

The Limits of Supply Chain Responsibility: A Critical Analysis of Corporate Responsibility Instruments*

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Abstract

One challenge in the area of supply chain management has been achieving sustainable compliance with labour rights throughout the entire production chain, including lower tiers of production. This article inquires specifically around sub-contracting, especially what is a brand's or a buyer's responsibility regarding workers' rights beyond its first tier of suppliers. In-depth literature on this issue remains scarce despite buyer's responsibility being at the core of outsourcing, the very area that brought disrepute to Nike and thus moved corporate social responsibility (CSR) in the international limelight 15 years ago. This article reviews 12 prominent CSR instruments and asks: do they provide legitimacy to calls that buyers should be responsible for labour conditions down their supply chains? Where do these responsibilities end as abuses become more remote and take place at lower tiers of the value chain? What are the concepts, the principles that attribute responsibility to the buyer company and what concepts are used to limit these responsibilities? What strategies exist to improve conditions at sub-contractor level? Reading a dozen CSR instruments with a keen eye to sub-contracting reveals a staggering diversity of answers. The responsibility of the core company, particularly the limits of responsibility, move in and out of focus. Questions around buyers' responsibilities remain open, but there is a wealth of concepts and experience to draw upon. Professor Ruggie, a United Nations Special Representative of the Secretary General, could bring clarity in this area of CSR and is invited to reconsider the justification, scope and content of a buyer company's responsibility to protect workers' rights in its value chains.

Keywords

human rights; labour standards; corporate responsibility; John Ruggie; sphere of influence; subcontracting

1. Introduction

Peter Drucker, a respected voice in management studies, has referred to outsourcing as “one of the greatest organizational and industry structure shifts of the century”.¹ Outsourcing as a business model and the greater sophistication in the management of supply chains are “part of the long-standing process in which companies and national and regional economies sharpen their focus on their areas of distinctive competence and comparative advantage”.² In the literature on corporate social responsibility (CSR), the violations of labour rights throughout supply chains

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¹ Quoted in C. B. Clott, 'Perspectives on Global Outsourcing and the Changing Nature of Work,' 109:2 *Business and Society Review* (2004) p. 153.

² M. Chu and K. Gordon, *Managing Working Conditions in The Supply Chain – A Fact-Finding Study Of Corporate Practices*, Paper presented at OECD Roundtable on Corporate Responsibility: “Supply Chains and the OECD Guidelines for Multinational Enterprises”, Paris, 19 June 2002, para. 2.

have been documented and received sustained attention.³ Advice for companies about what human rights standards they should reference in their codes and what due diligence steps they should take has emerged and is continuously refined.⁴ For companies in consumer goods industries, traditionally exposed to scrutiny, subcontracting is common and has been recognised as one of the most contentious issues that require systems to track and respond to labour abuses.⁵ The challenge has been achieving sustainable compliance throughout the production chain, including lower tiers of production.

This article approaches the topics of outsourcing and supply chain management from a CSR perspective, particularly inquiring into the responsibilities of large buyers – brands, retailers – do to their impacts and leverage down their production chains. This research inquired specifically around sub-contracting to see whether buyers could and should exercise their influence to protect workers’ rights beyond their first tier of suppliers.⁶ The aim is to bring more clarity on the existence and limits of responsibilities of these special companies often referred to as the “core firm”, “brands”, “buyers”, etc. The question of where to draw the limits is particularly pressing in complex supply chains.⁷ It is also a topical question giving the on-going soul-searching process that the United Nations (UN) Special Representative of the Secretary-General (SRSG) on Business and Human Rights, Prof. John Ruggie, has triggered in the “business and human rights” area. For these reasons this article takes an in-depth, comparative look at the most recognised international soft law instruments and private sector initiatives. The questions will simply be: First, are there responsibilities of buyers for labour abuses committed by entities involved in making their products down the supply chain? Second, if yes, how are the limits of responsibility defined? Answering these questions will provide a good grasp on the consistency and clarity of social expectations regarding buyers after 15 years of CSR in an area of critical importance for CSR. It is beyond the scope of this article to look at the practices of leading companies; nevertheless they have accumulated significant experience in this area of CSR that

³ I. Mamic, *Implementing codes of conduct: How businesses manage social performance in global supply chains*, ILO, 2004; Maquila Solidarity Network, *Clearing the Hurdles: Steps to Improving Wages and Working Conditions in the Global Sportswear Industry*, Play Fair 2008, 2008; Oxfam, *Labour Rights and sportswear production in Asia*, 2006; S. Barrientos and S. Smith, *The ETI code of labour practice: Do workers really benefit?, Report on the ETI Impact Assessment*, Institute of Development Studies, 2006; Clean Clothes Campaign, *Looking for a quick fix – how weak social auditing is keeping workers in sweatshops*, 2005; Traidcraft (UK) et al., *Buying Matters: Sourcing Fairly from Developing Countries*, 2006.

⁴ ETI’s ‘Management Approach Framework’ provides a useful and clear conceptual framework for supply chains. Barrientos and Smith, *ibid.*, Part 3, pp. 17–24.

⁵ Mamic, *supra note 3*, p. 276.

⁶ In 2006 Bloomberg broke the story of slavery in the production of charcoal/pig iron in Brazil and put an immediate focus on the far reaches of supply chains of certain industries (automotive, large appliances). M. Smith and D. Voreacos, ‘The Secret World of Modern Slavery’, *Bloomberg Markets*, December 2006, <www.bloomberg.com/news/marketsmag/modern_slavery1.html>.

⁷ The larger MNEs regularly use thousands and even tens of thousands of suppliers. For example, the Walt Disney Company reports it has 17,000 factories approved for production at any one time, out of a database of 60,000 facilities, Disney, FAQs, <corporate.disney.go.com/responsibility/faq.html>. Walmart, the US retail giant, has 100,000 suppliers, Wal-Mart Stores, Inc., *Walmart Announces Sustainable Product Index*, 16 July 2009, <walmartstores.com/factsnews/newsroom/9277.aspx>.

can serve as a critical reference point for social expectations, public policy and even law-making.⁸

2. Literature Review

Krajewski and Ritzman defined supply chain as a set of linkages between suppliers of materials and services that spans the transformation of raw materials into products and services.⁹ According to the International Organization for Standardization (ISO), a supply chain is a “sequence of activities or parties that provides products and services to the organization”.¹⁰

Central to CSR writings is the idea that social and environmental impacts should be integrated into regular business decision-making and that companies should take systematic due diligence steps to prevent and remedy harmful impacts.¹¹ This CSR angle is part of the wider field of supply chain management. Spring notes that the term “supply chain management” was first used in 1982 and began to cover relationships with suppliers, “the idea being that working more closely and co-operatively with these counterparts would enable a kind of integration and coordination that would lead to reduced inventory, better quality and delivery performance and reduced cost for everyone involved”.¹² Giunipero and colleagues observe that only a handful of articles mentioned the phrase “supply chain” between 1985 and 1997.¹³ Their review of articles published on the topic reveals surprising limitations. Thus many of the articles reviewed conducted only one-tier investigations looking solely at the relationship between the main supplier and the manufacturer. Furthermore, despite economic globalisation, the global dimension is under-researched: “Global Supply Chain represents one of the least published topics within SCM literature over the past decade. However, at this moment, it is arguably one of the most critical to industry practitioners.”¹⁴ On a similar note, Busi and McIvor write that “outsourcing is here to stay and will continue to grow. There is no doubt about it. While practice is moving at an extremely fast pace, theory is lagging behind.”¹⁵ This state of affairs contrasts with the pressing need to properly understand the dynamics of production chains; as Andersen and Skjoett-Larsen note, “supply chain management is an area of increasing strategic importance due to global competition, outsourcing of noncore activities to developing countries, short product life cycle, and time compression in all aspects of the supply chain”.¹⁶

⁸ R. Mares, *The Dynamics of Corporate Social Responsibilities* (Martinus Nijhoff Publishers/ Kluwer Law International, 2008)

⁹ S. Gary Teng *et al.*, ‘Integrating the US textile and apparel supply chain with small companies in South America’, 11:1 *Supply Chain Management: An International Journal* (2006) p. 45.

¹⁰ International Organization for Standardization, *Guidance on social responsibility ISO 26000* (December 2008 draft), para. 348.

¹¹ See *Protect, Respect and Remedy: a Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5, 2008, paras. 54–64 (hereinafter: *Protect, Respect and Remedy*).

¹² M. Spring, Book review of *Strategy and Organization in Supply Chains*, 11 *Journal of Purchasing & Supply Management* (2005) p. 208.

¹³ L. C. Giunipero *et al.*, ‘A Decade of SCM Literature: Past, Present and Future Implications’, 44:4 *Journal of Supply Chain Management* (October 2008) pp. 66–86.

¹⁴ *Ibid.*, p. 83.

¹⁵ M. Busi and R. McIvor, ‘Setting the outsourcing research agenda: the top-10 most urgent outsourcing areas’, 1:3 *Strategic Outsourcing: An International Journal* (2008) p. 193.

¹⁶ M. Andersen and T. Skjoett-Larsen, ‘Corporate social responsibility in global supply chains,’ 14:2 *Supply Chain Management: An International Journal* (2009) p. 75.

With the attention given to CSR in recent years, a new layer of complexity appears for companies having to manage new risks. Webby consider that because of ambiguous boundaries, CSR presents a large scope of risk for supply professionals:

CSR risk is unique in that intermediate suppliers often do not provide effective insulation against harm. Many other supply-related risks (e.g., financial insolvency, late delivery) that occur with so-called “lower-tier” suppliers will likely be absorbed to a great extent by the middle-tier, and thus the impact on customers further down in the value chain is often minimized. CSR risks like poor working conditions, unfair labor practices, or environmentally destructive operating practices are different: they can impact any company anywhere along the value chain – but they pose the greatest risk to well-known, highly-branded companies or public institutions.¹⁷

While the labour standards that should be uphold throughout the supply chains get clearer as they are based on the International Labour Organization (ILO) standards and national laws, not the same can be said of the scope of responsibilities. In other words, the limits of responsibility are far from clear, mainly for those entities in the value chain that can exert control or influence over other entities. A non-governmental organisation (NGO) study observes that a company holding the dominant position in the value chain can exert influence on the partners irrespective of these entities being legally independent companies.¹⁸ The UN Global Compact bases its strategy on an understanding that “core firms” at the centre of large business networks can play a key role as the driver of change their global value chains.¹⁹ How CSR documents handle the responsibilities of this special type of companies is a key issue this article seeks to examine.

Further clarity on the issue is needed because, as OECD Watch pointed out, “[r]egardless of sector, following standards of good practice throughout supply chains is recognised to be one of the most important and challenging issues for multinational corporations that are serious about CSR”.²⁰ The Global Reporting Initiative (GRI) noted that multinational enterprises (MNEs) have extensive chains of suppliers in emerging economies where the actual production process take place and where also the most important sustainability impacts, such as labour issues, take place. Although it is sometimes challenging for multinational buyers to understand and improve their impacts outside their in-house operations, “improving their external impacts is often where they can make the most significant changes towards a more sustainable world”.²¹ The reality, as shown by for example JO-IN’s baseline assessments, is that a common occurrence is the heavy use of sub-contractors both in-house and externally in a continuous production chain.²²

¹⁷ R. Webby, *Insulating the Supply Network from Corporate Social Responsibility Risk*, 91st Annual International Supply Management Conference, May 2006, p. 2, <www.ism.ws/files/Pubs/Proceedings/BHWebby.pdf>.

¹⁸ M. Stephan, ‘Responsibility of Multinational Enterprises within the Supply Chain – The Theory of Business Management’s View of the “Investment Nexus” Concept’, in Germanwatch, EED, TUAC, OECD Berlin, *Where is the Limit to Corporate Responsibility? Trade Relations and Supply Chain Responsibility of Multinational Enterprises*, Conference Documentation, 2004, p. 37.

¹⁹ OHCHR, ‘Briefing Paper on the Global Compact and Human Rights: Understanding Sphere of Influence and Complicity’, in UNGC, *Embedding Human Rights in Business Practice*, vol. I, 2004, p. 17.

²⁰ OECD Watch, *Assessing Adherence to the OECD Guidelines’ Supply Chain Provision*, Fact Sheet 4, 2007, p. 1.

²¹ GRI, *Transparency in the Supply Chain project*, <www.globalreporting.org/CurrentPriorities/SupplyChain/GRIGTZProject>.

²² JO-IN, *Codes and Compliance under Scrutiny*, A Final Report of the Joint Initiative for Corporate Accountability and Workers’ Rights (JO-IN) Turkey Project, 2008.

A lot of attention in CSR has been rightly given to developing management tools and providing guidance to companies on how to responsibly deal with their impacts. Professor Ruggie framed those desirable steps as due diligence.²³ There is little doubt that both he and the CSR community will continue to refine the *content* of due diligence and hopefully describe the comprehensive packages needed to address root causes and provide sustainable improvement;²⁴ simply policing top-down, heavy-handed interventions by buyers are neither enough nor indeed a feasible solution.²⁵ A different challenge will be to clarify the *scope* of due diligence, that is, the boundaries or the limits of the effort that influential companies should expand and the entities in the supply chain towards which it should be directed.

Focused treatments of buyer's responsibility regarding not only direct suppliers or contractors, but for lower tiers in the supply chain, and the limits of such a responsibility, have been surprisingly scarce in academic literature.²⁶ Especially for consumer goods, Andersen and Skjoett-Larsen deem necessary that future research on supply chain-related CSR practices addressees "how far back in the chains CSR requirements are posed".²⁷ However, this issue of the scope of due diligence, or of boundaries of responsibilities, constantly resurfaces in CSR writings. For instance, OECD Watch clearly outlines an understanding widely shared in civil society:

International business has witnessed far-reaching structural changes. Through international business transactions and global production networks the boundaries of enterprises tend to blur. The globalised economy is characterised by the enlargement and complexity of supply chain relationships. Civil society organizations demand that multinational enterprises take responsibility for their supply chain. This requires an assessment of how far the responsibility of multinationals for social and environmental issues in the supply chain goes, and where it stops.²⁸

A study commissioned by the electronics industry also addresses the issues of limitations:

One of the most challenging issues to researchers and practitioners in this field is to determine "how far do the boundaries of CSR extend?" In the case of codes of conduct, boundary considerations mean understanding when and how the code should be applied to first, second or higher tier suppliers. In light of the intricate ethical, technical, commercial and legal aspects related to this boundary issue, current literature does not offer any straightforward answers for dealing with it. In this context, industry responses have been on an individual or *ad hoc* basis.²⁹

²³ Protect, Respect and Remedy, *supra* note 11.

²⁴ See for example the excellent 'guidance sheets' on eight labour rights and the 'Good Practice Sheets: Apparel' developed by Better Work, available at <www.betterwork.org/public/global/resources/good-practice-sheets/atct_topic_view?b_start:int=20&-C=>>.

²⁵ As a UNGC publication concluded, supply chains continues to be a challenging area for many companies and "there is a movement away from monitoring alone as a way to tackle human rights and labour challenges in the value chain, towards more sophisticated models that combine monitoring with an emphasis on building capacity, the business case and involving partners". UNGC, *Embedding Human Rights in Business Practice II*, 2007.

²⁶ K. M. Amaeshi *et al.*, *Corporate Social Responsibility in Supply Chains of Global Brands: A Boundaryless Responsibility? Clarifications, Exceptions and Implications*, SSRN Working Paper Series, 2006.

²⁷ Andersen and Skjoett-Larsen, *supra* note 16, p. 83.

²⁸ OECD Watch, *The OECD Guidelines for Multinational Enterprises and Supply Chain Responsibility*, A Discussion Paper, December 2004, p. 1.

²⁹ GHGm, *Social and Environmental Responsibility in Metals Supply to the Electronic Industry*, Global e-Sustainability Initiative & Electronic Industry Citizenship Coalition, 2008, p. 5, (references omitted).

From this review it appears that a practical issue recognised as being of high business importance and placed at the core of the CSR agenda³⁰ – the limits of responsibility of large, influential buyers for labour abuses as production takes place at lower tiers of the supply chain – has hardly been analysed systematically to discern some principles. In these conditions it is timely to have a new look at relevant international instruments and discern what concepts they employ to cover responsibility for the supply chain. Also the dynamics specific to these instruments may carry important insights for the main on-going effort in the business and human rights area, the mandate of the SRSG. The result should be a clearer and more authoritative view of the explicit and implicit limitations of buyer’s responsibility, if any.

3. Instrument Review

During the following comparative review, some questions are important for clarifying the “scope” of responsibility issue: Are subcontractors covered, explicitly or through other formulations? What concepts do the instruments use to establish responsibility for the acts of third parties such as suppliers, sub-contractors, etc? Are there any express, principled limitations regarding the buyer’s due diligence effort to be directed at lower tiers? Are there any specific due diligence steps a buyer should take beyond the first layer of suppliers? What is the strategy, if any, adopted in these instruments in order to promote subcontractor’s respect of labour rights? The primary focus of this article is concerned with the scope rather than with the content of due diligence. Understandably there is now greater detail about what concrete steps buyers should take. This article does not aim to list all such detailed steps, by instrument. It will do so only when a document identifies some measures a buyer should take to influence subcontractors.

The review begins with soft law instruments on corporate responsibilities adopted by international governmental organisations and continues with specialised CSR schemes, often advanced by the private sector. The presentation is chronological in order to track the progression of thinking throughout the years.

3.1. *OECD Guidelines for Multinational Enterprises*

The Organisation for Economic Co-operation and Development (OECD) Guidelines adopt a broad definition of MNEs and note the influence, the leverage existing at the helm of business groups: MNEs “usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another.”³¹

³⁰ The scandals in which Nike got entangled in the 1990s and that propelled CSR on the international agenda had to do with abuses taking place further down in the supply chain, in factories not owned or operated by Nike. As a result, in 1998, Phil Knight, Nike’s chief executive, admitted that “[t]he Nike product has become synonymous with slave wages, forced overtime and arbitrary abuse”. J. H. Cushman, Jr., ‘Nike Pledges to End Child Labor And Apply U.S. Rules Abroad’, *The New York Times*, 13 May 1998.

³¹ Organisation for Economic Co-operation and Development, *The OECD Guidelines For Multinational Enterprises: Text, Commentary And Clarifications*, (DAFFE/IME/WPG(2000)15/FINAL) 2001, para I.3.

Specifically on supply chains, the Guidelines provide, after their revision in 2000, that “enterprises should ... encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines”.³² The Commentary accompanying the Guidelines explains that “encouraging, where practicable, compatible principles of corporate responsibility among business partners serves to combine a re-affirmation of the standards and principles embodied in the Guidelines with an acknowledgement of their importance to suppliers, contractors, subcontractors, licensees and other entities with which MNEs enjoy a working relationship”.³³ The Guidelines also explicitly consider subcontractors when companies report on social aspects, environmental issues and various risks. Such disclosures “may pertain to entities that extend beyond those covered in the enterprises’ financial accounts. For example, it may also cover information on the activities of subcontractors and suppliers or of joint venture partners.”³⁴ These supply chain statements came as NGOs succeeded in 2000³⁵ to introduce a supply chain provision,³⁶ a watered down and quite general formulation, in the Guidelines. The OECD had soon to concentrate on supply chain issues and organised a conference early on, in 2002, at its second annual meeting on the OECD Guidelines.³⁷

The Commentary is explicit about the limits of responsibility as it extends towards workers on lower tiers:

It is recognised that there are practical limitations to the ability of enterprises to influence the conduct of their business partners. The extent of these limitations depends on sectoral, enterprise and product characteristics such as the number of suppliers or other business partners, the structure and complexity of the supply chain and the market position of the enterprise vis-à-vis its suppliers or other business partners. The influence enterprises may have on their suppliers or business partners is normally restricted to the category of products or services they are sourcing, rather than to the full range of activities of suppliers or business partners. Thus, the scope for influencing business partners and the supply chain is greater in some instances than in others.³⁸

The OECD Guidelines system, however, did not have the chance to elaborate more on the limits of buyer’s responsibility. This issue has proved so controversial that the OECD decided, in a highly controversial move, to restrict the scope of the Guidelines to practically exclude supply chain responsibility altogether. Already in 2000, the Commentary introduced a cautionary note, by way of explanation, by differentiating among business relationships: “Established or direct business relationships are the major object of this recommendation rather than all individual or ad hoc contracts or transactions that are based solely on open market operations or client relationships.”³⁹ This limitation alluded to in 2000 “exploded” in controversy in the following

³² *Ibid.*, para II.10.

³³ *Ibid.*, Commentary, para. 10, p. 13.

³⁴ *Ibid.*, Commentary, para. 14, p. 16.

³⁵ See the detailed account provided in OECD Watch, *supra* note 28.

³⁶ OECD Watch, *supra* note 20.

³⁷ Roundtable on Corporate Responsibility: Supply Chains and the OECD Guidelines for Multinational Enterprises, 19 June 2002, Paris, France. For a behind the scenes account of that conference, see OECD Watch, *supra* note 28.

³⁸ OECD, *supra* note 31, Commentary, para. 10, p. 13.

³⁹ *Ibid.*

years. As complaints began to invoke the new provision on supply chains introduced in 2000,⁴⁰ some National Contact Points (NCPs),⁴¹ those national bodies in OECD member states entrusted with the implementation of the Guidelines began to define narrowly the scope of the Guidelines to include only equity-relationships and exclude contract-based relationships. As OECD Watch writes, an intense debate about the scope of the Guidelines soon began after some NCPs ignored or downplayed references to trade in the Guidelines. Not all NCPs supported this exclusion of “trade cases” and few believed that the distinction between trade and investment could easily be drawn.⁴²

This overly narrow interpretation of the Guidelines excludes first tier suppliers, not to talk about lower tiers. Trying to address these divergent practices of NCPs, in 2003, the OECD Committee on International Investment and Multinational Enterprises (CIME) issued a statement which more or less excludes supply chain relations from the purview of the Guidelines and advised a case-by-case treatment mindful of the degree of influence:

[T]he Guidelines have been developed in the specific context of international investment by multinational enterprises and their application rests on the presence of an investment nexus. When considering the application of the Guidelines, flexibility is required. This is reflected in Recommendation II.10 and its commentary that deal with relations among suppliers and other business partners. These texts link the issue of scope to the practical ability of enterprises to influence the conduct of their business partners with whom they have an investment like relationship. In considering Recommendation II.10, a case-by-case approach is warranted that takes account of all factors relevant to the nature of the relationship and the degree of influence. The fact that the OECD Declaration does not provide precise definitions of international investment and multinational enterprises allows for flexibility of interpretation and adaptation to particular circumstances.⁴³

NGOs, grouped under the umbrella of OECD Watch, have criticised this restrictive interpretation that flies in the face of the text of the Guidelines,⁴⁴ of the outsourcing model and of CSR practice; they question whether the Guidelines can aspire, with this flaw, to be a leading CSR instrument at global level: “OECD Watch believes that this narrowing of the Guidelines’ scope is unjustified based on the agreed revised text of the Guidelines and that the exclusion of supply chain cases is discriminatory. If the Investment Committee is not able to deal with trade cases, then a complementary instrument will have to be developed.”⁴⁵

⁴⁰ By December 2009, NGOs have referred 29 cases on supply chain issues to NCPs. For a listing of cases *see* oecdwatch.org/cases/advanced-search/keywords/casesearchview?type=Keyword&search=en_Supply%20chain.

⁴¹ OECD Watch listed some concerns regarding the performance of NCPs: unequal treatment of parties by NCPs, particularly biased towards business interests; location of some NCPs in a single ministry with a potential conflict of interest; unjustifiable delays in the handling of specific instances; □ inconsistent and arbitrary interpretation of the Guidelines, e.g. on parallel legal proceedings and supply chain issues; lack of clarity and functional equivalence among NCPs on procedures for accepting and handling cases; lack of capacity and resources among the majority of NCPs; and lack of credibility and authority to mediate. OECD Watch, *The OECD Guidelines for MNEs: Are they ‘fit for the job’?*, Submission to the Annual Meeting of the National Contact Points, June 2009, p. 2.

⁴² OECD Watch, *Five Years On, A Review of the OECD Guidelines and National Contact Points*, p. 19.

⁴³ OECD Committee on International Investment and Multinational Enterprises (CIME), *Statement by the Committee on the Scope of the Guidelines and the investment nexus*, 2003.

⁴⁴ *See* OECD Watch, *supra* note 28, pp. 5–6.

⁴⁵ OECD Watch, *supra* note 42, p. 47.

What due diligence entails is discussed in various places, with increased detail when it comes to disclosure in Section III and employment and industrial relations in Section IV. Particularly relevant to supply chain situations, the Commentary notes that “in cases where direct influence of business partners is not possible, the objective could be met by means of dissemination of general policy statements of the enterprise or membership in business federations that encourage business partners to apply principles of corporate conduct compatible with the Guidelines”.⁴⁶

To summarise, the Guidelines cover only investment and investment-like relations leaving out trade relations. It is impossible to use the Guidelines for purposes of establishing a responsibility of brands regarding the activities of subcontractors. As a result, clarifications of the scope of responsibility cannot be expected from this instrument. The OECD unfortunately accepted blatant inconsistencies between the text of Guidelines and its application. The fact that the Guidelines used an expansive definition of MNEs, referred to influence and leverage of core firms, and mentioned supply chains and subcontractors in responsibility discussions has been rendered irrelevant in clarifying the limits of responsibility of buyers. In the end, the Guidelines introduced an arbitrary limitation that leaves out an essential part of the CSR agenda, that is, buyer’s responsibility for supply chains.

3.2. ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy

The ILO Tripartite Declaration, adopted in 1977 and revised successively till 2006, does not make an explicit reference to sub-contracting. Indeed it does not mention suppliers or contractors either. Nevertheless, just like the OECD Guidelines, the Declaration defines broadly a MNE in a way that can surely encompass suppliers. Furthermore, the definition places some responsibility on the parent company to “cooperate and provide assistance” as the term “MNE” designates “the various entities (parent companies or local entities or both or the organization as a whole) according to the distribution of responsibilities among them, in the expectation that they will cooperate and provide assistance to one another as necessary to facilitate observance of the principles laid down in the Declaration”.⁴⁷

Such a responsibility to “cooperate and provide assistance” is further weakened by the high threshold of influence imposed when the Declaration refers to enterprises that ‘*own or control* production, distribution, services or other facilities outside the country in which they are based’.⁴⁸ Otherwise the Declaration nowhere elaborates on the precise limits of the parent company’s responsibilities regarding tiers of suppliers.⁴⁹ The reality of such influence of core firms is however clearly recognised as the Declaration explains that “[t]he degree of autonomy of entities within multinational enterprises in relation to each other varies widely from one such enterprise to another, depending on the nature of the links between such entities and their fields

⁴⁶ OECD, *supra* note 31, Commentary, para. 10, p. 13.

⁴⁷ ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, 1977 (amended 2006), para. 6. A very similar concept is used in para I.3 of the OECD Guidelines, *supra* note 31.

⁴⁸ ILO, *ibid.*, para. 6 (emphasis added).

⁴⁹ There is an “examination of disputes” procedures under the Tripartite Declaration. ILO has handled only five complaints since 1981 according to <www.baseswiki.org>, but it is not possible to find information on these cases on ILO’s website to see how they have dealt with supply chain issues.

of activity and having regard to the great diversity in the form of ownership, in the size, in the nature and location of the operations of the enterprises concerned”.⁵⁰

The ILO Declaration aside, supply chains have been the object of other ILO projects, such as “Better Work”, which is a joint project with the International Financial Corporation that started in 2006. The programme seeks to improve labour practices and competitiveness in global supply chains. It is primarily centred on suppliers to increase their competitiveness “in global markets where many buyers demand compliance with labour standards from their suppliers”.⁵¹ MNEs have a supporting role.⁵² The ILO has also opened in 2009 the “ILO Helpdesk”, which provides a one-stop-shop for company managers and workers who have questions about the ILO approach to socially responsible labour practices.⁵³ At the time this article is written, the Helpdesk does not have a special paper explaining the scope of responsibilities in supply chains.⁵⁴ Since 2008, the ILO through its Turin Centre offers training for companies and others on assessing compliance in global supply chains.⁵⁵

Overall the Declaration only hints at a buyer’s responsibility for supply chain abuses. This is done by defining MNEs in a broad manner, just as the OECD has done before. The text, however, draws a tight boundary as the threshold is high: the buyer company should own or control facilities. This serves to exclude most supply chain situations. The Declaration has been implemented rather weakly and has not resulted in further clarifications to the subjects of interest herein.

3.3. UN Global Compact

The UN Global Compact (UNGC) asks company to respect and support human rights within their sphere of influence and not be complicit in abuses.⁵⁶ The ten brief Principles of the UNGC do not make a direct reference to supply chains; so one has to turn to the literature that the UNGC has produced. As an instrument that is not legally binding and does not even aspire to be a voluntary code of conduct subject to monitoring, the UNGC is designed to offer a “learning platform”. Supply chain issues are clearly entertained within the UNGC. In its materials, the UNGC has been explicit about the special position of controlling entities placed at the top of business networks and groups. One document accounts for “core firms” and the influence they have over business partners:

Current trends in the globalization of business are marked by the emergence of core firms at the centre of large networks of business relationships. This network is made up of a firm’s global value chain and its relationships with possible joint venture partners and government authorities in different regions where it operates. The core firm plays a key role as the driver of change within its global value chain. It has substantial influence not only on its own employees, but also on upstream suppliers and downstream

⁵⁰ ILO, *supra* note 47, para. 6.

⁵¹ <www.betterwork.org>.

⁵² See *International Buyer Principles*, *ibid*.

⁵³ <www.ilo.org/empent/Whatwedo/Publications/lang--en/docName--WCMS_106376/index.htm>.

⁵⁴ <www.ilo.org/empent/WorkingUnits/lang--en/WCMS_DOC_ENT_DPT_MLT_EN/index.htm>.

⁵⁵ ILO, *Implementing core labour principles in global supply chains – a training course for social auditors*, <www.itcilo.org/en/calendar/4447/?searchterm=None&language_id=1>.

⁵⁶ Global Compact, Principles 1 and 2, <www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>.

customers. The concept of “sphere of influence” encompasses this combination of relationships, and the core firm’s central position as the leader of its global value chain.⁵⁷

The UNGC covers suppliers and lower tiers through a variety of concepts such as sphere of influence, complicity and involvement. The UNGC was the first instrument to advance the “sphere of influence” concept in CSR in an attempt to clarify corporate responsibilities. The UNGC wrote that sphere of influence “will tend to include the individuals to whom the company has a certain political, contractual, economic or geographic proximity”.⁵⁸ For example, in *Raising the Bar*, the graphic scheme that describes various zones of influence has one of the layers dedicated to “business partners”.⁵⁹ Sphere of influence has proven a helpful visual tool for those companies willing to manage, to map and prioritise their diverse impacts.⁶⁰ Professor Ruggie called it a useful metaphor.⁶¹

The UNGC was also the initial proponent of “complicity” used in both a narrow, legal sense and in a broader sense to capture evolving social expectations. Capturing both these meanings the definition promoted by the UNGC states that “a company is complicit in human rights abuses if it authorises, tolerates, or knowingly ignores human rights abuses committed by an entity associated with it, or if the company knowingly provides practical assistance or encouragement that has a substantial effect on the perpetration of human rights abuse”.⁶² Indeed, the second Principle of the UNGC states that “[b]usinesses should make sure they are not complicit in human rights abuses”. On its website, the UNGC relies on the writings of human rights experts, Clapham and Jerbi,⁶³ and divides “complicity” into three categories: direct, indirect (beneficial), and silent complicity.⁶⁴ Supply chain issues can easily fit into the second or third category as to avoid risks of complicity the UNGC recommends companies to have explicit policies that protect the human rights of workers throughout their supply chains.⁶⁵

The UNGC also refers to supply chain issues as an instance of indirect involvement which alludes to the immediate or more remote “causality” to harm. As a difference from direct involvement which results from the conduct of a firm’s own employees, “indirect involvement can take many forms but typically involves the violation of human rights by a firm’s contractor, joint-venture partner, host government or other independent actor, acting on behalf of or with the active aid and encouragement of the firm in question”.⁶⁶

⁵⁷ OHCHR, *supra* note 19, p. 17

⁵⁸ *Ibid.*

⁵⁹ C. Fussler *et al.* (eds.), *Raising the Bar, Creating Value with the UN Global Compact* (Greenleaf Publishing, 2004) pp. 22–23; Business Leaders Initiative on Human Rights/Office of the UN High Commissioner for Human Rights/United Nations Global Compact, *A Guide to Integrating Human Rights in Business Management*, 2004, p. 8.

⁶⁰ The GC references the BLIHR Human Rights Matrix which identifies substantive areas of human rights where companies should take action with priority. Areas are split into “essential, expected and desirable”. This Matrix should be read for what it is: it helps companies to map and prioritise issues within their sphere of influence (p. 13) and does not purport to define the “sphere of influence” to clarify the “scope” issue in CSR.

Business Leaders Initiative on Human Rights, *supra* note 59, pp. 13–15.

⁶¹ Protect, Respect and Remedy, *supra* note 11, para. 66. *See also* the discussion in the SRSR section below.

⁶² Global Compact, *supra* note 19, para. 19.

⁶³ A. Clapham and S. Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 2001, <www.reports-and-materials.org/Clapham-Jerbi-paper.htm>.

⁶⁴ Global Compact, Principle 2, <www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/Principle2.html>.

⁶⁵ *Ibid.*

⁶⁶ Fussler *et al.*, *supra* note 59, p. 25.

Clearly the UNGC covers lower tiers of the supply chain, possibly the entire supply chain. In 2003 the UNGC organised its second “Policy Dialogue” on the theme of “Supply Chain Management and Partnerships”, and asked the question: “How do the GC principles translate into corporate practice throughout the supply chain?”⁶⁷ A few years later, the UNGC remarked that “there is much room for advancement in areas such as ... applying labour standards throughout supply chains”.⁶⁸ In the aforementioned publication *Raising the Bar*, the UNGC referred to an Amnesty International scheme which prompts business to “reach agreement with suppliers to ensure no forced labour, abusive forms of child labour or ill treatment of workers occur anywhere along the supply chain”.⁶⁹ The ILO, a member of the UNGC, has used its expertise to clarify the labour principles of the UNGC in its *Guide for Business* which contains references to suppliers and sub-contractors in regard to forced labour and child labour. For example, the ILO advises businesses to “exercise influence on subcontractors, suppliers and other business affiliates to combat child labour”.⁷⁰

The responsibility of large buyer companies aside, the UNGC has made a drive to enrol large companies from developing countries, among which one can naturally expect to find first tier suppliers of buying MNEs. This reach to developing countries’ companies indicates a direct strategy of improving labour standards in supply chains and is further confirmed by the UNGC welcoming small and medium sized business within its ranks.

Overall, there is no doubt that the UNGC takes on a broad coverage of supply chain issues. This is done primarily through the concepts of sphere of influence and complicity. This broad coverage is facilitated, on the one hand, by the fact that the UNGC has no regulatory or standard-setting ambitions but aims to encourage and disseminate good business practices, and, on the other hand, by the aspiration of the UNGC to have companies not only respect human rights but also to “support the protection of internationally proclaimed human rights”.⁷¹ The UNGC, through its materials, has advanced the understanding of the content of due diligence through mapping of corporate impacts, various categorisations, and examples of proper managerial steps. Less clarity has been achieved on the limitations of responsibility, partly because of the aforementioned dynamics within the UNGC, and partly because the attempts to specify borders by referring to “sphere of influence” ended up more like “mapping” impacts than “limiting” responsibilities. One could have expected more clarity on the limits of a buyer’s responsibility from a self-described learning platform a decade after its start. As to the precise strategy that buyers should adopt regarding subcontractors, the lack of clear statements leaves the impression that the UNGC expects buyers to “roll-out” to lower tiers, if feasible, the due diligence processes they have developed for direct suppliers on the first tier.

⁶⁷ Global Compact, *Policy Dialogue: Supply Chain Management and Partnerships*, Summary Report, 12–13 June 2003, New York, <www.unglobalcompact.org/Issues/supply_chain_management/index.html>.

⁶⁸ G. Kell, ‘Preface’, in Global Compact, *Annual Review*, 2007.

⁶⁹ Fussler *et al.*, *supra* note 59, p. 24.

⁷⁰ International Labour Organization, *The Labour Principles of the United Nations Global Compact – A Guide for Business*, 2008, p. 30. ILO also writes: “For users of this Guide, the abuse [forced labour] will most likely be indirect through business relationships such as suppliers and their sub-contractors, and will require the exercise of due diligence in managing these relationships.” *Ibid.*, p. 23.

⁷¹ Global Compact, Principle 1, *supra* note 56.

3.4. UN Norms on the Responsibilities of TNCs with Regard to Human Rights

The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the Norms), the ill-fated codification effort that the UN Sub-Commission on the Promotion and Protection of Human Rights undertook between 1999 and 2003, were not adopted by the UN Commission on Human Rights but led to the creation of the SRSG mandate in 2005. The Norms have no formal authority, but because Professor Ruggie vehemently rejected them when he defined his own conceptual approach to CSR, an analysis of the Norms offers both a good contrast and a chance to see how this contested document sits conceptually among other CSR instruments.

The Norms contain express references to supply chains and propose an expansive understanding of corporate responsibilities. The latter is achieved through the use of a few concepts, some proposed in no other CSR instrument. First, just as the ILO and the OECD before, the Norms use a loose definition of MNEs. This is done in order to make the document relevant and applicable to all types of business entities irrespective of their peculiar legal forms. The Norms define MNEs as any “economic entity operating in more than one country or a *cluster of economic entities* operating in two or more countries ... and whether taken individually or *collectively*”.⁷² It can be noted that, similar to the OECD and ILO, there is no clarity as to whether “transnational corporations” (TNC) refers to the controlling entity at the helm of a business group or to the entire group/network of companies; this is done to ensure that the standards proposed by the Norms will be deemed applicable in the operations of all companies, transnational or not. As the main drafter explained, the Sub-Commission deliberately “de-emphasised” the definition of TNCs in order not to restrict the Norms’ scope of application.⁷³

Second, there are express references to suppliers and subcontractors all throughout the Norms. The Preamble notes that TNCs have “the capacity to cause harmful impacts on the human lives of individuals through ... relations with suppliers”.⁷⁴ As the Norms apply to TNCs and “other business enterprises”, the latter encompass directly and without difficulty contractors, subcontractors, suppliers, licensees, distributors, corporate partnerships and other legal forms used to establish the business entity.⁷⁵ So suppliers are covered both directly as a business and indirectly by being part of a business group or network under the influence of a transnational influential entity.

Third, the Norms use the concept of “sphere of influence” with emphasis on the “influence” component because it establishes the principle that actual leverage brings a responsibility to use it. The drafters purported to take “a flexible approach” that recognised that “the larger the resources of transnational and other businesses, the more opportunities they may have to assert influence. Accordingly, larger businesses, which generally engage in broader activities and enjoy

⁷² UN Sub-Commission on the Promotion and Protection of Human Rights, *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, E/CN.4/Sub.2/2003/38/Rev.2, para. 20, (emphasis added) (hereinafter: Norms).

⁷³ D. Weissbrodt and M. Kruger, ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’, 97:4 *The American Journal of International Law* (October 2003) p. 909.

⁷⁴ Norms, *supra* note 72, Preamble, para. 11.

⁷⁵ *Ibid.*, para. 21.

more influence, have greater responsibility for promoting and protecting human rights.”⁷⁶ The drafters of the Norms rightly noted that TNCs, however defined, “attract special attention because they tend to be large, politically influential, and autonomous to the extent that they can move their operations from one country to another”.⁷⁷

Fourth, as to the content of the buyer’s responsibility, the Norms define the principled corporate responsibility as an “obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights”.⁷⁸ This expansive formulation is a hollow victory of jargon over clarity and common sense. These are also the exact words the Norms used to reaffirm the (primary) obligations of states regarding human rights.⁷⁹ Business organisations commented that “every phrase creates a mystery”.⁸⁰ There is no doubt that the drafters had in mind a broad enough responsibility of buyers extending to lower tiers of suppliers.

Furthermore, when it comes to the specification of corporate responsibilities in the Norms there is a notable disconnect, at least in tone and maybe in the concepts used, with the Commentary. The later is more nuanced⁸¹ and contains striking similarities with Professor Ruggie’s discourse. For example, the Commentary explains Article 1 as: “Transnational corporations and other business enterprises shall have the responsibility to use *due diligence* in ensuring that their activities do not *contribute directly or indirectly* to human rights abuses, and that they do not *directly or indirectly benefit from abuses* of which they were aware or ought to have been aware.”⁸² The references to “due diligence”, to contribution to harm, and to various implementation steps that businesses should take are all parts of the SRSG’s discourse. The Norms ground the responsibility to protect on “benefit”, hinting at “unjust enrichment” as a concept. “Complicity” is mentioned only in the Commentary once when businesses are asked to inform themselves of their impacts so as to avoid complicity in human rights abuses.⁸³ Whatever the concept used to express moral condemnation, the idea seems to be responsibility for culpable failure to monitor and act to prevent or redress abuses committed by third parties.

The Norms mention a range of measures a company can take. Thus the expectation is for companies to “adopt, disseminate and implement internal rules of operation”, to provide training, pre-audit potential business partners, monitor partners and engage relevant stakeholders in monitoring to obtain their input, disclose information in the spirit of transparency, set up early warning systems in health-related cases, adopt plans of action or methods of reparation and redress when abuses are uncovered, conduct human rights impact studies before commencing major projects, provide grievance mechanisms for workers, and so on.⁸⁴ Years later, Professor

⁷⁶ Weissbrodt and Kruger, *supra* note 73, p. 912.

⁷⁷ *Ibid.*, p. 909.

⁷⁸ Norms, *supra* note 72, Article 1.

⁷⁹ *Ibid.*

⁸⁰ IOE and ICC, *Joint views on the draft “Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights”*, 2004.

⁸¹ See for example the repeated references to “to the extent of their resources and capabilities” when it comes to training (para. 15(b)) and impact assessments (para. 15(i)), and to “to the extent possible” regarding monitoring of suppliers and subcontractors (para. 16(d)). Norms, *supra* note 72.

⁸² Norms, *supra* note 72, Commentary, para. 1(b).

⁸³ *Ibid.*, Commentary, para. 1(b).

⁸⁴ *Ibid.*, paras. 15–16 and accompanying Commentary.

Ruggie merely replaced the umbrella term “implementation” with the more business-sounding “due diligence” and placed much more emphasis on refining these practical measures throughout its mandate. The Norms cannot be attacked here as they resonate with good business practices. Such implementation measures only get clearer in time through experience and consensus-building.

So what is the scope of this responsibility down the supply chain? What is the limiting principle? The Norms use the concept of “sphere of influence”, here with emphasis on “sphere”, in a fashion similar to the UNGC: TNCs and other businesses have obligations “within their respective spheres of activity and influence”.⁸⁵ It is through this concept that the Norms purport to limit corporate responsibilities.⁸⁶ However, just as in the case of the UNGC, this concept appears able to help with mapping and prioritising but not with drawing conceptual boundaries on responsibility. Also on the “boundaries” of responsibilities issue, a piece written by the main drafter is notable for asking the core question and then totally failing to answer it. Professor Weissbrodt writes: “Closely connected with this issue was the debate over how to handle contractors, subcontractors, suppliers, licensees, and other business partners of transnational corporations. How far up or down the line should businesses be expected to monitor the compliance of their subcontractors and suppliers?”⁸⁷ No one knows what the drafters thought of the answer as the author immediately diverts attention to termination of contracts, which is merely one measure of numerous due diligence options. This measure is of course a matter of “content” as opposed to “scope” of responsibilities.

His inability to answer the scope question backfires most when one reads the Norms provision regarding reparations where “transnational corporations and other business enterprises shall provide prompt, effective and adequate reparation to those persons, entities and communities that have been adversely affected by failures to comply with these Norms”.⁸⁸ This should be read against the drafters’ expectation that national courts and/or international tribunals will apply this provision. How could courts apply this idea, or the reader be enlightened, when the Norms fail to explain who should provide reparation – the company parent or the business partner – and based on parent’s fault or no fault? There is no useful guidance here because the drafters did not outline a concept to limit the responsibility of the controlling entity.

There is a great chance that one can find here, in the failure to deal with the scope of corporate responsibilities, an explanation for the puzzling reasoning of the drafters. Professor Weissbrodt presented the Norms as not legally binding but neither were they voluntary.⁸⁹ They would be “authoritative” because they restate international law. He wrote that “the legal authority of the Norms now derives principally from their sources in international law as a *restatement* of legal principles applicable to companies, but they have room to become *more binding* in the future”.⁹⁰ Furthermore, “the *legal authority* of the Norms derives principally from their sources in treaties and customary international law, as a *restatement of international legal principles* applicable to

⁸⁵ *Ibid.*, Article 1.

⁸⁶ C. Pitts, *Response to IOE/ICC Concerns Regarding the UN Norms for Business*, 2004

⁸⁷ Weissbrodt and Kruger, *supra* note 73, p. 910.

⁸⁸ Norms, *supra* note 72, para. 18.

⁸⁹ Weissbrodt and Kruger, *supra* note 73, p. 913.

⁹⁰ *Ibid.*, p. 915 (emphasis added).

companies. The United Nations has promulgated dozens of declarations, codes, rules, guidelines, principles, resolutions, and other instruments...⁹¹ What the thinking behind the Norms obscures is that the controversy in CSR has hardly been about the human rights standards that people should enjoy, i.e. *human rights entitlements* standardised in law, but overwhelmingly about how far the responsibilities of new duty-bearers, such as businesses, extend, i.e. *scope* of corporate responsibilities, and what more specific actions the duty bearer should take. Saying that the Norms “restate” international law works fine for the first part – standardised entitlements – only because nowhere in international law is the scope of corporate responsibilities discussed. Missing this distinction between entitlements and scope turned the Norms into a rhetorical exercise when saying that they “reflect and restate” a wide range of human rights legal principles.⁹² The Norms could not be authoritative and were not found as such by Professor Ruggie as well because the drafters built the Norms on flawed analogies on the scope issue.⁹³

In conclusion, the Norms used a broad definition of TNCs as the OECD and the ILO did previously and laid down a very expansive formulation of corporate responsibilities. Express references to subcontractors pepper the text of the Norms. This instrument does maintain a strong focus on the responsibility of core firms, such as buyers. One can only agree that no CSR framework should obscure the special situation of controlling entities. To allocate responsibilities to core firms, such as powerful buyers in supply chains, the Norms referred to “influence” that entails commensurate responsibilities and repeatedly discouraged “benefits” that result from human rights abuses; “complicity” is mentioned only in the Commentary once. To limit the scope of responsibilities, the Norms relied on the concept of the “sphere of influence and activity” as the Global Compact has done before. Rather detailed implementation steps that companies can take are outlined and appear analogous to those labelled by Professor Ruggie as “due diligence”. The Norms failed to add clarity on the scope of responsibility that follows from corporate leverage due to the drafters being distracted by a desire to make the Norms carry more legal weight than they could, and due to prioritising and trying to be more specific on the “content of responsibility”, that is, applicable human rights standards and implementation measures.

3.5. UN SRSG on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises

The writings of the SRSG, Professor Ruggie, properly account for business outsourcing. He comments on MNEs as “the most visible manifestation of globalization today” and takes note of the fact that there are “some 70,000 transnational firms, together with roughly 700,000 subsidiaries and millions of suppliers spanning every corner of the globe... What once was

⁹¹ *Ibid.*, p. 921.

⁹² *Ibid.*, p. 912.

⁹³ Looking at the formulation of Article 1 the reader is inclined to think that the drafters had in mind that the scope of state responsibilities as defined in international human rights law can be applied *mutatis mutandis* to the scope of corporate responsibilities. This is a fatal mistake that the SRSG correctly identified (Protect, Respect and Remedy, *supra* note 11, para. 53). Entities as different as states and businesses cannot be analogised. Neither should the “jurisdiction” of states and the “sphere of influence” of business: jurisdictions are mainly exclusionary and not overlapping in a world of sovereign states while a company’s sphere of influence by definition overlaps with state jurisdictions and other companies’ spheres of influence. The overlapping aspect makes jurisdiction work as a limiting principle on a state’s responsibility to protect but renders the sphere concept useless in limiting a corporate responsibility to protect.

external trade between national economies increasingly has become internalized within firms as global supply chain management, functioning in real time and directly shaping the daily lives of people around the world.”⁹⁴ He further refers to business groups as “extended enterprises” and notes the difficulty in holding controlling entities legally liable for the impacts of their business partners. The legal framework regulating TNCs makes the parent company generally not liable for wrongs committed by its subsidiaries, nor is the buyer company liable for the deeds of its suppliers: “Despite the transformative changes in the global economic landscape generated by offshore sourcing, purchasing goods and services even from sole suppliers remains an unrelated party transaction. Factors such as these make it exceedingly difficult to hold the extended enterprise accountable for human rights harm”.⁹⁵ It becomes clear that Professor Ruggie recognises business networks as a distinct, important business entity and sounds critical of how liability is (not) legally shared upwards in “extended enterprises”. Outsourced industries are clearly on his agenda.

The question then arises as to what principle or concept Professor Ruggie finds most suited to attribute liability upwards to the buyer company? He expressly writes on the topic: “The challenge for buyers is to ensure they are not complicit in violations by their suppliers.”⁹⁶ Complicity is the key concept in SRSR’s architecture dealing with abuses occurring in partners’ operations. Similar to the Global Compact, where Professor Ruggie also played a pivotal role, complicity is accepted for both its legal and non-legal meanings.⁹⁷ The SRSR also refers to indirect involvement to explain complicity: “Complicity refers to indirect involvement by companies in human rights abuses – where the actual harm is committed by another party, including governments and non-State actors.”⁹⁸

In his important 2008 Report, the SRSR touches upon “benefiting” from harm created by the “extended enterprise”. He writes that “deriving a benefit from a human rights abuse is not likely on its own to bring legal liability. Nevertheless, benefiting from abuses may carry negative implications for companies in the public perception.”⁹⁹ His 2009 Report does not comment on “benefit” or allude in other way to “unjust enrichment”. This rather neutral, cautioning tone is evident also in other reports.¹⁰⁰ So he stops short of deriving a principle of responsibility for the buyer company. In his 2007 Report, Professor Ruggie seemed to leave more space for “benefit” to serve as a basis of liability: “Mere presence in a country and paying taxes are unlikely to create liability. But deriving indirect economic benefit from the wrongful conduct of others may do so, depending on such facts as the closeness of the company’s association with those actors.

⁹⁴ *Promotion and Protection of Human Rights*, Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, E/CN.4/2006/97, 22 February 2006, para. 11 (references omitted).

⁹⁵ Protect, Respect and Remedy, *supra* note 11, para. 13.

⁹⁶ *Business and human rights: Towards operationalizing the “protect, respect and remedy” framework*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/11/13, 22 April 2009, para. 75 (hereinafter: *Towards operationalizing*).

⁹⁷ The SRSR accepts that complicity is a concept with legal and non-legal pedigrees. Protect, Respect and Remedy, *supra* note 11, paras. 73 and 76.

⁹⁸ *Ibid.*, para. 73.

⁹⁹ *Ibid.*, para. 78.

¹⁰⁰ *Clarifying the Concepts of “Sphere of influence” and “Complicity”*, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie, A/HRC/8/16, 15 May 2008, paras. 41 and 70.

Greater clarity currently does not exist.”¹⁰¹ This observation was included in a discussion of complicity alluding to the “beneficial complicity” used in the Global Compact materials. Overall, it is clear that Professor Ruggie does not seem inclined to make “benefit” from a harm a principle for allocating responsibility upwards, as the UN Norms and the Global Compact have done.

The “influence” that the core company may have over its partners plays a role as principle of attribution of responsibility in Professor Ruggie’s thinking. While the Norms spoke of a “sphere of influence and activity” without further elaborating, he takes the idea further and usefully distinguishes influence as ‘impact’ of own decision from influence as ‘leverage’ over partners. While the Norms formulated a single, broad responsibility based on influence, he accepts a responsibility for the impacts created by own decisions and rejects a responsibility to exercise leverage once it exists. On influence as ‘impact’ Professor Ruggie explains that a buyer’s decisions may have ripple effects throughout the supply chain. He clarifies that not only direct impacts are relevant but even more remote, indirect impacts should be identified through due diligence, including “potential or actual impacts of suppliers several layers removed”.¹⁰² Where the company’s activities or relationships are contributing to harm, “impact falls squarely within the responsibility to respect”.¹⁰³ The implications can be far reaching. This understanding extends the responsibility of buyers to situations where, for example, their decisions have negative impacts but due to such decisions being too remote from the harms have traditionally not been acknowledged as leading to responsibility. The key idea for the SRSG is responsibility for own culpable behaviour, for own “impacts”. This applies to buyer companies too, and even when that buyer does not control suppliers: “The responsibility to respect requires that companies exercise due diligence to identify, prevent and address adverse human rights impacts related to their activities. If the scope of due diligence were defined by control and causation this could imply, for example, that companies were not required to consider the human rights impacts of suppliers they do not legally control, or situations where their own actions might not directly cause harm but indirectly contribute to abuse.”¹⁰⁴

When it comes to influence as ‘leverage’, the Norms laid down directly a responsibility to use it. In contrast, Professor Ruggie has been adamant that no such responsibility to use actual leverage exists in relation to his responsibility to respect human rights. He explains that the existence of influence /leverage does not entail responsibility to use it except in “in particular circumstances”,¹⁰⁵ which are nowhere clearly spelled out. In philosophical terms, this would imply “can implies ought”, which is not acceptable. It would be unreasonable to hold a company “responsible for the human rights impacts of every entity over which they may have some influence” and even not “desirable to have companies act whenever they have influence, particularly over governments”¹⁰⁶

¹⁰¹ *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/4/035, 2007, para. 32.

¹⁰² SRSG, *supra* note 100, para. 24. *See also* para. 17.

¹⁰³ *Ibid.*, para. 12.

¹⁰⁴ *Ibid.*, para. 17.

¹⁰⁵ Protect, Respect and Remedy, *supra* note 11, para. 68.

¹⁰⁶ *Ibid.*, para. 69.

Not only did Professor Ruggie reject “influence” as a “basis for attributing legal obligations to companies”,¹⁰⁷ but he contested the value of the concept of “sphere of influence” as a limiting principle. Here again he used the Norms for contrast. The Norms mistakenly used this concept of “sphere of influence” that Professor Ruggie himself promoted in another instrument – the Global Compact – but that was a non-regulatory instrument meant not to assign responsibility but to encourage businesses to contribute to worthwhile goals and thus alleviate some unbalances of economic globalisation.¹⁰⁸ Explaining the background, the concept “was introduced into corporate social responsibility discourse by the Global Compact. It was intended as a spatial metaphor: the ‘sphere’ was expressed in concentric circles with company operations at the core, moving outward to suppliers, the community, and beyond, with the assumption that the ‘influence’ – and thus presumably the responsibility – of the company declines from one circle to the next.”¹⁰⁹ But for purposes of clarifying the limits of corporate responsibility, “‘sphere of influence’ is too broad and ambiguous a concept to define the scope of due diligence [and responsibility to respect] with any rigour”.¹¹⁰

So how does Professor Ruggie actually delineate the limits of his responsibility to respect? First, it is crystal clear that the “scope” issue is a priority; he criticised the UN Norms for emphasizing “precisely the wrong side of the equation: defining a limited list of rights linked to imprecise and expansive responsibilities, rather than defining the specific responsibilities of companies with regard to all rights”.¹¹¹ Professor Ruggie explicitly deals with supply chains: “How far down the supply chain a buyer’s responsibility extends depends on what a proper due diligence process reveals about prevailing country and sector conditions, and about potential business partners and their sourcing practices.”¹¹² Second, the SRSG had two potential limiting concepts, sphere of influence and complicity, that “have potential implications for the scope of due diligence – the range of factors and actors a company needs to consider as it exercises its due diligence”.¹¹³ By rejecting “sphere of influence” Professor Ruggie defaults on complicity as the sole attributing and limiting concept. Third, keeping in mind that the buyer’s responsibility to respect can reach far into the supply chain – it accounts for actual and potential impacts, close or remote impacts – Professor Ruggie does not draw a clear line because “the process inevitably will be inductive and fact-based” and “how far or how deep this process must go will depend on circumstances”.¹¹⁴

He makes a quick note of another strategy of targeting subcontractors: directly rather than through the buyer’s responsibility. He notes that “it is often overlooked that suppliers are also companies, subject to the same responsibility to respect human rights as any other business”.¹¹⁵ Ultimately, the SRSG’s preferred strategy results from his conceptual framework which emphasises the state’s obligation to protect human rights; this of course includes preventing a private party – subcontractors – from infringing the rights of another private actor – own

¹⁰⁷ *Ibid.*, para. 66.

¹⁰⁸ *Secretary-General Proposes Global Compact On Human Rights, Labour, Environment*, Address To World Economic Forum in Davos, 1999, <www.un.org/News/Press/docs/1999/19990201.sgsm6881.html>.

¹⁰⁹ Protect, Respect and Remedy, *supra* note 11, para. 66.

¹¹⁰ SRSG, *supra* note 100, para 4.

¹¹¹ *Ibid.*, para. 51.

¹¹² Towards operationalizing, *supra* note 96, para. 75.

¹¹³ SRSG, *supra* note 100, para. 4.

¹¹⁴ Protect, Respect and Remedy, *supra* note 11, para. 57.

¹¹⁵ Towards operationalizing, *supra* note 96, para. 75.

employees. Professor Ruggie undoubtedly added value by keeping both corporate and state responsibilities in a simple CSR picture. How this strategy delivers in practice when governments are unwilling or unable to fulfil their obligation is an inescapable question that might require, even temporary, revisiting the other available strategies proposed in CSR, including a buyer's responsibility to protect.

In conclusion, Professor Ruggie acknowledges supply chains as a business practice covered by his framework. Furthermore, the place of companies at the core of "extended enterprises" is also noted. Even indirect impacts that ripple through several layers of the supply chains may trigger the buyer's responsibility to respect human rights. To attribute and limit responsibility to the buyer he uses "complicity" understood as contribution to harm, which is entirely consistent with taking responsibility for own impacts. However this legal meaning overly circumscribes CSR situations to which SRSG's responsibility would apply; so he also accepts the broader, non-legalistic meaning of complicity. This extension is problematic though because it loses the limiting principle: while the legal meaning demands "contribution", the non-legal meaning demands "association", which is open-ended. As to the scope of the responsibility to respect, the SRSG explains that an inductive process is at work and limitations depend on factual circumstances requiring a case-by-case analysis. Professor Ruggie rejects a responsibility to protect, that is, a buyer's responsibility to exercise leverage. However, he wrote briefly that responsibility to exercise leverage may arise "only in particular circumstances",¹¹⁶ but these are nowhere explained. Further conceptual treatment is required or Professor Ruggie might exclude such CSR cases and risk the relevance of his framework in important CSR cases, just as the OECD has done.

3.6. European Community's CSR Policies

The European Community (EC) is famous for its consistent, non-legally binding strategy on CSR¹¹⁷ and for defining CSR as a strictly voluntary exercise, as "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis".¹¹⁸

Supply chains are often mentioned in the EC's documents. The Commission notes that there is a need for more interdisciplinary research on CSR, in particular on supply chains,¹¹⁹ that consumers lack clear information on the social and environmental performance of goods and services, including information on the supply chain,¹²⁰ and notes that the business-led European Alliance for CSR identified supply chains as a priority area for action.¹²¹ The 2002 Paper acknowledged the global dimension of CSR, writing that "a growing number of enterprises,

¹¹⁶ SRSG, *supra* note 100, para. 12.

¹¹⁷ The EC considers that "an approach involving additional obligations and administrative requirements for business risks being counter-productive and would be contrary to the principles of better regulation". European Commission, *Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility*, COM(2006) 136 final (Brussels, 2006), p. 1, (hereinafter: EC White Paper 2006).

¹¹⁸ European Commission, *Promoting a European Framework for Corporate Social Responsibility*, Green Paper (2001) para. 20, (hereinafter: EC Green Paper 2001).

¹¹⁹ EC White Paper, *supra* note 117, p. 7.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*, p. 12.

including SMEs, are developing their business world-wide, as they take advantage of market liberalisation and trade integration and are sourcing from subsidiaries and suppliers in developing countries”.¹²²

The question is then how EC documents refer to the special position of core firms in their value chains and the responsibilities that might come with such a position. In 2001, the EC unequivocally stated that “companies should pursue social responsibility internationally as well as in Europe, including through their whole supply chain”,¹²³ that “in a world of multinational investment and global supply chains, corporate social responsibility must also extend beyond the borders of Europe”,¹²⁴ that CSR “has a strong human rights dimension, particularly in relation to international operations and global supply chains”.¹²⁵ Even more remarkable was the explicit observation on additional corporate responsibilities for “large companies, which have outsourced part of their production or services and, therefore, may have acquired additional corporate social responsibility with regard to these suppliers and their staff, bearing in mind that sometimes economic welfare of these suppliers depend primarily or entirely on one large company”.¹²⁶

It is known that the 2001 Green Paper was rather “activist” in tone and that the EC backtracked in its next communications.¹²⁷ Therefore the 2001 Paper has a rather historical value in showing the (in)volution in EC’s stance. The White Paper in 2002 stops talking of a “responsibility” but about an EC that “encourages” MNEs “to play a part in promoting respect for human rights and labour standards, including gender equality, particularly where their operations have an influential role in countries with a poor record in this area”.¹²⁸ From this angle it may be misleading to even begin talking of responsibilities as the discussion actually is about “roles”, about “taking part”, basically about creating opportunities for businesses to contribute to socially-desirable outcomes.¹²⁹ Even the 2001 Paper talked about a contribution to human rights and a responsibility for making profits: “Although the prime *responsibility* of a company is generating profits, companies can at the same time *contribute to social and environmental objectives*, through integrating corporate social responsibility as a strategic investment into their core business strategy, their management instruments and their operations.”¹³⁰ That seems different from saying that companies are responsible for abuses arising in their operations overseas. The only instance where the EC has dropped the ball and the meaning of CSR points to assumption of responsibility is in the 2002 Paper that reads: “Globalisation has created new opportunities for enterprises, but it also has increased their organisational complexity and the increasing extension of business activities abroad has led to new responsibilities on a global

¹²² *Ibid.*, p. 6.

¹²³ EC Green Paper 2001, *supra* note 118, para. 12.

¹²⁴ *Ibid.*, para. 42.

¹²⁵ *Ibid.*, para. 52.

¹²⁶ *Ibid.*, para. 48.

¹²⁷ For a quick look “behind the scene” into EC’s deliberations throughout last decade, see the ‘Explanatory Statement’, in Committee on Employment and Social Affairs, European Parliament, *Report on Corporate Social Responsibility: A New Partnership*, 2006 (A6-0471/2006), pp. 17–18, (hereinafter: EU Parliament Report).

¹²⁸ Commission of the European Communities, *Communication From The Commission Concerning Corporate Social Responsibility: A Business Contribution To Sustainable Development*, COM(2002) 347 final (2002), p. 23, (hereinafter: EC White Paper 2002).

¹²⁹ EC Green Paper 2001, *supra* note 118, para. 11.

¹³⁰ *Ibid.*, para. 11.

scale, particularly in developing countries.”¹³¹ Otherwise, the thinking in the EC is clearly about CSR as a managerial strategy that integrates better economic, social and environmental considerations.

When it comes to the scope of the buyer’s responsibility or role, the 2001 Green Paper seemed to envisage buyers taking an interest in CSR throughout the entire supply chain: “Companies should be aware that their social performance can be affected as a result of the practices of their partners and suppliers throughout the whole supply chain.”¹³² More clarity on the scope issue cannot be expected from the EC’s current approach to CSR. Its strategy and its applied focus are about creating tools and opportunities to implement CSR. This no doubt will advance understanding of the content of CSR. The EC begins to resemble the Global Compact, which also failed to bring clarity on the scope of responsibilities of core firms. Both these initiatives do not rely conceptually on an assumption of “responsibility” which inherently would have to be delimited more clearly and to be grounded in some principles of attribution of liability upwards to the core firm. The issue of scope still lingers within the EC halls. For example, a 2004 Report signalled the “unclear boundaries” as weak point of CSR: “what parts of the organisation, which issues, where geographically, how far out into the supply chain, how far does responsibility extend when causes are multiple or indirect?”¹³³ This Report of the European Multistakeholder Forum on CSR, which was convened by the EC following its 2002 White Paper, cannot, however, be considered an authoritative representation of the EC’s position.

Less influential than the Commission, the European Parliament has taken a radically different angle on CSR on various issues. A Motion for Resolution from 2006 starts with the definition of CSR which, contrary to EC’s concept of “responsibility”, refers directly to corporate accountability for abuses: “Corporate Social Responsibility represents business taking more direct responsibility for managing its social and environmental impact, becoming more openly accountable not simply to employees and their trade unions, but also to wider ‘stakeholders’ including investors, consumers, local communities, environmental and other interest groups.”¹³⁴ Furthermore, the Motion discussed the responsibilities of controlling entities and speaks of remediating “social, human and environmental problems in operations and supply chain of EU-based companies in third countries”.¹³⁵ Then it often referred specifically to supply chains, for example, by writing that it “believes that the potential impact of CSR policies remains greatest in relation to companies’ global supply chains”.¹³⁶

This concern for supply chains apparently extends to lower tiers of supply chains because the Motion called for CSR assessments of European enterprises to “cover their activities and those of their subcontractors outside the European Union, as well, so as to be sure that CSR also benefits third countries and especially developing countries”.¹³⁷ The Commission was urged to take into account the experience accumulated by the international fair trade movement which proved that

¹³¹ EC White Paper 2002, *supra* note 128, p. 6.

¹³² EC Green Paper 2001, *supra* note 118, para. 48. *See also* paras. 54 and 61.

¹³³ European Multistakeholder Forum on CSR, *Final Report*, p. 9.

¹³⁴ R. Howitt, ‘Explanatory Statement’, in EU Parliament Report, *supra* note 127, p. 17.

¹³⁵ European Parliament, *Motion for a European Parliament Resolution on Corporate Social Responsibility: A New Partnership*, (2006/2133(INI)), in EU Parliament Report, *supra* note 127, para. 72.

¹³⁶ *Ibid.*, para. 60.

¹³⁷ *Ibid.*, para. 23.

“such practices are viable and sustainable throughout the supply chain”.¹³⁸ The Parliament also called for DG Development “to work with domestic enterprises as well as the overseas operations of EU companies, sub-contracting enterprises and their stakeholders, to tackle abuse and malpractice in supply chains, to combat poverty and to create equitable growth”.¹³⁹

Most interesting and rather unique is that the European Parliament states clearly the principles of attribution of liability within corporate groups and networks. The Parliament “calls on the Commission to regulate *joint and several liability* on the part of general or principal undertakings in order to deal with abuses in the subcontracting and outsourcing of workers”.¹⁴⁰ This is part of the views of the Parliament on “better regulation”. In the same document, the Parliament “calls on the Commission to organise and promote awareness campaigns and monitor the implementation of the application of *foreign direct liability* according to the Brussels Convention”.¹⁴¹ The Parliament has been unusual in specifying the legal principles – “joint and several liability” and “foreign direct liability” – for attributing liability for remote harms taking place in developing countries.

There seems to be an irreconcilable difference between the Commission and the Parliament when it comes to the buyer’s responsibility. The strategies of reaching subcontractors are very different. While the Parliament favours hard law and the buyer to have a clear responsibility for supply chains abuses, the Commission rejects both a responsibility of the buyer not to mention a legal obligation being imposed. The Commission has outlined an alternative package of strategies that have the potential to improve practices throughout the supply chain. Thus, besides the capacity-building efforts targeted at buyers through actions such as awareness-raising and best practice exchange, support to multi-stakeholder initiatives, consumer information, research and education, the 2006 Paper enumerates a range of strategies: first, promote awareness, implementation and effectiveness of established and coming reference instruments that provide international benchmarks for responsible business conduct; second, use trade negotiations and agreements as a means of encouraging respect for human rights; and third, strengthen co-operation with the ILO to promote decent work.¹⁴²

In conclusion, after examining CSR at European Union level one sees that the most influential policymaker, the Commission, is concerned primarily with the content of CSR rather than the scope thereof. Lack of concern with the scope of responsibilities comes from the decision to not impose any “regulatory burdens” directly on companies and also because the EC uses corporate “responsibilities” as a shortcut for desirable, good managerial strategies. As a consequence the EC need not elaborate on concepts such as sphere of influence or define the responsibilities of controlling entities, e.g. influential purchasers at the top of supply chains. The Parliament, on the contrary, went far in advocating even “joint and several liability” of purchasers for their supply chains. It appears that the contribution that the European Union will make to the CSR debate will be in relation to the content of CSR, that is, due diligence measures that leading companies will explore with the support of the EC and other stakeholders. One cannot be too hopeful in finding

¹³⁸ *Ibid.*, para. 52.

¹³⁹ *Ibid.*, para. 54.

¹⁴⁰ *Ibid.*, para. 37.

¹⁴¹ *Ibid.*, para. 40.

¹⁴² EC White Paper 2006, *supra* note 117, pp. 6–8.

in the EC's CSR documents clarifications on how far the responsibility of buyer companies extend down their supply chains.

3.7. Global Reporting Initiative

Different from the previous instruments, with a comprehensive, though general, treatment of CSR, the GRI is a specialised scheme assisting enterprises in reporting more rigorously on their sustainability performance. In other words, the GRI is not about due diligence in general, but about a single due diligence step that the GRI explains in great detail: while the GRI talks not about how an organisation should be duly diligent in drawing up and implementing CSR commitments and how the buyer should use its influence throughout the supply chain, it advises on taking, from all supply chain aspects, the most important information and reporting it. To that end, the GRI provides guidance on both the content and the scope of reports, guidance that can be gleaned from the G3 Sustainability Reporting Guidelines accompanied by Protocols, Sector Supplements and other GRI materials.

The GRI accounts clearly for outsourcing and supply chain issues: “[I]n outsourced industries, the issues of greatest concern to an investor could be the reputational risks associated with poor supply chain management, which would suggest the importance of reporting on supply chain management systems and associated performance.”¹⁴³ Similarly, the GRI's Protocol dealing with human rights explains that “the development of extensive networks of suppliers and contractors to produce products and services has generated interest in how reporting organizations apply their human rights policies to their supply networks. This is particularly relevant for organizations in sectors that rely heavily on outsourcing and global networks.”¹⁴⁴ Furthermore, the GRI's Supplement dedicated to the Apparel and Footwear Sector notes that this sector

is characterized by global supply chains, resulting in complex relationships between the entities engaged in those chains (e.g. brands, manufacturers, subcontractors, material suppliers, etc.). Consequently, the actions of one entity in the supply chain can affect the ability of another to fulfill its social and environmental responsibilities. As apparel and footwear supply chains have expanded globally, the focus on working conditions and environmental practices throughout the supply chain has intensified.¹⁴⁵

It is parent companies and larger subsidiaries that have tended to issue CSR reports;¹⁴⁶ so the GRI is mindful of their upper position in value chains. On the special responsibility that buyer companies might have due to their position in the value chain, the same Supplement considers that “there is increasing agreement that – in addition to owners and operators of manufacturing facilities – apparel and footwear brands are responsible for the conditions in their supply chains. This is especially the case where fundamental rights and protections are not upheld through law and enforcement systems.”¹⁴⁷ This responsibility of buyers is based on the actual control or influence it might have over suppliers; this is the simple principle of attribution that the GRI uses to introduce a reporting responsibility for supply chains. A sustainability report must not reflect only financial “control” but also “influence” because a tight boundary built on financial control

¹⁴³ Global Reporting Initiative, *Boundary Protocol*, 2005, p. 16.

¹⁴⁴ Global Reporting Initiative, *Indicator Protocols Set Human Rights*, Version 3.0 (undated, probably 2006), p. 4.

¹⁴⁵ Global Reporting Initiative, *Sustainability Reporting Guidelines & Apparel and Footwear Sector Supplement*, 2008, p. 9.

¹⁴⁶ GRI, *supra* note 143, p. 2.

¹⁴⁷ GRI, *supra* note 145, p. 9.

would be unworkable in a CSR context: “[R]eporting only on entities within the boundary used for financial reporting may fail to tell a balanced and reasonable story of the organisation’s sustainability performance and may fall short of the accountability expectations of users. This is one of the key messages underlying the logic of this protocol.”¹⁴⁸ The Protocol contains examples of “control”,¹⁴⁹ “significant influence”¹⁵⁰ as well as “influence”. Furthermore, it usefully emphasises the principle of “substance over form” since there will be “instances where control is exercised even though the exact terms of the definition are not met... In such cases, the substance of the relationship is the overriding factor rather than the specific form.”¹⁵¹ So the advice of the G3 boils down to the following: “In setting the boundary for its report, an organization must consider the range of entities over which it exercises control (often referred to as the ‘organizational boundary’, and usually linked to definitions used in financial reporting) and over which it exercises influence (often called the ‘operational boundary’).”¹⁵²

This responsibility of buyers extends clearly beyond the first tiers of suppliers as the G3 refer plenty to suppliers and also explicitly to sub-contractors when introducing the idea of “boundary” of reports: the boundary “refers to the range of entities (e.g., subsidiaries, joint ventures, sub-contractors, etc.) whose performance is represented by the report”.¹⁵³ The Protocol on human rights categorises “procurement practices” as a “core aspect”¹⁵⁴ and expects companies to disclose information on the human rights performance of suppliers and contractors.¹⁵⁵ The definitions the GRI uses and reference to contractors as separate from suppliers indicate that “supplier” can cover lower tiers in supply chains. The GRI goes further in its attempt to draw sensible limits on the reporting responsibilities of buyers.

The GRI uses a special Protocol dedicated to boundaries in reporting and a battery of principles and concepts to bring clarity in this notoriously difficult area. First, the Guidelines lay down general principles such as materiality of information,¹⁵⁶ inclusiveness of stakeholders,¹⁵⁷ and completeness of the report’s coverage. Second, the GRI draws on actual influence to establish responsibility to report, but is mindful of varying degrees of influence: “The organisation’s degree of control or influence over the entities involved in these activities and their resulting

¹⁴⁸ GRI, *supra* note 143, p. 2.

¹⁴⁹ Control is defined by GRI as the “power to govern the financial and operating policies of an enterprise so as to obtain benefits from its activities”. *Ibid.*, p. 9.

¹⁵⁰ Significant influence refers to the “power to participate in the financial and operating policy decisions of the entity but is not control over those policies”. *Ibid.*, p. 10.

¹⁵¹ *Ibid.*, p. 9.

¹⁵² GRI, *Sustainability Reporting Guidelines G3*, 2006, p. 12.

¹⁵³ *Ibid.*

¹⁵⁴ GRI, *supra* note 144, p. 1.

¹⁵⁵ See Human Rights Performance Indicator 2, paras. 2.2–2.3. *Ibid.* The G3’s Human Rights Performance Indicators require organisations to report on “the extent to which human rights are considered in investment and supplier/contractor selection practices” and the “procedures related to monitoring and corrective and preventive actions, including those related to the supply chain”. GRI, *supra* note 152.

¹⁵⁶ The GRI explains that “the organization’s overall mission and competitive strategy, concerns expressed directly by stakeholders, broader social expectations, and the organization’s influence on upstream (e.g., supply chain) and downstream (e.g., customers) entities” are factors that determine whether information is material. GRI, *supra* note 152, p. 8.

¹⁵⁷ The G3 lists suppliers among the stakeholders the reporting organisation should identify and respond to. *Ibid.*, p. 10.

impacts ranges from little to full.”¹⁵⁸ In screening its relationships, the GRI reporter should take into account “the entire chain of entities upstream and downstream”.¹⁵⁹ What should then be reported is explained by the GRI in a simple scheme that confines disclosure only to relationships characterised by control or influence over partners and for significant impacts only.¹⁶⁰ This generates different types of disclosures starting from the most demanding data on performance when control exists, through to disclosures on the management approach when significant influence exists, and finally narrative reporting on issues and dilemmas when influence exists.¹⁶¹ So GRI’s solution is that not all entities within the Report Boundary must be reported on in the same manner as the guidance “is based on the recognition that different relationships involve differing degrees of access to information and the ability to affect outcomes”.¹⁶²

Third, the GRI clarifies that the boundary between entities mentioned in the report and those left out is not a uniform one: “The boundary may vary based on the specific Aspect or type of information being reported”.¹⁶³ In other words, the organisation “could choose extended reporting boundaries (e.g., report data on all the organisations that form the supply chain), but only include a very narrow scope (e.g., only report on human rights performance)”.¹⁶⁴ Such key issues are mentioned in a GRI Supplement for the Apparel and Footwear sector, which expects companies to report on their code of conduct’s coverage, that is, “the extent of supply chain covered by stating the kinds, number and location of supply chain workplaces to which the code applies”.¹⁶⁵ Furthermore, companies should report on available grievance mechanisms for receiving, investigating and responding to grievances that are filed by workers in the supply chain.¹⁶⁶ Companies are asked to report on their use and selection of labour brokers.¹⁶⁷ The GRI Working Group on human rights indicators asks in its recent Report companies to disclose their approach to implementing due diligence processes. A company “should explain the scope of countries and business activities addressed”¹⁶⁸ and clarify whether policies apply to all subsidiaries, joint ventures and other business partners such as suppliers. Even more, as part of “rollout & reach”, the company should disclose “strategies for extending and embedding human rights policies, goals, and processes across the organization and extending applicable policies and procedures to external partners such as suppliers, joint ventures, other business partners, etc.”.¹⁶⁹

Through standard-setting, the GRI has clarified the content and limits of a buyer company’s responsibility to report on supply chain issues. There is another strategy of reaching lower tiers

¹⁵⁸ GRI, *supra* note 143, p. 2.

¹⁵⁹ *Ibid.*

¹⁶⁰ “Generally speaking, significant impacts are those that change a performance measured under a quantitative indicator by a noticeable amount.” And the Boundary Protocol provides some examples such as an entity being “located in a region of the world known to have a high level of incidence for certain labour problems”. *Ibid.*

¹⁶¹ See Decision Tree for Boundary Setting, GRI, *supra* note 152, p. 18.

¹⁶² GRI, *supra* note 143.

¹⁶³ GRI, *supra* note 152, p. 12

¹⁶⁴ GRI, *supra* note 143.

¹⁶⁵ GRI, *supra* note 155, AF1 at p. 34 and AF7 at p. 36.

¹⁶⁶ *Ibid.*, AF4 at p. 35.

¹⁶⁷ *Ibid.*, AF24 at p. 44.

¹⁶⁸ GRI, *Report*, Human Rights Reporting Working Group, 2009, p. 9.

¹⁶⁹ *Ibid.*, p. 11.

that the GRI has recently taken: directly building the capacity of suppliers to report using GRI benchmarks. Through two projects the GRI aims to build capacity of reporters to use the GRI tools.¹⁷⁰ These are interventions targeted directly at suppliers. The GRI frames these as “enhancing transparency in supply chain”. Thus, through direct training of suppliers, the aim is to get suppliers themselves to disclose information that can be used by buyer companies issuing their own reports and other interested stakeholders. Transparency thus spreads through the supply chain rather than remaining limited to the buyer’s level. Besides the two projects undertaken so far, the GRI has produced a reporting handbook, “The GRI Sustainability reporting cycle: A handbook for small and not-so-small organizations”.

In conclusion, the GRI eloquently comments on why supply chains aspects are relevant and have to be included in corporate reports. The Guidelines identify subcontractors explicitly as possible entities over which the reporting company may exert influence and therefore may have to report on. This expectation is grounded simply but firmly into the actual control or influence the buyer might enjoy over partners. The GRI assumes that buyers will have taken some actions given their leverage and expects reports to contain information on those actions. Of utmost concern to the GRI is to clearly define the entities a report should cover. To that end, the GRI provides a remarkably simple and clear scheme requiring different types of information depending on whether a buyer has control, significant influence or mere influence over suppliers and only when “significant impacts” occur. Through this scheme, backed up with examples, it becomes clear that GRI deems some first tier suppliers as potentially subject to “significant influence” while lower tiers might be under some “influence” from the buyer. Reporting on partners subject to mere influence should be done by using GRI’s general principles, on a case-by-case basis and only through narrative disclosures. The result is a report with varying requirements because “the nature of reporting may vary depending on the degree of control/influence”.¹⁷¹ Overall it is most interesting the way in which the GRI took various and broader relationships into account, categorised them and attuned its prescriptions to each case. This could well be a model for the rest of due diligence measures a company may take in discharging its responsibilities.

3.8. Ethical Trading Initiative

The Ethical Trading Initiative (ETI), UK-based and founded in 1998, is the first specialised CSR scheme discussed here that concentrates on labour standards. Because the ETI is an alliance of companies, trade unions and voluntary organisations specialised in work-related issues, the level of detail regarding supply chain issues increases dramatically compared with previous general instruments. The labour standards are explicitly derived from ILO’s documents. To that end, the ETI has adopted the Base Code.¹⁷²

The Code’s standards are meant to cover sub-contractors, as detailed in ETI’s Principles of Implementation, which lay down due diligence principles and measures that companies should

¹⁷⁰ One project was ‘Transparency in the Supply Chain project’, GRI, 2007–2008. The follow-up project, ‘Global Action Network for Transparency in the Supply Chain’, envisages large companies offering GRI-certified training and support to their Small and Medium Enterprise (SME) suppliers in preparing a GRI G3 sustainability report. Both projects at <www.globalreporting.org/CurrentPriorities/SupplyChain/>.

¹⁷¹ GRI, *supra* note 143, p. 6.

¹⁷² The ETI Base Code, <www.ethicaltrade.org/>.

adopt.¹⁷³ The ETI expects its members to make improvements “throughout the supply chain”¹⁷⁴ since, by becoming an ETI member, a company commits itself “to promote respect for workers’ rights and to achieve real improvements in working conditions within their supply chain”.¹⁷⁵ The ETI has also given sustained attention to a particular sort of subcontractor – the homeworkers – and issued detailed recommendations for companies on this issue.¹⁷⁶

Although the scope of buyer’s responsibilities under the ETI is broad, implementation in practice is more limited and confined to contractors and upper tiers of the supply chain. The ETI observed in 2003 that companies prioritise the auditing of first tier suppliers while “serious labour problems are more likely in the further reaches of the supply chain”.¹⁷⁷ A few years later, an evaluation of ETI’s impacts notes that NGOs were concerned about the scope of Code implementation:

NGOs in particular were concerned that implementation of the Base Code was largely limited to the higher levels of value chains, with workers at lower levels perhaps suffering poorer working conditions and yet being excluded from the benefits of codes. NGOs wanted an assessment of the scope of member company codes, including whether abuses were being pushed further down value chains, for example onto smallholders and homeworkers, and whether the workers with the worst conditions were being helped by codes.¹⁷⁸

To reach down the supply chain, the ETI adopts the “cascading strategy” by asking member companies, as part of their commitment to ethical trading, to require their “suppliers to comply with the Base Code and also requires them to engage with their own suppliers to comply with the Base Code throughout the supply chain”.¹⁷⁹

In conclusion, the ETI expects its corporate members to assume a far reaching responsibility for their supply chains, though in practice companies have concentrated on upper tiers of suppliers. This is the *de facto* limitation of responsibility the ETI seems to accept for the time being. ETI spells out detailed due diligence measures through which actual leverage of buyers can be turned into sustainable improvements in work conditions. A strategy of cascading commitments is also envisaged to increase the reach of the Code and buyer’s commitment to ethical trading.

3.9. SA8000

Social Accountability International (SAI) is a US-based, non-profit organisation that launched in 1998 the SA8000, a certification standard based on ILO instruments and the Universal Declaration of Human Rights.¹⁸⁰ The SA8000 is probably the most well established certification scheme for labour conditions.

¹⁷³ ETI, *Principles of Implementation*, 2009, para. 1.4.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*, Preamble.

¹⁷⁶ ETI, *Homeworker Guidelines: Recommendations for Working with Homeworkers*, 2006.

¹⁷⁷ ETI, *Annual Report*, 2002–2003, quoted in Clean Clothes Campaign, *supra* note 3.

¹⁷⁸ Barrientos and Smith, *supra* note 3.

¹⁷⁹ ETI, *supra* note 173, para. 1.4.

¹⁸⁰ <www.sa-intl.org>.

The SA8000 refers expressly to subcontractors and expects the corporate commitment to cover the whole supply chain. The Standard aims “to protect and empower all personnel within a company’s scope of control and influence, who produce products or provide services for that company, including personnel employed by the company itself, as well as by its suppliers/subcontractors, sub-suppliers, and home workers”.¹⁸¹ The broad coverage of the SA8000 is further clarified by definitions of subcontractors,¹⁸² sub-suppliers¹⁸³ and references even homeworkers as a type of subcontractor.

The SA8000 makes repeated use of the concept of “sphere of control and influence” wherein the company “shall make a reasonable effort to ensure that the requirements of this standard are being met by suppliers and subcontractors within their sphere of control and influence”.¹⁸⁴ The SAI issued further clarifications in its Drafters’ Notes indicating that “a ‘company’s scope of control and influence’ will need to be defined on a case by case basis. The inclusion of this language does reflect, however, the expectation that adherents to the standard are making every good faith effort to promote workers’ rights throughout their supply chain.”¹⁸⁵ The precise scope of responsibilities over suppliers is hard to ascertain. The SA8000 simply uses qualifications such as “reasonable efforts” and “where appropriate”.

This under-defined scope of responsibilities persists in SAI’s projects targeting specifically the largest of buyers. Indeed the SAI offers two options: certification of facilities/workplaces according to the SA8000 standard, and involvement of buyers through the “SAI Corporate Programs”. The latter makes the shift from having every workplace SA8000-certified to having a brand obtain the use of the SA8000 Logo in their communications. By purpose, Corporate Programs assist companies to extend the SA8000 principles and management approach throughout their supply chains. Indeed, the most advanced level from the three progressive levels of corporate participation that SAI offers assesses a corporation’s compliance systems “throughout its supply chain” in areas such as management systems, supplier development, auditing, verification, transparency and multi-stakeholder participation.¹⁸⁶

The SA8000 thus properly accounts for the influence of a buyer over its suppliers. The Standard dedicates a whole section to the issue of “Control of Suppliers/Subcontractors and Sub-Suppliers”.¹⁸⁷ There are outlined specific due diligence steps that a SA8000-certified company (facility) should take, mainly obtain written commitments from its contractors, perform pre-audits to evaluate and select suppliers, and monitor and intervene to ensure compliance by making a reasonable effort.

The SA8000 relies on a “cascading” strategy where upper tiers extract commitments from lower tiers. This is a change introduced in the 2008 revision which asks a certified company to obtain

¹⁸¹ Social Accountability International, *Social Accountability 8000 (SA8000)*, 2008.

¹⁸² A supplier/subcontractor “provides the company with goods and/or services integral to and utilised in or for the production of the company’s goods and/or services”. *Ibid.*, p. 4.

¹⁸³ A sub-supplier “directly or indirectly, provides the supplier with goods and/or services integral to and utilised in or for the production of the supplier’s and/or the company’s goods and/or services”. *Ibid.*, p. 5.

¹⁸⁴ SAI, *supra* note 181, para. 9.9.

¹⁸⁵ These are further explained in the SAI, *SA 8000: 2008 Drafters’ Notes*, 2008, p. 3.

¹⁸⁶ <www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageId=907&parentID=478>.

¹⁸⁷ SAI, *supra* note 181, paras. 9.7–9.10.

the “written commitment of those organisations [suppliers/subcontractors (and, where appropriate, sub-suppliers)] to conform to all requirements of this standard and to require the same of sub-suppliers”.¹⁸⁸ The standard further outlines in detail even what the supplier should promise to the buyer, in other words what the buyer should demand of its suppliers.¹⁸⁹ The SAI also employs a strategy of targeting suppliers directly through for example the “Strategic Supplier Training” course in order to assist them to achieve certification¹⁹⁰ as well as assistance to large buyers and MNEs through the “SAI Corporate Programs”.¹⁹¹ In this regard, the SAI presents itself as “one of the world’s leading social compliance training organizations”.¹⁹²

In conclusion, by specifying what a company should do as due diligence both within its workplace and regarding its suppliers and subcontractors, the SA8000 is most detailed in its dealing with the content of responsibilities in the supply chain. Through repeated references to sub-contractors and sub-suppliers, even homeworkers, the SA8000 adopts a broad scope for corporate responsibilities and thus prevents unwarranted narrow limitations. The concept of sphere of influence re-emerges in this specialised document. However, the boundaries of a buyer’s responsibility are not defined beyond vague qualifications such as “reasonable efforts” and “where appropriate”. The SA8000 is notable for both its potentially broadest of coverage of supply chains and its explanations of the content of due diligence; in other words it is precise “content” rather than a precise “scope” of responsibilities that remains SA8000’s strong point. Just as the ETI, the Standard relies on a “cascading strategy” to reach deeper into the supply chain. These impressive accomplishments notwithstanding, the SA8000 has been criticised sometimes for performing summary audits that resulted in certification of non-compliant factories.¹⁹³

3.10. Fair Labor Association

The Fair Labor Association (FLA) is another specialised CSR scheme dedicated to workplace issues and a US-based coalition of companies, universities and NGOs operating since 1998. Its Workplace Code of Conduct is based on the ILO standards. The FLA naturally refers explicitly to supply chains operating overseas.

As to the boundaries of buyer’s responsibilities, the FLA appears inconsistent. On one hand, in its broader, introductory statements, the FLA refers to entire supply chains: “Participating Companies (PCs) make a sustained corporate commitment to the FLA by bringing their *entire*

¹⁸⁸ *Ibid.*, para. 9.7 (a).

¹⁸⁹ SAI, *supra* note 181, paras. 9.7–9.10.

¹⁹⁰ <www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageID=818&grandparentID=473&parentID=553>.

¹⁹¹ <www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageId=478>.

¹⁹² SAI, *Corporate Programs*, <www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageId=478>.

¹⁹³ For some concerns about SA8000 auditing process see Clean Clothes Campaign, *supra* note 3; M. M. Blair *et al.*, *Assurance Services as a Substitute for Law in Global Commerce*, Vanderbilt University Law School, *Law and Economics Working Paper* Number 07-06, 2007, pp. 33–36. More generally on SA8000, see F. Ciliberti *et al.*, ‘Codes to coordinate supply chains: SMEs’ experiences with SA8000’, 14:2 *Supply Chain Management: An International Journal* (2009) pp. 117–127; D. Leipziger (ed.), *SA8000, The first Decade, Implementation, Influence, and Impact* (Greenleaf Publishing Ltd., 1999); Center for International Private Enterprise, Social Accountability International, *From Words to Action: A Business Case for Implementing Workplace Standards – Experiences from Key Emerging Markets*, 2009.

supply chain into the FLA program”,¹⁹⁴ and: “When joining the FLA, Participating Companies commit to promoting and complying with international labor standards *throughout their supply chains*, both in the U.S. and overseas.”¹⁹⁵ The FLA requires affiliated companies to enforce the Workplace Code of Conduct “in factories that supply their products”.¹⁹⁶

On the other hand, there are no explicit references to sub-contractors or lower tiers of the supply chain; instead the FLA constantly enumerates the triad of “contractors, licensees and suppliers” without specifying subcontractors. What suppliers are is defined neither in the Code and the Principles of Implementation nor in the FAQ section, and “suppliers” is a term used only in relation to retailers: “Any Company that determines to adopt the Workplace Code of Conduct also shall require its licensees and contractors and, in the case of a retailer, its suppliers to comply with applicable local laws and with this Code...”¹⁹⁷ It becomes clear that the scope of the FLA Code reaches only to the direct suppliers which, by FLA’s definition used in its advanced FLA 3.0 project, “[provide] production and sales of *finished goods* bought by a Participating Company... Another term often used for the Supplier is factory.”¹⁹⁸ So this is the limited reach of the corporate “labor compliance programs” which under FLA refer to “mechanisms and procedures to increase code awareness, monitor and remediate noncompliance, and prevent persistent patterns of noncompliance”.¹⁹⁹ Part of its external monitoring function, the FLA will sample for factories for audit which seem to be limited to factories owned by buyers and contracted partners. So the scope of responsibility for member companies is limited. It is unfortunate that FLA deals with the boundaries of buyers’ responsibility in such an opaque manner.²⁰⁰ The FLA is a brand-certification scheme²⁰¹ that assesses not performance *per se* but the management systems of the brand. It is crucial to have clarity on how far these management procedures cover the supply chain.

What seems indeed to extend beyond first tier is an unclear obligation – Participating Companies “must submit entire supply chain to FLA Independent External Monitoring (IEM)”²⁰² – which could be taken to mean Participating Companies not objecting to FLA sampling and monitoring entities anywhere in the supply chain.

Universities are a special case as they are under a special obligation to require their licensees to register with the FLA. So licensees which are companies that manufacture products for FLA-

¹⁹⁴ Fair Labor Association, *Participating Companies*, <www.fairlabor.org/fla_affiliates_a1.html>.

¹⁹⁵ Fair Labor Association, *Accreditation*, <www.fairlabor.org/fla_affiliates_participating_companies_b1.html>.

¹⁹⁶ Fair Labor Association, *Workplace Code of Conduct*, <www.fairlabor.org>.

¹⁹⁷ *Ibid.*

¹⁹⁸ Fair Labor Association, *FLA 3.0 – Toward Sustainable Compliance*, <www.fairlabor.org/what_we_do_flas_3.0_c2.html>.

¹⁹⁹ FAQ, <www.fairlabor.org/about_us_faqs_g1.html#04_01>.

²⁰⁰ The FLA is one of six standard-setting organizations that were involved in Jo-In, an effort to unify provisions found in different labour codes. The resulting Draft Code of Labour Practice does not appear to be authoritative if one notices how much broader its reach is compared to FLA’s own Code. It covers a company’s “own operations and ... those of their suppliers, contractors, subcontractors and licensees”. By “subcontractor” the Draft Code means “any enterprise or independent person who contracts with the contractor, with a sub-contractor or with an agent of the contractor or subcontractor (such as is often the case of homeworkers)”.

Joint Initiative on Corporate Accountability and Workers’ Rights, *Draft Code of Labour Practice*, 2005.

²⁰¹ FAQ, <www.fairlabor.org/about_us_faqs_g1.html#02_01>.

²⁰² FLA, *Licensee Categories, Obligations and Fees*, 2008, p. 1.

affiliated universities become themselves members of FLA. Licensees²⁰³ must disclose where licensed goods are manufactured²⁰⁴ and more generally should bring the factories from which they source into compliance with FLA standards and “this would apply to both owned/operated factories and contract factories”.²⁰⁵

There is a further hidden provision that deals directly with subcontractors. The FLA refers to tolerating unauthorised subcontracting as incompatible with the status of a FLA Participating Company. Thus a FLA Report explains that “[t]he Miscellaneous provision/category of the FLA Code captures issues such as legal or contractual noncompliances that were observed by FLA-accredited monitors that are not currently included in the FLA Code or Benchmarks but nevertheless are inconsistent with [FLA requirements]”.²⁰⁶ FLA Annual Reports regularly track cases where such subcontracting occurred; for example the 2007 Report found that 28 per cent of non-compliances in the “Miscellaneous category” referred to “unauthorized subcontracting, that is, subcontracting to contractors involved in production processes (e.g., embroidery, washing, dyeing, etc.) that had not been approved by the FLA company sourcing from the factory”.²⁰⁷ From FLA reports, one reads that Liz Claiborne reported that detecting unauthorised subcontracting was a priority;²⁰⁸ Puma conducted audits at sub-contractor level;²⁰⁹ and Reebok considered unauthorised subcontracting a threshold issue when selecting new suppliers.²¹⁰ The attention that the FLA pays to unauthorised subcontracting is welcome as the latter effectively outsources responsibility as highlighted by the United Nations Children’s Fund with reference to child labour:

[W]hile there have been fewer reported cases of child workers in production facilities that are regularly monitored, it is suspected that the problem of child labor has shifted to less transparent areas of the supply chain, such as through home work or illegal subcontracting. UNICEF reports that larger factories sometimes contribute indirectly to child labor by subcontracting certain production tasks to small workshops and home workers, which make extensive use of child labor, and which are generally not covered by domestic child labor law, and much more difficult to monitor.²¹¹

The due diligence of participating companies regarding their supply chain is clearly laid down in FLA documents.²¹² As in the case of the ETI, a specialised CSR scheme delivers a less grainy picture than general CSR instruments and offers useful advice to companies.

In addition to standard-setting through the Workplace Code of Conduct, the FLA has been involved in special projects that have gone beyond the first tier. An example is the Cotton

²⁰³ Category C licensees are those with between USD 5–50 million in total annual revenues or those under USD 5 million who are manufacturing or sourcing from overseas. FLA, *The Enhanced Licensee Program*, p. 1.

²⁰⁴ FLA, *supra* note 202, p. 1.

²⁰⁵ FLA, *supra* note 203, p. 3. FLA observed in 2006 “significant gaps in the capacity of licensees to comply with university codes of conduct”. *Ibid.*, p. 1.

²⁰⁶ FLA, *2007 Annual Report*, 2007, p. 54.

²⁰⁷ *Ibid.*, p. 55.

²⁰⁸ Puma conducted in 2004 400 supplier audits and follow-up visits worldwide both at the first tier supplier level and the subcontractor level. *Ibid.*, p. 123.

²⁰⁹ FLA, *supra* note 206, p. 107.

²¹⁰ FLA, *First Public Report: Towards Improving Workers’ Lives*, Washington, DC, 2003, p. 69.

²¹¹ UNICEF, quoted in *ibid.*, p. 91.

²¹² FLA, *Obligations of Companies*, in FLA, *supra* note 202.

Project²¹³ to build tools and capacity of buyers to trace cotton across the entire supply chain and improve labour rights. The project description explains that “[i]t may be too early for brands to accept responsibility for labor compliance issues all the way down their supply chain to the farm level, but there is a duty to know and to act to avoid or address those issues that are already well documented in the literature”.²¹⁴

Overall, the FLA uses inconsistent language on buyers’ responsibilities that creates confusion. In its broader, introductory statements, the FLA refers to entire supply chains creating the impression that buyers’ responsibility is correspondingly broad. However the Code and other documents severely limit the scope of responsibility. Practically the FLA covers the first tier in the case of participating companies (brands) and, in the case of participating universities, the second tier of the supply chain (licensees on the first tier and their contractors on the second tier). There is, however, a hidden extension, an extra responsibility, where FLA prohibits, though not expressly in its Code, unauthorised subcontracting, which is deemed inconsistent with FLA. To reach subcontractors, the FLA has not so far outlined a “cascading strategy”.

3.11. ISO 26000

In 2005, the International Organization for Standardization has embarked on a extensive consultation and drafting process aimed at delivering in 2010 a guidance document on CSR. It is pointless to make a detailed analysis of text when the ISO is still to release the final version of ISO 26000. However, the ISO 26000 is available in an advanced Draft form²¹⁵ and is remarkably detailed in its treatment of some issues relevant to this article. It should be kept in mind that the latter is not a rigorous standard against which a company can be certified as being ISO-compliant but a guidance document. Furthermore, the drafters have obviously attempted to account for and synthesise the experience with CSR that has been accumulated in the last decade. That said, this section takes a peek into the ISO thinking notwithstanding the fact that formulations can change or concepts dropped.

The ISO 26000 Draft (December 2008) covers expressly human rights but also other issues in a broad coverage reminiscent of the OECD Guidelines. The ISO 26000 is particularly explicit in stating buyer’s responsibility and expansive in its coverage regarding subcontracting:

The labour practices of an organization encompass all policies and practices relating to work performed within, by or on behalf of the organization. Labour practices extend beyond the relationship of the organization with its direct employees or the responsibilities that the organization has at a workplace that it owns or directly controls. Labour practices include the responsibilities of the organization for work performed on its behalf by others, including subcontracted work.²¹⁶

The Draft takes into account the leverage that buyers might have over their supply chains and advises that a company “should make reasonable efforts to encourage organizations in its supply chain or in the value chain to follow responsible labour practices, recognizing that a high level of influence is likely to correspond to a high level of responsibility to exercise that influence”.²¹⁷

²¹³ <www.fairlabor.org/what_we_do_special_projects_cotton.html>.

²¹⁴ *Ibid.*

²¹⁵ ISO 26000, *supra* note 10.

²¹⁶ *Ibid.*, para. 6.4.1.1 Organizations and labour practices.

²¹⁷ *Ibid.*, para. 6.4.3.2.

The justification for imposing responsibility within the sphere of influence can be gleaned from the initial choice made by an organisation that “decides whether to have a relationship with another organization and also decides the nature or extent of this relationship”.²¹⁸ This is coupled elsewhere with an expectation to “not benefit from unfair, exploitative or abusive labour practices of their partners, suppliers or sub-contractors”.²¹⁹ Furthermore, the actual ability to affect business partners counts: “In addition to being responsible for its own activities, there are situations where an organization has the ability to influence the decisions or behaviour of those with whom it has a relationship. The ability to influence another organization ranges from having no influence, to having limited influence, to having very significant influence.”²²⁰ Grounded on these three pillars – choice, benefit, and ability – the ISO Draft lays down a general responsibility “to be alert to the impacts caused by the activities and decisions of other organizations and to take steps to avoid or to mitigate the negative impacts that are related to its relationship with such organizations”.²²¹ The Draft indicates that it entertains both responsibilities to respect and to protect by stating that, “[g]enerally, the responsibility for exercising influence increases with the ability to influence [and] there will be situations where an organization’s ability to influence others will be accompanied by a responsibility to exercise that influence”.²²² Professor Ruggie criticised ISO for its reliance on influence and the resulting responsibility to protect.²²³

The drafters show concern for production taking place in the informal economy. It is not acceptable for a buyer to outsource production to the informal economy, and the ISO proposes specific responsibilities in this respect. Thus an organisation

should contract out work only to organizations that are legally recognized or are otherwise able and willing to assume the responsibilities of an employer and to provide decent working conditions. An organization should not use labour intermediaries who are not legally recognized or make other arrangements for the performance of work that do not confer legal rights on those performing the work. In this regard, an organization should take steps to confirm that the organizations with which it deals, for instance suppliers and sub-contractors, are legitimate organizations whose labour practices require that all work be performed within the appropriate legal and institutional framework.²²⁴

In the tradition of most post-2000 soft law instruments, the ISO talks of a “sphere of influence” and defines it as an area in both a geographic sense and functional sense – across which an organisation has the ability to affect the decisions or activities of individuals or organisations.²²⁵ This will usually include parts of the supply chain. The Draft is careful to clarify that “[a]n organization cannot be held responsible for the impacts of every party over which it may have some influence”.²²⁶ Here the ISO turns to discussing the limits of influence and therefore of buyer’s responsibility by examining in detail different facets of the concept of “sphere of influence”. ISO enumerates some factors that affect actual influence, such as physical proximity,

²¹⁸ *Ibid.*, para. 5.2.3.

²¹⁹ *Ibid.*, para. 6.4.3.

²²⁰ *Ibid.*, para. 7.3.2.1.

²²¹ *Ibid.*, para. 5.2.3.

²²² *Ibid.*

²²³ Prof. John G. Ruggie, *Note on ISO 26000 Guidance Draft Document*, November 2009.

²²⁴ *Ibid.*, para. 6.4.3 Labour practices issue 1: Employment and employment relationships (references omitted).

²²⁵ *Ibid.*, para. 2.1.19.

²²⁶ *Ibid.*, para. 5.2.3.

scope of the relationship and length of the relationship.²²⁷ Then there is a list of sources from which an organisation derives influence, among which are ownership or representation on the governing body of the associated organisation (governance aspect), economic dependency (economic aspect), legal and contractual authority, political authority and public opinion.²²⁸ Among the methods of exercising influence the ISO includes setting contractual provisions and/or incentives, sharing knowledge and information, conducting joint projects, undertaking responsible lobbying and using media relations, promoting good practices, and forming partnerships.²²⁹ This structured treatment of sphere of influence makes the ISO unique among instruments examined herein. The ISO also uses “complicity”. The Draft is less creative here as it borrows textually the Global Compact’s three-pronged scheme of direct/beneficial/silent complicity²³⁰ and the SRSG’s recognition of the legal and non-legal pedigree of complicity.²³¹

As to the content of responsibility, the Draft supports Professor Ruggie’s terminology and speaks of due diligence which requires from a business to manage “the risk of harm to human rights with a view to avoiding it”.²³² This refers to negative impacts of its activities, but “it may also entail influencing the behaviour of others, where they may be the cause of human rights violations. To respect human rights, organizations have a responsibility to exercise due diligence to become aware of, identify, prevent and address actual or potential adverse human rights impacts resulting from their activities and from the relationships associated with these activities.”²³³ As to supply chain due diligence, the ISO states that “depending upon the situation and influence, reasonable efforts could include establishing contractual obligations on suppliers and sub-contractors; making unannounced visits and inspections; and exercising due diligence in supervising contractors and intermediaries”.²³⁴

In conclusion, the ISO takes a clear position on covering subcontractors and lower tiers in production chains. It does not attempt to set arbitrary limits on buyers’ responsibilities, but conditions responsibility on various factors. The ISO makes a significant contribution to the CSR movement by grounding a responsibility to use leverage in the triad “choice, benefit, and ability”. The ISO also contributes to clarifying the (nature of) limits of responsibilities by working the “sphere of influence” concept. Indeed, the ISO has put in its Draft a particular amount of thought in refining various facets of responsibility to use influence – factors, sources and methods. The ISO also retains the concept of complicity for more direct contributions to harm. Hopefully, the drafters of the ISO will not succumb to the pressure of Professor Ruggie who so far lacks either the willingness or the conceptual architecture to properly account for buyer’s responsibility to protect, that is, to exercise leverage. The ISO’s efforts can lead to clarity on buyer’s responsibility and more generally on the corporate responsibility for culpable omissions.

²²⁷ *Ibid.*, para. 7.3.2.1.

²²⁸ *Ibid.*

²²⁹ *Ibid.*, para. 7.3.2.2.

²³⁰ *Ibid.*, para. 6.3.5.1.

²³¹ *Ibid.*, para. 4.7.

²³² *Ibid.*, para. 6.3.3.1.

²³³ *Ibid.*

²³⁴ *Ibid.*, para. 6.4.3 Labour practices issue 1: Employment and employment relationships.

3.12. Clean Clothes Campaign

The Clean Clothes Campaign (CCC) is strictly a NGO movement concerned with labour issues in a globalised economy and focused on the apparel and sportswear industries. It synthesised its expectations from large buyers into a Code, which under the “scope of application” rubric outlines clearly the buyer’s responsibility:

[R]etailers and manufacturers declare their responsibility for the working conditions under which the apparel, sportswear and shoes they sell are produced. This responsibility extends to all workers producing products for the company, regardless of their status or relationship to the company and whether or not they are employees of the company. The code would therefore apply to home-based workers and to workers who are engaged either informally or on a contracted basis. The code applies to all of the companies’ contractors, subcontractors, suppliers and licensees world-wide.²³⁵

The justification for such a broad responsibility could be found in CCC’s view on subcontracting, which “is a system used to reduce costs or enhance flexibility by contracting work out to suppliers in whose factories workers often suffer from worse conditions and more labour rights violations than in the buyer company”.²³⁶ Therefore the CCC “takes the position that a company’s responsibility encompasses its complete subcontracting chain all the way down to garment home workers... Restricting compliance of the code to only one or a limited number of tiers of suppliers could actually result in more subcontracting to suppliers whose workers are not covered by the code of conduct.”²³⁷ This explanation in the FAQ section of the CCC website has since been removed. Furthermore, the Code specifies the detailed due diligence steps that a company should take in implementing and enforcing its responsibilities.²³⁸

The Code defines the most sweeping responsibilities for the buyer companies to reach deep into supply chains, but also adopts the “cascading strategy” to enrol lower tiers of the supply chain. Thus the company has to implement the Code by, *inter alia*, making “observance of the code a condition of all agreements that it enters into with contractors, suppliers and licensees. These agreements will obligate these contractors, suppliers and licensees to require observance of the code in all agreements that they make with their respective subcontractors and suppliers in fulfilling their agreement with the company. Such agreements shall also oblige these contractors, subcontractors, suppliers and licensees to undertake the same obligations”²³⁹ as the company.

Overall, the CCC presents a good illustration of what civil society groups expect from socially responsible buyers. Because of the model of outsourcing, buyers should assume responsibility for their entire supply chain and also enrol suppliers in a “cascading strategy” able to reinforce protections for workers throughout the value chain.

4. Analysis

²³⁵ Clean Clothes Campaign, *Code of Labour Practices for the Apparel Industry Including Sportswear*, 1998.

²³⁶ <www.cleanclothes.org>.

²³⁷ *Ibid.*

²³⁸ See also Clean Clothes Campaign, *Full Package Approach to Labour Codes of Conduct: Four major steps garment companies can take to ensure their products are made under humane conditions*, 2008.

²³⁹ Clean Clothes Campaign, *supra* note 235.

The issue of labour abuses in supply chains is at the core of debates on the fairness of globalisation. Who is responsible and what is the nature, scope and content of a buyer's responsibility, if any, are questions relevant to the outsourcing model of production as it becomes commonplace in many industries. This article analysed a dozen prominent CSR documents in an attempt to find answers.

All these instruments address outsourcing and supply chains, except surprisingly the ILO Declaration. The latter, although it is so focused on labour conditions, handles outsourcing rather obliquely through references to MNEs operating in developing countries, foreign investment, local entities that are owned or controlled by the parent company, etc. The rest of the instruments expressly mention supply chains. The Norms, the SRSG, the UNGC, the ETI, the SA8000, the ISO, the GRI and the CCC expressly mention lower tiers of supply chains through references to sub-contractors, sub-suppliers, even homeworkers. In other words, all instruments are in tune with outsourcing as an important industrial development.

One of the core questions is whether the reviewed instruments propose a special responsibility of the buyer company for abuses happening throughout its supply chain. To put it differently, can one draw on such CSR instruments to amass legitimacy for a buyer's responsibility?

Unexpectedly, the OECD Guidelines offer a resounding negative answer as complaints have to show an "investment-nexus" in order to be admissible under the OECD system. Here the door is largely closed as the guidance from the OECD's CIME leaves place only for a flexible, "case-by-case" treatment and only when cases are on the borderline between "trade" and "investment" relationships. The ILO provides some support as the Declaration expects the buyer to "cooperate and provide assistance ... as necessary to facilitate observance" by the supplier. Furthermore, it would encompass only cases where the parent company "owns or controls" a supplier, a high threshold unlikely to be met in most supply chain cases. This state of affairs can be attributed to the nature of the instrument which either discusses macro-economic impacts of foreign investment on developing countries' economies or lays down substantive labour rights to be safeguarded. So the ILO Declaration appears very workplace-centred without going into the discussion of who in the corporate network (supply chain) has responsibilities. The EC presents another special case. The Commission acknowledges the problem of abuses in supply chains and has issued Communications speaking of corporate *responsibilities*. However could the EC's be read to legitimise a genuine responsibility for the buyer company when it talks about a "role" that buyers could play, about European companies to "play a part in promoting respect", about making "contributions"? Hardly so. Further reservations about the buyer's responsibility for supply chain abuses come from the much more recent mandate of the SRSG. He recognises a buyer's responsibility for its own impacts, even remote ones with indirect and mediated causality. Thus Professor Ruggie accepts only a qualified, limited responsibility of the buyer, but rejects a buyer's responsibility to exercise leverage, as will be discussed further below. Looking further at the Global Compact the picture changes. The UNGC lays down mere principles, but the tone and further writings soon clarify that this instrument strongly expects buyer companies to take action and improve protections in supply chains. The rest of the documents are unequivocal in stating responsibilities for the buyers and other core companies. Overall, the review reveals an unexpected diversity of views on this fundamental issue; for different reasons, the 12 instruments cannot be taken to speak with a unitary voice and build a solid legitimate foundation for the responsibility of the company that outsourced its production.

The next important question is to examine what is the nature of responsibilities falling upon the buyer? Basically there are two categories. One responsibility is to account for the impacts created by the buyer's own conduct even if these impacts occur in workplaces several layers down the supply chain, and thus even if the causality is indirect, remote and mixed with the conduct of suppliers, or third parties in general. It is now accepted that a buyer's requirements for rock-bottom prices and very tight delivery schedules place its suppliers in an impossible situation to both deliver and be socially responsible.²⁴⁰ Following Professor Ruggie, this can be called a responsibility to "respect" human rights, which means basically to be informed of, prevent and remedy harms created by own conduct. The other responsibility is for the buyer to identify those impacts created by suppliers, independent of the buyer's conduct, and use whatever leverage the buyer has over the supplier to prevent or remedy harms. This has the nature of a responsibility to "protect". The review of instruments makes it clear that Professor Ruggie opposed a responsibility to protect although he leaves the backdoor open for such a responsibility to exercise leverage "only in particular circumstances". At the opposite pole are the Norms which laid down an express responsibility to protect human rights. The ISO also envisages a responsibility to protect as does the CCC, as one could expect from an NGO-issued Code. The Global Compact encourages companies to "support" human rights, though one should keep in mind the non-regulatory, non-standard-setting profile of the UNGC.

If there is a buyer's responsibility to respect and protect human rights, what are the concepts on which the instruments draw to establish a legitimate foundation for responsibility? Here again a varied picture emerges. To begin with, not all instruments give explicit thought and space to this foundational issue. However, all instruments notice the "influence", meant as leverage, that the buyer might have over its suppliers. For some instruments, such as the Norms, influence is enough of a concept to carry alone the weight of a buyer's responsibility. Other instruments, such as the SRSR reports, which have been most explicit in this regard, refuse to recognise a responsibility to exert influence from the mere fact that leverage exists.

So what other concepts have been advanced? First, complicity is often referred to. The UNGC, the SRSR and the ISO, which tends to synthesise current CSR thinking, all refer to complicity understood in both a legal and a broader non-legal sense. Professor Ruggie has made complicity the centrepiece of his conceptual architecture when it comes to abuses carried out by third parties. Second, "benefit" is another concept that the Norms have used and that non-legal complicity also covers through the formulation of "beneficial complicity". "Benefit" makes one think of "unjust enrichment" as a legal base for liability. Third, the most advanced conceptualisation comes from the ISO which grounds a responsibility to use leverage in the triad "choice, benefit, and ability" of buyers; the new element the ISO introduces is "choice". The GRI also offers an interesting conceptual scheme by coupling degrees of influence – control, significant influence, and influence – with a "significant impact" to derive differentiated responsibilities to report.

Another core question is whether and how the instruments reviewed set the boundaries of the buyer's responsibility. To put it simply, where does a buyer's responsibility end: first tier of

²⁴⁰ H. B. Jørgensen *et al.*, *Strengthening Implementation of Corporate Social Responsibility in Global Supply Chains* (World Bank Group, October 2003), pp. 60 and 74.

suppliers, sub-contractors and lower tiers, or all the way down throughout the entire supply chain? Here one encounters a most diversified landscape. Some instruments simply keep silent on the issue altogether, as is the case with regard to the ILO and the EC which did not provide for a buyer's responsibility in the first place. Other instruments, on the contrary, state a responsibility extending to the entire supply chain – the Norms, the CCC, the ETI – without appearing too concerned with the necessity to conceptually define limitations on a potentially very broad responsibility. Surely a limitation results from expectations of “reasonable efforts” that the buyer should make, as the Norms' Commentary writes. One instrument, the OECD Guidelines, manages to draw a much criticised arbitrary distinction excluding supply chain responsibility altogether unless the situation resembles an investment relationship. Another instrument speaks of entire supply chains but clearly limits responsibility to contractors (first tier): the FLA. Yet another instrument, the SA8000, goes beyond first tier to audit subcontractors, but it is not easy to find information where the line is drawn.

Using a different approach one can still identify how most instruments try to employ more or less adequate limiting concepts which should be applied and deliver contextual solutions to the boundary issue. Primary among such limiting principles is “sphere of influence”, with an emphasis on “sphere”. Launched by the UNGC this concept simply asserts that whatever responsibility a company might have it lives only within the limits of actual influence, not beyond. The responsibility ends where influence ends. The problem with this concept is that it cannot perform to “limit” responsibility but it is useful in “mapping” impacts and “prioritising” CSR actions that the company could take. Prompted by the “excesses” of the Norms and by his mandate,²⁴¹ Professor Ruggie explained and discarded this concept as a limiting principle. The Norms bet everything on this concept and take for granted its ability to limit extremely broadly-formulated responsibilities. The ISO also mentions this concept but enriches it in a significant manner by discussing its different facets – sources, factors, methods of using influence. ISO's is a leap forward that, surprisingly, the UNGC, the self-coined learning platform, did not quite manage to take despite launching the concept a decade ago. The GRI has provided its own simple conceptual scheme that did not make it necessary to rely on the “sphere” metaphor. The SA8000 also uses this concept although it does not play a key role in there. The venerable OECD and ILO instruments were drafted before the term was coined.

Another limiting concept is “complicity”, which due to its legal heritage has true potential to serve as a limiting concept. Professor Ruggie discarded “sphere of influence” and came to rely entirely on complicity to cover abuses committed by third parties. Stripped to the bone to mean “knowing contribution to harm”, complicity limits a parent company's or buyer's responsibility too much and therefore both the UNGC and the SRSR have been forced to refer to the non-legal meaning of complicity. This later concept does indeed cover important CSR situations and extends the boundaries of responsibility. The problem, a fundamental one, is that this extension through a non-legalistic meaning of complicity loses the limiting principle. While the legal meaning demands “contribution”, which is clearly limiting, the non-legal meaning demands “association”, which is open-ended. Are not entities joined in a value chain “associated” by definition given that they all have a role in together making a product? Professor Ruggie has so far not acknowledged the problem and his insistence on complicity as the sole limiting principle

²⁴¹ The Commission on Human Rights, ‘Human rights and transnational corporations and other business enterprises,’ *Human Rights Resolution 2005/69*, 20 April 2005, para. 1(c).

might result either in an undesirable tight boundary making his scheme not relevant to important CSR situations or in an open-ended, boundary-less responsibility accepted silently under the guise of the responsibility to respect. The apparent danger facing Professor Ruggie, driven by his desire to set clearer limits on corporate responsibilities, is to end up proposing an arbitrary narrow boundary in unfortunate resemblance with the OECD Guidelines. Those boundaries would exclude a buyer's responsibility to protect altogether. The search for limiting principles must go on regarding a responsibility to protect and the ISO is in pole position to come up with a package of elements that together can draw clearer limitations.

This diversity of approaches in treating buyer's responsibilities to respect and to protect human rights must be correlated with some alternative strategies of reaching subcontractors. The instruments pick and choose from a broad menu of strategies. First, to ease a buyer's responsibility to protect human rights throughout the supply chain, some instruments such as the ETI, the SA8000 and the CCC promote a "cascading strategy" where upper tiers are mobilised to influence lower tiers,²⁴² which results in a sharing of responsibilities among buyers and suppliers. This strategy recognises the limited reach the buyer has and tries to capitalise on the lower tiers' own influence over their direct contractors. A due diligence step specific to subcontracting is thus to insert "cascading" clauses in contracts with suppliers and even to prohibit unauthorised subcontracting, as the FLA does.

A second strategy used in some instruments is to target lower tiers directly. The Norms and the SRSG remind us that suppliers and subcontractors are businesses themselves and expected to assume responsibilities to respect human rights. As shown, the FLA covers only the first tier but it has provided capacity-building, mainly through training, to contractors and other entities in supply chains. The ILO also offers training. The SA8000 certifies all kinds of suppliers for compliance with SA8000 to make them more attractive to buyers. This strategy relieves the buyer of its responsibility to protect, but has clear limitations as it seems impossible to scale it up due to an "infinite" number of large and small suppliers.

A third strategy shines through Professor Ruggie's conceptual framework when he reaffirms a state's duty to protect. The host states have their own obligations to bring suppliers into compliance with labour laws. The EC also counts on this strategy, and due to its special position among other instruments envisages inserting social clauses in trade agreements to encourage responsible business practices among suppliers. The Norms also affirmed the primary responsibility of states. How this strategy delivers in practice when governments are unwilling or unable to fulfil their obligation is an inescapable question that might require, even temporary, revisiting the other available strategies proposed in CSR. It is though essential to keep the responsibilities of states and companies in a unitary CSR picture as done by Professor Ruggie and the Norms in order to devise a package of interconnected strategies. More effective and sustainable protections are likely to result then.

²⁴² "Cascading" is a common supply chain control strategy where companies impose policy or performance requirements on their immediate suppliers, who are then expected in turn to forward, or cascade, these to sub-suppliers. T. Johnsen and D. Ford, 'At the receiving end of supply network intervention: The view from an automotive first tier supplier', 11 *Journal of Purchasing & Supply Management* (2005) p. 183.

A fourth strategy relies on strengthening the capacities of buyers to responsibly manage impacts and increase human rights protections. The UNGC and the EC are clear examples self-defined as “learning platforms” or hinting at learning “laboratories”. For example the EC’s concept of CSR is not about accountability but clearly about a managerial strategy that integrates better economic, social and environmental considerations; the job of the EC then is to assist in this integration through research, awareness raising, etc. Coalitions of firms and their stakeholders, such as the ETI, the FLA, even the SA8000 and the GRI, are fundamentally about accumulating knowledge and experience about what due diligence in CSR actually entails. The labour issues-specialised and supply chain-focused ETI, FLA and SA8000 provide best guidance on supply chains while the GRI deals in-depth with a specific due diligence step – reporting on sustainability. This capacity-building strategy thus clarifies the “content” of a buyer’s responsibility, but it often lets the “scope” issue fade out of sight. For example, the lack of clear statements from the UNGC and the ETI leaves the impression that they expect buyers to “roll-out” to lower tiers, if feasible, the due diligence processes they have developed for direct suppliers on the first tier. This strategy of working out the content has so far been unable to clarify scope (what entities will be covered) and this may be because the respective due diligence steps can be *mutatis mutandis* applied to cover more and more entities in the supply chain.

A fifth strategy for reaching directly down the supply chain has not been formalised in the instruments reviewed, except maybe the SRSG reports, but revolves around the partnership idea. Its main point is to strengthen the host country’s capacities to protect labour rights in the workplace. This strategy practically combines all strategies above: the SRSG’s and EC’s strategy of highlighting the government’s duty to protect converges with capacity-building strategies of specialised instruments such as the FLA, ETI and SA8000 and with influential buyers playing a role and fulfilling their responsibilities to respect and protect human rights down the supply chain including through “cascading” measures. An illustration of this approach could be ILO’s Better Factories Cambodia.²⁴³ There are further examples of localised partnerships – Vietnam Business Links Initiative²⁴⁴ – which have witnessed innovative alliances of companies, ministries in host countries, supported by external donors and specialised labour organisations. The FLA, ETI and SAI have all been involved in similar initiatives. The necessity of such a comprehensive strategy has to do with tackling root causes of abuses and with delivering sustainable improvements, but the complexity this strategy entails can be daunting.

From all these instruments the ball is in Professor Ruggie’s court: his mandate is by far the most consequential in the human rights and business field. It would be desirable that he acknowledges the dilemma around the buyer’s responsibility to protect. Rejecting it out of hand risks the relevance of his framework in a crucial area of CSR, outsourcing. It would also overlook the legitimacy that some instruments offer to a buyer’s responsibility to protect. Alternatively, accepting and leaving this responsibility without a conceptual foundation and without a discussion of its limitations would be detrimental to the SRSG’s mandate which added clarity and value at many other junctures of CSR. So far he has rejected or at best been ambivalent on the buyer’s responsibility to protect when speaking of accepting it “only in particular circumstances”, an ambivalence that the OECD also exhibited initially as it papered over the issue with ambiguous, weak formulations. The tribulations of the OECD Guidelines may prove

²⁴³ <www.betterfactories.org/ILO/aboutBFC.aspx?z=2&c=1>.

²⁴⁴ <www.vcci.com.vn/sub/vbli/default.htm>.

instructive in the coming years as Professor Ruggie continues his efforts to define the scope of corporate responsibilities. The moment of clarification inevitably came for the OECD. Hopefully he will not succumb to the temptation of drawing arbitrary narrow boundaries as the OECD did. The due diligence concept is “mapping”, not “limiting”, and might share the fate of the “sphere of influence” concept that Professor Ruggie himself discarded. A sound conceptual framework able to limit responsibility also cannot draw on complicity as the main concept to draw limitations because its non-legal meaning (“association”) cannot clarify limitations. A fresh look at other concepts such as “benefit” (unjust enrichment) and those proposed by the ISO might deliver a battery of limiting principles. It would not be too late for Professor Ruggie to change course and add a buyer’s responsibility to protect as a circumscribed addition to the main responsibility to respect, and frame this responsibility as part of a comprehensive package of interacting strategies for reaching lower tiers of supply chains.

5. Conclusions

Defining corporate responsibilities for the acts of their partners has been a thorny issue in CSR. The human rights issues are quite clear by now; international law offers human rights standards as guiding lights; and the due diligence measures a company could take are becoming clearer due to efforts of leading companies and their stakeholders. However, the “scope” issue explaining how far responsibility extends for the misconduct of third parties remains a weak spot. By reviewing a dozen CSR instruments this article sought to provide a good grasp on the consistency and clarity of social expectations after 15 years of CSR in an area of critical importance for CSR: a buyer’s responsibilities over its supply chain. The review confirms that all instruments are mindful of outsourcing and associated infringements of labour rights. There is mixed support for establishing responsibilities of buyers. For clarity, a buyer’s responsibilities can be split into responsibilities to respect, meaning to accept responsibility for impacts created by own decisions, and to protect, meaning to exercise leverage even when a buyer’s decisions are not a factor. Instruments have different coverage ranging from no coverage of supply chains at all to a coverage limited to direct contractors only, to a coverage of the entire supply chain. Some instruments explicitly draw the limits of a buyer’s responsibility; some are silent on the issue; while most use some limiting concepts that facilitate limitations, on a case-by-case basis. Some of these limiting concepts, or principles, are more able than others to offer clarity on the scope issue. A prime example is “sphere of influence” which evolved into a “mapping” concept despite pretensions of being a “limiting” concept; the same can be said of the “due diligence” concept. Other concepts, such as “complicity”, are better suited for the task, but the non-legal meaning of complicity has no limiting abilities. As a result, the search for a package of concepts including additional factors such as choice, benefit, ability, as shown by the ISO, must continue.

Professor Ruggie has a unique opportunity and responsibility to reverse the current unsatisfactory situation in one of the core areas of globalisation and human rights. A buyer’s responsibility to protect should be recognised, its content and limits be specified with a view to it playing a key role in a package of comprehensive strategies necessary to deliver effective and sustainable protections throughout the supply chains. The conceptual architecture of these instruments, good or bad, as well as the experience accumulated by a dozen instruments can inform the SRSR’s mandate on the specific issue of buyer’s responsibility to protect and to avoid the traps and find fresh insights about strategies for strengthening labour rights at lower tiers of supply chains.