TORT AS META-REGULATION: THE LIABILITY OF PRIVATE TRANSNATIONAL REGULATORS

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ABSTRACT

Consumers in developed countries regularly voice concerns regarding the working conditions under which goods, especially clothing and electronics, are manufactured in developing countries. Nobody wants slavery sneakers or a sweatshop iPhone; we all want to purchase fair trade goods. But how do we know we can trust a fair-trade label? Such certificates are given by private transnational organizations, which fill a regulatory vacuum created by the persisting weakness of international organizations such as the International Labor Organization (ILO), the United Nations Environment Programme (UNEP), and the World Health Organization (WHO). Absent any global oversight framework that supervises the work of such private regulators, it is unclear whether these certificates can be trusted, or whether they represent a mere whitewashing/greenwashing strategy, which allows multinational enterprises to turn a blind eye to manufacturing conditions across the less visible tiers of their global supply chains. To increase the accountability of this system, we propose holding private transnational regulators liable in tort if their actions (or omissions) generated harms. We support this proposal through a comparative legal analysis and discuss the practicalities of its implementation. We argue that this proposal will support and facilitate positive network effects in the global private regulation system.

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On March 25, 1911, a fire broke out in the Triangle Shirtwaist Factory in the Greenwich Village neighborhood of Manhattan, New York City. The flames quickly consumed the 8th, 9th, and 10th floors of the building. While most workers on the 8th and 10th floors managed to escape unharmed, the main exit door on the 9th floor was locked. This was standard practice at the time, meant to reduce theft and to prevent workers from taking unauthorized breaks. Trapped behind the locked door, workers on the 9th floor burned alive, suffocated from inhaling the smoke, or were forced to jump to their certain death on the sidewalks below. 146 died, most of them young women. The Triangle Shirtwaist Factory fire is one of the deadliest industrial disasters in U.S. history and brought about profound legal and societal transformations. The fire led to legislation requiring improved factory safety standards; more broadly, it is considered the starting point for industry and


3 Id.

4 Id.

5 See id. (noting how the doors in the Triangle Shirtwaist factory were allegedly locked to prevent theft).


Bodies were falling all around us . . . . The girls just leaped wildly out of the windows and turned over and over before reaching the sidewalk . . . . They stood on the windowsills tearing their hair out in the handfuls and then they jumped. One girl held back after all the rest and clung to the window casing until the flames from the window below crept up to her and set her clothing on fire. Then she jumped far over the net and was killed instantly, like all the rest.


7 McEvoy, supra note 2, at 622.

8 See generally McEvoy, supra note 2, at 621 (referencing the Triangle Shirtwaist Factory fire as “one of the most infamous industrial accidents in U.S. history”).

9 See McEvoy, supra note 2, at 621-22.

10 See McEvoy, supra note 2, at 622, 626, 641.
workplace safety law\textsuperscript{11} and an important landmark in the move towards the modern regulatory state.\textsuperscript{12} In the century since the Triangle Shirtwaist Factory fire, developed countries introduced unprecedentedly detailed and ambitious legal frameworks designed to regulate industry and market behavior in order to reduce harms generated through the operation of modern industrialized society.\textsuperscript{13} The goal of such legal reforms was to make sure that tragedies such as the Triangle Shirtwaist Factory fire do not repeat themselves.\textsuperscript{14}

Yet in some ways, little has changed since this disaster took place. On September 11, 2012, a full century after the Triangle Shirtwaist Factory fire, a similar factory fire claimed the lives of at least 262 workers, many of them found themselves trapped behind locked doors.\textsuperscript{15} Some were only able to escape by using heavy machinery to break out through the thick windows.\textsuperscript{16} Less fortunate workers died of burns or from inhaling the smoke,\textsuperscript{17} while others were boiled alive in the factory basement in the water used to extinguish the fire.\textsuperscript{18} This factory fire did not occur in New York City, but at the Ali Enterprises factory in Karachi, Pakistan. Claims against the factory focus on the existence of heavy iron bars on the windows,\textsuperscript{19} the lack of emergency exits,\textsuperscript{20} the fact that the few


\textsuperscript{12} David Von Drehle, Triangle: The Fire That Changed America 10-15 (2003).

\textsuperscript{13} See Brenda Lange, The Triangle Shirtwaist Factory Fire 75-86 (2008) (discussing the legislative efforts to improve work conditions after the fire); Elizabeth Faulkner Baker, Protective Labor Legislation: With Special Reference to Women in the State of New York 153-56 (1925); McEvoy, supra note 2, at 621 (arguing the fire was the trigger for legislative reform); Eric G. Behrens, The Triangle Shirtwaist Company Fire of 1911: A Lesson in Legislative Manipulation, 62 Tex. L. Rev. 361, 365-67 (1983) (discussing successes in legislative reform after the fire).

\textsuperscript{14} See McCormick, supra note 11, at 646 (“The Triangle Shirtwaist Factory tragedy mobilized the labor movement and progressive reformers, and provided part of the political will to enact significant protective health and safety legislation for workers.”).


\textsuperscript{16} Id.

\textsuperscript{17} Id.

\textsuperscript{18} Id.

\textsuperscript{19} Id.

\textsuperscript{20} Id.
available exits were locked, and generally highlight the lack of adequate fire safety measures.\textsuperscript{21}

Together, these two factory fires tell the story of a legal failure of epic proportions. Despite a century of regulatory efforts,\textsuperscript{22} industrial accidents are a growing concern, with numerous casualties yearly. To take another example, in 2013, the Rana Plaza factory collapse left 1,129 Bangladeshi workers dead and 2,515 injured.\textsuperscript{23} The reason for this continuous failure is that factories like the Triangle Shirtwaist Factory mostly did not stay in New York City but were replaced by production sites in developing countries such as Bangladesh, India, and Pakistan. Thus, as part of the globalization of the world economy, production, and its associated labor and environmental risks largely shifted from developed to developing countries.\textsuperscript{24} At the same time, the stricter regulatory frameworks adopted in western countries are not applicable beyond their borders. Developing countries in Asia, Africa, and South America still lag behind in their regulatory infrastructure and did not fully adopt the comprehensive regulatory regimes developed in western countries.\textsuperscript{25} This is not only a safety concern; production in

\begin{itemize}
\item \textsuperscript{21} \textit{Id.}
\item \textsuperscript{22} See \textsc{Lange}, supra note 13, at 75, 87; \textsc{Baker}, supra note 13, at 153-56; \textsc{Behrens}, supra note 13, at 365-67; \textsc{McEvoy}, supra note 2, at 621.
\item \textsuperscript{23} Philip James, Lilian Miles, Richard Croucher & Mark Houssart, \textit{Regulating Factory Safety in the Bangladeshi Garment Industry}, 13 \textsc{Regul. \\& Governance} 431, 431 (2019).
\end{itemize}
developing countries relies on millions of forced laborers, denied pay and elementary living conditions. Environmental disasters are also a major issue; in what is now known as the “Bhopal Gas Tragedy,” more than forty tons of methyl isocyanate gas leaked from a pesticide plant in Bhopal, India, immediately killing more than 3,800 people, with thousands more victims in the following months. Such disasters demonstrate the need for improving regulatory standards in developing countries.

We focus on this issue as a failure of enforcement. The legal reforms that followed the Triangle Shirtwaist Factory fire symbolized a vision: to increase safety, save lives, and improve working conditions.

This vision did not come to fruition. Production largely still takes place under similar conditions to those that led to the Triangle Shirtwaist Factory fire, or worse; this is evident in the recent and frequent disasters such as the Ali Enterprises factory fire and the (reporting higher employment fatality rates for China and India in comparison to the European Union, United Kingdom and the United States); Vinand M. Nantulya & Michael R. Reich, The Neglected Epidemic: Road Traffic Injuries in Developing Countries, 324 BRIT. MED. J. 1139, 1140-41 (2002) (discussing inadequate regulation and infrastructure to address high road traffic injuries in developing countries); Zain Anwar, Atif Mustafa & Muhammad Ali, Appraisal of Process Safety Management Practices in Refining Sector of Pakistan, 128 PROCESS SAFETY & ENVI’RT. PROT. 36, 40 (2019) (noting absence of safety regulations and system for refining sector in Pakistan).26 See Marsha Dickson & Hayley Warren, A Look at Labor Issues in the Manufacturing of Fashion Through the Perspective of Human Trafficking and Modern-Day Slavery, in THE DANGERS OF FASHION: TOWARDS ETHICAL AND SUSTAINABLE SOLUTIONS 103, 103 (Sara B. Marcketti & Elena Karpova eds., 2020) (describing the working conditions of an estimated 21 million forced laborers).


The Triangle fire played a critical role in transforming the ways in which the legal culture attributed causes to industrial accidents, which were a main focus of political debate at the time. . . . As the change it wrought in public thinking about industrial accidents became manifest in legislative reform, however, the Triangle fire contributed significantly to shaping the worldview that underlay 20th-century public life and legal institutions.

McEvoy, supra note 2, at 626.
Bhopal environmental pollution tragedy, and in data on the prevalence of modern-day slavery.\(^{31}\)

In light of this failure, one important legal response has been the emergence of private transnational regulatory organizations,\(^ {32}\) which develop and maintain semi-binding regulatory schemes.\(^ {33}\) Most of these private transnational regulators (PTRs) have a dual functionality: they operate both as standard-setting organizations that produce prescriptive behavioral guidelines predominantly focusing on firms,\(^ {34}\) and as compliance agents, responsible for the enforcement of such guidelines and standards.\(^ {35}\) PTRs operate in diverse areas, ranging from labor rights (child labor, compulsory labor, and workplace discrimination, working hours and remuneration, occupational health, and safety standards)\(^ {36}\) to

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\(^{31}\) Dickson & Warren, supra note 26. Another prominent example of this phenomenon is the ship-recycling industry, which is dominated by Bangladesh, India, and Pakistan and is similarly characterized by a poor environmental record and unsafe and abusive working conditions. See, e.g., George M. Cairns, *Return to Chittagong: Ten Years Since the “Postcard”*, 14 CRITICAL PERSPS. ON INT’L BUS. 340, 341 (2017) (arguing that working conditions in Bangladesh have not improved since 2007); Hasan Ruhan Rabbi & Aevelina Rahman, *Ship Breaking and Recycling Industry of Bangladesh: Issues and Challenges*, 194 PROCEEDIA ENGINEERING 254, 256 (2017) (discussing environmental pollution caused by ship breaking industry in Bangladesh).

\(^{32}\) See Math Göbbels & Jan Jonker, *AA1000 and SA8000 Compared: A Systematic Comparison of Contemporary Accountability Standards*, 18 MANAGERIAL AUDITING J. 54, 54 (2003) (explaining the emergence of private regulatory standards as a response to growing gaps left by traditional legal institutions); Dirk Ulrich Gilbert, Andreas Rasche & Sandra Waddock, *Accountability in a Global Economy: The Emergence of International Accountability Standards*, 21 BUS. ETHICS Q. 23, 25 (2011) (attributing the emergence of private transnational regulation to the “lack of transnational regulation of social and environmental issues related to corporate activity,” and arguing that this regime is “a mechanism to fill the omnipresent governance voids which the rise of the global economy has created”).

\(^{33}\) See Gilbert et al., supra note 32, at 24 (explaining that private transnational regulation is primarily voluntary, but also allows for some forms of “soft law” regulations).

\(^{34}\) See, e.g., Göbbels & Jonker, supra note 32, at 55-56 (describing the frameworks of PTRs, AA1000, and SA8000).

\(^{35}\) See id. (discussing audits and reviews provided by the PTRs).

environmental standards\textsuperscript{37} and fair-trade standards.\textsuperscript{38} Examples of PTRs include organizations such as Fairtrade International,\textsuperscript{39} SA8000,\textsuperscript{40} Responsible Care,\textsuperscript{41} ISO 14001,\textsuperscript{42} and Global Compact.\textsuperscript{43} Firms that are willing to commit to the standards set by these organizations can apply to become members or be certified by them.

The emergence of private transnational regulation has been driven, in part, by the decline of the international treaty system and its increasing inability to respond to global risks. The failure of the World Health Organization (WHO) to properly coordinate the global response to the coronavirus crisis provides a forceful demonstration of the weaknesses of the global governance system.\textsuperscript{44} As we show below, global organizations such as the International Labor Organization (ILO), the United Nations Environmental Programme (UNEP), and the WHO are increasingly seeking to forge partnerships with private regulators in order to overcome their


\textsuperscript{39} Aims of the Fairtrade Standards, FAIRTRADE INT’L, https://www.fairtrade.net/standard/aims [https://perma.cc/A256-CCJL] (last visited Jan. 25, 2022); see Bennett, supra note 38 (examining the operations of Fairtrade International and explaining its decision to include or exclude products from certification).

\textsuperscript{40} Göbbels & Jonker, supra note 32, at 56.

\textsuperscript{41} Aseem Prakash, Responsible Care: An Assessment, 39 BUS. & SOC’Y 183, 184 (2000).


\textsuperscript{43} Oliver F. Williams, The UN Global Compact: The Challenge and the Promise, 14 BUS. ETHICS Q. 755, 755-57 (2004).

in institutional deficit. PTRs provide an additional layer of regulation, operating alongside global public law (such as the ILO and international environmental conventions) and domestic law (national environmental, health and safety, and workers’ rights regulations).

The increasing role played by PTRs in global governance processes raises, however, a meta-regulatory dilemma. Namely, to what extent PTRs can be trusted to provide appropriate solutions to the problem of low regulatory standards in developing countries. Thus, consumers might intuitively trust a “fair trade” label, especially if they (wrongly) assume that such labels are backed by international or state regulators. Knowing that these certifications are given by private organizations, can we simply assume they represent candid and rigorous regulatory efforts?

The Ali Enterprises case vividly illustrates the dilemma. The Ali Enterprises Factory in Karachi was certified by SA8000 code of conduct, which provides detailed standards for decent work conditions, including provisions on health and safety, discrimination, working hours, disciplinary practices, and remuneration.45 Yet, as it can be observed from the Ali Enterprises Factory disaster itself, whether private regulation can provide effective solutions remains in doubt. Scholars have raised various questions regarding the credibility of private regulation.46 First, PTRs are not subject to formal supervision by public international law bodies such as the ILO or UNEP or by national regulators. This

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46 See Rasche, supra note 45, 285-89 (analyzing the limits and implications of SA8000); Locke et al., supra note 3636, at 22-24 (noting the debate over whether private codes and conduct are working) corporations); HUM. RTS. WATCH, "WHOEVER RAISES THEIR HEAD SUFFERS THE MOST": WORKERS’ RIGHTS IN BANGLADESH’S GARMENT FACTORIES 58-61 (2015), https://www.hrw.org/sites/default/files/report_pdf/bangladesh0415_web_0.pdf [https://perma.cc/7K4D-H9TD] (describing how companies failed to change working conditions with their codes).
means that they mainly operate in response to private market forces, public pressure from civil society organizations, and collegial monitoring by other PTRs. Second, it is not clear whether these market and civic pressures provide PTRs with sufficient incentives to set appropriate standards and verify their enforcement. The concern raised by critics is that PTRs are used to whitewash or greenwash the illnesses of production in developing nations in order to keep prices low for consumers in the West.47

In this Article, we propose a novel remedy to this problem. We suggest holding PTRs directly liable in tort for harms that were caused due to their negligence in either setting the standard or in enforcing it on market participants. This proposal fills a significant gap in existing literature, which focuses on the responsibility of transnational firms, and not on the accountability of transnational regulators.48

To illustrate our proposal, consider again the Ali Enterprises Factory fire described above. According to our proposal, in the Ali Enterprises case, the organizations behind the SA8000 standard—Social Accountability International (SAI) and Social Accountability Accreditation Services (SAAS)—could be held liable for the damages caused by the fire if it is determined that the safety provisions in the SA8000 standard were unreasonable, or if the standard was not effectively enforced by the private regulator. If private regulators are held liable in this way, this will provide them with the missing incentive to assure appropriate standards are set and, more importantly, enforced. The justification behind our proposal is simple: preventing industrial accidents can only be achieved if someone is made responsible when such accidents occur. As long as both employers and private regulators are systematically not held liable for the damages caused to workers due to unreasonable industrial risks, it would be naïve to expect such risks to spontaneously disappear. By holding private regulators liable in

47 See Locke et al., supra note 36, at 22 (“[C]odes of conduct and voluntary monitoring regimes . . . are designed not to protect labour rights or improve working conditions but instead to limit the legal liability of global brands and prevent damage to their reputation.”).

tort, we fill the gap in the existing private law toolbox and strengthen the global governance system. We show that this solution is in line with existing principles of tort law, compare it to other possible legal solutions, discuss its advantages and limitations, and the legal possibility for its implementation. We also show that our approach reinforces already existing trends for public-private collaboration between treaty organizations and PTRs.

The Article proceeds as follows. Part II details the difficulties that local and international legal systems encounter in trying to regulate global markets. It explains that legal systems in developing countries are easily caught in a race-to-the-bottom and tend to not develop regulatory regimes that will limit the profitability of multinational enterprises (MNEs). For these reasons, protection of workers and citizens in southern regions must come from transnational and global mechanisms and cannot originate solely in national legal frameworks. Part III reviews recent developments in the use of private regulators and certification schemes designed to contend with the challenges of regulating the global economy. It explains the limitations of these emerging regimes, especially their lack of formal legal authority supported by the state administrative machinery. In light of these difficulties, Part IV moves on to present our proposal of tort liability for transnational private regulators. It offers a detailed analysis of the proposed regime and a discussion of possible counter arguments. It also explores the projected consequences of our proposal, especially focusing on its potential network effects. A short conclusion follows.

II. THE FAILURE OF TRADITIONAL LEGAL FRAMEWORKS

Regulatory standards in developing nations lag behind those in developed countries. The sources of this pervasive lag are multifaceted. First, in a highly competitive global market environment in which capital has become highly mobile, developing countries find it increasingly more difficult to raise the level of their environmental, safety, or labor standards and to develop strong enforcement mechanisms, out of fear of undermining the competitive edge of their local industries or of losing manufacturers

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49 Blackman et al., supra note 25, at 381.
to jurisdictions that offer more lenient regulatory environments.\textsuperscript{50} Second, the capacity of many developed countries to introduce regulatory reforms and improve environmental and safety standards has been undermined by widespread corruption within their administrative bureaucracy.\textsuperscript{51}

These forces hinder development and improvement of safety and environmental standards on all legal fronts. In this Part, we examine the shortcomings of traditional legal frameworks in regulating the safety and environmental behavior of manufacturing firms operating in developing countries. We study both public law and private law regimes, operated both locally and internationally.

\textit{a. The Limits of Traditional Public Law Solutions}

As a starting point, existing research tends to turn to public law schemes as the natural framework for setting environmental and safety standards. As we show below, the success of public law instruments in changing the situation in developing countries has been limited.

\textit{i. National Regulation}

One of the key features of the globalization process has been the offshoring of production to developing countries.\textsuperscript{52} Multinational


\textsuperscript{52} Bernard et al., \textit{supra} note 24; Gereffi & Memedovic, \textit{supra} note 24; Kumar, \textit{supra} note 24.
companies and transnational supply chains have increasingly moved production to the global south, for various reasons. Demand from the developed world has also spurred domestic growth of independent, domestic producers. This important change is intimately connected to the lax regulatory standards common in developing countries and to their relative inability to provide legal protection to vulnerable classes.

This dynamic contributes to a special—and severe—breed of regulatory capture. Regulatory capture is always a significant concern because regulators, effected by powerful commercial lobbies, might drift to represent industry interests instead of the interests of the general public. In the case of developing countries and the regulation of transnational production, this risk is especially pronounced. Big businesses in the global north—buyers in the transnational supply chain—enjoy a privileged market position. Such business entities therefore enjoy the capacity to weaken regulatory structures in the global south, allowing them to influence labor standards in manufacturing firms in developing countries. This can be done directly through bargaining and through insistence on low manufacturing prices, or indirectly through lobbying efforts.

Often, developing countries lack the regulatory capacity to enforce labor standards, meaning that even if developing countries set higher standards, manufacturing firms can shirk their regulatory obligation in order not to increase their production costs.

Another aspect of the problem is that developing countries are locked in a destructive race-to-the-bottom when attempting to regulate transnational markets. Developing countries have a strong economic interest in appealing to buyer-firms and attracting their business. Since high regulatory standards impose a cost on production, developing countries will be reluctant to set and enforce

53 Bernard et al., supra note 24.
54 See Olney, supra note 50, at 191-93 (discussing the phenomena of race to the bottom in developing countries).
them. Regulators in developing countries therefore might set regulatory standards too low, or at least be reluctant to increase regulatory demands. The race-to-the-bottom dynamic is straightforward: buyer firms seek cheap production opportunities in developing countries; developing countries, in response, are forced to compete amongst themselves to offer attractive conditions, including low regulatory standards. This means that even if political conditions within the country could allow for raising regulatory standards, transnational market pressures can easily prevent this.

ii. International Public Law Regulation

As we described above, developing countries are gripped in a race-to-the-bottom, which results in low environmental and safety standards. The competitive pressures that the global economic order imposes on developing nations make it very difficult for them to set standards that are stricter than those that exist in other developing countries. The only way in which this destructive race-to-the-bottom dynamic can be countered is through international collaborative regulatory initiatives that bring together developed and developing countries. Unfortunately, attempts to use global public law mechanisms to create collective regulatory solutions had only limited success.

We offer two key examples for this global failure. Consider first the Sustainable Development Goals (SDGs). In September 2015, the United Nations General Assembly adopted the 2030 Agenda for Sustainable Development that includes seventeen Sustainable Development Goals. Building on the principle of “leaving no one behind,” the new Agenda emphasizes a holistic approach to achieving sustainable development for all. Among the SDGs are

58 G.A. Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development (Oct. 21, 2015).
goals that target decent work conditions (SDG 8), reduced inequality and gender equality (SDGs 10 and 5), stronger environmental commitments on both local and global levels (SDGs 6, 13, 14, 15), and responsible consumption and production (SDG 12). The United Nations Resolution A/RES/70/1 includes a specific provision, in section 67, calling upon businesses to take part in realizing the SDGs:

We call upon all businesses to apply their creativity and innovation to solving sustainable development challenges. We will foster a dynamic and well-functioning business sector, while protecting labour rights and environmental and health standards in accordance with relevant international standards and agreements and other ongoing initiatives in this regard, such as the Guiding Principles on Business and Human Rights and the labour standards of the International Labour Organization, the Convention on the Rights of the Child and key multilateral environmental agreements, for parties to those agreements.⁶⁰

The SDG programme had some impact on corporate practices, and on the Corporate Social Responsibility (CSR) universe more broadly. For example, a recent PricewaterhouseCoopers report, based on a survey of global companies, notes that seventy-one percent of the business participants say they are already planning their responses to the SDGs.⁶¹ Jan Anton van Zanten and Rob van Tulder conducted a survey of eighty-two large MNEs in North America and Europe included in the 2015 Financial Times Global 500, and similarly found a high level of engagement with the SDGs targets. Companies indicated particularly high contributions to SDG 5 (Gender Equality), SDG 8 (Decent Work and Economic Growth), SDG 12 (Responsible Consumption and Production), SDG...
13 (Climate Action), SDG 16 (Peace, Justice, and Strong Institutions), and SDG 17 (Partnerships for the Goals).  

However, the voluntary structure of the SDG programme, raises doubts regarding its capacity to realize its goals. The United Nations resolution clarifies that “[o]ur Governments have the primary responsibility for follow-up and review, at the national, regional and global levels, in relation to the progress made in implementing the Goals and targets over the coming fifteen years.” The primary regulatory mechanism that will be used to foster compliance with the programme is “systematic follow-up and review,” which will be coordinated by the high-level political forum under the auspices of the General Assembly and the Economic and Social Council. Neither of these bodies has compliance powers (especially not against private businesses, which are not parties to the United Nations system).

The weaknesses of the SDG programme with respect to corporate actors have been corroborated by studies that examined more closely the impact of the SDG programme on corporate behavior. Thus, for example, van der Waal and Thijssens examined the sustainability reports of companies included in the Forbes Global 2000 universe. The results suggest that corporate SDG involvement is overall still limited (twenty-three percent of sample), and intentional rather than actual. The authors find that SDG reporting is mainly symbolic and is undertaken by corporations in a context of impression management. They find that SDG involvement is largely described in broad terms, expressed as intentions, opportunities, and future actions, and that companies remain silent on current actions taken, explicit business cases, measurement of SDG outcomes or ways in which SDGs can be operationalized.

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63 G.A. Res. 70/1, supra note 58, ¶ 47.
64 G.A. Res. 70/1, supra note 58, ¶ 47.
65 Johannes W.H. van der Waal & Thomas Thijssens, Corporate Involvement in Sustainable Development Goals: Exploring the Territory, 252 J. CLEANER PRODUCTION 1, 3 (2020).
66 Id. at 9; Macellari et al. provide further confirmation to this argument in a recent study of the disclosure practices of United Nations Global Compact LEAD members. Margherita Macellari, Alexander Yuriev, Francesco Testa & Olivier Boiral, Exploring Bluewashing Practices of Alleged Sustainability Leaders Through a
The regulatory weaknesses of the SDG programme reflect a more general problem in the field of international environmental law: the lack of a robust and effective compliance framework. Without such a framework, compliance with the myriad global environmental treaties remains partial at best. The results of this shortcoming are reflected in the deteriorating state of the earth ecological system.67

A similar situation exists in the domain of global labor law. The effort to develop a global governance system that ensures decent working conditions for workers across the world has a long history.68 Starting in 1919, a complex body of regulations has begun to evolve, with the adoption of the first six International Labor Organization (ILO) Conventions. The ILO has sought to provide a global regulatory framework that includes procedural rights such as freedom of association and the right to collective bargaining, substantive rights like paid holidays, maternity leave and minimum or living wages, and standards pertaining to occupational health and safety.69 This regulatory framework, consisting of a myriad of conventions and protocols, attempts to operate both internationally and intra-nationally, and to shape both global market relations as

Counter-Accounting Analysis, 86 ENV’T IMPACT ASSESSMENT REV. 1, 1 (2021). LEAD companies belong to an exclusive group of companies that have demonstrated leadership in one or more SDG issues. Global Compact LEAD, UNITED NATIONS GLOB. COMPACT, https://www.unglobalcompact.org/take-action/leadership/gc-lead [https://perma.cc/7V47-A6AL] (last visited Jan. 26, 2022). They find a low propensity of United Nations Global Compact LEAD members to disclose information about significant negative events in their sustainability reports (consistent with the greenwashing literature). Macellari et al., supra. More than eighty percent of identified events were not reported or were only partially reported. Macellari et al., supra, at 8.


well as the regulatory practices within nation states. However, despite its long history, the ILO has failed to produce a robust institutional structure that could ensure global compliance with its myriad rules.\textsuperscript{70}

The ILO worker rights conventions serve as a good illustration of this public law failure. In a recent study, Dursun Peksen and Robert G. Blanton have examined the impact of the ratification of core ILO Conventions on the level of respect for workers’ rights, based on data analysis for the period 1981-2011.\textsuperscript{71} They found “the ratification of ILO Conventions to be negatively related to the protection of worker rights.”\textsuperscript{72} The authors argue that these findings reflect the paradoxical impact of ILO Conventions:

States thus have an incentive to ratify ILO Conventions, as they provide a visible signal of support for these standards. At the same time, the ILO has no mechanism to enforce labor standards. . . . This combination of factors creates a “perfect storm” for radical decoupling, as treaties “serve to relieve pressure for real change in performance” and give states a shield to tolerate further labor rights violations.\textsuperscript{73}

In a recent study, Joseph LaDou provides a similar critique of the ILO’s SafeWork programme, arguing that it failed to increase worldwide awareness to the risks of work-related accidents and to promote compliance with ILO Conventions on occupational safety and health.\textsuperscript{74}

Finally, attempts to develop an international binding regulatory instrument, that will obligate transnational corporations to respect


\textsuperscript{72} Id. at 90.

\textsuperscript{73} Id. at 77.

human and labor rights and environmental interests, have so far been futile. The most recent attempt in this context has been the adoption of the United Nations Human Rights Council Resolution 26/9, which in 2014 tasked the Open-Ended Intergovernmental Working Group (OEIGWG) with developing such an instrument. In October 2020, the Chair of the OEIGWG issued a second revised draft of a “[l]egally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.” However, the instrument still has to receive the formal support of developed countries, and more importantly, it does not foresee the imposition of direct human rights obligations on MNEs, but is basically a mediating instrument: “it obliges State parties to adopt and improve their domestic laws in order to hold business actors to account.”

b. Traditional Private Law Mechanisms

In addition to regulatory enforcement, firms can be induced to invest in minimizing the harms of their activity out of fear of a

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private suit brought by victims who suffer the harm.\textsuperscript{78} This section shows that such mechanisms, although in theory supposed to offer effective solutions, are too often insufficient to provide appropriate response in the context of global production networks.

Generally, private law remedies do not provide credible and robust alternatives to the foregoing public law failures, due to several concurring reasons. First, local manufacturers often have insufficient resources to compensate accident victims.\textsuperscript{79} Second, the judicial systems in many developing countries do not have the necessary resources and the know-how to deal with mass tort cases.\textsuperscript{80} Third, when the accident involves transnational chains of ownership or supply, victims face significant hurdles in bringing a lawsuit against either the parent company or the purchaser.\textsuperscript{81} These hurdles consist of both jurisdictional barriers (e.g., \textit{forum non}


\textsuperscript{79} See S. Shavell, \textit{The Judgment Proof Problem}, 6 \textit{Int’l Rev. L. & Econ.} 45, 45 (1986) (noting that when the parties have less assets than liabilities they might cause, there is a lack of appropriate incentive to prevent accidents).

\textsuperscript{80} See, e.g., \textit{Edwin Mujib, Regulating Multinationals in Developing Countries: A Conceptual and Legal Framework for Corporate Social Responsibility} 91-120 (2012) (discussing a tort case from Chad); Fan Yang, Ting Zhang & Hao Zhang, \textit{Adjudicating Environmental Tort Cases in China: Burden of Proof, Causation, and Insights from 513 Court Decisions}, 21 \textit{Asia Pac. J. Envt’L} 171, 172 (2018) ("Generally, environmental tort plaintiffs face enormous obstacles in bringing cases to courts. Chinese courts have set stringent bars to accepting cases."). See also Ngozi F. Stewart, \textit{A Proposal of Reforms for Effective Environmental Management in Nigeria}, 31 \textit{Ajayi Crowther U.L.J.} 1, 24 (2017):

Nigerian judges usually have little or no capacity to effectively adjudicate and manage the environmental cases before them. Some of the judges are hardly updated on developments in law, rules and jurisprudence on environmental matters; also, some of the judges have low sensitivity levels in the resolution of environmental disputes.

conveniens doctrine) as well as various private law and corporate law doctrines. Victims and their families are therefore left without legal recourse against either the local factory or firms further down the transnational supply chain.

i. Traditional Tort Claims

The most direct way to hold firms responsible for the harmful outcomes of their activity is through the use of a tort action. Thus, in the case of the Ali Enterprises Factory fire, workers and their families could theoretically sue the factory owners for the harms they suffered. Unfortunately, such claims are rarely successful. While similar tort claims might offer valuable recourse in the United States or in other developed economies, in Pakistan, where the Ali Enterprises Factory fire took place, such venue for recourse is often irrelevant for workers.

One reason for this is that the capital structure of manufacturing factories in developing countries is usually too thin, making them unable to compensate victims. Theoretically this difficulty, described in the literature as the ‘judgment proof’ problem, could be corrected by requiring manufacturing firms to purchase

82 Christopher A. Whytock & Cassandra Burke Robertson, Forum Non Conveniens and the Enforcement of Foreign Judgments, 111 Colum. L. Rev. 1444, 1444 (2011) (describing the forum non conveniens doctrine, allowing a defendant to seek dismissal of the claim based on the argument that a foreign court is a more appropriate forum for hearing the suit).

83 Louis Kaplow & Steven Shavell, Economic Analysis of Law, in HANDBOOK OF PUBLIC ECONOMICS VOLUME 3, at 1661, 1667 (Alan J. Auerbach & Martin Feldstein eds., 2002) ("[W]e will view the primary social function of the liability system as the provision of incentives to prevent harm.").


85 Shavell, supra note 79, at 46.
environmental and accident insurance. But such obligation is rarely imposed in developing countries.

In addition, direct tort claims in developing countries can be problematic due to lack of funding, corruption in the local judicial system, or doctrinal limitations in the structure of local laws. The judicial system in developing countries is typically underfunded, often badly managed, and characterized by an extremely low judge to population ratio. Under such conditions, tort suits are typically pushed to the end of the line, as the courts are swamped and prioritize criminal cases. This means civil lawsuits are typically not adjudicated for many years, if ever. For instance, in India, studies show that only a very low number of tort cases are adjudicated every year.

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88 Doe v. Nestle, SA, 748 F. Supp. 2d 1057, 1064 (C.D. Cal. 2010) (alleging corruption as a reason for the plaintiffs’ inability to sue in their place of employment, ivory coast).

89 Id.

90 See Marc Galanter, “To the Listed Field . . .”: The Myth of Litigious India, 1 JINDAL GLOB. L. REV. 65, 71 (2009) [hereinafter Galanter] (noting relatively low number of judges per capita for India).

91 Id. (citing a ratio of one judge per 100,000 people in India, with a small number of courts available); Marc Galanter & Jayanth K. Krishnan, Debased Informalism: Lok Adalats and Legal Rights in Modern India, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW 96, 99 (Erik G. Jensen & Thomas C. Heller eds., 2003) (describing very low judge to population ratio in India).

92 See Galanter, supra note 90, at 72 (noting long delays for cases in district and subordinate courts in India); see also Timothy J. O’Neill, Through a Glass Darkly: Western Tort Law from a South and East Asian Perspective, 11 RUTGERS RACE & L. REV. 1, 12 (2009) (“Indian courts are over-loaded, with the backlog of cases causing years of delays”).

Finally, tort claims often encounter barriers in substantive law of developing countries. Local legal systems in developing countries offer a complex and multilayered network of semi-autonomous, cohabiting legal orders. Such legal systems can contain layers of local customary law, religious law, colonial law (usually German, French, or British) and finally modern (often socialist) law of the modern independent state. These layers represent a process of stratification, by which each layer is superimposed on top of another, without completely replacing it. This complex system is difficult for private claimants to navigate, and often does not provide remedies for accident victims in the fashion now accepted as the norm in the United States or in Europe.

ii. Suing Down the Supply Chain

To overcome the difficulties described above, victims of harm could try and sue down the supply chain in an attempt to hold either a parent company or a contractual buyer liable for the harms created by manufacturers. The economic logic of such claims is simple: by suing the buyer-firm or parent company directly (instead of suing the local employer), victims can gain access to the western company’s deep pocket and enjoy more favorable legal institutions in the courts of developed economies. There is also a moral logic in such claims, since in many cases companies in the west enter contractual relations with manufacturers in the South in full recognition of the problematic working conditions and the environmental risks that exist in their facilities.
However, such claims typically face significant legal hurdles. We should distinguish in this context between cases in which the defendant company is linked to the local firm through corporate ownership, and cases in which the links are only contractual. The English case of Chandler v. Cape \(^{99}\) provides an example of cases of the first type. Employees of the South African company Cape Building Products Ltd ("Cape Products") have filed a claim against the parent company (English) Cape. \(^{100}\) The plaintiff argued that he was injured due to the negligent and unsafe practices in which asbestos and asbestos produces were manufactured. \(^{101}\) The Ali Enterprises case illustrates the second category. Here the links were contractual; fire victims sued KiK, a German clothing retail company that was the sole buyer of all garments produced at the Ali Enterprises Factory.

When the foreign and local firms are linked through relations of corporate ownership, the primary hurdle for establishing the liability of the parent company is the doctrine of separate corporate personality. \(^{102}\) Most common law jurisdictions provide an exception to this rule under the doctrine of "piercing the corporate veil." \(^{103}\) However, this doctrine allows the courts to impose liability on the parent company only in limited circumstances, which typically do not include cases in which the subsidiary company has caused harm


\(^{100}\) Id.

\(^{101}\) Id. ¶ 3 (“Asbestos was produced on the same site in a factory with open sides, and dust from that factory migrated into the area where Mr Chandler worked. Cape in effect accepts that Cape Products failed in its duty to Mr Chandler.”).


to its employees or third parties as part of its business activity.\footnote{See Tan Cheng-Han, Jiangyu Wang & Christian Hofmann, \textit{Piercing the Corporate Veil: Historical, Theoretical and Comparative Perspectives}, 16 BERKELEY BUS. L.J. 140, 150-57 (2019) (discussing how different jurisdictions allow piercing in limited circumstances).}

The broader principle, which characterizes both English and American law, is that the corporate veil may be pierced only to prevent the abuse of corporate legal personality.\footnote{Id. at 153; Prest v. Petrodel Res. Ltd., [2013] UKSC 34, [2013] 3 WLR 1 at 2-3 (Eng.) (affirming the holding to refuse piercing the corporate veil without an abuse of corporate personality); Glazer v. Comm’n on Ethics for Pub. Emps., 431 So. 2d 752, 757 (La. 1983) (“It is not unusual for a court in this country to disregard . . . “piercing the corporate veil,” . . . . A court might pierce the corporate veil when the established norm of corporateness has been so abused in conducting a business . . . .”) (citation omitted).}

In view of the limitations imposed by company law, plaintiffs have used basic tort law principles to establish the responsibility of the parent company, arguing that it (and potentially its directors) owes a direct duty of care to the victims of the subsidiary’s negligent behavior. Thus, for example, in \textit{Chandler v. Cape},\footnote{Chandler v. Cape PLC [2012] EWCA (Civ) 525 [80] (Eng.).} the English Court of Appeal has stated that the law may impose on a parent company responsibility for the health and safety of its subsidiary’s employees only in the following circumstances (which are also applicable to cases involving damage to third parties):

(1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary’s system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees’ protection.\footnote{For the purposes of (4) it is not necessary to show that the parent is in the practice of intervening in the health and safety policies of the subsidiary. The court will look at the relationship between the companies more widely. The court may find that element (4) is established where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues.}

\textit{Chandler v. Cape PLC} [2012] EWCA (Civ) 525 [80] (Eng.). For a similar ruling by English court, see Lungowe v. Vedanta Res. PLC [2017] EWCA Civ 1528 [83] (Eng.) (accepting the Chandler’s test for finding a parent company responsible).
In the *Chandler* case, the court found that the four conditions have been met.\(^{108}\) It should be emphasized that the ruling was also based on the finding that the parent company exercised significant level of control over the operation of its subsidiaries.\(^{109}\)

However, these conditions represent a relatively unique parent-subsidiary business dynamic, which is not common. The *Chandler* doctrine does not apply to cases in which the relations between the parties are purely contractual,\(^{110}\) for example, where manufacturing firms in developing countries sell their goods to buyer-firms in the West, but are not owned by them. For instance, in the Ali Enterprises case, workers argued that KiK, as the sole buyer of all garments produced at the Ali Enterprises Factory, was responsible for the factory and for their injuries. The first route the victims can take to support their claim is based on contract law. The claim in this case would be that the agreement between KiK and Ali Enterprises grants enforceable rights to the workforce of Ali Enterprises as third-party beneficiaries. This argument is based on the content of KiK’s code of conduct, which sets out detailed fire and workplace safety regulations as well as monitoring and auditing procedures.\(^{111}\) The doctrine that a contract may grant third-party beneficiary enforceable rights against the promisor, even if the third-party is not part of the actual agreement, can be found in both civil law and common law jurisdictions.\(^{112}\)

However, this contractual argument faces various difficulties, and in most cases, it will not provide a viable strategy for victims. First, most jurisdictions require that the contract will include an explicit statement providing that the third party may enforce a term

\(^{108}\) Chandler v. Cape PLC [2012] EWCA (Civ) 525 [73] (Eng.).

\(^{109}\) *Id.;* see also Vedanta Resources PLC v. Lungowe [2019] UKSC 20 [55] (Eng.) (emphasizing the issue of effective control, in a claim brought by 1,826 Zambian villagers against UK based Vedanta and its Zambian subsidiary KCM).

\(^{110}\) See Chandler v. Cape PLC [2012] EWCA (Civ) 525 [73] (Eng.).

\(^{111}\) See Reinke & Zumbansen, *supra* note 48, at 15 (arguing detailing “fire and workplace safety regulations as well as monitoring and auditing procedures” in code of conduct is granting enforceable rights as a third-party beneficiary).

of the contract.\textsuperscript{113} It would be far-reaching, for example, to infer such an intention from a firm’s code of conduct by itself, if the supplying contract between the parties does not explicitly incorporate it into the contract.\textsuperscript{114} Indeed, in \textit{Doe I v. Wal-Mart Stores, Inc.}, in which employees of foreign companies that sell goods to Wal-Mart Stores brought claims against Wal-Mart based on the working conditions in each of their factories, the court rejected the plaintiffs third-party beneficiary theory.\textsuperscript{115} The court noted that “Plaintiffs’ allegations are insufficient to support the conclusion that Wal-Mart and the suppliers intended for Plaintiffs to have a right of performance against Wal-Mart under the supply contracts.”\textsuperscript{116} Second, the purchasing company can easily protect itself from such claims by adding a provision that expressly excludes any capacity of third-parties to sue under the contract.

Another option is to base the claim on tort principles, drawing on the doctrinal structure which was set out in \textit{Chandler}. In the relationship between KiK and Ali Enterprises, one can convincingly argue that the first two conditions of \textit{Chandler} have been satisfied: the two companies were in the same business (textile) and the purchasing company (KiK) had superior knowledge on some relevant aspect of health and safety in the textile industry. The next two conditions are more difficult to satisfy. The third condition requires the victims to prove that KiK ought to have known that the manufacturing conditions in Ali Enterprises are unsafe. While KiK could have reasonably assumed that the health and safety conditions in Ali Enterprises are not on par with those that exist in similar German firms, it is not obvious that it had actual and concrete knowledge of such risks or an obligation (and ability) to collect data regarding their existence. The fourth criterion is even more problematic; it states that the purchasing company ought to have foreseen that the employees of the manufacturing company

\textsuperscript{113} See, for example, Contracts (Rights of Third Parties) Act 1999, c.31, § 1(1) (UK):

Subject to the provisions of this Act, a person who is not a party to a contract (a “third party”) may in his own right enforce a term of the contract if – (a) the contract expressly provides that he may, or (b) subject to subsection (2), the term purports to confer a benefit on him.


\textsuperscript{115} Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 678 (9th Cir. 2009).

\textsuperscript{116} \textit{Id.} at 682.
would rely on KiK using its superior knowledge to protect them. Implicitly, this condition also assumes that the contracting party would have some level of control over the behavior of the manufacturing party. In usual commercial relations, the last two conditions would rarely materialize. From an economic perspective, the purchaser would usually not be in a position to efficiently reduce the risks of health and safety accidents within the premises of the manufacturer (relative to other entities).

What may change this presumption are situations, such as those existing in the Ali Enterprises scenario, where the purchaser and manufacturing company are engaged in a long-term business relation and where the purchaser has explicitly undertaken certain commitments regarding the health and safety conditions within the manufacturer in its code of conduct. Still, even in such scenario, imposing tort liability could be interpreted as an unreasonable intervention in the contractual framework that governs the commercial relations between the parties, turning the purchasing company to a kind of mega-insurer of all the risks associated with the value-chain. Indeed, courts have been reluctant to accept such claims.

The Canadian case of Das v. George Weston Limited nicely illustrates this dilemma. We consider the case in some detail because it is paradigmatic of the contractual structures underlying many transnational value-chain interactions. Loblaws, Canada’s largest retailer, has purchased clothes from a manufacturer whose factory was located in the Rana Plaza building in Savar, Bangladesh. On April 24, 2013, the Rana Plaza collapsed. 1,129 people died, and 2,520 people were seriously injured. On April 22, 2015, just before the second anniversary of the tragedy, four Bangladeshi citizens filed a class action lawsuit in Ontario against Loblaws and against Bureau Veritas, which was retained by Loblaws to conduct audits in manufacturing sites.

The further details of the contractual structure of this case are important for the analysis:

Loblaws retained Pearl Global to produce articles for the Joe Fresh line of clothing. Pearl Global, in turn, out-sourced some of the work to New Wave, which was operating two

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117 See Das v. George Weston Ltd., [2017] ONSC 4129, ¶ 5 (Can.) (dismissing actions of the plaintiffs (Das and others); Das v. George Weston Ltd., [2018] ONCA 1053, ¶¶ 4-5 (Can.) (affirming the dismissal from the lower court).
factories on several floors of the Rana Plaza in Savar, Bangladesh. Loblaws does not own or manage Rana Plaza. . . [49] The Vendor Buyer Agreement between Loblaws and Pearl Global, dated February 23, 2009 designates New Wave Style as a supplier for Loblaws. Only Loblaws and Pearl Global are parties to the Vendor Buyer Agreement. The Vendor Buyer Agreement incorporated Loblaws’ Supplier Agreement, which includes a Supplier Code of Conduct, which was derived from Loblaws’ CSR standards. . . [49] The Vendor Buyer Agreement and CSR standards permitted Loblaws to perform site inspections of its suppliers’ factories, but did not require Loblaws to do so. The Vendor Buyer Agreement and the CSR standards permitted Loblaws to end their business relationship with Pearl Global if it failed to comply with the CSR standards. However, Loblaws had no contractual right to control the supplier’s operations or to order a supplier or sub-supplier to shut down. . . [52] . . . [To ensure compliance with Loblaws’ CSR standards,] Loblaws [also] engaged Bureau Veritas’ Bangladesh subsidiary . . . to conduct “social audits.” [55] Loblaws’s retainer of Bureau Veritas was a limited retainer for a basic social audit.\textsuperscript{119}

The retainer \textit{did not include safety risk assessment and building construction and structural integrity assessment}. These safety audits required special expertise and were thus more expansive.\textsuperscript{120}

The following figure describes the contractual structure underlying the case.

\textsuperscript{119} \textit{Id.} \textsuperscript{¶} 43-55.

\textsuperscript{120} \textit{Id.} \textsuperscript{¶} 54. Under the Agreement between Loblaws and Bureau Veritas, Bureau Veritas was not required to investigate and report on the structural integrity of the premises in which it was conducting a social audit. \textit{Id.} \textsuperscript{¶} 57. An employee of Bureau Veritas in his deposition stated that the retainer was for auditing “occupational health and safety issues and employment practices, such as forced labor, child labor, wages and benefits, hours of work, harassment, and workers’ rights” and not for “inspect[ing] the building’s structural integrity.” \textit{Id.} \textsuperscript{¶} 63. Social auditors, he said, “are not trained engineers and do not investigate the structural integrity of buildings.” \textit{Id.} Bureau Veritas conducted two audits of New Wave premises in which it identified several health and safety problems such as machinery safety and use, clean drinking water, fire alarm systems and emergency lighting and exits. \textit{Id.} \textsuperscript{¶} 66. Neither Loblaws nor Bureau Veritas followed up on these deficiencies. \textit{Id.} \textsuperscript{¶} 68. Bureau Veritas argues that “it had no ability to schedule a follow-up audit because scheduling was within the sole discretion of Loblaws.” \textit{Id.}
The Ontario Superior Court of Justice found that the plaintiffs “have no legally viable tort claims or breach of fiduciary duty claims against either Defendant, and, therefore, the Plaintiffs’ action should be dismissed” under either the law of the law of Ontario or the law of Bangladesh. The court provided several reasons for its ruling. As we will see below, the ruling also provides some tentative support for the idea of PTR liability.

First, the court distinguishes this case from Chandler, by emphasizing Loblaws’ lack of control over New Wave. The duty to the subsidiary’s employees, that was recognized in Chandler v. Caple plc, the court noted, “arose where the subsidiary was, practically speaking, a division of the parent company and the parent company had extensive knowledge of the dangerous working conditions and what to do about them.” The court further emphasized that New Wave was not Loblaws’ subsidiary: “rather, it was a sub-supplier to one of Loblaws’ subsidiaries and Loblaws had no direct control over New Wave and only limited indirect control over New Wave through its CSR standards and no control over the workplace and over the employees working there.”

121 Id. ¶ 5.
122 Id. ¶ 433.
123 Id. ¶ 435.
Loblaws was not directly involved in the management of New Wave or in the process of manufacturing the products. Loblaws did not have control over where the manufacturing operation took place. Loblaws’ only means of controlling New Wave was through cancellation of its product orders from Pearl Global for non-compliance with the CSR Standards. Nor is there any pleaded history of Loblaws using that lever to enforce any change in New Wave’s operations.\footnote{124} The position of the Court of Justice regarding the auditing company Bureau Veritas was more nuanced, and is of special interest in the context of our inquiry into the liability of private regulatory bodies. The court seems to be more open to the possibility that Bureau Veritas owed a duty of care to the employees of New Wave, which could have led to it becoming liable to their tort claims. However, Bureau Veritas was only retained to conduct "social audits," and the risk of the Rana Plaza structural collapse was thus outside Bureau Veritas contractual responsibilities. Therefore, the Court accepted the auditor’s argument, and maintained it cannot be responsible for any damage associated with the collapse:

If it had negligently performed some service within the ambit of its social audit and a New Wave Style employee was injured as a result, then Bureau Veritas would be exposed to liability. However, Bureau Veritas says it could not be negligent for failing to address matters associated with the structural integrity of Rana Plaza, which was outside its contractual responsibilities.\footnote{125}

\begin{itemize}
\item \footnote{124} Das, [2018] ONCA 1053, ¶ 180.
\item \footnote{125} Das, [2017] ONSC 4129 ¶ 444. The court provides a useful analogy: A public health inspector inspects a restaurant and fails to warn that the equipment in the restaurant is contaminated by bacteria. The public health inspector also fails to warn about a possible structural defect in a barring wall of the restaurant. A few days later, the restaurant’s premises collapses and the patrons who happened to be in the restaurant are injured. The patrons sue the public health inspector and allege that the public health inspector owed them a duty of care. This allegation of a duty of care would be true insofar as any patrons suffered from food poisoning but not insofar as the patrons suffered injuries from the collapse of the restaurant’s premises. \textit{Id.} ¶ 443; \textit{see also} ¶ 551 (restating this idea in the context of Canadian law). The Court of Appeal confirmed this point. Das, [2018] ONCA 1053, ¶¶ 181, 200.
\end{itemize}
The plaintiffs in *Das v. George Weston Limited* have put forward several general policy considerations, which they argue support the imposition of liability on MNEs such as Loblaws:

(a) accountability by Canadian corporations who enjoy substantial profits from holding themselves out as responsible corporate citizens; (b) preventing Canadian corporations from exploiting the regulatory vacuum in developing countries, particularly when doing so places vulnerable workers at risk of death or grave bodily harm, and (c) advancing the common law duty of care in a manner that reflects the globalized economy in which Canadian entities participate.\(^{126}\)

While the court was sympathetic to these arguments,\(^ {127}\) it decided that stronger counter-policy arguments overpowered them. First, it noted that imposing liability on Loblaws and other similar MNEs may deter them from doing business with manufacturers in developing countries.\(^ {128}\) Second, if developing CSR policies exposes companies to transnational liability, this could deter them from developing and promulgating such standards, and from trading with developing countries with weak regulatory frameworks.\(^ {129}\) The court therefore concluded that:

> [T]he imposition of liability is unfair given that the Defendants [Loblaws and Bureau Veritas] are not responsible for the vulnerability of the plaintiffs, did not create the dangerous workplace, had no control over the circumstances that were dangerous, and had no control over


\(^{127}\) *Id.*

\(^{128}\) *Id.* ¶ 455.

\(^{129}\) *Id.* ¶ 456.
the employers or employees or other occupants of Rana Plaza.”\textsuperscript{130}

While the Court of Appeal confirmed the lower court ruling to dismiss the claim, it revised its ruling regarding the costs. It noted that the motion judge failed to appreciate the public interest component in the claim advanced by the appellants and therefore reduced the costs awarded by thirty percent.\textsuperscript{131} The court (Judge Doherty) has made the following important comments in this context:\textsuperscript{132}

\[259\] In a very real sense, the tragedy at Rana Plaza reveals the true cost associated with the production of inexpensive goods for consumers in affluent countries. The ready-wear garment industry in Bangladesh pays very low wages, and tolerates unsafe and unhealthy working conditions. The low wages and abysmal working conditions are the product, in part, of the very low prices paid for the products made by those workers. Purchasers like Loblaws are able to keep the prices paid for the products low under the implied threat of taking their business to a manufacturer in another developing country . . . \[262\] The claim advanced by the appellants lays bare important public policy questions going to the role Canada and, more specifically, its business community, play and should aspire to play in the global marketplace. Do Canada and Canadian business entities have any social, moral, or legal obligations to workers in developing countries whose labour contributes to the economic well-being of Canadian businesses and consumers? If so, what are those obligations? These difficult issues go well beyond the immediate interests of the parties to this lawsuit, and raise important matters of public interest.

In \textit{Doe I v. Wal-Mart Stores, Inc.}, the court has rejected the plaintiffs’ negligence claims for similar reasons.\textsuperscript{133}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{130} \textit{Id.} \textsuperscript{¶} 457. The foregoing analysis relates to Bangladesh law. The court reaches the same conclusion under Ontario law, similarly emphasizing the issue of Loblaws lack of over the actions of its foreign sub-supplier. \textit{Id.} \textsuperscript{¶} 540.
\item \textit{Id.} \textsuperscript{¶¶} 259, 262.
\item \textit{See Doe I}, 572 F.3d at 684 (emphasizing Wal-Mart’s lack of control over the day-to-day work of plaintiffs in the supplier’ foreign factories and the fact that Wal-Mart did not undertake any obligation to protect the plaintiffs, but “merely
\end{enumerate}
\end{footnotesize}
Overall, while courts in the West may be sympathetic to the claims brought by victims down the supply chain, the barriers for succeeding in such claims remain high.

III. PRIVATE-PUBLIC HYBRIDS: THE LIMITATIONS OF PRIVATE REGULATORS

Following the globalization of manufacturing, both activists and scholars have called for increased responsibility of retailers in developed countries to working conditions in developing countries. 134 This Part reviews the development of private transnational regulatory regimes, as a response to these calls and to the global governance deficit described in Part II. We discuss the problems that can undermine the efficacy of this form of private global regulation. This discussion is used as background to our proposal detailed in Part IV.

PTRs are private transnational entities that offer semi-regulatory services. PTRs perform both a “legislative” function, setting standards of behavior, and a “policing” function, enforcing these standards. PTRs are part of an institutional complex that includes the relevant legal texts, the body (or bodies) responsible for administering the texts and the individual agents closely associated with these bodies. This institutional complex may encompass more than one organization (e.g., when the compliance functionality is not provided by the body responsible for developing the norms). Private firms actively seek the endorsement of PTRs (through certification or membership) in order to signal their high social and environmental performance to consumers and to earn a civic license to operate in the markets of developed countries. 135

reserved the right to cancel its supply contracts if inspections revealed contractual breaches by the suppliers”).


135 See Sandra Waddock, Building a New Institutional Infrastructure for Corporate Responsibility, 22 ACAD. MGMT. PERSPS. 87, 89 (2008) (arguing that corporate responsibility standards such as SA 8000 are part of a new institutional infrastructure and are being increasingly adopted by corporations).
PTRs provide an additional layer of regulation that operates alongside the global public law (e.g., ILO and environmental conventions) and domestic law (national environmental, health and safety and workers’ rights regulations). We argue that the system of PTRs constitutes a complex network which establishes, through the condensation of links between multiple PTRs, a new type of transnational authority, which is independent of the regulatory apparatus of either state or treaty law. As we argue below, the ‘network’ feature of PTRs has various theoretical and pragmatic implications.

PTRs represent a novel mode of voluntary “self-governance.”136 PTRs are generated jointly by firms, non-government bodies, and international treaty organizations (such as ILO and UNEP). Advocates argue that PTRs are necessary to improve workplace conditions, especially in jurisdictions that lack robust enforcement of regulatory standards.137 PTRs are voluntary and are usually not accompanied with formal legal sanctions;138 advocates argue they are nevertheless effective because PTRs utilize a combination of soft regulatory instruments and sanctions, and market mechanisms.139 In particular, the advocates focus on firms’ reputational motivations: firms have an incentive to qualify for private certification in order to appeal to consumers, signal that the firm abides by accepted standards of social responsibility, and thereby increase income and market access to developed markets.140 Once certification is obtained, firms have an incentive to comply with the code of conduct in order to maintain the certification; presumably, losing the certification after it is obtained is harmful to the firm’s reputation and to its market opportunities.141

Critics of PTRs have voiced concerns regarding the capacity of PTRs to effectuate real change in the behavior of manufacturers in

136 They are self-governance because they are initiatives that voluntarily emerged. See Gilbert et al., supra note 32, at 23-24 (“We label this diverse set of [PTRs] ‘international accountability standards’ and define them as voluntary predefined rules, procedures, and methods . . . .”).
137 Göbbels & Jonker, supra note 32.
138 See Gilbert et al., supra note 32, at 24 (noting that PTRs “are not enforceable through legally binding regulations).
139 See Gilbert et al., supra note 32, at 24 (discussing three reasons that can make PTRs less voluntary).
140 See Gilbert et al., supra note 32, at 24 (discussing the pressures on companies to adopt standards).
141 See Gilbert et al., supra note 32, at 27-28 (explaining Certification Standards).
developing countries. The Ali Enterprise disaster which occurred despite the fact that the factory gained SA8000 certification just weeks before the accident, illustrates this problem.\textsuperscript{142} The Ali Express Factory received its SA8000 safety certification in August 2012,\textsuperscript{143} and was burned down on September 11 the same year. RINA Services S.p.A., an Italian company headquartered in Genoa, issued the factory’s certificate.\textsuperscript{144} RINA functioned as a compliance agent that provides inspection, assessment, and certification services.\textsuperscript{145} The Ali Express certification followed an inspection by RI&CA, a RINA subcontractor in Karachi. Investigations conducted after the fire showed that hundreds of lives could have been saved if lax safety standards in the factory had been identified and acted upon in time.\textsuperscript{146} Research suggests that the Ali Enterprise case may reflect a more systematic problem regarding the capacity of PTRs to improve working conditions in developing countries.\textsuperscript{147}

Several interrelated problems may contribute to the failure of PTRs to act as alternate regulators. First, PTRs operate only as complementary regulators. They do not possess the formal powers of either national regulators or international public law organizations. Thus, even if a PTR acts optimally, its efforts could be completely countered by the national regulator’s approach to regulatory breaches. The repertoire of regulatory responses that a PTR can use are much more limited than those of national regulators. They consist primarily of various informational actions (notifying the purchasing company of any breaches, issue warnings regarding safety problems) and the revocation of certification.

Second, because of the close association of PTRs and the business community, PTRs may be subject to rent-seeking pressures from

\begin{footnotesize}
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\item EUR. CTR. FOR CONST. & HUM. RTS., supra note 143, at 1.
\item EUR. CTR. FOR CONST. & HUM. RTS., supra note 143, at 1.
\item EUR. CTR. FOR CONST. & HUM. RTS., supra note 143, at 1.
\item EUR. CTR. FOR CONST. & HUM. RTS., supra note 143, at 2.
\item See Locke et al., supra note 36, at 34 (noting in its case study wide variations in compliance and working conditions even after implementing a PTR); MARTJE THEUWS, MARIETTE VAN HUIJSTEE, PAULINE OVEREEM, JOS VAN SETERS & TESSEL PAULI, FATAL FASHION 13-15 (SOMO & CCC eds., 2013) (pointing out flaws of PTRs); HUM. RTS. WATCH, supra note 46; Richard Locke, Ben A. Rissing & Timea Pal, Complements or Substitutes? Private Codes, State Regulation and the Enforcement of Labour Standards in Global Supply Chains, 51 BRIT. J. INDUS. RELS. 519, 543 (2013) (concluding that effects of PTRs vary across regimes).
\end{enumerate}
\end{footnotesize}
corporate players.¹⁴⁸ PTRs are subject to an inherent conflict of interests, since their enforcement and auditing services are typically paid by the factory or company supposedly being supervised, or by the transnational buyer.¹⁴⁹ The influence of corporate players may prevent PTRs from setting high-enough standards. Critics of PTRs argue that the current system is not truly designed to improve safety and working conditions, but simply to legitimize production in developing countries in the eyes of consumers and maintain the oppressive arrangements of globalized manufacturing.¹⁵⁰

Third, while the problem of regulatory capture is present also at the domestic level, it is more severe in the case of PTRs because of the lack of sufficiently robust supervisory mechanisms similar to the ones that can be found at the national level. There is no global, meta-regulatory framework that scrutinizes the operations of PTRs. PTRs are neither subject to the checks-and-balances of the democratic process, with its embedded threat of re-election, nor are they subject to the control of a regulatory czar like the U.S. Office of Information and Regulatory Affairs (OIRA).¹⁵¹ There are some parallel private meta regulatory mechanisms such as ISEAL, the global membership association for credible sustainability standards. ISEAL’s Credibility Principles require standard-setters to engage with a balanced and representative group of stakeholders in development of standards¹⁵², and its Assurance Code requires scheme owners to


¹⁴⁹ Locke et al., supra note 36, at 23.

¹⁵⁰ See Locke et al., supra note 3636, at 22-23 (“[Codes] are designed not to protect labour rights or improve working conditions but instead to limit the legal liability of global brands and prevent damage to their reputation.”).

¹⁵¹ See Stuart Shapiro, OIRA Inside and Out, 63 ADMIN. L. REV. 135, 137-38 (2011) (explaining the use of the term “Regulatory Czar” in the context of OIRA, a United States federal government office located within the Office of Management and Budget, which is a division of the Executive Office of the President).

¹⁵² ISEAL, ISEAL CREDIBILITY PRINCIPLES: VERSION 2 (2021),
establish a complaint resolution procedure with power to investigate and take appropriate action regarding relevant complaints. However, ISEAL does not possess the same powers as OIRA.

There are also good reasons to be skeptical of consumers’ ability to act as efficient watchdogs of PTRs’ behavior. On the one hand, PTRs respond to the demands of consumers and the public in developed countries, pressuring to set higher and more demanding standards. On the other hand, PTRs, as noted above, are also subject to pressure by firms and manufacturers, in both developed and developing countries, to offer lenient standards and lax compliance. There is ample reason to believe that pressure from firms is more effective compared to pressure from consumers. Consumers are rarely aware of the precise details of the standards; typically, they will only be aware of the fact the manufacturer abides by some standard and may have a general idea of its content. Manufacturers, in contrast, have detailed knowledge of the content of the code, and can negotiate with standard-setters for specific modifications. Furthermore, consumers in the West are dispersed and their gains from pressuring Western firms are rather low. In contrast, firms have much stronger incentives to lobby standard-setters directly or through the political system in order to affect their costs of complying with the standard.

In some cases, the presence of the private regulator may not only be unhelpful but actually harmful. Thus, if the standard-setter sets a suboptimal standard, and the firm can show that it had complied with such standard, the firm may secure legal immunity although it did not exercise due care. In this sense, the intervention of a PTR can create a new problem, by allowing the firm to escape liability. Another problem is that the presence of PTRs may provide states with an excuse to forgo their own enforcement efforts. Since PTRs provide regulatory services with no public funding, are self-
governed, and report their activities, governments can use them to justify a decrease in state-based enforcement efforts. The concern is, therefore, that PTRs may represent a whitewashing effort: they provide legitimacy to firms, but it is unclear whether this legitimacy is backed by a real improvement in regulatory standards. This is an accountability problem; it is hard to point out any effective mechanism pressuring PTRs to set high standards and enforce them rigorously.

IV. A PROPOSAL: TORT LIABILITY OF PRIVATE REGULATORS

This Part details our proposal, to hold PTRs liable in tort for harms caused by suboptimal regulatory standards or compliance activity. We argue that this type of responsibility could contribute to the structuring of a more effective global regulatory CSR network. The literature that examined the governance of risks across transnational value chains has focused on the responsibility and potential liability of MNEs, and has mostly ignored the potential liability of PTRs. We argue that this represents a significant lacuna in the literature. We show that our thesis has solid ground in tort case law in the United States and in Canada, and that our proposal can contribute to the emergence of more efficient and accountable transnational regulatory networks.

PTRs do not often cause harms directly; they do, however, cause indirect harms by setting suboptimal standards or by failing to fully enforce the standards they create. We propose holding private regulators liable in tort for such harms in order to incentivize them to invest appropriately in preventing harms. Our proposal targets then both the standard-setting organizations and their compliance agents, which in most cases constitute separate entities. Standard-setting organizations include, for example, Social Accountability International (SAI) that established the SA8000 standard and Fairtrade International that is responsible for a series of Fairtrade standards. In the case of SA8000, compliance assurance is...
provided through Social Accountability Accreditation Services (SAAS), which accredits certification bodies, authorizing them to audit and issue SA8000 certificates. In the case of Fairtrade International, the certification of producers and traders for compliance with Fairtrade Standards is delivered by FLOCERT. We argue that imposing liability on such organizations could lead PTRs to set and enforce more appropriate standards, and to strengthen their ties with public international organizations and other PTRs in a way that will improve the overall efficacy of the regulation of transnational value chains.

a. Liability Regimes

We suggest that private regulators be held liable under a negligence regime. That is, a private regulator will be liable if it can be shown that it failed to exercise due care in setting the standard or in enforcing it. In the case that these functions are undertaken by different entities, the nature of the duty of care will be revised accordingly. To illustrate what would constitute such negligent behavior in practice, consider again the details of the Ali Enterprises Factory fire.

Reports following the Ali Enterprises disaster indicated the following causes that ultimately led to the tragic consequences: “the lack of emergency exits while the few available exits were locked . . . absence of fire alarms . . . not enough fire extinguishers and those that were there were not in working order . . . [and] there was no general fire safety training at the factory.” Further analysis of the conduct of all the private regulators associated with this case, SAI, SAAS and RINA Services S.p.A (an Italian company that provided the Ali Enterprises Factory with the SA8000 certification) provides indications of negligence at both the standard-setting and compliance stages.

158 SA8000 Standard, supra note 157.
161 Terwindt, et al., supra note 15 Error! Bookmark not defined., at 272.
A Complaint submitted by the Ali Enterprises Factory Fire Affectees Association (AEFFAA) against RINA Services to the Italian OECD National Contact Point demonstrates the negligent behavior of the auditing company. The audit report issued by RINA Service before the disaster found the health and safety requirements to be satisfactory, and that the Ali Enterprises facility complied with the SA8000 standard. The audit report failed to indicate the various safety problems found on the site, including the lack of access to exit-routes, the lack of sufficient emergency-exits, the lack of sufficient fire extinguishers and the lack of sufficient fire safety training. Worse, the auditing report has actually reported that all these conditions had been met, falsely representing the actual situation in the factory.

A report prepared by SAI after the disaster provides indication of potential negligence by SAI and SAAS, both in the standard-setting process and in the governance of the certification agencies. The report noted that “SAI has developed and issued a fire safety checklist for SA8000 auditor use.” The checklist provides many more details compared to the general and abstract provisions regarding health and safety included in the original SA8000

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163 RINA has been accredited to carry out SA8000 certification by SAAS since 2001. For the audit of the Ali Enterprises factory, RINA has engaged a subcontractor from Pakistan, RI&CA, Regional Inspection & Certification Agency. Ali Enters. Factory Fire Affectees Assoc., Italian OECD Nat’l Contact Point, Complaint, at 5.


165 See SOC. ACCOUNTABILITY INT’L, REPORT ADDENDUM: FIRE SAFETY IN PAKISTAN AND WORLDWIDE (n.d.) (a copy is available from the authors).

166 Id. at 23.
standard that was also revised in 2013. The checklist responds to many of the problems that were identified as contributing causes to the fatal fire in the Ali Enterprises Factory and requires “a formal training program through which new and existing workers are periodically trained on fire-related issues,” “escape routes and fire doors free from obstruction,” “functioning fire alarm system that has been recently tested” and that “fire doors have push bars to open the door manually.” The proper articulation and specification of general standards is part of an optimal rule-making process. The fact such details were only required in the updated SAI checklist indicates the inadequacy of the original standard. A further problem that was indicated in the report concerned the oversight of the SA8000 audit system by SAAS. The report outlines several aspects in which SAAS has failed to optimally supervise the auditing agencies, and details steps to improve the quality and credibility of the auditing process. Such steps include increased frequency of unannounced SA8000 audits in ‘high risk’ countries, improved auditor competency and training, preparation of fire safety webinar required of all SA8000 auditor, and minimization of the risk of corruption by requiring rotation of SA8000 auditors to reduce conflicts of interest.

As we showed above, PTRs may be negligent in various aspects of their behavior: the standard-setting process, the compliance assurance of a concrete firm, and the oversight of compliance agents.

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168 Id.

169 Colin S. Diver, The Optimal Precision of Administrative Rules, 93 Yale L.J. 65, 66-71 (1983) (discussing balancing of articulation and specification to create precise optimal rules). A blog post, SAI explicitly noted the need for “more clarity and performance indicators in the requirements for fire safety for the SA8000 system, e.g.: Required push bar/non-lockable exit doors for emergency evacuation [and] [i]mplementation of fire drills during audits.” Fire Safety a Key Focus in SA8000 Revision, Soc. Accountability Int’l (Mar. 11, 2013) (a copy is available from the authors).

170 See Soc. Accountability Int’l, Report Addendum, supra note 165, at 8 (discussing the oversight role of SAAS).


To complete this analysis, we develop an appropriate negligence test for each of these functions fulfilled by PTRs. An operable conceptualization of negligence by PTRs requires some further analytical clarifications. The reason for this is that PTRs are second-order tortfeasors, and their liability emerges only in conjunction to that of a primary tortfeasor, such as the factory owner in the Ali Enterprises case. Therefore, the standard method of assessing negligence, based on the cost-benefit calculus of the Learned Hand formula, cannot be used to assess their negligence directly, without some recalibration. In a regular tort case, a tortfeasor will be considered negligent if it failed to exercise cost-effective precaution under the Learned Hand formula, or precautions (B, for burden) lower than expected harms (PL, for probability of loss). For example, if the factory failed to install fire extinguishers in sufficient numbers, this would be considered negligent if the cost of installing them (B) is lower than the expected harm this measure could prevent (PL). However, for PTRs the question of negligence is somewhat different, as they are not investing to directly change the safety conditions in the factory. In this sense, it is more difficult to define what B (the investment in precautions) designates in the case of PTR liability.

First, consider the task of examining possible negligence in the standard-setting stage, where the concern is that PTRs might set standards that are too lax. In such cases, one way to evaluate the negligence of the PTR would be to examine the investment required to set a more accurate standard and consider it as an investment in precautions (B). In many cases, setting appropriate standards requires significant investment in research and the collection of data in order to determine appropriate level of precautions. If the PTR failed to efficiently invest in such research, we could say it was negligent based on a modified Hand formula test. An alternative way to determine negligence in the standard-setting stage would be to piggyback on the efficiency of the resulting standard. That is, the PTR will be considered negligent not if it failed to optimally invest itself in the sense of the Hand formula test, but if it sets a standard

that fails to require the regulated firm to make cost-effective investments in precautions. Finally, we note that when examining the question of negligence in the rule-setting stage, a key element of the inquiry concerns the appropriate combination of general principles with more precise rules. Thus, a key failing of the regulatory framework in the Ali Enterprises case was that the general standard governing health and safety in the SA8000 standard was not accompanied by more detailed and specific rules, which would ensure appropriate implementation.

Second, consider the determination of negligence in the auditing stage, or the enforcement stage of the private regulatory regime. For the compliance function, the main question is whether the auditor has invested optimal resources in verifying the enforcement of the standard. Such investment may reflect the frequency of auditing visits or the investment in the technical competence of its staff. Here the test is whether the cost of the enforcement effort would be lower than its utility in terms of reduction of expected harm. To illustrate, in the Ali Enterprises case, it seems straightforward that the PTR was negligent in the auditing stage. Thus, the cost of a more rigorous auditing process that could have identified the various safety flaws in the factory would have been justified by the expected utility, represented by the chance of preventing the fire. Another dimension of determining negligence here relates to the oversight structure of the auditors. In a regulatory framework in which compliance is delegated to manifold small auditors, dispersed across multiple jurisdictions, there is obvious risk of sub-optimal compliance. Indeed, in the Ali Enterprises case, this oversight risk


176 We abstract here from the causal question which is not trivial: one cannot be sure that even if RINA would have issued a warning this would have changed the situation in the factory. If causality is difficult to establish in specific cases, partial compensation may be awarded. See Ariel Porat & Alex Stein, Tort Liability Under Uncertainty 70–73, 181–82, 193–95 (2001) (studying the possibility of partial compensation to tort victims who were unable to fully prove causation); David Rosenberg, The Causal Connection in Mass Exposure Cases: A “Public Law” Vision of the Tort System, 97 HARV. L. REV. 849, 857 (1984) (arguing that in appropriate cases, courts can compensate victims based on the probability that their injuries were caused by the defendant). See generally Richard Delgado, Beyond Sindell: Relaxation of Cause-In-Fact Rules for Indeterminate Plaintiffs, 70 CALIF. L. REV. 881 (1982) (suggesting that courts can relax the requirement of causation in cases of indeterminate causality); Mario J. Rizzo & Frank S. Arnold, Causal Apportionment in the Law of Torts: An Economic Theory, 80 COLUM. L. REV. 1399 (1980) (offering a concept of relative causation).
was identified by SAI as one of the major weaknesses of the SA8000 regime. Therefore, the auditing process may be considered negligent under a principle of *res ipsa loquitur*, if it is shown that auditing was outsourced to agencies that are too far removed from effective supervision mechanisms.

**b. Liability of Standard-Setters in U.S. and Canadian Case Law**

Generally speaking, tort doctrine recognizes the possibility of holding private standard-setters liable in cases in which compliance to the standard they set resulted in harm. For instance, courts in the United States have recognized the liability of standard-setters that set unsafe standards for pool construction. In some cases, swimmers were injured when swimming in pools that were built according to approved safety standards, although it was later determined that those standards themselves represented insufficient precautions. In such cases, the victim’s injury can be attributed to the negligence of the standard-setter, and courts recognized the possibility of a duty of care between the standard-setter and end-users. In these cases, liability exists even though the standard-setter had no legal duty to set the standard and did not act directly as a state organ. Rather, once the standard-setter took it upon itself to produce standards for the industry, it was responsible to provide users with safe and suitable guidelines. Similar decisions also exist in the context of construction and building codes.

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**Notes:**


179 See, e.g., King v. Nat’l Spa & Pool Inst., Inc., 570 So. 2d 612, 615-16 (Ala. 1990) (holding that there was a legal duty to exercise care in setting standards).


181 See King, 570 So. 2d at 615-16.

Similar rulings exist also in the context of medical malpractice where harms are sometimes caused indirectly by standard-setters.\(^{183}\) For instance, in *Snyder v. Am. Ass’n of Blood Banks*,\(^{184}\) a patient underwent an open-heart surgery and was accidently given HIV-infected blood. The standard-setter in this case was the American Association of Blood Banks (AABB) that did not require appropriate blood tests that might have prevented such occurrences. The court in this case decided that the AABB was obligated to develop improved standards and was therefore liable to some of the patient’s harms.\(^{185}\) Courts have also recognized the possibility of holding trade unions liable in tort for standards they produce.\(^{186}\)

In *Hempstead v. General Fire Extinguisher Corp.*,\(^{187}\) an employee was injured while helping to put out a fire in an apartment building because a fire extinguisher had exploded unexpectedly. The court held that the testing company was responsible for the resulting harm for two reasons. First, the testing company approved the design of the fire extinguisher despite the fact it was inherently dangerous and highly likely to cause harm. Second, it affixed its official label on the fire extinguisher, stating it had been inspected, tested, and approved, while in fact it had not been.\(^{188}\) Magazines and advertisers who gave their seal of approval to consumer products can also be held liable when such products turn out to be negligently made.\(^{189}\) More generally, standard-setters were held liable in a variety of contexts when their actions indirectly led to harmful outcomes when industry players relied on their standards.\(^{190}\)

\(^{183}\) *Cf.* Case C-219/15, Elisabeth Schmitt v. TÜV Rheinland LGA Prod. GmbH, ECLI:EU:C:2017:128, ¶ 60 (Feb. 16, 2017) (stating that the standard-setter’s failure to fulfill their obligations may give rise to liability).


\(^{185}\) *Id.* at 1049.


\(^{188}\) *Id.* at 111.


The decision of the Ontario Court of Justice in *Das v. George Weston Limited*\(^{191}\) provides further support for our thesis. The court’s ruling regarding the potential liability of the auditing company Bureau Veritas emphasized that Bureau Veritas owed a duty of care to the Bangladeshi employees of New Wave. The court ruled that the auditing company was not liable because the risk of Rana Plaza structural collapse was outside its contractual responsibilities. The Court accepted here the argument made by Bureau Veritas, which “acknowledged that if it had negligently performed some service within the ambit of its social audit and a New Wave Style employee was injured as a result, then Bureau Veritas would be exposed to liability.”\(^{192}\)

c. **Network Implications and Policy Considerations**

We argued that introducing tort liability in cases involving private transnational regulation could yield positive policy results. The option of using tort liability to regulate PTRs has been ignored in the literature on transnational law and CSR, which focused almost exclusively on the potential liability of MNEs.\(^{193}\) The key question is whether the imposition of tort liability on PTRs would contribute to a better global governance regime.

A possible concern, which was mentioned by the court in *Das v. George Weston Limited*, is that imposing liability on MNEs based on their decision to develop and promulgate ethical purchasing practices (CSR standards) would deter businesses from developing CSR policies in the first place.\(^{194}\) A similar concern applies also to the case of PTRs: the risk of liability, which could be substantial, might cause PTRs to exit the market, thus further weakening the global regulatory structure that governs transnational value chain interactions.

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\(^{191}\) See *Das*, [2017] ONSC 4129, ¶ 5.

\(^{192}\) *Id.* ¶ 444.

\(^{193}\) For literatures focusing on the responsibility and potential liability of MNEs, see sources cited *supra* note 48.

\(^{194}\) See *Das*, [2017] ONSC 4129, ¶ 456 (“[F]rom an exposure to liability perspective, Loblaws would have been far better off if it had not developed and promulgated its CSR standard.”).
We emphasize, however, the opposite view. Namely, in order to avoid liability, PTRs will not necessarily exist the market; they will instead make sure to abide by the reasonableness standards of tort law and invest efficiently in precautions and in the prevention of harms. Importantly, the negligence regime aspires to free agents from tort liability entirely, provided they exercised sufficient levels of care. Therefore, our proposal does not necessitate any undue burdens on PTRs, as long as they efficiently contribute to safety. Thus, if PTRs are made to bear the damage caused to third parties through their negligent standard-setting and compliance efforts, they would be optimally incentivized to invest and efficiently prevent harms. For instance, assume that a PTR needs to invest $50,000 in precautions in order to develop and enforce optimal standards designed to prevent factory fires. For simplicity, assume further than the risk of a fire is ten percent and that the harm from a fire equals one million dollars. Under a negligence regime, the private regulator is faced with a simple choice: it can either invest $50,000 in development and enforcement of the appropriate standard or pay one million dollars in case an accident occurs (for an expected cost of $100,000). The private regulator will prefer investing $50,000 rather than face an expected cost of $100,000, and the efficient outcome will be obtained. This is socially efficient, as precautions here are cost-beneficial. More generally, if the PTR is made to bear the full harm, it has full incentive to invest in precautions when it is efficient to do so. Since the PTR fully internalizes the harm, it now has every incentive to act to efficiently minimize it.

Furthermore, we argue that introducing tort liability for PTRs could support and facilitate the creation of a hybrid governance model in which private transnational regulators, multinational enterprises and global treaty organizations collaborate. We argue that PTRs would be driven to explore various networking routes in order to protect themselves from liability. These processes will,

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195 See Landes & Posner, supra note 160, at 873 ("Under a negligence rule . . . an injurer is liable for his victim’s damages if and only if the accident resulted from the injurer’s failure to take due care.").

196 See Landes & Posner, supra note 160, at 874-76 (showing how negligence regime can incentivize PTRs to prevent harms).

overall, tend to have a positive effect on the regulatory conditions within developing countries. In particular, PTRs will seek to connect their activity more explicitly with the operation of other organizations and authorities in the transnational regulatory universe, in order to accumulate legitimacy and lower their liability exposure. This carries significant advantages and can potentially generate positive feedback loops, strengthening the overall structure of the transnational regulatory regime.

These types of processes can take several forms. First, to lower their exposure to liability, PTRs will rely more strongly on the provisions of international treaties. Such reliance can provide standard-setters with immunity against claims attacking the reasonableness of their standards. A good example are ILO standards on Occupations Safety and Health. Additionally, PTRs will seek to improve the standard-setting process by extending collaboration with international organizations and local stakeholders. Extending collaboration with international organizations such as UNEP or ILO will provide the standard-setting process with further expertise and also increase its political and legal legitimacy. Extending the involvement of local stakeholders in the creation and revision of standards (particularly from factories in developing countries) will contribute local knowledge to the discussion and provide some counter force against the potentially excessive influence from MNEs. Jointly, these processes will turn the standard-setting process within PTRs into a highly networked process and significantly improve its overall contribution to safety, working conditions and environmental standards.

Our proposal can have similar implications for the improvement of compliance processes. Mainly, it will foster collaboration between auditing firms, orchestrated by central certification organizations such as SAAS and FLOCERT. Such consolidation will be driven by several concurring processes. First, PTRs will be under pressure to develop more efficient oversight mechanisms that can govern their auditing services. This pressure can create pressure for consolidation within the auditing domain, giving more prominence to central certification organizations such as SAAS and FLOCERT, which have the necessary resource and expertise to supervise a large

and nationally dispersed group of small auditors. Second, the risk of liability will drive auditing firms to purchase liability insurance. Insurers will most likely require some form of oversight as a pre-condition for providing insurance or may charge high premiums for independent auditors. Third, MNEs will prefer to engage with auditors that are subject to oversight by credible central organizations and carry their own insurance.

PTRs have therefore a variety of reasonable steps they can take in response to the risk of liability, steps that will significantly improve transnational regulatory regimes. We therefore do not think that our proposal will lead to over-deterrence, and will not make the operation of PTRs prohibitively costly, or push them out of the market. Additionally, from a broader theoretical perspective, we think that the claim that PTRs will be driven out of the market should be taken with a grain of salt. If we assume PTRs have a real contribution to safety and to appropriate work conditions, this contribution should be reflected in court’s negligence determination and reduce PTRs’ exposure to tort liability. To the extent that PTRs will be driven out of the market when faced with the risk of tort liability, this would simply indicate that those entities did not make a true contribution to safety or to compliance. Weeding out incompetent PTRs should therefore be considered a positive outcome of our proposal.

As noted above, our proposal is consistent with existing trends driven by global organizations such as the ILO and UNEP. Such organizations, recognizing the limitations of their own compliance powers, have sought to forge partnerships with non-state organizations, including civic organizations, corporations, and PTRs. Thus, for example, Article 6(4)(b) of the Paris Agreement establishes a mechanism that seeks to incentivize and facilitate participation in the mitigation of greenhouse gas emissions by public and private entities. The increasing role played by private entities in climate action is also reflected in the Non-State Actor Zone for Climate Action portal where non-state actors, such as regions, cities, companies, investors and other organizations, can display their commitments to act on climate change. As of February 12, 2021, there were 149 cooperative initiatives registered on the portal.

with 20,417 participants. Similarly, the ILO has invested significant effort in developing public–private partnerships (PPPs), largely focusing on implementation.\textsuperscript{201} The response of the ILO to the 2013 Rana Plaza factory disaster provides a good illustration of this approach. The ILO is involved in the governance of the resulting Accord on Fire and Building Safety in Bangladesh, which is an independent, legally binding agreement between brands and trade unions to work towards a safe and healthy garment and textile industry in Bangladesh.\textsuperscript{202}

d. Jurisdiction

A major advantage of our proposal is that it will allow workers and other interest holders to sue for their rights in courts located in developed countries, thereby avoiding the myriad problems associated with the need to pursue their claims in courts in developing countries. As we explain above, workers who suffered a harm will find it difficult to secure legal recourse in their own jurisdiction, due to a variety of legal, economic, and political reasons.\textsuperscript{203} At the same time, workers will find it difficult to sue “down the supply chain” and hold buyers or parent companies in developed countries responsible for their harms.\textsuperscript{204}

Our proposal extends the opportunities open for victims, thus resolving some of the jurisdictional problems associated with lawsuits against MNEs. PTRs are multinational agents, and often have a legal presence in developed countries.\textsuperscript{205} This means that workers will typically be able to sue PTRs in developed countries based on the standard rules of international jurisdiction,\textsuperscript{206} which

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\textsuperscript{201} Jakovleski et al., \textit{supra} note 70, at 82-108.
\textsuperscript{203} See discussion \textit{supra} Part II.B.
\textsuperscript{204} See discussion \textit{supra} Part II.B.ii.
\textsuperscript{205} For instance, Social Accountability International (SAI), the institution responsible for SA8000, is based in New York. Rasche, \textit{supra} note 45.
\textsuperscript{206} See Michael Akehurst, \textit{Jurisdiction in International Law}, 46 \textit{B.R.I.T. Y.B. INT’L L.} 145, 170-71 n.5 (1973) (noting that only a brief presence or business is required for jurisdiction).
\end{flushright}
dictates that in all legal systems, the location of the defendant is sufficient to establish international jurisdiction in civil cases.\textsuperscript{207} Furthermore, the rules of \textit{forum non conveniens} will probably not apply in such claims\textsuperscript{208} because there is no doubt that the tortious behavior has happened within the jurisdictional boundaries of the developed country (where the private regulator resides).\textsuperscript{209}

\section*{V. Conclusion}

One of the features of the globalized economy is the mismatch between the regulatory needs of the global society and the capacity of the global legal system to provide solutions. This reflects, first, the persisting fragmentation of private law and regulatory law (which runs counter to the expansion of cross-border manufacturing, consumption, and trade) and, second, the limitations of the global treaty system (whose dependence on governmental consensus undermines its capacity to provide policy solutions). This mismatch creates numerous regulatory gaps, ranging from unsatisfactory treatment of workers in southern regions to a wide-ranging failure to cope with global risks such as climate change. While theoretically these dilemmas could have been dealt with by public international law (through either reinforced public law treaties or harmonization of local private and regulatory law), the difficulties of reaching government consensus make this path unfeasible. The rise of private transnational institutions that produce and enforce diverse regulatory standards represents an evolutionary response to this regulatory gap. Such institutions operate as private regulators, setting quasi-legal framework for market participants. These bodies seek to fill lacunae in the laws of developing countries (e.g., in labor or environmental law) or in global treaty law (e.g., climate change). Yet, since these bodies act outside the traditional framework of the sovereign state, the legal status and impact of the private regulatory frameworks they create remains unclear.

Commonly, this debate has been carried out under public law lens. In this Article, we explore this problem from a private law perspective. We explore the possibility of using traditional private

\textsuperscript{207} Id.
\textsuperscript{208} Id.
\textsuperscript{209} Id.
law doctrines, and tort law doctrines in particular, as a means of solving the meta-regulatory problem of regulating the emergent universe of private global regulators. More specifically, we examine the implications of holding transnational private regulators liable in tort, when their actions—as norm-makers and compliance agents—lead (directly or indirectly) to undesirable or harmful outcomes. This proposal aims to offer a meta-regulatory framework: first, by providing transnational standard-setting bodies with sufficient incentives to set optimal standards, and second, by assuring that auditing agencies have sufficient incentive to verify these standards are implemented. As we explain above, our approach is likely to strengthen already existing processes of collaboration between PTRs and International Treaty Organizations.