An Overview Analysis of Financial Stability in the South African Multi-National Enterprises and Supply Chains: Reflections on Difficulties with the Enforcement of Workers' Rights

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Abstract

The issue of human and labour rights violations in global supply chains has gained significant attention in contemporary society, making it essential for international organisations, governments and businesses to address this critical concern. Multi-national enterprises (MNEs) offer well-documented benefits to their host nations, such as improving residents' standards of living by fostering economic growth and facilitating the transfer of skills and technology to their host nations. These advantages create competitive pressure among nations striving to attract MNEs. Consequently, MNEs have the option to relocate their operations to countries with lower human and labour rights standards to maximise profits, potentially incentivising governments to lower their human and labour rights standards as well.

Compounding this issue is the fact that MNEs are not governments and, therefore, cannot be members of the ILO. This exclusion means there is currently no legally recognised mechanism to hold MNEs accountable for human and labour rights violations, despite substantial evidence of such abuses in global supply chains. The primary shortcoming of the existing legal framework is the absence of a legally recognised dispute resolution forum through which workers who experience violations can seek remedies against MNEs. This gap has resulted in a reliance on self-regulation by MNEs through codes of conduct and other mechanisms implemented by non-governmental organisations. However, the self-regulation system faces criticism because it relies on voluntary compliance, meaning its decisions are not legally binding.

This contribution examines the challenges faced by employees whose human and labour rights have been violated by MNEs. It also recommends regulatory reforms that would empower the ILO to set labour standards that MNEs must adhere to and to provide effective remedies for workers when violations occur.

Keywords

Codes of conduct; hard law; human rights; human rights due diligence; International Labour Organisation; *ILO MNE Declaration*; labour rights; multi-national enterprises; non-governmental organisations; *OECD Guidelines*; United Nations; soft law.

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> The rapid growth of the global marketplace has outpaced the instruments of governance, allowing corporations to profit in the interim from unregulated and cheap labour.[1]

1 Introduction

The International Labour Organization (ILO) was established in 1919 in the wake of the First World War.[2] More than a century after the inception of this specialist United Nations (UN) agency, the ILO continues to play a central role in the establishment of international norms in the world of work.[3] Amongst other things, the ILO recognises that multi-national enterprises (MNEs) play an important role in the process of social and economic globalisation. MNEs are also referred to as "multi-national corporations" and according to the ILO, these institutions typically "own or control production, distribution, services or other facilities outside the country in which they are based".[4]

MNEs are often associated with foreign direct investment (FDI),[5] economic growth and the transfer of skills and advanced technology to their host nations. As a result, poor countries compete fiercely to attract MNEs to resolve their economic challenges. MNEs and global supply chains (GSCs) go hand-in-hand. According to Seric and Tong GSCs are involved in "international production sharing", which is "a phenomenon where production is broken into activities and tasks [that are] carried out in different countries".[6] Employees working in this environment often manufacture

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1 Maryanov 2010 *Lewis and Clark Law Review* 401.

2 Van Niekerk and Smit *Law@work* 23.

3 Van Niekerk and Smit *Law@work* 23.

4 Paragraph 6 of the *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (1977) (the *ILO MNE Declaration*). Also see para 4 of the *Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises on Responsible Business Conduct* (1976) (the *OECD Guidelines for MNEs*), which defines MNEs as "companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways".

5 Paragraph 1 of the *ILO MNE Declaration*.

6 Seric and Tong 2019 https://iap.unido.org/articles/what-are-global-value-chains-and-why-do-they-matter. Also see the official website of the OECD, which states that "global supply chains occur where the different stages of the production process are located across different countries". The official website of the Chartered Institute of Procurement and Supply states that a global supply chain refers "to the procurement of products and services from countries with lower labour and production costs than

components of products and are frequently employed in developing countries, and they effectively keep the machinery of MNEs going.

Lyutov[7] confirms that MNEs wield substantial economic power in poor countries. This is especially true where governments are desperate for FDI.[8] This prompts such governments to implement policies which ensure that labour standards remain low to entice MNEs to stimulate their sluggish economies.[9] It also encourages MNEs to outsource production to developing countries with lower labour costs.[10] It is against this background that the ILO has cautioned that where governments of host countries offer incentives to attract MNEs, these encouragements should not include any limitation of their workers' fundamental rights.[11] This could lead to a race to the bottom and to the exploitation of such workers.

2 Problem statement and aims of this contribution

In an important development, several international organisations like the UN, the ILO and the Organisation for Economic Co-operation and Development (OECD) have published fragmented norms regarding the regulation of MNEs and the protection of vulnerable workers working in GSCs. Nonetheless, this contribution argues that it is problematic insofar as individual states remain the main enforcers of international legal obligations applicable to MNEs. It is submitted that workers are prejudiced in instances where national laws may have been purposefully weakened or simply do not exist where the countries chose not to ratify certain conventions.[12] The main challenge is that employees whose rights are violated by MNEs do not have a legally recognised forum to which they can refer their human and labour rights complaints against MNEs. In the light of this context, the contribution aims to develop conceptual arguments supporting the establishment of an international dispute resolution forum. This forum would be responsible for managing labour disputes involving MNEs. Since MNEs are not governments and therefore cannot become members of the ILO, the article investigates whether such a forum could potentially be situated within

that of the home country". See CIPS date unknown https://www.cips.org/knowledge/procurement-topics-and-skills/supply-chain-management/global-supply-chains/.

7 Lyutov 2017 *Zbornik Pravnog Fakulteta u Zagrebu* 32.

8 Ahiakpor 2010 *Religion and Liberty* 15.

9 Ahiakpor 2010 *Religion and Liberty* 15. Also see Collingsworth 2016 *Harv Hum Rts J* 183, who confirms that in some countries human and labour rights are purposefully being ignored to make it easier for multi-national enterprises (MNEs) to maximise profits.

10 Lyutov 2017 *Zbornik Pravnog Fakulteta u Zagrebu* 32.

11 Paragraph 52 of the *ILO MNE Declaration*.

12 Ruggie 2017 *Regulation and Governance* 317.

the sphere of international non-governmental organisations and if the ILO should ideally establish an accreditation procedure.

In the parts that follow, the contribution firstly highlights the difference between the hard law and soft law approaches to the regulation of MNEs' human rights obligations. Secondly, the contribution traverses the problems associated with the enforcement of rights by victims in their country of residence, where they render services, as well as difficulties relating to claiming in the country where the MNE is situated. Thirdly, the article briefly explores the content of, and the enforcement mechanisms in terms of the *ILO MNE Declaration*. Fourthly, the article covers the OECD's main MNE instrument and its enforcement mechanisms. Fifthly, the article covers the role and function of non-governmental organisations (NGOs) and their dispute resolution possibilities. In conclusion, the article proposes possible solutions to the challenges identified.

3 Methodology

This research is founded on the doctrinal and comparative research methods. The doctrinal approach aims to logically describe, analyse and assess the relationships between established principles and concepts that govern a particular field of law.[13] Its goal is to bridge gaps, to clarify ambiguities in existing legal frameworks and to propose coherent proposals that could potentially resolve identified problem areas. This method, and this contribution in particular, does not merely constitute a description of existing law. It involves thorough analysis.[14] This research seeks to organise known information and it proposes solutions to resolve lacunae which have been recognised within the ambit of this study.

The second technique, the comparative research method, on the other hand, compares legal instruments in the context of their application by authorised international bodies. The method is factual in nature and it relies on the effects of rules on particular case studies. In this article the objective is to compare judicial decisions by different bodies in similar situations, but in different countries.[15] The contextual relation of particular societies assists researchers to understand the particular problems associated with MNEs. The spotlight of this study falls on the functionality of dispute resolution in the context of workers' rights and MNEs. How can these rights be enforced effectively?[16] In this article the dispute resolution mechanisms of the ILO, OECD and NGOs are considered and compared before our conclusions and recommendations are formulated. The main sources upon which this study

13 Smits "What is Legal Doctrine?" 5.
14 Smits "What is Legal Doctrine?" 5.
15 Michaels "Functional Method of Comparative Law" 342.
16 Hasselblatt 2023 *European Business Law* 6.

relies are published guidelines, declarations, case law and outcomes of complaints.

4 The soft law and hard law approaches

Policy makers have adopted two approaches when formulating international instruments regarding the monitoring and enforcement of MNEs' compliance with human and labour rights.[17] These instruments are classified either as "soft law" or as "hard law", and in some instances the instruments have been designed to adopt a "hybrid" approach.[18] The most common examples of hard law at the international level are treaties and directives.[19] The benefits associated with hard law instruments are well-documented. Shaffer and Pollack point out that hard law instruments usually contain sanctions such as fines and the withdrawal of licences for non-compliance.[20]

Regrettably, it has taken a long time for international bodies to conclude and adopt a hard law instrument to enforce compliance with human and labour rights by MNEs.[21] Mares bemoans the fact that the UN has been grappling for approximately 50 years, starting in the 1970s, to develop a Code on Transnational Corporations.[22] Ter Haar mentions that:

> [w]hether desirable or not from a legal perspective, one of the reasons for using soft law instruments to regulate social matters is the failure of public actors, such as governments and international organisations, to adopt legally binding rules on social matters at transnational level.[23]

The outcome of this was that various international organisations have introduced soft law instruments. These instruments include the following: the *UN Guiding Principles on Business and Human Rights* adopted in 2011; the *OECD Guidelines for MNEs* published in 1976; the *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*; published in 1977; and the *UN Global Compact* published in 2000. As discussed later in the article, in addition to the above regulatory instruments a new regime of private governance of labour standards for MNEs has emerged. These mechanisms include the adoption of codes of conduct formulated by MNEs and NGOs.

Despite the wide use of the term "soft law instruments", there is no precise and universally accepted definition for the term.[24] Guzman states that "soft

17 Weiss 2013 *IJCLLIR* 19.
18 Weiss 2013 *IJCLLIR* 19.
19 Senden *Soft Law* 1.
20 Shaffer and Pollack 2009 *Minn L Rev* 717.
21 Mares 2022 *IJHR* 1523.
22 Mares 2022 *IJHR* 1523.
23 Ter Haar, García-Muñoz Alhambra and Kun 2011 *IJCLLIR* 338.
24 Choudhury 2018 *ICLQ* 963. According to Choudhury, soft law refers to "principles, norms, standards or other statements of expected behaviour that do not create enforceable rights and duties".

law is not law at all, strictly speaking".[25] Despite serious criticisms of soft law, Langille argues that a shift from hard law to soft law is required to rid the ILO of, in his words, "the disconnect between the legal machinery of the ILO and the real world".[26] Additionally, supporters of the soft law approach state that hard law agreements can be more difficult to adapt to changing circumstances.[27] They argue that hard law is particularly problematic as it presupposes a fixed condition when situations of uncertainty demand constant experimentation and adjustment.

Scholars such as Weiss and Ter Haar support a hybrid approach. Ter Haar explains that the traditional forms of regulation on their own cannot resolve the challenges posed by MNEs.[28] She argues that the "law-like" forms of regulation adopted by private organisations, including NGOs, MNEs and trade unions, are necessary to ensure collective problem-solving in complex situations.[29]

This study argues that a strict application of hard law may diminish the opportunity for other role players to engage in ways to improve compliance with decent work standards. It is submitted that neither the exclusive application of hard law nor soft law instruments will increase compliance with human and labour rights by MNEs. The authors of this contribution support the view that a combination of both soft law and hard law will provide a solution to the gap identified.

The section below discusses the challenges facing employees who utilise national dispute resolution procedures.

5 Problems associated with the enforcement of rights

5.1 Introduction

Any victim of human rights abuses, such as a person who has been compelled to work in unsafe or hazardous circumstances, could potentially institute legal proceedings in the country where the work was rendered. Another possibility would be to take the MNE to task in the country where the head office of the MNE is situated. Both possibilities have their own unique challenges regarding the enforcement of victims' rights.

5.2 National procedures

It may be argued that employees whose human and labour rights have been violated by MNEs should, in the first instance, explore remedies provided

25 Guzman and Meyer 2010 *JLA* 172.
26 Langille 2010 *Comparative Labor Law and Policy Journal* 540.
27 Langille 2010 *Comparative Labor Law and Policy Journal* 540.
28 Ter Haar 2013 *EJSL* 71.
29 Guruparan and Zerk 2021 https://www.chathamhouse.org/2021/06/influence-soft-law-grows-international-governance 10.

for in their national jurisdictions where the work was rendered.[30] In many instances, local dispute resolution procedures are designed to provide for expeditious and less costly dispute resolution mechanisms.[31] Newaj argues that modern labour relations no longer envisage procedures that imitate criminal trials, which are technical and complex.[32] She argues that labour relations procedures should ideally not be bound by the same strict rules as criminal and civil cases.

As argued elsewhere by Van Eck,[33] there are several coherent reasons for the establishment of specialised labour dispute resolution institutions. These include that labour disputes should ideally be finalised expeditiously; dismissed employees can ill-afford high legal costs; labour dispute resolution institutions should be accessible to employees by virtue of their simplified procedures and proximity; and specialised dispute resolution institutions, clothed with exclusive jurisdiction, are more likely to develop uniform and coherent labour law principles that are based on the premise of fairness rather than merely dealing with lawfulness within the confines of the law of contract. However, these goals have sadly not been realised.[34]

It is submitted that the Commission for Conciliation, Mediation and Arbitration (CCMA) and labour court system in South Africa has largely proved ineffective in ensuring compliance with internationally recognised human and labour rights by MNEs. This is so because the jurisdiction of the CCMA and labour courts does not extend beyond the determination of unfair labour practices and the resolution of unfair dismissal cases, which are regulated in terms of South Africa's *Labour Relations Act*. Their dispute resolution functions do not include disputes about the breach of obligations covered in international human and labour rights instruments.

Apart from lodging cases in tailor-made labour tribunals and labour courts, employees also have the option of litigation in a country's civil courts. In South Africa the option of litigation against MNEs in the civil courts has rarely been used due to the high costs and complexities associated with such court procedures. A case in point is *Nkala v Harmony Gold Mining Company Limited*[35] where the South Gauteng High Court had to decide whether gold mines were liable for damages resulting from negligence

30 In South Africa, the employees may approach the Commission for Conciliation, Mediation and Arbitration (CCMA), the labour courts or the High Court. At the CCMA, disputes are conciliated, and if unresolved, the parties may request arbitration.

31 Grogan *Workplace Law* 7. Also see s 138(1) of the *Labour Relations Act* 66 of 1995, which provides that "the labour relations disputes must be determined fairly and quickly, and the substantial merits of the dispute must be dealt with, with the minimum of legal formalities and mainly without legal representation".

32 Newaj 2020 *Obiter* 641.

33 Van Eck 2005 *Obiter* 550.

34 Van Eck 2005 *Obiter* 555.

35 *Nkala v Harmony Gold Mining Company Limited* 2016 7 BCLR 881 (GJ).

because of exposure to dust that had caused silicosis and tuberculosis (TB). However, the *point in limine* arose whether the former mine employees could lodge an action for damages as a class action against a gold mining MNE.[36] The defendants were, amongst others, large MNEs from around the globe such as Anglo American, Anglo Gold, Gold Fields, and African Rainbow Minerals.

In an apparent victory, the High Court ruled that the employees were entitled to lodge such an application. Next, the court had to determine the main issue, namely, whether the defendants were liable for the damages due to negligence. To complicate the matter further, the defendant MNEs lodged an appeal against the finding of the High Court but later withdrew it. The parties thereafter reached an out of court settlement agreement which resulted in the establishment of a R5 billion compensation fund award for gold miners afflicted with silicosis and TB.

The resolution ultimately favoured the employees. Nonetheless, the case highlights the difficulties that employees face due to the technical and time-consuming nature of the process. Additionally, the employees were fortunate to have legal representation, made possible only through "pro bono" services. It is imperative to establish expedited and cost-effective procedures to aid employees lacking financial resources. Such procedures should ideally permit employees to lodge complaints and to enforce their rights against MNEs based on international human and labour rights violations before an international forum specifically designed for such disputes.

5.3 Dispute resolution in the home state of the MNE

Employees whose human and labour rights have been violated by MNEs have the option to seek recourse in the courts of the MNE's home state. Despite the complexities associated with such matters, pursuing legal action in the MNE's home state may be necessary if certain claim procedures or remedies are unavailable in the country where the work is being performed. The case of *Lubbe v Cape Plc*[37] serves as a notable example of employees bringing a claim against an MNE in its home state. In this case the employees, including Lubbe, worked for a company incorporated in England known as Cape Asbestos Company Limited, which was primarily involved in asbestos mining and processing. The employees filed a lawsuit in

36 The applicants in the proceedings represented approximately 500 000 current and former goldmine workers and their dependents in all the Southern African Development Community countries. More than 45 of the applicants were silicosis patients, with or without TB, and more than 25 of them were employees who only had TB.

37 *Lubbe v Cape Plc* WLR 1545 (2000).

England, citing illness exposure while working at the company's subsidiary in South Africa.

At the outset of the legal proceedings the defendant sought to halt the case, claiming that it should be adjudicated in South Africa rather than England.[38] In response the plaintiffs argued that they would not receive legal aid, and there was a likelihood that they would not find lawyers willing to accept a contingency fee for such a complex case. The trial court ruled in favour of South Africa as the appropriate jurisdiction. Displeased with this decision, the plaintiffs filed an appeal. Upon appeal the House of Lords unanimously determined that while South Africa was indeed the more suitable forum for hearing the claim, it was highly probable that the claimants would not have access to legal representation and that South Africa lacks procedures to handle multi-party claims.[39] Consequently it was deemed appropriate to lift the stay, allowing the legal action to proceed in the English court system.[40]

In respect of merits, the court held that the issue of whether the MNE owed a duty of care to employees would be determined based on principles of negligence law. The matter was ultimately settled between the parties, which can be considered a victory for the employees. However, it is unfortunate that the settlement agreement has hindered the evolution of the law in this area and the establishment of precedent. It is argued that the above case illustrates that litigation against MNEs has the potential to become complex and extremely costly in some circumstances. As Schoeman states, "litigating about where to litigate diverts the focus from the substantive issues that need to be decided".[41]

The tests developed by the courts are extremely sophisticated and technical. It is submitted that employees will likely be unable to invoke such procedures.[42] There is therefore a need for a simplified, cost efficient and

38 *Lubbe v Cape Plc* WLR 1545 (2000) para 16.

39 *Lubbe v Cape Plc* WLR 1545 (2000) para 32.

40 *Chandler v Cape Plc* [2012] EWCA Civ 525 para 29.

41 Schoeman 2019 *CILSA* 457.

42 In *Chandler v Cape Plc* [2012] EWCA Civ 525. This case highlights a crucial issue concerning the liability of parent companies for the well-being of their subsidiary's employees. The employee lodged a negligence claim against Cape Plc, the parent company of Cape Products, alleging a direct duty of care to the subsidiary's employees. The court laid down four essential criteria to establish the duty of care owed by a parent company to its subsidiary's employees. Firstly, the business activities of the parent company must essentially be the same; secondly, the parent company should have been aware of the unsafe working conditions at the subsidiary; thirdly, the parent company should possess substantial knowledge of health and safety in the specific industry and fourthly, the parent company should have anticipated that the subsidiary or its employees would rely on its superior knowledge for their protection. The court held that the businesses of the two companies were essentially the same. The court concluded that the parent company was liable for the negligence of the subsidiary.

effective procedure for employees employed by MNEs. The section below delves into the main instruments and enforcement mechanisms of the ILO, the OECD and of NGOs.

6 The *ILO MNE Declaration* and its enforcement mechanisms

6.1 Introduction

The *ILO MNE Declaration* was adopted by the ILO governing body in 1977 and has been amended four times, the latest being in 2022.[43] According to Goldstein "the ILO MNE Declaration is the only ILO instrument that provides direct guidance to MNEs on social policy and inclusive, responsible and sustainable workplace practices".[44] Globally it is the only instrument that regulates the conduct of MNEs that was discussed and adopted by governments, employers and employees.[45] Amongst others, the *ILO MNE Declaration* aims to facilitate access to remedies for victims of human and labour rights against MNEs. The dispute resolution process is discussed below:

6.2 Dispute resolution in terms of the ILO MNE Declaration

As part of their duty to protect workers against business-related human and labour rights abuses, governments are obliged to provide judicial means and remedies.[46] All employees working for GSCs, whether individually or collectively, must have the right to lodge grievances without facing any form of prejudice. This is especially crucial in countries where the MNE operates and where the local labour laws may not align with the principles of ILO conventions.

The *ILO MNE Declaration* stipulates that governments and MNEs should implement conciliation and arbitration to address labour disputes within GSCs.[47] The procedure should be free of charge and preferably be expeditious.[48] Where the governments fail to implement such an obligation or do not ratify certain conventions, MNEs are required to use their leverage to encourage their business partners to provide effective means of enabling the remediation of abuses of internationally recognised human rights.[49]

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43 ILO date unknown https://www.ilo.org/empent/areas/mne-declaration/lang--en/index.htm.

44 Goldstein 2020 *Cardozo International and Comparative Law Review* 1265.

45 ILO date unknown https://www.ilo.org/empent/areas/mne-declaration/WCMS_845906/lang--en/index.htm.

46 Clause 64 of the *ILO MNE Declaration*.

47 Clause 67 of the *ILO MNE Declaration*.

48 Clause 67 of the *ILO MNE Declaration*.

49 Clause 67 of the *ILO MNE Declaration*.

While governments have adopted dispute resolution procedures, it is regrettable that MNEs are not always the direct employers of the workers producing their goods.

The independent factories are primarily responsible for the violation of human and labour rights. The current version of the *ILO MNE Declaration* suggests that MNEs should utilise their influence to ensure that their business partners also adhere to labour standards. However, it is up to each MNE to determine the scope and meaning of this influence. There is a need to define and clarify the obligations placed on MNEs. For instance, the Declaration should specify the circumstances under which an MNE is expected to end its relationship with business partners.

Instead of adopting an effective dispute resolution process, the *ILO MNE Declaration* adopted an interpretation procedure as a method to resolve disputes. The procedure is discussed below.

6.3 The interpretation procedure

The interpretation procedure is a voluntary tool, and it is used to interpret the provisions of the *ILO MNE Declaration* when the need arises to resolve the members' disagreement on their meaning.[50] Several principles apply to this procedure. The request for interpretation must arise from a factual situation between two or more parties to whom the *ILO MNE Declaration* applies.[51] The requester must be a government of an ILO member state, an employer's organisation and/or a trade union.[52] Furthermore, the procedure in the case may not duplicate an existing national process or that of the ILO.[53] The complainants may lodge a complaint to the ILO directly only if the relevant government has refused to submit the request to the ILO, or if three months have passed since the complainant addressed the issue to the government.[54] It is argued that the stipulation that only a government is permitted to refer a case to the interpretation procedure is absurd. It assumes that only governments can be violators, disregarding the fact that MNEs can violate human and labour rights. It is not surprising that, decades since the introduction of this procedure, only a limited number of cases have been referred for such interpretation.[55]

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50 Cernic 2009 *Mich J Int'l L* 31.

51 Paragraph 1 of the *ILO MNE Declaration*.

52 Paragraph 1 of the *ILO MNE Declaration*.

53 Annexure II clause 2 of the *ILO MNE Declaration* declares that to avoid duplication, the following disputes cannot be referred for interpretation. The procedure should in no way duplicate or conflict with existing national or ILO procedures. Thus, it cannot be invoked: (a) in respect of national law and practice; (b) in respect of international labour Conventions and Recommendations; and (c) in respect of matters falling under the freedom of association procedure.

54 Paragraph 2 of the *ILO MNE Declaration*.

55 Cernic 2009 *Mich J Int'l L* 35.

The interpretation process has several limitations. Firstly, the ILO follows very strict confidentiality requirements in handling cases. The details of the parties, including the names of the MNEs involved, are withheld. It is submitted that such confidentiality of basic details undermines the efficacy of the procedure. The interpretation procedure is, by its very nature, limited since it cannot be invoked to challenge violations of internationally recognised labour standards by MNEs.[56] It is submitted that the interpretation procedure does not offer any real solution to individual employees. It does not create any viable platform for victims of human and labour rights violations by MNEs. Instead, the employees must still rely on ineffective national laws.[57] It is therefore essential that a transparent dispute resolution procedure be established. The next section introduces the dispute resolution mechanisms of the OECD.

7 The *OECD Guidelines* and its enforcement mechanisms

7.1 Introduction

The Organisation for European Economic Cooperation (the OEEC) was established in 1948 to oversee the implementation of the Marshall Plan, a programme funded by the United States (US) aimed at reconstructing Europe in the aftermath of the Second World War.[58] Encouraged by the success and the prospects of carrying its work forward on a global stage, Canada and the US joined other OEEC members and they signed the *Convention of the Organisation for Economic Co-operation and Development* (OECD).[59] This convention transformed the OEEC into the OECD, it was signed in Paris on 14 December 1960 and it entered into force on 30 September 1961.

In response to international calls to end human and labour rights violations in GSCs, the OECD has adopted the *OECD Guidelines*, which sets forth principles and standards for responsible business conduct across an array of issues such as human rights and labour rights.[60] Through the *OECD Guidelines* the OECD encourages its member countries to implement internationally recognised labour standards to ensure that all MNEs follow the same rules.[61] The *OECD Guidelines* established the National Contact Points (NCPs), which are responsible for handling complaints about breaches of the *OECD Guidelines* by MNEs. The NCPs follow the dispute resolution procedures discussed below.

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56 Annexure II clause 2 of the *ILO MNE Declaration*.
57 Schoeman 2019 *CILSA* 446.
58 Leimgruber and Schmelzer *The OECD* 23.
59 Leimgruber and Schmelzer *The OECD* 23.
60 Maheandiran 2015 *Harvard Negotiation Law Review* 205.
61 OECD 2021 https://mneguidelines.oecd.org/annualreport-on-the-activity-of-national-contact-points-for-responsible-businessconduct-2021.pdf 4.

7.2 Dispute resolution under the OECD Guidelines

Any workers who feel that their labour rights have been violated by an MNE or third-party companies involved in producing products for that MNE may lodge a complaint with the NCP in the country where the MNE is headquartered. The OECD deserves commendation for extending jurisdiction to MNEs operating in countries that are not members of the OECD. For example, in the case of *Global Witness v Afrimex*, a UN panel of experts filed a complaint against OECD-based companies for violating the *OECD Guidelines* in the Democratic Republic of Congo, highlighting the severe labour conditions.[62] The United Kingdom-based NCP concluded that Afrimex had breached the *OECD Guidelines* and determined that the MNE should take proactive measures to influence the responsible conduct of the entities in its supply chains.[63]

Within three months of receiving the complaint, the NCP is required to determine whether to offer mediation to the parties involved. In this process the NCP verifies the identity of the parties, their interests in the matter, whether the issue raised is substantial and supported by evidence, and the connection between the enterprise's activities and the issue at hand. The OECD deserves commendation for adopting NCP procedures that are relatively easy to navigate, flexible, and do not require judicial expertise. Furthermore, the financial risk involved is limited, making these procedures more acceptable for both MNEs and complainants. This allows employees to refer cases without the fear of incurring legal costs if they lose.

Despite the positive results from NCPs, the system has several shortcomings. The primary issue is that it relies solely on mediation for dispute resolution, and participation in this process is voluntary. As a result, victims of labour and human rights violations can obtain remedies only if the MNE involved is willing to engage in resolving the disputes. For instance, in

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62 OECD Watch 2023 https://www.oecdwatch.org/complaint/global-witness-vs-afrimex/.

63 OECD Watch 2023 https://www.oecdwatch.org/complaint/global-witness-vs-afrimex/. In another case of *ECCHR et al v TÜV Rheinland AG*, the applicants filed a complaint against TÜV Rheinland AG and its subsidiary TÜV Rheinland India Pvt Ltd for carrying out an inadequate social audit of a factory in the Rana Plaza building in June 2012 and breaching the *OECD Guidelines for MNEs* in the process. The complainants further alleged that the company failed to accurately report on the various labour rights violations, such as child labour, discrimination against women, the absence of trade unions and forced overtime. The complainants sought financial compensation from TÜV Rheinland to cover the psychological treatment of the victims of the Rana Plaza Factory collapse, as well as the company's commitment to work with the Bangladesh Government. In this case, the German national contact point (NCP) decided that it had jurisdiction to hear the matter based on being home to the parent company, since there was no NCP in Bangladesh and India, where the MNE operated. See OECD Watch 2024 https://www.oecdwatch.org/complaint/ecchr-et-al-vs-tuv-rheinland-ag/.

the case of *Communal Landowners v Excellon Resources*[64] it was alleged that Excellon Resources breached provisions of the *OECD Guidelines* concerning disclosure, human rights and labour rights. The Mexican NCP rejected the complaint, citing the company's unwillingness to participate in mediation as the reason for its decision.

The NCP's system often fails to adhere to established time frames, resulting in unreasonably long delays in finalising disputes. Additionally, since the outcomes of the NCPs are not binding, their effectiveness largely relies on the public availability of the decisions made.[65] Unfortunately, the *OECD Guidelines* do not grant NCPs the authority to ensure this transparency. Various NCPs have, however, started to overrule the *OECD Guidelines* by pronouncing on the verdict of the MNE. Instead, the parties to the dispute are given discretion as to which information is to be published.[66] A notable example is the case of *Raid v Das Air*,[67] where a UN panel of experts alleged that 85 OECD-based MNEs violated the *OECD Guidelines*, particularly concerning human rights and labour rights. Despite Das Air denying the allegations, the NCP ultimately concluded that the company had breached the *OECD Guidelines*.[68] This case marked a significant milestone, as it was the first instance in which an MNE was found to have violated its responsibilities regarding human and labour rights under the *OECD Guidelines*.

This study suggests that the solution lies in the amendment of the *OECD Guidelines* to empower NCPs to publish certain basic and relevant details, such as the name of the complainant and MNE, as well as of the factories involved in the supply chain and a summary of the main issue at hand. The next section deals with the dispute resolution mechanisms adopted by NGOs.

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64 OECD Watch 2024 https://www.oecdwatch.org/complaint/communal-landowners-vs-excellon-resources/.

65 Santner 2011 *Geo Wash Intl L Rev* 384.

66 Paragraph 73 of the *OECD Guidelines for MNEs* provides that "at the conclusion of the procedures the NCP will make a statement publicly available after consultations with the parties involved and taking into account the need to preserve the confidentiality of sensitive business and other information. Information, such as the identity of individuals involved in the procedures, should be kept confidential".

67 OECD Watch 2024 https://www.oecdwatch.org/complaint/raid-vs-das-air/.

68 Also see OECD Watch 2006 https://www.oecdwatch.org/complaint/fenceline-community-and-foe-nl-vs-royal-dutch-shell/. The Dutch NCP's attempts to get the parties together for mediation failed when the company refused to discuss the primary issue raised in the complaint. Nonetheless, the NCP proceeded with a field visit to the project site and published a final statement with a thorough analysis of the company's *OECD Guidelines for MNEs* compliance.

8 Self-regulation: NGOs and MNEs' codes of good conduct

8.1 Introduction

This section examines the role of NGOs in enforcing the international human and labour rights standards by MNEs. Scholars commonly define an "NGO" by highlighting what it is not, rather than providing a precise definition. According to Edwards, an "NGO" can be understood as "a private, independent, non-profit, goal-oriented group not founded or controlled by a government".[69]

Recently, human rights NGOs have become increasingly active in safeguarding labour standards. This surge in activity is attributed to the failure of states to adopt a binding instrument capable of effectively addressing challenges posed by globalisation.[70] It is estimated that there are nearly 5000 NGOs that are accredited by the UN.[71]

Scholars such as Supiot advocate the expansion of the ILO's scope and the facilitation of open discussions involving external specialists in order for the ILO to remain relevant in the face of globalisation.[72] The authors of this article share the same view as Supiot but add that the traditional ILO structure is no longer fit to deal with the challenges posed by MNEs.

It is argued that from its inception the ILO created alternatives to allow for participants who did not necessarily fall in the tripartite structure to play some roles within the ILO. Like the UN, the ILO developed an accreditation procedure which allows NGOs' participation in its processes.[73] In this respect, Article 12 provides that "the ILO may make suitable arrangements for such consultation as it may think desirable with recognised NGOs, including international organisations of employers, workers, agriculturalists and cooperators".[74]

This study submits that NGOs should be given more formal powers, especially in regard to MNEs. Notable NGOs in this domain include the Fair Labour Association (FLA), Fair Wear Foundation, Worker Rights Consortium, Social Accountability International, and Clean Clothes Campaign (CCC). The primary goal of these NGOs is to encourage compliance with labour standards to enhance their MNEs' brands and maintain certification. Such accreditation proves that MNEs do not engage

69 Edwards 2021 *Pace Int'l L Rev* 329.
70 Edwards 2021 *Pace Int'l L Rev* 329.
71 Edwards 2021 *Pace Int'l L Rev* 335; *Economic and Social Council Resolution 1996/31: Consultative Relationship Between the United Nations and Non-governmental Organizations* UN Doc E/RES/1996/31 (1996).
72 Supiot 2020 *Int'l Lab Rev* 128.
73 Dey 2020 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3668622 3.
74 Article 12(3) of the *Constitution of the International Labour Organization* (1919).

in harmful practices such as child labour, forced labour or excessive overtime during production. Moreover, MNEs can leverage these certifications to pursue projects, funding and tenders.[75] The section that follows analyses the approaches of NGOs in resolving disputes lodged against MNEs.

8.2 Dispute resolution by NGOs

Employees, including trade unions or interested parties, may file complaints with the NGO to which the MNE, accused of human and labour rights violations, is affiliated. Once the complaint is accepted by the NGO, a complaint-handling procedure is set in motion. This process involves the affiliated MNE investigating the issue and recommending a course of remediation.[76] This study applauds the NGOs' complaint-handling procedures because they employ neutral third parties to investigate allegations and recommend corrective action.[77]

It is submitted that such power allows for independence in dispute resolution. For instance, in the case of *Union Federation Federación De Asociaciones Y Sindicatos Independientes de El Salvador (FEASIES) v Supertex*,[78] the trade union filed a complaint about freedom of association with the FLA. It was alleged that the Supertex factory unfairly dismissed trade union leaders from work. The FLA commissioned the independent investigation, and the investigator's final report concluded that the dismissal of the union leaders from work was not legal under national labour regulations. Supertex factory management agreed to retrospectively reinstate them.[79]

In addition to third-party complaint procedures, NGOs also have a system of investigations and auditing that is launched by NGOs themselves when they have indications of non-compliance by their affiliated member MNEs.[80] According to Le Baron, "historically, audits have been used as a tool for internal business management, helping MNEs to minimise public relations risks and to reassure investors of the company's commercial viability".[81] However, auditing has shifted from internal business management towards the governance of labour standards in global supply chains.[82]

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75 Marx and Wouters 2016 *Int'l Lab Rev* 438.
76 FLA 2023 https://www.fairlabor.org/accountability/fair-labor-investigations/tpc-tracking-chart/.
77 FLA 2023 https://www.fairlabor.org/accountability/fair-labor-investigations/tpc/
78 FLA 2022 https://www.fairlabor.org/reports/supertex-el-salvador/.
79 FLA 2022 https://www.fairlabor.org/reports/supertex-el-salvador/Supertex Summary report 3.
80 FLA 2024 https://www.fairlabor.org/.
81 Le Baron, Lister and Dauvergne 2017 *Globalizations* 959.
82 Le Baron, Lister and Dauvergne 2017 *Globalizations* 959.

However, some scholars criticise investigation and auditing as a method of enforcing compliance with human and labour rights. Ter Haar and Keune argue that MNEs operate globally, and their supply chains extend through all continents.[83] As such, auditing firms may not have the capacity to have auditors everywhere in the world. Also, suppliers or subcontractors can develop audit fatigue when they manufacture and provide goods and products for many MNEs each of which has its own set of norms and monitoring schemes.[84] Some scholars believe that the auditing process is not designed to improve labour rights but rather to reduce the MNEs' legal and social liability and generate new business opportunities.[85] Terwindt and Armstrong warn that the auditing process is also challenged by a lack of due diligence by auditors themselves.[86]

Lastly, some NGOs embark on the mobilisation of consumers, lobby MNEs and governments at regional and national levels and campaign outside of their network.[87] In this case the work of the CCC deserves special attention. The CCC was founded in the Netherlands in 1989, and at the time it was called "Schone Kleren Campagne (SKC)".[88] Its campaigners were mainly female activists who wanted the world to know that women were responsible for making clothes under inhumane working conditions.[89] The CCC network's vision is that "all people working in the global garment and sportswear industries enjoy and exercise their human and labour rights at work … and are able to defend and improve the implementation of those rights".[90]

The CCC may, amongst other things, initiate days of action, panel discussions, information desks, learning opportunities, speeches, fashion shows or movie screenings in the hope of developing increased media exposure.[91] Upon receipt of the case, the CCC will, together with local organisations in the country where the alleged violation took place, explore possible ways to support the employees or activists. If the matter is urgent the CCC will classify such a case as an urgent appeal. Thereafter, the CCC may prepare online letters and transmit them to the MNE agents in the places of production or to their customers.

83 Ter Haar and Keune 2014 *IJCLLIR* 8.
84 Ter Haar and Keune 2014 *IJCLLIR* 8.
85 Marx and Wouters 2016 *Int'l Lab Rev* 440.
86 Terwindt and Armstrong 2019 *Int'l Lab Rev* 251.
87 CCC 2023 https://cleanclothes.org/about.
88 Sahan *Tactical Changes in the Clean Clothes Campaign* 42-43.
89 Ascoly and Finney 2005 https://ecommons.cornell.edu/server/api/core/bitstreams/f56a6d4e-1f54-4445-a14c-7ade27bbfb96/content.
90 CCC 2023 https://cleanclothes.org/about/our-global-strategic-framework.
91 Kryst 2012 *Interface* 114.

The CCC must be commended for having created a simple referral procedure for employees who believe that their human and labour rights have been violated. The CCC may also accept such cases even in situations where there is no formal referral.[92] For instance, in *Angelica Manole v Tanex Clothing Factory* the Romania-based factory makes clothing for MNEs such as Ted Baker. In 2020 the factory withheld half of the employees' wages without giving any reason. One of the aggrieved employees, Manole, posted a photo of her paycheck online. Her post received 996 responses and was shared 2682 times. Through the support of international trade unions, organisations from the network of CCC and supporters worldwide, Manole and her colleagues were eventually paid their outstanding wages, and the Minister of Labour Inspectorate issued an apology.

It is submitted that a criterion for assessing whether a case qualifies to be classified as an urgent appeal is not written in any document. This area needs to be cleared as a matter of urgency to ensure the certainty and predictability of cases. CCC's weakness is that it entirely relies on exerting pressure, naming, and shaming MNEs only. There is no legal obligation on the part of the MNE to comply with the requests from NGOs.

It is submitted that NGOs have shown the capability to address labour disputes involving MNEs and third-party companies involved in GSCs. However, these NGOs operate without legal recognition, which undermines the effectiveness of their decisions. As a result, their outcomes are not binding and cannot be enforced, making them largely ineffective. Therefore, there is a need to grant legal recognition to their work in the area of MNE dispute resolution. This could be achieved by expanding the ILO's focus to include the accreditation of NGOs.

9 Conclusion

The responsibility of MNEs for the prevention of human and labour rights violations across their global operations remains a contentious topic among scholars and human rights professionals. The work of NGOs in regulating MNEs has shown promising results. This regulatory regime offers a viable alternative to statutory dispute resolutions, which are often hampered by technical and jurisdictional challenges. Such a system can achieve results by bypassing the technical and jurisdictional challenges faced by employees in statutory dispute resolutions. The regime can hold MNEs accountable for a wide range of workplace issues, including those committed by their suppliers/sub-contractors. It is submitted that the regulation of MNEs

92 Check #Payyourworkers date unknown https://www.payyourworkers.org/ for what you can do to help solve it. SKC date unknown https://www.schonekleren.nl/urgent-appeal/het-verhaal-van-angelica/.

through NGOs' involvement, for instance, could reduce the capacity of states to resist emerging international law. This system may add ILO standards for MNEs even if they are not part of national laws.

By collaborating with NGOs, MNEs commit to being under the scrutiny of international law, including the conventions not yet ratified by their host or home countries. Further, NGOs may establish higher standards than those of host countries. Perhaps the most important advantage of labour dispute resolution through NGOs is that NGOs complement state functions because private regulation relieves pressure on scarce state resources and complements state efforts. It is argued that the most practical approach to addressing the current gap would be to establish a partnership between the ILO and NGOs that have expertise in the resolution of labour disputes between MNEs and employees.

It is proposed that the ILO grant accreditation to NGOs based on Article 12 of its Constitution. This accreditation will be awarded only if the NGO demonstrates its ability to effectively perform dispute resolution functions and its commitment to upholding ILO standards. It is intended that these accredited NGOs will manage complaints against their member MNEs, while the ILO will be responsible for setting the necessary standards. It is anticipated that both MNEs and NGOs will accept these proposed amendments, as similar procedures are already in place through the adoption of MNE codes of conduct.

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List of Abbreviations

CCC	Clean Clothes Campaign
CCMA	Commission for Conciliation, Mediation and Arbitration
CILSA	Comparative and International Law Journal of Southern Africa
EJSL	European Journal of Social Law
FDI	foreign direct investment
FLA	Fair Labour Association
GSC	global supply chain
Geo Wash Intl L Rev	George Washington International Law Review
Harv Hum Rts J	Harvard Human Rights Journal
ICLQ	International and Comparative Law Quarterly
ILO	International Labour Organization
Int'l Lab Rev	International Labour Review
IJCLLIR	International Journal of Comparative Labour Law and Industrial Relations
IJHR	International Journal of Human Rights
Int'l Lab Rev	International Labour Review
JLA	Journal for Legal Analysis
Mich J Int'l L	Michigan Journal of International Law
Minn L Rev	Minnesota Law Review
MNEs	multi-national enterprises
NCP	National Contact Point
NGO	non-governmental organisation
OECD	Organisation for Economic Co-operation and Development
OEEC	Organisation for European Economic Cooperation
Pace Int'l L Rev	Pace International Law Review
SKC	Schone Kleren Campagne

TB	tuberculosis
UN	United Nations