no other agency with an effective capacity to influence their entire structure, it seems clear that the only way to take steps towards guaranteeing a floor of labor rights in their global supply chains is by trying to instrumentalize this centralized decision-making power in order to turn these chains into *global chains of control* or even into *global chains of improvement* of labor conditions.

This is a possibility that is enabled by the organizational logic that characterizes the functioning of these enterprises. Multinationals are subjects endowed not only with a special capacity to avoid national labor orders by using their reticular composition, but also a particularly suitable structure to create, from that same composition, global normative processes, capable of projecting the application of a common protection base to all the workers who participate in the production processes associated to them, regardless of the territory where they are located or the personification of the subject who occupies the position of employer with respect to them. [29] The keys that explain this aptitude can be found, on one hand, in the essential link that ties the companies' activities, which are part of their supply chains, to a global production process and, on the other, the fact that this process is subject, with varying degrees of intensity, to the control and direction of the company that exercises leadership over it. This double power, which can be exercised by multinationals over its network of subsidiaries, suppliers and contractors because of the corporate or contractual links it has with them and due to the "asymmetric market relationship per se" that usually links them, [30] can be used as a tool to impose a set of common standards for labour treatment in its supply chain. It will be sufficient for the parent company to decide turning these standards into *mandatory* rules for its subsidiaries or into *terms of partnership* for its business associates. The result in both cases is the same: the creation by the multinational enterprise of "an autonomous field of regulation" from "its own private sphere of action". [31] Multinational enterprises thus have an effective capacity to implement regulatory processes with a transnational impact through the use of Private Law techniques. In fact, they are now the only subject in a position to achieve this result.

What can be the driving force capable of pushing these companies to limit their initially unconditional capacity to take advantage of their organizational structure? The answer lies in the "potential planetary relevance" that "reputational damage" acquires in globalized societies, [32] as a consequence of the universalization of the social requirement to respect democracy and human rights and the emergence of a growing activism in their defense, associated also with the exercise of consumption habits. Although this "consumption citizenship", in which "consumers express their political preferences through their consumption choices", [33] is not necessarily majority, the fear of being victims of a campaign organized by activist networks, which

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[28] Carlo Focarelli, *Economia globale e diritto internazionale*, Il Mulino, Bologna, 2016, p. 224.
[29] Silvine Nadalet, *Le dinamique delle fonti nella globalizacione: ipótesi per un diritto transnazionale del lavoro*, Lavoro e Diritto, 4, 2005, p. 685.
[30] ILO, *Op. Cit.*, p. 11.
[31] Antonio Baylos, *Los acuerdos marco de empresas globales: una nueva manifestación de la dimensión transnacional de la autonomía colectiva*, Revista de Derecho Social, 28, 2004, pp. 194-195.
[32] Vania Brino & Enrico Gragnoli, *Le imprese multinazionali e il rapporto di lavoro*, Rivista Giuridica del Lavoro e de della Previdenza Sociale, 2, 2018, p. 210.
[33] Kevin Kolben, *A Suply Chain Approach to Trade and Labor Provisions*, Politics and Governance, 4, 2017, p. 64.

might find an echo among consumers, can put significant pressure on multinationals – especially those from the sectors that are most exposed to public scrutiny – to implement initiatives such as those afore-indicated. Implementing such strategies is therefore "a way of controlling the risks to a brand's reputation" resulting from the relocation of manufacturing processes of the products that identify it. [34]

B. Possibilities and limits of private regulatory instruments

What has just been described is not only a possibility but a widespread reality today. In fact, "market reasons" such as those indicated [35] are at the origin of the emergence –from the mid-1990s– of an unprecedented phenomenon of spontaneous adoption of regulatory competencies on a transnational scale by multinational parent enterprises. [36] This action is aimed at the creation of principles or rules of general or impersonal scope to be applied to existing legal relations in the area of these companies' operation, regardless of the territory in which they function. A common characteristic of this phenomenon, ideologically based on the notion of *corporate social responsibility*, is the creation of new formulas of regulation, independent of any State legal system and applicable to legal relations subject to several of them. These formulas use – in order to achieve this result – the control that multinational enterprises exercise, through corporate or contractual mechanisms, over the subjects that make up their production networks [37] and this is how they are able to deploy a force of constraint on their targets, which is hardly compatible with their being considered manifestations of *soft law.* [38] Hence, it is convenient to call them *private standards of transnational application* [39] in order to highlight their purpose of giving rise to transversal regulation formulas with respect to State systems, whose effectiveness is based on market mechanisms. [40]

Initially driven by the increasing dependence -showed by multinationals -on product image and activities mainly located in destinations with low protection intensity, as a response to the spread of aberrant working conditions in the supply chains of the companies, nowadays these instruments are omnipresent within multinational enterprises' dynamics. It can even be claimed that there is no one deserving that qualification that does not introduce among its suppliers and contractors some mechanism to guarantee at least the rights proclaimed by the 1998 ILO Declaration, whether it is represented by the elaboration of a conduct code, participation in a joint or mixed initiative aimed at the same objective, the implementation of vigilance systems or the signing of a global framework agreement with a world union federation.

The course of more than two decades since their launch seems to be sufficient time to assess whether these instruments are able to comply with the promise of eliminating abusive labour practices and promoting improved working conditions within the global supply chains of multinational enterprises. However, available results do not support these expectations. [41]

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[34] Dwight Justice, *El concepto de responsabilidad social de las empresas: desafíos y oportunidades para los sindicatos*, Educación Obrera, 130, 2003, p. 4.
[35] Lisa Greco, *Op. Cit.*, p. 141-142.
[36] Isabelle Daugareilh, *Responsabilidad social de las empresas transnacionales: análisis crítico y prospectiva jurídica*, Cuadernos de Relaciones Laborales, 27, 2009, p. 90.
[37] Silvine Nadalet, *Op. Cit.*, pp. 672-673.
[38] Antonio García-Muñoz, Beryl Ter Haar & Attila Kun, *Dúctil en el interior, fuerte hacia el exterior. Un análisis de la naturaleza legal de los nuevos instrumentos de Derecho Laboral Internacional*, Temas Laborales, 13, 2012, pp. 46-47.
[39] Isabelle Daugareilh, *Loc. Cit.*
[40] Bob Hepple, *Does Law Matter? The future of binding norms*, in George Politakis (ed.), *Protecting Labour Rights as Human Rights*, ILO, Geneva, 2007.
[41] Isabelle Daugareilh, *Introduction*, in Isabelle Daugareilh, *La responsabilitè sociale de l'entreprise, vecteur d'un droit de la mondialisation?*, Bruylant, Bruxelles, 2017, p. 11, Richard Locke, *Op. Cit.*, pp. 12, 20.

While these initiatives may have contributed to curb the most notorious abuses, particularly child labour exploitation, and favoured improvements in some areas, such as health and safety, other working conditions and the respect for other fundamental rights, and in particular freedom of association, have not been significantly improved because of their influence. [42]

These results are due in part to design and implementation deficiencies. We are dealing with voluntary practices, whose design and application depend on the importance attributed to them by the leading company of the chain (it increases alongside the level of risk associated to its activities) and on the asymmetries of power with respect to the company's commercial partners (the more intense these asymmetries are, the more they favour the effectiveness of these practices). [43]Their quality and impact can therefore be highly variable and not always satisfactory.

Despite this diversity, it is possible to systematize the areas in which the shortcomings are concentrated. In the first place, they affect the *procedures used for their elaboration,* within which a clear legitimacy deficit is appreciated, [44] insofar as they are usually the result of an exclusive decision of the companies' governing bodies that promote them, adopted without considering the participation of the interested subjects and, in particular, of the workers whose rights need to be secured, although this participation could contribute to their effectiveness. [45] The second area where it is possible to identify deficiencies is linked to the *block of guaranteed rights and their level of protection*, as the extent of companies' commitment may vary considerably from one to another depending on the risks they perceive and their concerns. [46] Thus, a certain "selectivity" may be detected in terms of the rights that are required to be respected in a particularly strict way, [47] focusing on those whose violation might be perceived more negatively, such as the prohibition of child labour, the non-payment of wages or the lack of security measures, at the expense of other rights which are equally relevant but less visible, such as freedom of association or the prohibition of discrimination. [48] The problems are, however, concentrated in the *compliance control systems* by suppliers and contractors.

These systems, which are often based on regular audits or visits to working places that seek to replicate the design of public inspection systems, have shown limited ability to cope with the complexity of global supply chains, to the extent that they have been said to constitute "a complete fiasco". [49] The vigilance of these chains is an extraordinarily difficult and costly task because of the need to reach the establishments of a multitude of companies located in very different countries, not all of which have a direct legal link with the parent company or its subsidiaries. However, audits usually neither approach them in their entirety nor penetrate into their depths despite the probability of violations and their gravity increases as it descends along its successive links. On the contrary, verification actions are usually restricted to the first level. [50] In addition, the method based on factory visits is not necessarily suitable for detecting the type of violations that may occur within these chains. These violations are not

[42] Mark Anner, Jennifer Bair & Jeremy Blasit, *Toward Joint Liability in global Suply Chains: addresssing the root causes of Labour Violations in Internacional Subcontracting Networks*, Comparative law and Policy Journal, 1, 2013, pp. 5, 15; Richard Locke, *Op. Cit.*, Cap. 6; ILO, *Op. Cit.*, p. 48.
[43] Lisa Greco, *Op. Cit.*, p. 147.
[44] Kevin Kolben, *Dialogic Labor Regulation in the Global Suply Chain*, Michigan Journal of International Law, 3, 2015, p. 441.
[45] Isabelle Daugareilh, *Responsabilidad social de las empresas transnacionales*, p. 92.
[46] Jean-Michel Servais, *Op. Cit.*, p. 439.
[47] Axel Marx & Jan Wolters, *Reforzar el control en sistemas de regulación privada del trabajo. Potencial y perspectivas*, Revista Internacional del Trabajo, 3, 2016, p. 489.
[48] Lisa Greco, *Op. Cit.*, p. 148; Kevin Kolben, *Op. Cit.*, p. 440.
[49] Isabelle Daugareilh, *Introduction*, p. 26.
[50] ILO, *Op. Cit.*, pp. 48-49.

usually represented, except in extreme cases, by the exploitation of children or forced labour, present – if at all – in the lowest strata, but by practices generated by the logic of exacerbation of the competition that characterizes them, such as excessive working hours, abuse of extraordinary work or deprivation of the freedom of association and the right to collective bargaining. These are actions that are difficult to detect in an annual audit. [51] The only way to access to such information is by offering a channel for the participation of workers who suffer from them and their representatives. [52] Such mechanisms are, however, very rare and not necessarily effective. [53]

However, the solution to the problem posed by the existence of poor working conditions in multinational enterprises' supply chains does not depend solely on a technical improvement of the control mechanisms included by the aforementioned instruments, due to the *procurement practices* used by a large number of these companies that are at the root of this problem. In fact, deficit situations such as those described are but the predictable result of the business model based on the outsourcing of production through highly flexible subcontracting networks that are sensitive to the cost differences that prevail in many sectors of the globalised economy. [54] This is a model within which multinationals compete fiercely to satisfy a highly variable and increasingly exigent demand, by imposing triple requirements on their partners for high quality at low cost, short delivery times and high levels of flexibility. [55]. This way of operating undermines the efforts that these companies may be making to promote decent working conditions in their supply chains, [56] insofar as it forces their business partners to respond to these requirements by imposing on their workers not only low salaries and long working hours, but also excessive volumes of overtime and precarious forms of recruitment, allowing for the increase and reduction of their production in accordance with a fluctuating demand. It also discourages any effort to invest resources in improving security conditions and leads them to weaken the effectiveness of freedom of association and the right to collective bargaining, given their positive impact on wages. It even encourages them to use other companies and self-employed workers to exert similar pressure on them, if not resorting to home working and clandestine employment, within which child labour and modern forms of forced labour may appear. [57]

In the light of this observation, it is not difficult to share the point of view of those who consider that the private formulas of transnational regulation promoted by global business actors are not in a position to provide, on their own, a comprehensive response to the labour challenges posed by them. [58] Hence the need, not to discard them, given their undeniable and unreplicated capacity for transnational impact, but to contemplate them within a broader approach, as part of integrated strategies [59] that contribute to supplanting their deficiencies and allow progress towards a model of greater commitment to the higher costs involved in guaranteeing adequate working conditions in global production processes.

The difficulty in taking steps in this direction is remarkable. However, there is nothing inevitable about the form adopted by these instruments today, which is the result of the inter-

[51] Axel Marx & Jan Wolters, *Loc.Cit.*
[52] Albert Sales, *Guía para vestir sin trabajo esclavo*, Icaria, Madrid, 2013, p. 40.
[53] ILO, *Loc. Cit.*
[54] Mark Anner, Jennifer Bair & Jeremy Blasit, *Op. Cit.*, p. 3.
[55] ILO, *Op. Cit.*, p. 11.
[56] Richard Locke, *Op. Cit.*, pp. 12.
[57] Mark Anner, Jennifer Bair & Jeremy Blasit, *Op. Cit.*, pp. 9-12; Richard Locke, *Op. Cit.*, pp. 8, 12-14; ILO, *Op. Cit.*, p. 11.
[58] Richard Locke, *Idem.*, p. 22.
[59] Kevin Kolben, *Op. Cit.*, p. 441.

action of multiple social, political and market forces, [60] mouldable and flexible by their very nature. This opens the space for the construction of more complete formulas, the emergence of which is beginning to become evident.

IV. The conjunction of intervention spheres and regulatory instruments as response

How should we proceed to turn multinational enterprises' global supply chains into global chains of control and improvement of working conditions in the world? The answer is neither easy nor certain. Nor is it unique. However, its elements started to be drawn in the last stage. They revolve around two strategies which, although conceived separately, can yield particularly relevant results if they operate together. The first seeks to influence on the design of the instruments that these companies set in motion, advocating an improvement of formulas for their adoption and control mechanisms, as well as the integration of clauses that would allow for the economic sustainability of guaranteed working conditions. The second aims at the connection between these instruments and traditional public regulatory mechanisms, seeking to build synergies between both in order to favour their dissemination, improvement and effectiveness. The logic in both cases is the same: the *combination or conjunction* of *intervention spheres* (labour and economic) and *regulatory instruments* (private and public) in pursuit of the same objective: to promote social sustainability of global supply chains and the respect of labour rights around the world.

The impetus for the first of these strategies is to stop considering violations that may occur along these chains to be an exclusive problem of contracting companies, and that they are possible to be solved by improving control mechanisms. Instead, they should be seen as a phenomenon for which all members of the supply chain are responsible, including multinationals , which are at the head of it. [61] As a consequence, the need for the parent companies' greater commitment to the standards they require to be met is postulated. This commitment must be expressed through clauses that would ensure, in addition to strict controls, stable contractual relations and prices that guarantee their economic viability. [62] The idea is to move towards the inclusion of these instruments of commitments related to these companies' purchasing practices, which would guarantee *a sustainable relationship* with them – an option that is not impossible to fulfill. Advocating for decent work through economic decisions that make it unviable does not seem to be a sustainable option, either in the short or medium term. This need and the pressure from workers' organisations on both sides of the chains, as well as from society and organised consumers, are in a position to open up a space for the emergence of this more evolved model of social responsibility, samples of which are beginning to appear and which could be strengthened by the second of the aforementioned strategies.

The implementation of the latter also demands a change of approach. This requires us to discard the idea that we are dealing with exquisitely private instruments, whose implementation must always be the result of multinationals' free decision, in order to understand that they represent the interests of the society as a whole, which can – and must – intervene in order to optimise the possibilities of global protection of the labour rights they offer. On this basis, the need for a growing interaction between the private forms of governance they introduce and classic normative instruments is postulated, [63] in order to reinforce the effectiveness of the result that can only be achieved through the former. The idea is to promote the generation of

[60] Kevin Kolben, *Transnational private labour regulation, consumer-citizenship and the consumer imaginary*, p. 410.
[61] Mark Anner, Jennifer Bair & Jeremy Blasit, *Op. Cit.*, p. 2.
[62] Mark Anner, Jennifer Bair & Jeremy Blasit, *Idem.*, pp. 3, 7, 40-42.
[63] Axel Marx & Jan Wolters, *Op. Cit.*, p. 491.

"synergies between public and private actors" [64] in the framework of an "*integrated theory of regulation",* within which "multiple regulatory measures" of both origins are used "in a cumulative way and with the purpose of counteracting their limitations" (DEVA 2015). In other words, the purpose is to integrate private mechanisms within broader systems that would reinforce their imposition and promote their effectiveness, giving rise to "hybrid formulas of governance" [65] or of "private-public co-regulation" [66] able to project their application and enhance their results. This is a path that has started to be taken both by International Law and national systems, through mechanisms that test new interactions between *soft* and *hard law*. [67]

The ways in which both strategies are being implemented will be explained below.

A. The construction of more effective and sustainable private instruments

Multinational enterprises' interest in ensuring social traceability of their products in defence of their commercial reputation and the value of their brands lies at the root of the recent evolution of private regulatory systems towards a model of greater involvement with global standards of decent work. This trend is expressed through a series of instruments that take a number of further steps with regards to their precedents, by attributing to a set of labour rights, which go beyond those proclaimed as fundamental by the 1998 ILO Declaration the value of mandatory rules for all subjects integrated in multinational enterprises' global supply chains, thus, incorporating workers' representative organizations in their design and control of their application, and even by incorporating clauses aimed at guaranteeing their economic viability. Instruments of this type are exceptional, but their presence shows us the most advanced trend line regarding its construction. We will comment below about two instruments that contain key contributions.

The first is the *global framework agreement on fundamental human and labour rights in Inditex chain of production,* signed in 2007 by this Spanish company and the world textile union federation, and renewed in 2014 and 2019 with IndustriALL Global Union. This agreement is distinguished from its precedents by the singularity of its approach on the control and the role that within this corresponds to the guarantee of the right to free unionisation. Its starting point lies in considering " freedom of association and the right to collective bargaining" to be a "fundamental piece to guarantee the sustainable and long term fulfilment of all the other international labour standards in the supply chain and distribution of Inditex". On this basis, it introduces a set of instrumental rights, all aimed at promoting trade union organizations' assumption of a relevant vigilance role of respect in the field of social standards demanded by the company. Among these are: a) the commitment of Inditex to provide the signatory trade union federation, and through this to the trade unions that comprise it, a list of the factories that are part of its supply chain, including their location, the results of their assessments and the number of workers that they employ; b) the duty of the contractors to allow the representatives of the signatory federation and the local trade unions affiliated with it to access these factories; and c) the obligation of the parties to exchange information on breaches in order to apply corrective measures. This gives rise to a "on-the-spot" vigilance system that is able to overcome the deficiencies of the usual auditing formulas, making fundamental labour rights, and in particular freedom of association, into guarantors of their own application.

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[64] Vania Brino, *Imprese multinazionali e diritti dei lavoratori tra profili di criticità e nuovi 'esperimenti' regolativi*, Diritto delle Relazioni Industriali, 1, 2018, p. 6.

[65] Axel Marx & Jan Wolters, *Loc. Cit.*; Kevin Kolben, *Dialogic Labor Regulation in the Global Suply Chain*, p. 446.

[66] Isabelle Daugareilh, *Introduction*, p. 24; Tania Sachs, *La loi sur le devoir de vigilance des sociétés mères et sociétés donnneuses d'orde: les ingrédients d'une corégulation*, Revue du Droit du Travail, jun. 2017, p. 382.

[67] Antonio Baylos, *La responsabilidad de las empresas transnacionales en los procesos de externalización*, p. 123.

The importance of this instrument, whose application has been backed up by a rich collaboration praxis, [68] cannot be minimised, given the colossal dimensions of Inditex chain of production, covering more than seven thousand factories located in forty-five countries, employing more than two million workers. [69]. Another reason for its great importance is its positive influence that encouraged other multinationals in the sector, such as Mango, H&M or Tchibo, to sign agreements that point out in the same direction. [70] This should not lead us to overlook its limitations, especially in order to ensure the sustainability of the achieved improvements. Tracking some of the cases in which contractors' abusive practices were stopped, shows that these changes were ephemeral, as INDITEX did not opt to maintain previous levels of orders and adjust the prices to be paid to the new context, sometimes even leaving the country. [71]

The barrier marked by the economic demands of large companies' business model will eventually be broken after the tragedy that occurred in the *Rana Plaza* building in Bangladesh on April 24, 2013, in which 1,134 people lost their lives. The need to react quickly and forcefully to such a serious event, which affected the workers of the contractors of a large number of fashion multinationals, led to the adoption of the *Agreement on Fire Prevention and Safety in Construction in Bangladesh,* signed by thirty-nine European multinationals – with many more joining in, eventually exceeding two hundred – in conjunction with IndustriALL and UNI and eight local unions. The innovations introduced by this agreement begin with its multilateral nature and its recognized "legally binding" quality, for both,contractors and multinationals who sign it. In addition, it is intended to act as an instrument to improve safety conditions in the country's textile factories, so that "no worker should have to fear fires, building collapses and other avoidable accidents". To this end it designs an inspection system – with obligatory recommendations for the contractors – together with preventive training mechanisms and formulas for workers' equal representation both in the governing body of the agreement and in the safety management bodies of each company. [72] What makes this instrument revolutionary is, however, the decision to include *clauses regulating purchasing practices* of the signatory enterprises, aimed at ensuring the economic viability of what has been agreed.

Therefore, the agreement establishes, besides these companies' duty to finance the activities derived from its application, their commitment both to negotiate commercial conditions "that guarantee that it is financially viable for the factory to maintain safe workplaces" and to "maintain long-term outsourcing commercial relations in Bangladesh", by negotiating "volumes of orders comparable to or greater than those existing in the previous year " at the beginning of the agreement and "at least during the first two years of its validity". For the first time it is assumed that ensuring fair labour conditions is a shared responsibility of all members of the supply chain, including multinationals, and not just that of suppliers and, of course, that this guarantee requires the former to bear the higher costs involved. It has been

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[68] Isidor Boix & Víctor Garrido, *Balance sindical de los 10 años del Acuerdo Marco Global con Inditex*, 2017, *available at* http://www.industria.ccoo.es/5ffa04a491584d076248dacd7957aeac000060.pdf (May 12, 2020).

[69] Isidor Boix & Víctor Garrido, *Proyecto ACT. Impulso global, sindical y empresarial, de negociación colectiva local*, p. 398.

[70] Wilfredo Sanguineti & Katia García, *La participación sindical en el control de las cadenas de producción de las empresas multinacionales: entre la utopía y la realidad*, in José Monereo (ed.), *La externalización productiva a través de la subcontratación empresarial*, Comares, Granada, 2018, pp. 97-114.

[71] *See* Catia Gregoratti & Doug Miller, *Internacional Framework Agreements for Workers' Rights? Insights from River Rich Cambodia*, Global Labour Journal, 2, 2011, pp. 84-105; Wilfredo Sanguineti, Katia García & Milagros Vivas, *Empresas multinacionales, responsabilidad social y derechos laborales en el Perú. La experiencia de Topy Top*, CICAJ-PUCP, Lima, pp. 31.33; Mark Anner, Jennifer Bair & Jeremy Blasit, *Op. Cit.*, p. 26.

[72] José Soler, *Nuevas tendencias en los acuerdos marco internacionales: el acuerdo sobre prevención de incendios y seguridad en la construcción en Bangladesh*, in Wilfredo Sanguineti (ed.), *La transnacionalización de las relaciones laborales,* Cinca, Madrid, 2015, pp. 97-114.

the fear of another great disaster what has allowed to overcome this barrier. The multilateral nature of the agreement and its high density have also contributed to it, as they ensure that resulting cost increase will put none of the participants at a competitive disadvantage with respect to the others. [73]

This is a model that can be replicated in other areas, especially if this desirable multi-enterprise dimension is maintained. In fact, awareness of the poor sustainability of purely control-based systems has led the accession of a large group of fashion multinationals to the IndustriALL-driven *ACT (Collaborative Action for Transformation) Project,* which aims to achieve sufficient wages for workers in several key countries for the fashion sector, through the development of collective bargaining, preferably industry-wide, supported by *responsible purchasing practices*. [74]

B. The hardening of corporate social responsibility treatment at the international level: the consolidation of the notions of due diligence and sphere of influence.

In parallel to the improvement of private instruments, in the last decade, international institutions undertook a process of appropriation and reworking of the notion of social responsibility, aimed at giving it regulatory consistency and projecting it over the entire space of multinational enterprises. An expression of this process, which has resulted in *normative hardening* of this notion, [75] has been the emergence of an important "mesh" of international instruments, all *soft* in nature. They share two features: their purpose to introduce regulatory guidelines for socially responsible behaviour of multinationals and their confluence around two key concepts: *due diligence,* as a criterion for defining these guidelines, and *sphere of influence,* as a delimiting element of their application space.

The starting point is the adoption of the *Guiding Principles on Business and Human Rights* by the United Nations in June 2011. The aim of these principles is to outline a general framework aimed at preventing and remedying human rights violations – including labour rights – that may occur as a result of business activities by providing a set of obligations and responsibilities for States and companies, articulated around three pillars: the obligation of the former to protect these rights, the responsibility of the latter to respect them, and the duty of both to ensure that victims are compensated for abuses. Within this framework, the responsibility of companies lies not only in their duty to "avoid causing or contributing to adverse human rights impacts through their own activities", but also in their obligation to "prevent or mitigate" those "directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts" (Principle 13), and to implement a "due diligence process" in order to design and apply all necessary measures to achieve this dual preventive and remedial effect, as well as to account for their results (Principle 15).

The Guiding Principles thus use a concept from Corporate Law that appeals to the power of international economic agents to act, such as due diligence, in order to make it the tool for ensuring respect for human rights, not only in the companies' internal space, but also in all the activities linked to them, that is to say, their global supply chains. This includes the notion of sphere of influence, launched in 2000 by the *United Nations Global Compact* in order to use it as an instrument to project the application of the duty to act diligently into the global economic space. The confluence, both of objectives and method, with the instruments developed by multinational enterprises is evident here, and, in view of this, so is the aptitude of the

[73] Mark Anner, Jennifer Bair & Jeremy Blasit, *Op. Cit.*, p. 29.
[74] Isidor Boix & Víctor Garrido, *Op. Cit.*, pp. 392-395, 399-401.
[75] Kathia Martin-Chenut, *Devoir de vigilance: internormativités et durcissement de la RSE*, Droit Social, 10, 2017, pp. 798-799.

mechanisms that can be set in motion by applying these principles to develop global processes aimed at ensuring respect for these rights. [76]

Because of this potential, the notion of due diligence has become both the standard to measure the companies' compliance with their international human rights obligations and an indispensable tool for managing risks associated to these rights. [77] An expression of this is the alignment of other international tools around it aimed at channeling multinational enterprises' actions, in particular, the *OECD Guidelines for Multinational Enterprises,* which have included them since 2011, and the ILO *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, which did the same in 2017. Thus, if the work of the ILO has served to set the goal of social rights universalization, the United Nations has provided the means: the development of due diligence processes by multinational enterprises, aimed at preventing negative impacts on these rights in their supply chains. [78]

This confluence implies the emergence of an important consensus on the suitability of the strategy to use multinationals' private power as an instrument to guarantee labour rights at a global level. The aim now is to project it beyond the companies that resort to it for market reasons, towards all those that carry out risk-generating activities. At the same time, the ways in which it is applied must be objective. The logic behind it is the combination or conjunction of regulatory instruments and techniques in order to promote synergies between them. The instruments of private origin mentioned in the previous section, which include potentially effective control systems and formulas to guarantee the economic sustainability of working conditions, should be considered, from this point of view, to be privileged forms of expression of the diligent action that is to be promoted.

The notion of due diligence thus constitutes the base for the building that has begun to be constructed since the adoption of the Guiding Principles. It makes reference to a duty of prudence that requires the application of all appropriate measures in order to achieve a particular objective. As such, it leads to the introduction of a dimension of prudence to business decision-making, requiring prior checks for the possible adverse impact of external factors, the ultimate aim of which is to protect the company itself from them. [79] Its transfer to the field of human rights entails the internalization of social risks within corporate governance. [80] This should be done through a "process" aimed at achieving a quadruple objective: "identify, prevent, mitigate and account" for the adverse impacts of business activities on human rights (Principle 17), whose implementation is divided into five phases: (a) "identify […] any actual or potential adverse […] impacts" in which they may be involved; (b) "integrate the conclusions from their impact assessments" into their internal processes and "take appropriate action"; (c) "track [their] effectiveness"; (d) report on them and their effects; and (e) remediate or "cooperate in [the] remediation" of damage that they have "caused or contributed to" (Principles 18-22). Compliance with it requires companies' proactive and committed behavior, which goes beyond the duty of damage compensation, to anticipate such damage by assessing and eliminating the risks that their activities may cause.

But the notion of due diligence would not be in a position to yield satisfactory results if it were limited to multinationals' internal sphere. It makes real sense when applied to the entire space of their global production processes. [81] This is what the Guiding Principles do, adopting a broad vision of their scope of action, capable of comprehending "relationships with

[76] Vania Brino & Enrico Gragnoli, *Op. Cit.*, p. 217.
[77] Kathia Martin-Chenut, *Op. Cit.*, pp. 799-800.
[78] Isabelle Vacarie, *Le travail dans un marchè sans frontiers*, Revue du Droit du Travail, 10, 2015, pp. 634-635.
[79] Boris Loewe, *Etude sphère d'influence versus due diligence*, 2010, pp. 3, 5-6, *available at* https://www.diplomatie.gouv.fr/IMG/pdf/1_2PESP_1_Etude_sphere_dinfluence_versus_due_diligence_cle874ee9.pdf (May 12, 2020).
[80] Vania Brino, *Op. Cit.*, p. 14.
[81] Boris Loewe, *Op. Cit.*, pp. 12-13.

business partners, entities in [their] value chain and any other […] entity directly linked to [their] business operations, products or services" (commentary on Principle 13). This covers not only the direct partners, but all the links in the value chain. By making this decision, which involves the tacit acceptance of the notion of sphere of influence, the Guiding Principles assume that this form of production organization is a source of risks (DAUGAREILH 2018: 362) that multinationals must "mitigate […] to the greatest extent possible" by using the possibility of influencing the behavior of their partners that is conferred to them by the control they exercise over the global production process. The notion of "influence" here refers to the ability "to modify injurious practices of an entity that causes a harm" (commentary on Principle 19). As such it can be greater or lesser depending on several factors –such as the production process or, the intensity and permanence of the commercial relationship, the type of existing agreement or the greater or lesser substitutability of the supplier[o]– allowing a modulation "by concentric circles" of diligence and responsibility. [82]

C. The anchoring or capture of private regulation processes by European and national law

The triumphal march of the notion of due diligence in the international arena has served to turn the method, spontaneously launched by multinational enterprises, into the fundamental tool for guaranteeing human rights at the global level. It has also made it possible to put on the table a series of objective parameters to which these companies must submit, thereby putting an end to the prevailing vagueness of the past. This should not make us lose sight of the fact that universalization and hardening of the notion of corporate social responsibility carried out by this process is conceptual rather than normative, since the implementation of the proposed due diligence processes continues to depend on these companies' decision, even though the assessment of their suitability is subject to pre-established criteria.

But the influence capacity of the Guiding Principles is not limited to the scope of these companies. These principles also provide a basis from which national systems of the countries where the parent companies are based can implement regulations aimed at promoting the application of due diligence processes, using incentives or formulas for transparency and accountability, or even making it enforceable, [83] giving rise in this case to regulatory processes of extraterritorial scope. [84]

In fact, the international impact of the Guiding Principles is beginning to be replicated at lower levels through more regulatory intensive interventions, demonstrating that a *soft law* instrument can become an effective means of promoting *hard law* formulas. [85] Indeed, in recent years we have seen the creation of innovative regulatory mechanisms that seek to provide an "anchor" for due diligence in a certain legal system, [86] in order to promote the "capture" of multinationals' power over their value chains [87] and its channeling towards the guarantee of a basic nucleus of fair working conditions, giving rise to hybrid formulas of governance resulting from a combination of public and private interventions.

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[82] Boris Loewe, *Idem.*, p. 9; Sophie Mac Cionnaith, *Le concept de "sphère d'influence": de nouvelles obligations pour l'entreprise*, Editions Universitaries Européennes, 2017.

[83] Adoración Guamán, *Diligencia debida en derechos humanos y empresas transnacionales: de la ley francesa a un instrumento internacional jurídicamente vinculante sobre empresas y derecho humanos*, Lex Social, 2, 2018, p. 234.

[84] Isabelle Daugareilh, *La ley francesa sobre el deber de vigilancia de las sociedades matrices y contratistas: entre renuncias y promesas*, in Wilfredo Sanguineti & Juan Vivero (eds.), *Impacto laboral de las redes empresariales*, Comares, Granada, 2018, p. 376.

[85] Vania Brino, *Op. Cit.*, p. 21.

[86] Antonio Baylos, *Op. Cit.*, pp. 122-123.

[87] Isabelle Daugareilh, *Op. Cit.*, p. 362.

The first area of due diligence dissemination is that of the European Union law. The technique chosen here has been one of a promotional nature, based on the creation of a duty of information regarding the policies and measures implemented in its exercise, by considering it a duty of companies whose activities generate risks. To this end, *Directive 2104/95/EU* states that all European companies that, due to the scale of their activity and the volume of their operations can be considered of public interest and which have more than 500 employees, must have "a non-financial statement" containing information on the impact of their activities on "social and environmental issues" and "respect for human rights", the policies and "due diligence procedures applied" and its results, including "where relevant and proportionate, their business relations". A reference that covers their "supply chains and outsourcing". Reputational risk and visibility are thus expected to be sufficient incentives for the promotion of due diligence practices in large European companies. [88] This has not been at odds with the direct imposition of a duty of diligence for activities of particular risk, such as wood commercialization and the import of certain minerals from conflict zones (*Regulations EU 995/2010* and *EU 2017/821*).

Alongside these actions, a greater sensitivity is beginning to spread among the States of the parent companies regarding the need to adopt measures aimed at encouraging the implementation of due diligence policies by multinational enterprises, applicable to their global production processes. The first initiatives are similar to the path chosen by European legislation, as they give rise to an obligation of transparency regarding the actions taken in order to avoid certain violations in the supply chains of companies based in their territories. This is the case of *The California Transparency Supply Chains Act*, passed in 2010, which requires all manufacturers and retailers operating in that territory with revenues of at least $100 million to publish an annual report specifying the measures taken to eradicate forced labor from their supplier networks. This is also the case of the British *Modern Slavery Act*, which since 2015 imposes a similar duty to companies with a turnover of more than £36 million per year. In both cases these are promotional rules, which do not make the leap towards a real duty of diligence for the companies they are targeting. This is a step taken for the first time by the Act on the duty of vigilance of parent companies and companies exercising control, approved in France in March 2017.

This law is the first, not only to expressly impose a duty of such nature on the head of companies that lead transnational production processes, but also to develop its content, establishing it as a *duty of vigilance* over their networks of subsidiaries and partners, the lack of compliance to which is subject to legally enforceable responsibilities. To this end, all companies domiciled in France employing between them and their subsidiaries at least five thousand workers within the territory of this country or ten thousand workers between the this territory and abroad are required to "establish and implement" a *vigilance plan* including "reasonable monitoring measures aimed at identifying risks and preventing serious violations of human rights, fundamental freedoms, health and safety of persons and the environment" derived from their activities and those of the companies they control, as well as of the activities performed by "their subcontractors or suppliers with whom they have a stable business relationship". This plan, which must be elaborated in collaboration with the social groups concerned, must include: (a) a risk map enabling its identification, analysis and prioritization; (b) procedures for the periodic assessment of the company's subsidiaries, subcontractors and suppliers in relation to such risks; (c) appropriate actions for the mitigation of such risks and the prevention of serious damage to protected goods; (d) an alert and complaints collection mechanism established in accordance with the representative trade union organisations within the company; and (d) a tracking system of the applied measures and evaluation of their effectiveness. It is

[88] Vania Brino, *Op. Cit.*, p. 22.

also indicated that failure to comply with these obligations "will make the author liable and will oblige them to compensate for any damages that their compliance might have prevented".

This standard seeks to transform global supply chains of all productive sectors into global chains of control and respect for a basic nucleus of rights, by converting what have so far been voluntary mechanisms created for reputational protection of multinational enterprises most exposed to public scrutiny into instruments that are mandatory for all such companies. To this end, a hybrid or mixed formula of co-regulation, a mixture of mandatory regulation and soft law, is designed, [89] according to which the legislator, instead of directly regulating the phenomenon, proceeds to instrumentalize these private regulatory mechanisms, [90] establishing both the mandatory use of them and the objectives to be pursued with them. In this context, the delimitation of the scope of action of the duty of vigilance is made not only by the notion of control inherent in Corporate Law, which can only cover subsidiaries, but also by a broader notion, which takes into account the influence these companies can exert on partners with whom they have a "stable business relationship". [91] Economic dependence thus becomes the basis for a duty of diligence from which dominant company's responsibility can derive, but without putting corporate boundaries into question. [92] Another relevant issue is the demand for collaboration in the preparation of the *stakeholders*' plan, insofar as it allows overcoming the legitimacy deficit of these instruments and contributes to improve their effectiveness. What is also remarkable is the inclusion of the need to agree with representative unions on warning systems and the collection of complaints, since through it the legislator takes charge of the enormous difficulty that involves the control of global supply chains and seeks to promote formulas for union involvement in dealing with them, giving rise to a space for negotiation capable to develope at national and international levels. [93] It should be highlighted also the special case of the creation of civil non-contractual liability of parent companies, which is part of the *liability-anticipation* logic, [94] as it compels them to compensate the damages that their action would have allowed to avoid. This action can be filed by any interested person.

There is no doubt that the special combination of elements present in this regulation represents a qualitative leap in the approach of the issue. This is why various bodies, such as the European Parliament or the Council of Europe, are advocating the introduction of mechanisms based on "*mandatory due diligence*" both at the State level and in the European Union law (Resolutions 2015/2315 and 2016/3). At the same time, similar proposals are beginning to be promoted in other countries, such as the Swiss popular initiative for responsible multinational enterprises launched in 2015 or the due diligence bill on child labour in the Netherlands in 2017. This solution could receive a decisive boost within the framework of the elaboration process of a binding international instrument aimed at regulating companies' obligations and responsibilities in the field of human rights, which has been developing since 2014 within the United Nations, if the proposal to include the duty of States of ensuring that all companies with activities of a transnational nature located in their territories respect the due diligence obligations on human rights matters, included in the first drafts, manages to overcome the resistance to this type of formula that continue to exist within the organization.

V. Conclusion: the advance towards a hybrid-based Transnational Labour Law and multilevel regulation

[89] Tania Sachs, *Op. Cit.*, p. 382.
[90] Isabelle Daugareilh, *Op. Cit.*, p. 382.
[91] Tania Sachs, *Op. Cit.*, p. 383.
[92] Tania Sachs, *Idem.*, p. 384.
[93] Isabelle Daugareilh, *Op. Cit.*, pp. 373-374.
[94] Isabelle Daugareilh, *Idem.*, p. 367.

In the light of the above, it can be no doubted that labour regulation in global supply chains is a reality under construction today. [95] This is manifested through a set of dynamics, techniques and instruments that are an expression of a new way of conceiving social rights protection in the global space which places the power of the very multinationals that manage them in its center [96] but tries to make its exercise enforceable and provide it with consistency through its interaction with formulas of public intervention and participation mechanisms by the subjects involved, mainly workers and their organizations.

The result is the progressive affirmation of a *new mixed type of global governance of the world of work,* halfway between private and public or, even better, an expression of an unsuspected mixture [97] that is beginning to be built between both of them. It is a new type of governance in which national laws, international treaties and collective agreements do not disappear, but their roles are profoundly modified, insofar as they are no longer intended to impose rules that must be applied directly in the global production networks, but rather to channel companies' power and influence towards certain objectives. This evolution is an expression of the crisis that globalization has brought on traditional formulas of Labor Law construction, but also of the emergence, as a result of it, of new private-source powers endowed with an effective capacity for regulatory impact on a transnational scale, whose redirection towards objectives compatible with the general interest cannot be renounced.

The resulting *multilevel regulation model,* characterized by the concurrence of multiple actors, levels and regulation formulas around the same object, [98] is able to yield results impossible to achieve through the sole use of its different components, since its strength does not lie in the regulatory power of each one, but in the result that is obtained from the interconnection between all and the synergies that it generates. [99] From this point of view, the experiences developed over the last decade show how it is possible to link or hybrid different *regulatory* techniques (international standards, community standards, national standards of the country of the parent company and national standards of the host country, international framework agreements and decisions resulting from the unilateral power of multinational enterprises) to give rise to *integrated regulatory systems* in which international standards – and in particular ILO conventions – represent the horizon to be reached; the community rules and national laws become the leverage that drives it; the power of companies and the relations they have with their subsidiaries and contractors are the instruments that allow them to make it effective at a transnational level; and the participation of workers through trade union organisations, both international and local, are the tool that make it possible to apply it effectively. This design is an expression of a contemporary trend to organize standards in a *network* rather than in the form of a pyramid, [100] in order to produce results that really contribute to their effectiveness, thus showing that what is important in this field is not the coercivity of each instrument, but the effectiveness of the result that can be achieved through the interaction between different normative techniques. [101]

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[95] Juan Raso, *Nuevos caracteres de las relaciones laborales en las cadenas mundiales de suministro*, in José Monereo (ed.), *La externalización productiva a través de la subcontratación empresarial*, Comares, Granada, 2018, p. 86.
[96] Isabelle Vacarie, *Op. Cit.*, p. 641.
[97] Vania Brino, *Op. Cit.*, p. 24.
[98] Stefano Rodotà, *Códigos de conducta. Entre hard law y soft law*, in Alicia Real (ed.), *Códigos de conducta y actividad económica*, M. Pons, Madrid, 2010, pp. 19-20.
[99] Tania Sachs, *Op. Cit.*, p. 382.
[100] Isabelle Daugareilh, *Op. Cit.*, p. 365; François Ost & Michel van de Kerchove, *De la pyramide au réseau? Pour una théorie dialectique du droit*, FUSL, Bruxelles. 2002.
[101] Vania Brino, *Loc. Cit.*

This "smart mix of measures" aimed to "promote respect for human rights in enterprises", to which the United Nations Guiding Principles make reference (commentary on Principle 3), is capable of giving rise to policy processes of transnational dimension that can begin to fill the governance deficits generated by the deployment of global economy. What it does not guarantee us is its economic sustainability. On the contrary, its evident contradiction with the prevailing business model in many sectors, based on an acute competition in terms of costs, deadlines and quality, may lead to its results being superficial and ephemeral if they are not accompanied by a parallel strategy of conjunction of spheres of action, which would allow the incorporation of *purchasing practices regulatory clauses* into social responsibility instruments, to ensure the economic viability of the working conditions it claims to protect.

Steps in this direction are more difficult to take. However, the fact that there are experiences and attempts to make this holistic understanding of labour rights guarantee in global supply chains a reality accounts the emergence of consciousness in some sectors – precisely those most affected by this system of competition – on the need to accompany measures to prevent abusive practices with economic decisions that favour a more stable and sustainable relationship with suppliers. Promoting decent work by adopting economic decisions that make it doubtfully achievable is not, however, just an unsustainable option. It is also a practice that is in direct opposition to due diligence in the sphere of human rights. For this reason, the mere imposition of respect for a number of basic labour rights on business partners is not sufficient to satisfy this standard if it is accompanied by prices and deadlines, as well as a lack of stability in trade relations, which materially prevent it. Therefore, the company's own commercial policy will then be a source of risks for the protected rights, that the company should have avoided. From this point of view, due diligence in the field of human rights includes the *economic and commercial accompaniment of social conditions* required from suppliers. It therefore outlaws any commercial practice that questions its viability.

The pieces are beginning to line up around the construction of a *hybrid-based and multi-level-regulation-type Transnational Labour Law* which not too long ago was hardly conceivable. [102] Their components are generated from the combination of diverse techniques and regulatory instruments that influence the power exercised by multinational enterprises over their global production networks. What still needs to be determined is whether the introduction of promotional measures, such as the duty of information imposed by the European Union, is sufficient to make progress in building them, or whether it is necessary to extend the example of the French law on the parent companies' duty of vigilance. An even, it is still a question whether these efforts must be accompanied by a more incisive regulation of these companies' responsibility for the breach of their duty to act with diligence in human rights matters, which requires them to provide evidence that they acted in an appropriate manner in order to prevent or avoid the materialization of the risks generated by the activities associated with their global business projects. [103]

The dream that inspired the construction of the ILO would then be in a position to find an unexpected formula for its concretion within global economy. There is no guarantee that this will end up this way. If there is one thing that is clear in the post-modern era in which we live in, it is that there is no force that guides the sense of history in a particular direction. Its creation will be, if so, the result of social and political experimentation, imaginative and re-

[102] Silvine Nadalet, *Op. Cit.*, pp. 672-673; Stefania Scarponi, *Globalizazzione e responsabilità sociale delle imprese trasnazionali*, Lavoro e Diritto, 1, 2006, p. 151; Antonio Ojeda, *Derecho Transnacional del Trabajo*, Tirant lo blanch, Valencia, 2013, pp. 24-25, 37-39; Kevin Kolben, *Transnational private labour regulation, consumer-citizenship and the consumer imaginary*; Wilfredo Sanguineti, *Los instrumentos de gestión laboral transnacional de las empresas multinacionales: una realidad poliédrica aún en construcción*, in Wilfredo Sanguineti (ed), *La transnacionalización de las relaciones laborales*, Cinca, Madrid, 2015, pp. 17-18.

[103] Isabelle Daugareilh, *Op. Cit.*, p. 365.

formist, based on trial and error and on the strategy of one step forward and two steps back, which we jurists love so little but which is at the base of all the great social and juridical transformations experienced in our democracies since the French revolution. [104]

[104] Richard Rorty, *Los intelectuales y el fin del socialismo*, in Richard Rorty, *Pragmatismo y política*, Paidós, Barcelona, 1998, p. 66.