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EDITORIAL

New Liabilities in Global Value Chains: An Introduction

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I. Risk, accountability and liabilities in global value chains

The regulation of risk is central to the modern governance of global value chains (GVCs). These chains constitute cross-border production networks that link firms, workers and consumers around the world in the production and supply of goods and services.[1] GVCs account for over 70 percent of global trade,[2] and participation in them is key for developing countries to achieve economic growth.[3] However, such participation may come at great cost. The offshoring of production by transnational corporations in the Global North to producers and suppliers in the Global South creates major risks for catastrophic harm to people and planet. High-impact tragedies such as the collapse of the Rana Plaza building in Bangladesh and oil spills in the Niger Delta show the devastating potential of negative production externalities in GVCs.

This Special Issue investigates the legal accountability and liability of transnational corporations for these negative production externalities. The network character of GVCs creates major challenges in holding transnational corporations legally accountable for the social and environmental harm caused by risky business operations in their GVCs.[4] Transnational corporations leading GVCs may organise their chains and control for risks related to the quality, safety and sustainability of the products and production concerns by way of foreign direct investments and equity holdings in overseas companies. Ever more frequently, however, lead firms employ formal and informal contracts to complement or replace equity as a chain governance model.[5] Here, contracts allocate risks, govern uncertainty and regulate entry and exit in GVCs.[6]

[1] On the development of GVCs, see R Baldwin, *The Great Convergence: Information Technology and the New Globalization* (Cambridge, MA, Harvard University Press 2019).

[2] OECD, "The Trade Policy Implications of Global Value Chains" <www.oecd.org/trade/topics/global-value-chains-and-trade/> (last accessed 10 October 2022).

[3] World Bank, "World Development Report 2020: Trading for Development in the Age of Global Value Chains", World Bank Publications 2020, at 68–70 and 137; UNCTAD – United Nations Conference on Trade and Development (2013), "Global Value Chains and Development. Investment and Value-added Trade in the Global Economy", United Nations Publication UNCTAD/DIAE/2013/1.

[4] H Collins, "The Weakest Link: Legal Implications of the Network Architecture of Supply Chains" in M Amstutz and G Teubner (eds), *Networks: Legal Issues of Multilateral Co-Operation* (Oxford, Hart Publishing 2009) pp 187–210.

[5] Fundamental in showing the shift in governance modes in GVCs are G Gereffi, J Humphrey and T Sturgeon, "The Governance of Global Value Chains" (2005) 12(1) Review of International Political Economy 78–104; S Ponte and T Sturgeon, "Explaining Governance in Global Value Chains: A Modular Theory-Building Effort" (2014) 21(1) Review of International Political Economy 195–223.

[6] See generally F Cafaggi, "Sales in Global Supply Chains: A New Architecture of the International Sales Law" in D Saidov (ed.), *Research Handbook on International and Comparative Sale of Goods Law* (Cheltenham, Edward Elgar 2019) pp 334–65; J Salminen, "Sustainability and the Move from Corporate Governance to Governance through

In both equity- and contract-based models of value chain governance, the transnational corporations leading the chain strategically use concepts of private law to regulate risks and limit liability exposure in relation to adverse impacts on human rights and the environment. It has long been recognised for the equity model that the concepts of "separate legal personhood" and "limited liability" are deployed by corporations to outsource high-risk activities to formally independent subsidiary firms.[7] These firms are "judgment-proof" whenever the extent of liability is higher than the equity they own,[8] whilst courts only exceptionally revert liability to the parent firm via the doctrine of "piercing the corporate veil".[9]

In the contract model, lead corporations use guarantees and warranties, certification programmes and indemnification and liability exclusion clauses to allocate risks to producers and suppliers elsewhere in the chain. Accordingly, they manage quality, safety and sustainability aspects throughout the chain while deferring risks and liabilities for consumer, worker and environmental harm to value chain partners.[10] These latter parties are independent in legal terms. In economic terms, however, they are very dependent on participation in the value chain.

II. Case law developments

Courts have been challenged on several occasions to overcome the challenges that exist in holding transnational corporations legally accountable for social and environmental harms occurring in their GVCs. The results of these judicial proceedings, typically rooted in civil liability theories of corporate, contract or tort law, are mixed. One example in which litigation against a transnational corporation failed is the Canadian case of *Das v. Weston*.[11] This case involved a negligence claim brought by injured workers and family members of deceased workers in the aftermath of the devastating collapse of the Rana Plaza building in Bangladesh in April 2013. The defendants included the Canadian retailer Loblaws and the global auditing firm Bureau Veritas.

The claim was primarily dismissed for being statute-barred by the applicable Bangladeshi Limitations Act. However, the decisions of the Canadian courts reveal key considerations as to when transnational corporations – either major retailers or global auditing firms – may owe a duty of care to workers of value chain partners under the law of negligence.[12] As these arguably restrictive conditions were not met, the case also

Contract" in B Sjåfjell and CM Bruner (eds), *Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (Cambridge, Cambridge University Press 2019) pp 57–70.

[7] H Hansmann and R Kraakman, "Toward Unlimited Shareholder Liability for Corporate Torts" (1991) 100(7) *Yale Law Journal* 1991, 1879–934.

[8] S Shavell, "The Judgment Proof Problem" (1986) 6(1) International Review of Law and Economics 45–58.

[9] T Cheng-Han, J Wang and C Hofmann, "Piercing the Corporate Veil: Historical, Theoretical and Comparative Perspectives" (2018) 16(1) Berkeley Business Law Journal 140–204.

[10] F Cafaggi and P Iamiceli, "Regulating Contracting in Global Value Chains: Institutional Alternatives and Their Implications for Transnational Contract Law" (2020) 16(1) European Review of Contract Law 44–73; V Ulfbeck, M Andhov and K Mitkidis (eds), *Law and Responsible Supply Chain Management: Contract and Tort Law Interplay and Overlap* (London, Routledge 2019); P Verbruggen, "Private Regulatory Standards in International Commercial Contracts: Questions of Compliance" in: H-W Micklitz, R van Gestel and R Brownsworth (eds), *Contract and Regulation: A Handbook on New Methods of Law Making in Private Law* (Cheltenham, Edward Elgar 2017) pp 284–322.

[11] *Das v. George Weston Limited* 2017 ONSC 4129 (confirmed on appeal by *Das v. George Weston Limited* 2018 ONCA 1053), as discussed by P Verbruggen and V Ulfbeck in this Special Issue.

[12] V Ulfbeck, "Supply Chain Liability for Workers' Injuries – Lessons to be Learned from Products Liability?" (2018) 9(3) Journal of European Tort Law 269–88, 282–85; and J Salminen, "The Accord on Fire and Building Safety in Bangladesh: A New Paradigm for Limiting Buyers' Liability in Global Supply Chains?" (2018) 66(2) The American Journal of Comparative Law 411–51, 436–38.

failed on the merits. What is more, the court at first instance imposed on the plaintiffs a costs order of over 2,300,000 Canadian dollars (close to 1,750,000 euros).[13] While the appellate court reduced the order by 30 percent in the light of the public interest component in the claims,[14] one might say that litigation in this case backfired and may entail significant costs for the victims and their sponsors. On a more general level, it reveals the major obstacles victims face in seeking redress for their harms.[15]

There are, however, also some recent successes for victims. In the Netherlands, two claims against Shell involving the civil liability for environmental damage caused to Nigerian farmers by oil spills in the Niger Delta were upheld.[16] Relying on Nigerian and English law, the Hague Court of Appeal held that the relevant Nigerian subsidiary of Shell was liable for the cause of the spills, the response to them and the remediation of the polluted areas. In addition, the parent company, Royal Dutch Shell (RDS), was considered liable for its subsidiary's negligent response to the spills. Accordingly, the Hague Court of Appeal ordered RDS to put in place protective measures to prevent future oil spills in the area, subject to a penalty of 100,000 euros per day in case it did not comply.[17]

At the same time, damages claims have been brought against Shell before the English courts. The UK Supreme Court recently overturned a decision of the Court of Appeal, which had denied a duty of care for RDS in relation to the environmental and health damages caused to the Nigerian farming and fishing communities affected by the oil spills in the Niger Delta.[18] Even though this case is still at a pre-trial stage, it has been noted that the Supreme Court decision is fundamental in allowing future cases of parent company liability to go to trial. As such, it enables the disclosure and establishment of all relevant facts, possibly including sensitive corporate information. This serves as an incentive for transnational corporations to settle cases prior to trial.[19]

Extending beyond the matter of parent company liability in GVCs is, again, a Dutch case. In another case against RDS, the District Court of The Hague imposed on Shell a duty of care to reduce the carbon dioxide (CO_2) emissions of the worldwide Shell group, its suppliers and final consumers in its value chain by 45 percent by 2030 compared to 2019 levels.[20] The court divined the novel duty of care from *inter alia* human rights conventions and international standards of corporate social responsibility, including the United Nations Guiding Principles on Business and Human Rights. The ruling, while contestable, has been considered the start of a new era for the tort liability of transnational corporations that have a significant worldwide CO_2 footprint.[21]

[13] 2018 ONCA 1053, para 221.

[14] 2018 ONCA 1053, para 273.

[15] See generally, in detail, European Law Institute, "Business and Human Rights: Access to Justice and Effective Remedies" (2022).

[16] The Hague Court of Appeal, 29 January 2021, ECLI:NL:GHDHA:2021:132 (*Oguru c.s./Shell NV*) and The Hague Court of Appeal, 29 January 2021, ECLI:NL:GHDHA:2021:133 (*Dooh c.s./RDS*). A third claim was denied. See the Hague Court of Appeal, 29 January 2021, ECLI:NL:GHDHA:2021:134 (*Milieudefensie/RDS*). All decisions are available in English.

[17] C van Dam, "Breakthrough in Parent Company Liability. Three Shell Defeats, the End of an Era, and New Paradigms" (2021) 18(5) European Company and Financial Law Review 714–48.

[18] *Okpabi and others v Royal Dutch Shell and another*, 12 February 2021, [2021] UKSC 3 and *Okpabi and others v Royal Dutch Shell and another*, 14 February 2018, [2018] EWCA Civ 191. See also *Vedanta Resources Plc and Konkola Copper Mines Plc. v Lungowe and Ors.*, 10 April 2019, [2019] UK Supreme Court 20.

[19] Cfm. Van Dam, supra, note 17, at 730.

[20] District Court of The Hague, 26 May 2021, ECLI:NL:RBDHA:2021:5339 (*Milieudefensie/RDS*), at para 4.4.18.

[21] Van Dam, supra, note 17, at 726. Compare also the damages action brought by a Peruvian farmer against the German energy giant RWE for climate change-related harm. The action is currently at the evidentiary stage before the Court of Appeal of Hamm. See Oberlandesgericht Hamm, pending, I-5 U 15/17 (*Luciano Lliuya v. RWE AG*).

III. Legislative interventions

Furthermore, legislatures have advanced statutory initiatives to impose new accountability mechanisms (including administrative, criminal and civil liabilities) on transnational corporations leading GVCs as regards corporate social responsibility. These statutes involve non-financial reporting requirements and due diligence obligations. The promise of reporting requirements lies in the greater transparency these create around the risks that transnational corporations face in terms of human rights abuses, corruption and environmental degradation.[22] Publicly reporting on these risks and disclosing what policies are in place to measure and avoid such risks would allow shareholders, investors, creditors and other stakeholders to better determine their position vis-à-vis these corporations and hold their boards to account. However, as Charlotte Villiers points out in her contribution to this Special Issue, such "regulation by revelation" frequently fails to materialise in practice. Instead, the overflow of corporate disclosure and the web of competing reporting standards leads to obfuscation and confusion.

Due diligence laws go beyond reporting requirements and oblige transnational corporations to identify, prevent and mitigate non-financial risks in their value chains. A key development in Europe has been the adoption in France of the *Loi de Vigilance* (Duty of Vigilance Law) in 2017.[23] As Lafarre and Rombouts make clear in their contribution to this Special Issue, this law requires corporations to develop a vigilance plan that allows for risk identification and prevents severe human rights abuses, bodily or environmental damage or health risks resulting directly and indirectly from the operations of the corporation and its supply chain. Non-compliance may lead to civil liability for harm caused to others. Various actions have been lodged against French corporations alleging the failure to comply with the Duty of Vigilance Law, but these have only just passed the preliminary stages of determining which courts can hear them.[24] Key questions as regards the meaning of due diligence, the coverage of corporations and the reach of their obligations in the value chain still require addressing.[25]

Elsewhere in Europe, due diligence obligations are on the legislative agenda. For example, in 2021, due diligence laws saw the light of day in Germany[26] and Norway,[27] while in Belgium,[28] the

[22] I Chiu, "Disclosure Regulation and Sustainability: Legislation and Governance Implications" in B Sjåfjell and CM Bruner (eds), *Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (Cambridge, Cambridge University Press 2019) pp 521–35.

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

[24] See, eg, Cour d'appel Versailles, 14e chambre, 18 November 2021, No. 21/01661 (*TotalEnergies re: climate change*) and Cour de Cassation, civile, Chambre commerciale, 15 December 2021, Nos. 21-11.882 and 21-11.957 (*TotalEnergies re: Uganda*). See for more background on the latter case <https://www.totalincourt.org/> (last accessed 10 October 2022).

[25] See also M-T Gustafsson, A Schilling-Vacaflor and A Lenschow, "Foreign Corporate Accountability: The Contested Institutionalization of Mandatory Due Diligence in France and Germany" (2022) Regulation & Governance forthcoming, doi: 10.1111/rego.12498.

[26] *Lieferkettengesetz* (Supply Chain Act) – Gesetz über die unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in Lieferketten vom 16. Juli 2022, Bundesgesetzblad Jahrgang 2021, Teil I Nr. 46, 22 July 2022, 2959–69.

[27] Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions, LOV-2021-06-18-99. Unofficial English translation at <~https://lovdata.no/dokument/NLE/lov/2021-06-18-99#:~:text=%20The%20Act%20shall%20promote%20enterprises,fundamental%20human%20rights%20and%20decent> (last accessed 10 October 2022).

[28] Wetsvoorstel houdende de instelling van een zorg- en verantwoordingsplicht voor de ondernemingen, over hun hele waardeketen heen, 2 April 2021, DOC 55 1903/001 <https://www.dekamer.be/kvvcr/showpage.cfm?section=/flwb&language=nl&cfm=/site/wwwcfm/flwb/flwbn.cfm?lang=N&legislat=55&dossierID=1903> (last accessed 10 October 2022).

Netherlands[29] and the UK the national parliaments were called upon to introduce new due diligence laws.[30] These laws, as they develop, show a great divergence in their material scope (types of risks and extent of (in)direct chain partners), personal scope (types of corporation regulated) and the consequences of non-compliance (injunctive relief, civil liability, criminal penalties, administrative fines).[31] As Charlotte Villiers warns in this Special Issue, consistency and coherency among legislative interventions at the national level are necessary to effectively regulate the risks in GVCs.

In this sense, the European Union (EU) Proposal for a Corporate Sustainability Due Diligence Directive as published in February 2022 is a welcome initiative.[32] It proposes to introduce harmonised due diligence obligations for specific categories of transnational corporations, requiring them to actively look for relevant risks linked to respect for human rights or environmental impacts and to demonstrate the steps they have taken to adequately identify, prevent and mitigate these risks. Failure to comply with these obligations may result in civil liability for harm caused to others. However, critics have already pointed to the limited scope of the Proposal due to the types of corporations it will regulate, as well as its use of the "established business relationships" concept to define the reach of the obligations throughout the value chain.[33] Furthermore, the extent to which victims of harms in GVCs will pursue damages claims against transnational corporations based on the proposed right to compensation should be questioned. Getting access to documentation to support their claims and thus meet the burden of proof may prove too formidable an obstacle, one that could be too costly to overcome in practice.[34]

IV. In this Special Issue

This Special Issue comprises four articles engaging with the broad theme of new liabilities in GVCs. These liabilities straddle the borderlines of corporate law, contract law and tort law. Each of the contributions discusses the challenges and potential impacts of these liabilities for the regulation of risk in GVCs. Together, they concern central topics in the broader landscape of judicial and legislative interventions related to corporate accountability for adverse human rights and environmental impacts in GVCs.

The article by Charlotte Villiers (University of Bristol) raises a fundamental challenge regarding the effectiveness of the EU's legislative interventions concerning corporate reporting requirements and due diligence obligations on sustainability, namely the challenge of complexity. As Villiers explains, such complexity is threefold. Sustainability, including climate change, is in itself a "wicked", multi-dimensional problem. But beyond

[29] Voorstel van wet houdende regels voor gepaste zorgvuldigheid in productieketens om schending van mensenrechten, arbeidsrechten en het milieu tegen te gaan bij het bedrijven van buitenlandse handel (Wet verantwoord en duurzaam internationaal ondernemen) (11 March 2021), Tweede Kamer 2020-21, Nr. 35761 (2).

[30] Business & Human Rights Resource Centre, "The case for human rights due diligence laws in the United Kingdom" <https://www.business-humanrights.org/en/big-issues/mandatory-due-diligence/the-case-for-human-rights-due-diligence-laws-in-the-united-kingdom/> (last accessed 10 October 2022).

[31] See J Salminen and M Rajavuori, "Transnational Sustainability Laws and the Regulation of Global Value Chains: Comparison and a Framework for Analysis" (2019) 26(5) Maastricht Journal of European and Comparative Law 602–27, as well as Lafarre and Rombouts in this Special Issue. See also Gustafsson et al, supra, note 25.

[32] European Commission. "Proposal for a Direction of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937", COM (2022) 71 final (23 February 2022).

[33] See Villiers and Lafarre and Rombouts in this Special Issue.

[34] A Pacces, "Supply Chain Liability in the Corporate Sustainability Due Diligence Directive Proposal" (*Oxford Business Law Blog*, 20 April 2022) <www.law.ox.ac.uk/business-law-blog/blog/2022/04/supply-chain-liability-corporate-sustainability-due-diligence> (last accessed 10 October 2022). See also European Law Institute, supra, note 15.

that layer of complexity sit the organisational complexity of GVCs and the regulatory complexity caused by the myriad of hard and soft law instruments and national and international laws that seek to address corporate social responsibility. In unpacking these two layers of complexity, Villiers asks: to what extent do they frustrate the goal of achieving corporate sustainability and how can these potential obstacles be overcome?

Villiers presents a balanced and realistic view of the organisational and regulatory complexities related to corporate accountability in GVCs. As she notes, organisational complexity has a double edge. One the one hand, the vast array of contracted and non-contracted entities in transnational production networks muddles legal responsibilities when it comes to redressing harmful conduct. On the other, it creates flexibility and protection for corporations to absorb production disruptions (eg the COVID-19 lockdowns of Chinese manufacturers) and supply shocks (eg the 2021 Suez Canal obstruction) and is of economic value as such. Regulatory complexity in corporate reporting relates to the technical nature of reporting activities, the plurality of reporting standards and the voluntary nature of standardised international reporting methodologies. Due diligence obligations will also be harmonised at the EU level, but there is no alignment with the corporate reporting requirements in terms of the scope of the companies covered by the proposed Corporate Sustainability Due Diligence Directive. Villiers explores solutions to both types of complexities in terms of increased corporate transparency, blockchain technology and regulatory quality indicators to address both types of complexities. Ultimately, these will help to enhance the effectiveness of the regulatory interventions concerning corporate accountability in GVCs.

Anne Lafarre and Bas Rombouts (Tilburg University) follow Villiers' call to monitor the effectiveness of the legislative interventions on corporate reporting and due diligence obligations in Europe. In their article, they seek to empirically assess whether and the extent to which the French Duty of Vigilance Law impacts corporate conduct in relation to fundamental labour rights. Lafarre and Rombouts' ambition is therefore to contribute to the academic debate about the effects that mandatory human rights due diligence laws have on human rights compliance in GVCs. To that end, their article first discusses the relationship between fundamental labour standards as secured by the Conventions of the International Labour Organization and the mandatory human rights due diligence laws as they develop in Europe. To measure the effect of the Duty of Vigilance Law on corporate behaviour, Lafarre and Rombouts use human rights scores provided in the Refinitiv Environmental, Social and Governance database, arguably the best means of assessing corporate human rights performance for a large sample of companies. As such, they studied sixty-four French corporations for which a French non-governmental organisation had independently reported mandatory compliance with the Duty of Vigilance Law in the period of 2014–2020.

Using a difference-in-differences analysis, the study reveals that the French Duty of Vigilance Law may have had a positive impact on the human rights scores of those French corporations that were previously lagging behind. Firms that were already performing well continued to do so. Lafarre and Rombouts compared these results against the scores of corporations that did not need to comply with the Duty of Vigilance Law. These comparisons confirm that the improvement has mainly been for the corporations lagging behind. While the presented empirical analysis is limited in its sample size and may contain flawed data on human rights compliance, Lafarre and Rombouts show that the French Duty of Vigilance Law can incentivise corporations to prevent and mitigate the risks that their business operations in GVCs pose to human rights and the environment.

A key feature of mandatory due diligence laws is the continuous obligation for transnational corporations to identify and assess (potential) adverse impacts of their business conduct on human rights or the environment. In uncovering these risks, private auditing firms play an essential role. Due diligence obligations, such as corporate reporting requirements, have created great demand amongst transnational corporations for the

professional services of third-party auditors. In his article, Paul Verbruggen (Tilburg University) discusses the rise of this auditing industry in GVCs. While private auditors are now central players in modern risk governance in GVCs, their position is contested because a number of high-impact safety incidents leading to extensive physical harm have cast doubts as to the integrity and rigour with which they carry out their commercial services. Tort liability is seen as an important legal instrument to incentivise private auditors to improve their audit accuracy and integrity. Relying on English law, Verbruggen aims to assess the extent to which that premise holds true by discussing the liability exposure of private safety auditors for negligent auditing in GVCs.

After discussing the structural role that private safety auditing plays in the modern governance of safety in GVCs, his article analyses the conditions under which an auditor owes a duty of care vis-à-vis a victim harmed by negligent auditing activities. The descriptive legal analysis provides the basis for a normative discussion around the need for subjecting private safety auditors in GVCs to liability for negligence. Verbruggen concludes by arguing that the liability exposure of these auditors is distinctively determined by the purpose and scope of their professional services, as outlined by the contracts that they conclude with audited firms. In other words, this exposure is primarily a function of the contractual obligations auditors undertake to perform for producers or suppliers in GVCs. This finding draws attention to the need to better understand and define the scope of the safety audits offered for risk management purposes within GVCs.

The final article in this Special Issue is by Vibe Ulfbeck (Copenhagen University). Her contribution, like that of Verbruggen, explores the instrumental role that tort liability may play in regulating and guarding against risks of social and environmental harm in GVCs. Ulfbeck is specifically interested in the potential that tort liability has in incentivising global manufacturers to design recyclable products and thus contribute to the creation of circular supply chains. The background is that the creation of a circular economy is high on the agenda of European policymakers.[35] To deliver on that aim, a transformation from linear to circular value chains is needed.

In her article, Ulfbeck explores the extent to which the current rules and concepts of product liability on the one hand and of value chain liability on the other can be reinterpreted to facilitate and sustain that transformation. Product liability rules are intended to incentivise manufacturers to design products that meet the safety that a user is reasonably entitled to expect during the life of the manufactured product. Value chain liability (or "production liability") concerns the corporate liability for harm caused by chain partners through dangerous production activities or activities that negatively impact the environment.[36] Ulfbeck shows that both domains become intertwined in discussing liability in circular value chains. She also argues that both domains use concepts such as "defect", "damage" and "control", which can be reinterpreted to push manufacturers to invest in circular product designs and help to establish circular supply chains.

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[35] See European Commission, "Circular economy action plan" (Europa.EU) <https://ec.europa.eu/environment/strategy/circular-economy-action-plan_da> (last accessed 10 October 2022).

[36] On the relationship between the two types of tort liability, see Ulfbeck, supra, note 12.

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