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Contents

Decent Work in Global Supply Chains: Mapping the Work of the International Labour Organization

Valentina Grado

Contents

1 Introduction

Notoriously, economic globalisation has led to a shift in the way business is conducted. Originally it was largely confined within the borders of individual states; then it assumed the form of multinational enterprises (MNEs), with mother

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companies located mostly in the Global North (the so-called *home* states) and their subsidiaries operating mostly in the Global South (the so-called *host* states); ultimately, it became large, fragmented global supply chains (GSCs), that is transnational networks of companies operating in several different countries. The latter encompass a broad range of commercial activities—such as conception, production and distribution of goods and services—often coordinated by (home) lead firms (brand-name MNEs, and global retailers), who, in turn, have business relationships with hundreds of corporations mainly domiciled in host states and acting as suppliers, contractors, and other business partners. In 2015, the International Labour Organization (ILO) noted that "the number of GSC-related jobs has increased rapidly over the past decades. . .[o]ut of 40 countries with available data to which methodology could be applied, 453 million people where employed in GSCs in 2013, compared with 296 million in 1995". It further observed that "[m]ost of the overall increase is driven by emerging economies, where GSC-related jobs grew by an estimated 116 million. Overall, GSC-related jobs represent 20.6 per cent of total employment among the countries analysed, compared with 16.4 per cent in 1995".[1] While GSCs have created in fact millions of jobs and opportunities for economic and social development, at the same time they have been however in the public spotlight due to both their several and serious disregards of labour standards and the significant decent work challenges they pose.

Against this backdrop, this chapter deals with the so far done ILO's work on the crucial topic of decent work in GSCs. Our discussion proceeds in several stages, as follows. Section 2 first highlights the main reason of the Organization's long inaction on the phenomenon of GSCs. Section 3 describes the work of the (2016) 105th Session of the International Labour Conference (ILC) dealing with this issue, by critically analysing—respectively—the ILO Office pre-conference report on ILC's agenda item IV; the debate on it during the ILC 15th Session; the conclusions achieved by the ILC on the topic; and the merits and demerits of these conclusions. Sections 4–6 will then illustrate and discuss the further significant work recently undertaken by the ILO Governing Body, namely by: the adoption of the (2017) Programme of Action and the Roadmap on decent work in GSCs; the new (2017) version of the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (ILO MNE Declaration) and, finally, by its action on specific segments of GSCs that are represented by *export processing zones* (EPZs). Section 7 concludes by discussing the adequacy of the recent and foreseen ILO's initiatives in the field of GSCs in delivering better labour conditions for workers within them.

[1] ILO (2015), p. 132.

2 The Main Reason for ILO's Inaction on International Supply Chains Till 2016

Within the ILO's framework, its tripartite executive body, the Governing Body, has the task of setting items for discussion by the ILC. In March 2006, the workers' representatives in the Governing Body proposed to put on the agenda of the ILC the issue of decent work in GSCs.[2] As it is well known, the decent work concept was formulated in 1999 by the ILO's constituents as a means to identify the Organization's main purpose. Since then the primary goal of the ILO has become the promotion of opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity. Decent work should be achieved through the implementation of the ILO's four strategic objectives, that is: promoting—respectively—employment, social protection, and social dialogue as well as promoting, respecting, and realising the fundamental principles and rights at work.[3] For the purpose of this chapter it is important to remember that the latter objective incorporates the 1998 ILO Declaration on Fundamental Principles and Rights at Work, which identifies four core labour standards (CLS), i.e.: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.

The 2006 workers' aforementioned proposal was supported only by a handful of governments and not by the employers, who underlined that the ILO international labour standards covered all possible situations and relationships in the world of work; therefore, in their opinion, the important thing was not so much to develop new general standards, but rather to ensure the more effectively application of the existing standards.[4] Even if the workers' representatives continued to support the item on decent work in GSCs at *every* subsequent meeting of the Governing Body,[5] it was only after the Rana Plaza disaster in Bangladesh in April 2013 and the first strategic report of ILO Director-General (Guy Ryder) that the Governing Body decided, in October 2013, to place on the agenda of the (2016) 105th ILC's Session an item for general discussion on decent work in GSCs. It is worth noting that in his first strategic report Ryder acknowledges the ILO's inadequacy in attending to the contemporary realities of the world of work. A distinctive feature of these realities is the fragmentation of production processes along increasingly complex and dispersed production chains, which may cover several countries or even regions.[6] According to the report, the urgent need for the ILO to engage with private enterprises is due to

[2]ILO (2006), par. 9.

[3]ILO (2008). On decent work see e.g. ILO (1999) and Nizami and Prasad (2017).

[4]ILO (2006), par. 5.

[5]Thomas and Turnbull (2018), p. 546.

[6]ILO (2013), para. 74.

both the serious abuses occurring within GSCs and the Organization's weak response to those violations.[7] Most importantly, on the issue of how the ILO could address the matter of labour practices along international chains, the report acknowledges the importance of the responsibilities of member states to apply ratified conventions but—at the same time—it wonders whether this purely state-centric approach is sufficient. In the light of the fact that private actors are the drivers of the constantly shifting supply chains or production networks, it indicates that additional opportunities for the ILO to promote decent work in their operations should be considered.[8] In other words, the report seems to recommend the development of a system of labour governance based not only on the traditional (horizontal) territorial approach (states bearing responsibility towards workers within their jurisdiction) but also on vertical labour governance along the supply chain (transnational corporations also responsible for enforcing labour rights within their chains of production).

3 The (2016) 105th Session of the International Labour Conference: Agenda Item IV—Decent Work in Global Supply Chains

On April 2016, the Office published a pre-conference report (Sect. 3.1). This was followed by a debate on it in June 2016 (Sect. 3.2). Finally, in June 2016 the ILC agreed on a set of conclusions on the fourth item on the agenda of its 105th Session (Sect. 3.3), characterised—as we will discuss—by several merits and demerits (Sect. 3.4).

3.1 The Pre-conference Report of the ILO Office

The Office background report (*Decent work in global supply chains*), consisting of five chapters and an appendix, aims to provide evidence regarding employment, working conditions and labour rights in GSCs.[9]

Its first chapter (*Introduction: Setting the stage*)[10] underlines the growing importance of GSCs as a common way of organising investment, production and trade in the global economy. It recognises that GSCs are complex, diverse, fragmented, dynamic and evolving organizational structures and defines them as "the cross-border organization of the activities required to produce goods or services and the process of bringing them to consumers through inputs and various phases of

[7] Ibid., para. 141.
[8] Ibid., para. 75.
[9] ILO (2016a).
[10] Ibid., pp. 1–4.

development, production and delivery".[11] In addition, this chapter discusses GSCs' major features, which are analysed more in detail in chapter two. It further recognises that, on the one hand, GSCs have contributed to job creation (particularly in developing countries), technology transfer, higher-value activities and skills development. On the other hand, the practice of cross-border sourcing of goods and services places significant downward pressure on wages, working conditions and the respect for fundamental rights of workers participating in the chains. Finally, this chapter highlights the existence of governance gaps and the difficulties created by cross-border sourcing versus national level legislation, regulation and jurisdiction.

The report's second chapter (*Global supply chains and the world of work*)[12] describes the GSCs' main drivers (telecommunications, technologies, logistics and trade agreements) and their various forms within two main types of intra- and inter-enterprise relationships, i.e.: (1) foreign direct investment (FDI) by MNEs with direct ownership of their overseas subsidiaries; and (2) the increasingly predominant model of international outsourcing, where lead firms do not have ownership or a direct contractual relationship, except with first-tier suppliers and intermediaries. Importantly, it defines the lead firm (mostly based in developed countries) as "the company that controls the global supply chain and sets the parameters with which other firms in the chain must comply, and is typically responsible for the final sale of the product".[13] This chapter further describes the typical typologies of GSCs that is producer-driven or buyer-driven. Producer-driven supply chains refer to those chains in which producer enterprises have the most significant influence over the production process, with wholly owned subsidiaries worldwide. Instead, in buyer-driven chains, lead firms (retailers and brand-name companies) make decisions with which supplier companies must comply. Within this second type of GSCs there is an asymmetrical power between the global buyer and the supplying companies and the pressure of the former on producer prices and standards of production may generate negative impacts on working conditions and fundamental rights of the workers participating in the chains. This global pressure can further encourage supplier firms to further subcontract parts of their production to suppliers in subcontracted tiers who use forms of employment which may not comply with labour standards, in some extreme cases resorting to forced and child labour. This chapter also describes the major production, trade and investment trends and the scale and quality of employment in GSCs. Data, statistics and case studies are presented on these topics. The studies cited on quality of employment show both positive and negative results, the latter being violations of labour standards, frequently in lower tiers. As far as wages and working time are concerned, the chapter recognises that the existence of low wages remains a source of concern; women are paid at the low end of the scale; wage structures do not reward skills; productivity gains are not shared with workers; low prices paid to suppliers create pressure down

[11] Ibid., p. 1.
[12] Ibid., pp. 5–26.
[13] Ibid., p. 5.

the supply chain to reduce costs, which may lead to downward pressure on wages; statutory minimum wages are often too low and this contributes to excessive overtime work, which in turn raises concerns about occupational safety and unhealthy working conditions. On the subject of non-standard forms of employment, their use by suppliers presents significant regulatory challenges. With regard to migrant workers, the latter are often found in non-standard forms of employment; moreover, the increasing cross-border flows of workers have also resulted in a greater risk of forced labour and trafficking in persons. In this chapter there is also a brief section on EPZs, describing their growth, exemptions from national labour laws in some countries, lack of enforcement of labour legislation and mixed records both in economic and social terms.

Chapter three of the background report (*Upgrading for decent work in global supply chains*)[14] explores the process through which the employment created by GSCs may attain decent work (*upgrading*). Particularly, it explores two forms of upgrading in GSCs: economic upgrading (that is, the process of suppliers moving from low-value to high-value activities in global chains) and social upgrading (that is, the process of achieving decent work conditions in GSCs), underling that to achieve decent work and desired developmental outcome social upgrading must accompany economic upgrading. Importantly, it specifies that social upgrading concerns the qualitative aspects of employment and does not condone the violation of applicable national laws and international labour standards, including the four CLS which must be respected everywhere, at all times and under all circumstances. However, it underlines the existence of challenges for social upgrading with respect to all four CLS. It also illustrates examples of the positive and negative combination of economic and social upgrading, with the conclusion that the link between economic and social upgrading is not automatic. Therefore, it calls for a clear role and need for governance mechanisms that support and promote integrated and mutually reinforcing economic and social upgrading.

The report's chapter four (*Governance in global supply chain*)[15] recognises the governance deficit in GSCs, partly because of a lack by governments of host countries of the institutional capacities to regulate and enforce labour standards and partly because of the cross-border nature of supply chains. It considers the different programmes and structures that have evolved to govern particular aspects of global supply operations, by categorising them into four types: public governance, private governance, social partners' and multilateral initiatives.

Public governance describes the state's duty to enforce national labour laws and regulations and to implement ratified international labour conventions.[16] This includes labour administration, inspection and enforcement functions, such as dispute resolution and prosecution of violators. The report highlights the challenges particularly applicable to GSCs as related to: (1) weak laws and law enforcement

[14]Ibid., pp. 27–37.
[15]Ibid., pp. 39–64.
[16]Ibid., pp. 41–47.

mechanisms in host states; (2) lack of jurisdiction, respectively, of the host states (to eventually hold foreign lead firms accountable) and of the home states (to regulate the extraterritorial conduct of corporations headquartered within their own jurisdiction); (3) the twin doctrine of separate corporate personality and limited liability, allowing MNEs to minimise legal liability for labour violations committed by their subsidiaries and/or suppliers; and (4) recent national legislative initiatives aimed at improving transparency in supply chains by lead firms, even if their impact on sustainable workplace compliance cannot be determined yet. This part of the report further describes some policies that have been developed to increase labour compliance, such as labour provisions in trade agreements, public lending and public procurement policies. These all have potential but their overall impact is not significant enough.

Private governance[17] is led by companies, employers' organizations or industry associations through private compliance initiatives, such as codes of conduct and social auditing; certification initiatives or other self-reporting mechanisms; sectoral initiatives and social labelling initiatives. According to the report such instruments have many shortcomings, including: their limitation to upper-tier supplies; their weakness in detect violations of enabling rights, such as freedom of association and the right to collective bargaining; inadequate accountability; and their failure to address the root causes of non-compliance.

Social partners' initiatives take place at the enterprise, sectoral, national or international levels.[18] These mechanisms require negotiation between workers and the employer. Examples of such governance include social dialogue, collective bargaining, multi-stakeholder initiatives (in which NGOs are often included) and international framework agreements between MNEs and global union federations. Although social partners are crucial to the effective implementation and enforcement of national labour laws, inclusiveness may be limited due to the lack of participation of: (1) lead firms at the national level; (2) small and medium-sized enterprises (SMEs) at the local level, and (3) union affiliates in workplaces (with regard to international framework agreements).

Multilateral initiatives include international regulatory mechanisms set up by international organizations.[19] The most relevant to this respect are the ILO MNE Declaration; the OECD Guidelines for Multinational Enterprises; the UN Global Compact, and the UN Guiding Principles on Business and Human Rights (UN Guiding Principles). Although these multilateral initiatives may require reporting, monitoring activities or complaints processes, the report underlines that they have limited capacity to enforce their standards directly.

The second section of background document's chapter four[20] indicates that, in order to close the governance gap in GSCs, there is a need to reinforce the layers of

[17]Ibid., pp. 47–52.
[18]Ibid., pp. 52–58.
[19]Ibid., pp. 58–61.
[20]Ibid., pp. 61–64.

governance and strengthen public capacity and social dialogue. It also describes three examples of how improved governance could be applied to promote decent work, such as the comprehensive programme to combat forced labour in Brazil; the ILO-IFC Better Work programme; and the ILO Maritime Labour Convention (2006).

The report's last chapter (*The way forward*)[21] focuses on the need to use a holistic approach to promote decent work in GSCs. It underlines, in particular, the role of the ILO in bringing together the main actors and stakeholders responsible to bridge governance gaps; the need to promote international labour standards and to assess whether additional guidance or *standard* (the last word in ILO-language meaning a *convention*) are needed to effectively promote decent work in GSCs; closing governance gaps by the coordination and combination of different and complementary compliance mechanisms; promoting inclusive and effective social dialogue at different levels including cross-border; strengthening development cooperation programmes; deepening the value of existing processes; strengthening labour administration systems; closing the knowledge gap and improving statistics; and, promoting partnerships and improving coherence and coordination between regional and multilateral organizations with mandates in closely related fields.

Under the perspective of a thorough evaluation of the content and actual relevance of the pre-conference report, it should be recognised that—although providing a complete and up-to-date assessment on the situation of decent work in GSCs—it presents two major limitations. The first one relates to the structure and functioning of these chains (examined in chapter two). According to the report, global buyers—as lead firms—control their supply chains and can, through their market power, dictate prices and the details of production which negatively affect wages, working conditions and the respect of CLS of the workers within the chains. In other words, the report highlights some of the ways in which MNEs may *contribute* to violations of labour standards by their *own activities*, occurring—for example—in case the buyer demands significant last-minute changes in product specifications without adjusting price or delivery dates, thus creating strong incentives for suppliers to breach international labour standards. This first scenario may happen in supply chains with a captive or even hierarchical governance structure, which are characterised by a group of small suppliers that are dependent on one or a few MNEs in their resource and market access.[22] However, as already pointed out by scholars, there are also other forms of GSCs governance, for example the modular chain governance, where major suppliers are able to operate independently of the lead firms and the latter does not control the supply chain.[23] In this second scenario the MNE is *not contributing* to the abuses by its own activities, but nevertheless it is implicated by its *link* to the goods or services it procures, e.g. suppliers use child labour to manufacture a product for the contracting enterprise (the buyer), without

[21] Ibid., pp. 65–68.

[22] Gereffi et al. (2005), p. 84.

[23] Ibid.

any pressure (contribution) from this enterprise to do so. As we will see below, a *different responsibility* of the MNE is attached to this second scenario according to the UN Guiding Principles.

The second major limitation relates to the governance gaps, as the report rightly acknowledges. To this respect, as already mentioned, chapter four reviews existing regulatory approaches to promote decent work in GSCs and it underlines their many shortcomings in the field of public governance, private governance, social partners' and multilateral initiatives. However, taking into account that the second section on "closing the governance gaps" only describes three example of improved governance and that the first two of them belong to the traditional (horizontal) territorial approach of labour governance, the report seems—in our opinion—to discuss not sufficiently how existing governance gaps could be close; for example, by the adoption of a new ILO convention on GSCs.

3.2 The Debate on Agenda Item IV at the ILC

As foreseeable, during the debate on agenda item IV at the 2016 Session of the ILC, the employers' and the workers' representatives were sharply divided on issues such as whether GSCs determine opportunities and/or challenges for the realisation of decent work, whether there is a governance gap at the international level; and, if so, whether a new standard (that is a convention) on GSCs should be adopted.

The employers highlighted that GSCs have stimulated growth, created jobs and contributed to productive employment and decent work. They argued that, while there are decent work deficits in some GSCs, these deficits are not unique to cross-border supply chains, but rather reflect the challenges in the general economy, such as a high prevalence of informality, ineffective labour inspections and legal systems, and inadequately developed social protection systems. For example, referring to the Rana Plaza tragedy, they stressed that the root cause was the lack of capacity of the government to implement and enforce its laws, including issuing of building permits and conducting building safety inspections. According to them, there was no evidence of a governance gap at the international level caused by cross-border supply chains, rather only a lack of implementation and enforcement of governance at national level. In addition to ratified international labour standards, the ILO Declaration on Fundamental Principles and Rights at Work, and the UN Guiding Principles were considered by the employers fully adequate to address decent work issues in all circumstances, including cross-border supply chains; what was needed was more effective implementation of national laws and regulations. Therefore, according to them no new standard setting on supply chains was required. Furthermore, the employers' representatives disagreed with the inference in the pre-conference report that lead firms always held control over the GSCs, for instance to dictate prices and the details of production in the supply chains, and as such

contribute to the violations of labour standards committed by their overseas subsidiaries and/or suppliers.[24]

In contrast, the workers' representatives underlined the unequal power between lead firms and subcontractors which place a significant downward pressure on wages, working conditions, and the respect of CLS of workers within the chains. In their opinion, the subcontracting to SMEs abroad, which is characteristic for the business model in GSCs, had contributed to decent work deficits. One cause of such deficits is the lack of local legislation and its enforcement, made difficult by the cross-border nature of the production; the other is the weak coordination and the lack of enforceable instruments to hold governments and business accountable. On the latter point, it was highlighted that currently the responsibility of MNEs for the acts of their subsidiaries or suppliers abroad is governed largely by voluntary guidelines such as the ILO MNE Declaration, the OECD Guidelines for Multinational Enterprises, and the UN Guiding Principles; however, those guidelines have not succeeded in changing practices. In addition, a major problem in workers' opinion is the lack of adequate remedy when their rights are violated. Local suppliers where the violations occur are unlikely to face indeed accountability, often because of weak, under-resourced or corrupt administrative and judicial processes. At the same time, lead firms are often de facto immune from legal accountability, as there might be no course of legal action or jurisdiction in the host or home country when a violation is caused by their suppliers or subsidiaries. To address gaps in governance, the workers' representatives asked for a revision of the ILO MNE Declaration; the creation of a reporting mechanism whereby breaches of the ILO MNE Declaration could be addressed effectively and the adoption of a convention on decent work in GSCs. Central to this convention should be the obligation of states to pass laws aimed at regulating the conduct of enterprises under their respective jurisdiction, wherever the alleged harms may occur. Another component of the instrument should be mandatory due diligence, with respect to international labour standards, and an obligation for transparency of supply chains; guarantees for freedom of association and the right to collective bargaining at all levels of the supply chain; minimum wage setting mechanisms to ensure living wages; the promotion of industry-wide and cross-border bargaining and the promotion of secure employment relationships in GSCs. The convention should include, finally, further guidance on how to ensure the implementation of existing standards, bring together the provisions in existing conventions relevant to GSCs, and provide an integrated framework applicable throughout the chain.[25]

A few considerations are worth to be made with regard to the polarised views of employers' and workers' representatives. Beginning with the former, their position on the foremost responsibility of governments to ratify and implement ILO conventions and, especially, to enforce national regulations is certainly sharable, in the light of the fact that labour rights violations in GSCs are often linked to governance gaps

[24]ILO (2016b), e.g. paras. 12–19.

[25]Ibid., e.g. paras. 20–21, 69 and 129–132.

in host countries which allow local companies to act in contravention of national laws and/or international labour standards. Thus, reliance on effective host country regulation and remedies is, on the one hand, critically important for ensuring observance of workers' rights but, on the other hand, it remains a long-term proposition due to—inter alia—the enormous pressure put on these countries by MNEs which threat the withdrawal of business if strong protective standards are enforced (the so-called *race to the bottom* phenomenon). Second, the employers' argument that the existing regulatory framework (that is, national-level enforcement of labour standards and the UN Guiding Principles) is an adequate response to serious abuses of labour standards in GSCs is—instead—in our opinion *at least* doubtful**,** in the light—respectively—of the transnational nature of some business operations and the limitations (discussed in what follows) of the currently international standards on business and human rights, such as the UN Guiding Principles.

Turning to the workers' position, their proposal for a new convention based—inter alia—on (home) states' regulations of the extraterritorial conduct of enterprises within their jurisdiction and on mandatory due diligence for companies throughout their cross-border supply chains is, certainly per se, commendable; but, admittedly, it also raises many questions, such as on the legality under customary international law of these (home) regulations with extraterritorial reach (as we will see below), on the potential effectiveness of a convention and—especially—on the actual feasibility of such a convention.

During the 2016 ILC debate, with a clear divide between employers and workers, the position of governments' representatives became crucial; and several of them—especially from the European and the African continents—shared the workers' views on the existence of governance gaps[26]; the need for a new binding international regulation or, at least, to assess whether current ILO instruments are sufficient to promote decent work in GSCs or whether there is a need for new ones.[27]

3.3 *The Outcomes of the 105th ILC Session on Agenda Item IV*

After many heated debates and several late-night negotiating sessions, a set of conclusions was finally agreed by the ILC.[28] In what follows, a brief illustration of their very relevance and actual scope seems useful to the end of this study.

On the subject of the opportunities emerged from GSCs for the realisation of decent work,[29] the ILC conclusions—after having highlighted that GSCs are complex, diverse and fragmented—recognise that those chains have contributed to

[26]Ibid., e.g. paras. 27, 29, 79, 83, 140 and 175.

[27]Ibid., e.g. paras. 45, 147, 156 and 161.

[28]ILO (2016c).

[29]Ibid., paras. 1–2.

economic growth, job creation, poverty reduction and can contribute to a transition from the informal to the formal economy. In addition, GSCs are considered being a possible engine of development by promoting technology transfer, adopting new production practices and moving into higher value-added activities, which would enhance skills development, productivity and competitiveness.

With regard to the challenges for the realisation of decent work,[30] the conclusions indicate that failures at all levels within GSCs have contributed to decent work deficits in the areas of occupational safety and health, wages, and working time. Such failures have also contributed to: (1) the undermining of labour rights, particularly freedom of association and collective bargaining; (2) informality and non-standard forms of employment; (3) the acute presence of child labour and forced labour in the lower segments of some GSCs; and (4) the presence of migrant workers and homeworkers that may face various forms of discrimination. In addition, there is the presence of women who are disproportionately represented in low-wage jobs in the chain's lower tiers and they are too often subject to discrimination and various forms of workplace violence. Furthermore, there are decent work deficits in a significant number of EPZs linked to GSCs. Finally, the conclusions recognise that governments may have limited capacity and resources to effectively enforce compliance with national laws and, most importantly, that these governance gaps have being exacerbated by the expansion of GSCs.

As far as the past interventions are concerned,[31] the conclusions recognise that despite a wide range of policies, actions and programmes have been put in place by the Office, ILO constituents and other stakeholders, decent work deficits and governance gaps continue to exist.

On the subject of the appropriate future interventions,[32] the conclusions refer to the UN Guiding Principles which are grounded in the recognition of: (a) states' existing obligations to respect, protect and fulfil human rights; (b) the role of business enterprises, required to comply with all applicable laws and to respect human rights; and (c) the need of access to effective remedies for victims. In addition, the conclusions underline that the ILO, due to its global mandate, expertise and experience in the world of work, is best placed to lead global action for decent work in GSCs. More in detail, the conclusions state that governments, business and social partners have different but complementary responsibilities in promoting decent work in GSCs.

As to states,[33] they have in particular—according to the ILC conclusions—the duty to adopt, implement and enforce national laws and regulations, and to ensure that CLS and ratified labour conventions protect and are applied to all workers. Governments should specifically: (a) strengthen labour administration and inspection systems in order to ensure full compliance with laws and regulations and access

[30] Ibid., paras. 3–7.

[31] Ibid., paras. 8–12.

[32] Ibid., paras. 13–14.

[33] Ibid., paras. 15–16.

to effective remedy; (b) actively promote social dialogue and CLS, including in EPZs; (c) use public procurement to promote CLS; (d) where appropriate, require enterprises owned or controlled by the state to implement due diligence procedures; (e) create an enabling environment to help enterprises to identify sector-specific risks and implement due diligence procedures in their management systems and, in addition, clearly communicate on what they expect from enterprises with respect to responsible business conduct; (f) stimulate transparency and encourage, and, where appropriate, require that enterprises report on due diligence within their supply chains to communicate how they address their human rights impacts; (g) fight corruption, including by protection of whistle-blowers; (h) consider to include CLS in trade agreements; (i) set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations; (j) implement measures to improve working conditions for all workers, including in GSCs; (k) target specific measures at SMEs to increase their productivity and promote decent work; (l) provide guidance and support to employers and business to take effective measures to identify, prevent, mitigate and account for how they address the risks of forced or compulsory labour in their supply chains; (m) implement policies to facilitate the transition from the informal to the formal economy; and (n) cooperate through regional bodies to harmonise laws and practices.

With specific regard to businesses,[34] according to the conclusions they have a responsibility to respect human and labour rights in their supply chains consistently with the UN Guiding Principles, and to comply with national law wherever they do business. In particular, enterprises should carry out human rights due diligence in order to identify, prevent, mitigate and account for how they address their adverse human rights impacts.

As far as the social partners are concerned,[35] they should jointly promote decent work and CLS, including in GSCs, through sectoral initiatives, collective agreements, cross-border social dialogue and international framework agreements, where appropriate.

Finally, with regard to the ILO action,[36] the conclusions call upon the Organization to develop a specific programme of action to address decent work in GSCs based—inter alia—on some ILO Declarations, all relevant international labour standards, and various conclusions adopted by the ILC. In particular, under the programme of action the ILO should, first of all, promote the ratification and implementation of the ILO standards relevant to decent work in GSCs. Second, it should strengthen capacity building and provide technical assistance to member states on labour administration and inspection systems, including in EPZs. Third, the ILO should promote effective national and cross-border social dialogue, thereby respecting the autonomy of the social partners. Fourth, the Organization should

[34]Ibid., paras. 15 and 18.

[35]Ibid., para. 17.

[36]Ibid., paras. 22–23.

assess the impact and scalability of development cooperation programmes, and develop sectoral and other approaches to address decent work challenges in GSCs. Fifth, the ILO should provide leadership to drive policy coherence among all multilateral initiatives and processes related to decent work in GSCs and work in partnership with international organizations and forums (e.g. UN, OECD, G7 and G20), and take into account international frameworks such as the UN Guiding Principles, and the OECD Guidelines for Multinational Enterprises. Sixth, the Organization should strengthen its capacity to give guidance to enterprises on the application of labour standards within their supply chains and make information available on specific country situations, laws and regulations, including on the implementation of labour rights due diligence in coherence with already existing international frameworks. Seventh, the ILO should consider adopting an action plan to promote decent work and protection of CLS for workers in EPZs. Eighth, it should take a proactive role in generating and making accessible reliable data on decent work in GSCs, in cooperation with all relevant organizations and forums, to create synergies in statistics and research. Finally, the Organization should carry out further research and analysis to better understand how supply chains work in practice, how they vary by industry, and what their impact is on decent work and CLS.

The conclusions further remember[37] that the ILO MNE Declaration is the Organization's framework supported by all tripartite constituents that aims at maximising positive impacts of MNEs and resolve possible negative impacts. Within the review process of this instrument, the Governing Body should consider the setting up of mechanisms to address disputes.

Most importantly, in their last paragraph[38] the conclusions recognise that current ILO standards may not fit for the purpose to achieve decent work in GSCs. Therefore, the ILO should review this issue and convene, as soon as appropriate, by decision of the Governing Body, a tripartite meeting to: (a) assess the failures which led to decent work deficits in GSCs; (b) identify the salient challenges of governance to achieving decent work in GSCs; and (c) consider what guidance, programmes, measures, initiatives or standards are needed to promote decent work and/or facilitate reducing decent work deficits in GSCs.

3.4 Merits and Demerits of the 2016 ILC Conclusions on Agenda Item IV

In the light of the above, the concluding text agreed by the 2016 ILC on decent work in GSCs seems to show many merits but also several pitfalls, which are worth of a closer comment on.

[37]Ibid., paras. 24 and 23(e).

[38]Ibid., para. 25.

Beginning with the former, it is clear that—by affirming that GSCs are complex, diverse and fragmented—the conclusions recognise first of all the existence of *different structures* of GSCs (captive or modular, simple or complex) and, therefore, the *different ways* MNEs (or lead firms) may be involved with negative impacts occurring in the group or network. Second, the text highlights in a balanced way the many *benefits* brought about by GSCs but, at the same time, the numerous decent work *deficits* created by them. Third, by underling the existence of failures *at all levels* within GSCs, the conclusions—again in a balanced way—underline that *both* MNEs (lead firms) and their suppliers may be responsible for social irresponsible behaviours. Fourth, the text clearly acknowledges the role of GSCs in *exacerbating governance gaps*, finally settling a question that was initially denied by the employers' representatives during the debate. Fifth, the conclusions admit the *insufficient* interventions (by the Office, ILO constituents, and other stakeholders) put in place in the past, the *current* existence of decent work deficits and governance gaps; and the need to *address* these challenges. Finally, in order to ensure an improvement of the conditions of workers within GSCs, the text emphasises that governments, business and social partners have *complementary* but *different* responsibilities. Significantly in this respect the conclusions *fully rely on* the UN Guiding Principles in order to define the different responsibilities of states and business enterprises for achieving decent work on GSCs. Thereby, they embrace a normative framework that, although has become a common reference point in the area of business and human rights, is characterised by strengths as well as limitations and pitfalls. Being clearly impossible to examine here in detail all these issues, we will limit our discussion on some key positive/critical aspects of the UN Guiding Principles most linked to the protection of international labour standards in GSCs.

As widely known, the UN Guiding Principles—endorsed by the UN Human Rights Council in 2011 and developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (Professor John Ruggie)—are not legally binding and do not create new international law obligations.[39] They aim to operationalise the former UN "Protect, Respect and Remedy" Framework developed in 2008 and based on three distinct but interlocked pillars: (a) the duty of states to *protect* human rights against abuses by third parties, including business enterprises; (b) the corporate responsibility to *respect* human rights; and (c) access to effective *remedy* for those who are harmed.[40]

As far as the Framework's first pillar is concerned, UN Guiding Principle 1 reiterates that the state's international human rights obligations require, inter alia, the duty to protect against corporate-related human rights abuses within its territory and/or jurisdiction by adopting appropriate steps to prevent, investigate, punish and redress such abuses through effective policies, legislation, regulations

[39]UN Human Rights Council (2011). For a comment see e.g. Mares (2012); Wetzel (2016), pp. 183–192.

[40]UN Human Rights Council (2008).

and adjudication. Thus, the UN Guiding Principles *as well as the 2016 ILC conclusions* recognise the (non-controversial) obligation of *host* States to protect worker's rights violations committed by local suppliers as well as subsidiaries of MNEs based on their territory. Further recommendations address by both texts to states vis-à-vis enterprises are: (a) where appropriate, require corporations owned or controlled by the state to implement due diligence procedures; (b) provide guidance on responsible business conduct; (c) encourage and (where appropriate) require self-reporting on due diligence and how enterprises address their human rights impacts; and, (d) set up clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.[41] With regard to this last invitation, the Commentary to UN Guiding Principle 2 explains: "[a]t present states are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis". Therefore, according to the UN Guiding Principles *home* states are not obliged to prevent human rights violations overseas by corporations domiciled in their territory and/or jurisdiction but they are permitted to do so provided two conditions are met: there needs to be a recognised basis of jurisdiction, and the actions of home states need to meet an overall reasonableness test, which includes non-intervention in internal affairs of other States.[42] Although this approach notoriously does not reflect increasing international recognition—by UN treaty bodies and some scholars—of the *legal obligation* of (home) states to regulate their transnational business activities,[43] we will confine our brief analysis on the legality under customary international law of the workers' proposed (home) states legislation that mandates due diligence (concerning international labour standards in the supply chain) by MNEs operating in their territories.

Before dealing with this issue, it is important to highlight the implications of mandatory due diligence concerning supply chains (which we will discuss again later on). Domestic supply chain-related law is an avenue by which home states (can) impose human- and labour-related norms *directly* on lead firms (mother companies of MNEs or global buyers) based on their territory and *indirectly* on their foreign subsidiaries and/or suppliers. Because the former has a legal responsibility to seek that the latter act in a responsible way, home states' lead firms are required to influence the conduct of their subsidiaries/suppliers in other countries and to impose due diligence requirements upstream in supply chain.[44] As a result, home states supply chain-related regulations (can) impose *indirect* obligations outside their

[41]UN Human Rights Council (2011), UN Guiding Principles 3–4 and their Commentaries; ILO (2016c), para. 16.

[42]UN Human Rights Council (2008), para 19.

[43]See, *ex multis*, Skogly (2017) and Krajewski (2018).

[44]For the potentialities and challenges posed by domestic laws regulating GSCs with respect to human rights and labour practices, whereby companies are not only regulated entities but also serve as regulators themselves (imposing standards on their suppliers in other countries) see e.g. Sarfaty (2015), pp. 421–422.

territory on foreign upstream companies and *indirectly* force them to comply with these rules. Therefore, self-evidently, these regulations raise two main questions: those of their legality in the light of—respectively—the rules of sovereignty and international jurisdiction and the principle of non-intervention in internal affairs.

Starting with the first issue, it could be argued that the aforementioned laws interfere with the host country's sovereign right under international law to regulate activities occurring within its jurisdiction and therefore produce extraterritorial effects by prescribing the adoption of a conduct outside the territory of the regulating state. However, it is important to underline that many domestic regulations may indeed have some effect beyond the territory of the regulating state, but not all of them will be considered as being applied extraterritorially. This is particularly the case of national supply chain-related laws address to corporations (with foreign activities) which are domiciled in the regulating (home) state. Indeed, they are in line with the rules on prescriptive jurisdiction; moreover—being enforced within the territory of the regulating (home) state—they seem also to be consistent with the rules on enforcement jurisdiction. Turning to the question on whether those national supply chain-related laws constitute a violation of the non-intervention norm by inducing changes in the host country's internal regulatory regime, it must be underlined that an intervention is prohibited only if it relates to a matter that concerns the *domestic affairs* of the target state. The workers' proposed (home) states regulations of transnational business activities, being aimed at producing compliance by local companies of domestic laws adopted after the ratification of the new ILO *convention*, would not constitute an unlawful intervention in the *internal affairs* of host states. This is because respect for existing laws does not negatively affect the political, economic or (importantly) the social system of (host) states which *freely* decided to be part of a new (labour) convention.

In the light of the above, it is possible to underline that the UN Guiding Principles *as well as the 2016 ILC conclusions*—by recognising only host states' obligations to protect as well as by giving a significant margin of appreciation to home states—take a rather *weak* approach to the role governments should play in achieving decent work in GSCs. It is also clear that the barriers to regulating corporate activity abroad are political rather than legal, in the light of the fact that customary international law does not prevent home states to act in this direction.

Turning to the Framework's second pillar, the UN Guiding Principles 11–24 set out the responsibility of business enterprises to respect human rights, the latter understood as a social expectation towards companies to avoid infringing upon the rights of others and to address adverse human rights impacts with which they are involved. According to them, this responsibility exists independently of states' abilities to meet their own human rights obligations; it applies to all enterprises, regardless of their size, sector, operational context, ownership and structure and it extends (over and above compliance with national laws) to all internationally recognised

human rights.[45] Companies are expected "to avoid causing or contributing to adverse human rights impacts through their own activities", but also "to seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts".[46] In order to meet the responsibility to respect, UN Guiding Principles 15–22 concretely require enterprises to have in place policies and processes, including: (a) a "policy commitment" on human rights compliance; (b) a "human rights due diligence" process to identify, prevent, mitigate and account for how they address their human rights impacts; and (c) processes to enable the remediation of any adverse human rights impacts they have caused or contributed to. With regard to the human rights due diligence process, it involves: (1) assessing actual and potential human rights impacts; (2) integrating and acting upon the findings; (3) tracking responses; and (4) communicating how impacts are addressed. This process should also draw on internal and/or independent external human rights expertise, and involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the enterprise and the nature and context of the operation.[47]

In light of this brief illustration, the Framework's second pillar provides some useful elements in order to qualify the corporate responsibility to respect human rights but—at the same time—it is characterised by several shortcomings.

Beginning with the former, it should be first mentioned the fact that the corporate responsibility to respect extends to *all internationally recognised human rights* understood, at a minimum, as those expressed in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the principles concerning fundamental rights in the eight ILO core conventions as set out in the 1998 ILO Declaration on Fundamental Principles and Rights at Work.[48] As a result, the responsibility to respect applies to the *four CLS as defined in the eight fundamental ILO conventions*[49]; as well as to *labour-related human rights* mentioned in the main human rights treaties, such as the right to, respectively, a fair and sufficient remuneration, safe and healthy working conditions, equal opportunity for promotion, and rest, leisure, reasonable limitation of working hours and holidays with pay.[50]

Moreover, the second pillar distinguishes between *three* levels of business' involvement with negative impacts on human rights, as: (a) a company may cause adverse impacts through its own activities (e.g. by employing itself child labour); (b) a company may contribute to such an impact through its own activities (e.g. through purchasing decisions which create strong incentives for a supplier to

[45]UN Human Rights Council (2011), UN Guiding Principles 11, 12 and 14 and their Commentaries.

[46]Ibid., UN Guiding Principle 13.

[47]Ibid., UN Guiding Principles 17–21 and their Commentaries.

[48]Ibid., Commentary to UN Guiding Principle 12.

[49]Bellace (2014), p. 185.

[50]On these labour-related human rights see e.g. MacNaughton and Frey (2016), pp. 626–628.

breach international labour standards); and (c) a company may be directly linked to adverse impacts through its business relationships yet without contribution on its part (e.g. without any pressure from the global buyer, the product contains components which are manufactured by suppliers using child labour). A different responsibility is attached to each scenario.[51] Where the company causes an adverse impact, it should take steps to cease the impact and engage in remediation. In turn, *contribution* and *linkage* are particularly relevant in the context of (domestic or global) supply chains. Where the enterprise is contributing to the abuse by its own activities, it should take appropriate steps to address those contributions (inter alia, termination and remediation). Finally, where the enterprise is implicated in the abuse solely by the direct link to its operations, goods or services through its supply chain relationships at whatever tier, appropriate action will depend on a number of factors such as the "enterprise's leverage over the entity concerned"; "how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences".[52] The combination of these variables will yield different conclusions as to what action should be taken. Appropriate responses by an enterprise may include: mitigating the risk that the adverse impact continues/recurs (when the enterprise possesses the leverage); seeking ways to increase the leverage to enable mitigation (when the enterprise lacks the leverage); and considering ending the relationship either where the enterprise lacks the leverage or where it is unable to increase its leverage. Therefore, the UN Guiding Principles incorporate an *extended corporate responsibility* with respect to its supply chain, which does not stop with the company's own activities, but also includes those adverse impacts that are directly linked to its products by its business relationships even beyond the first-tier relationships.[53]

Lastly, the second pillar introduces an innovative concept—*human rights due diligence*—as the means through which an enterprise can operationalise its responsibility to respect human rights in its own activities and supply chains. More in detail, UN Guiding Principle 17 defines the parameters for human rights due diligence: it should cover both the impacts that the business may cause (or contribute to) through its own activities and those that may be directly linked to an enterprise's operations, products or services through its business relationships. With regard to the nature and extent of the human rights due diligence, it should be commensurate with the severity (and probability) of the actual and potential adverse impacts; the nature and context of the enterprise's operations; and its size. Lastly, the timeframe of human rights due diligence should be ongoing, because risks may change over time as the enterprise's operations and operating context evolve.

[51]UN Human Rights Council (2011), UN Guiding Principle 19 and its Commentary.

[52]Ibid. Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of the entity that causes a harm.

[53]Commentary to UN Guiding Principle 17 acknowledges that a supply chain may have so many numbers of entities that a reasonable approach to human rights due diligence in such a context would warrant prioritisation for assessment of general areas (e.g. suppliers' operating context, operations, products or services involved) where the risk of adverse human rights impact is highest.

Therefore, human rights due diligence goes *beyond* corporate due diligence (that is, processes to manage enterprises' own risks), being primarily aimed at protecting actual and potential victims of negative human and labour rights impacts.[54] Moreover, in addition of being a *process* which help ensure that the expectations placed on business are both reasonable and feasible in the light of the circumstances, human rights due diligence has started to be used as a basis for attaching *legal liability* to lead firms throughout their group or network.[55]

Turning to the limitations of the second pillar, the most significant one is the voluntary and non-binding nature of the requirements for corporate business (domestic or transnational) operations. In this respect, it is sufficient to underline that according to the 2018 report of the UN Working Group on the issue of human rights and transnational corporations and other business enterprises—the body mandated inter alia to promote good practices and lessons learned on the implementation of the UN Guiding Principles—only a small number of committed enterprises, mainly large companies, have made progress on due diligence. The majority of companies—both large and small—still need to embrace their human rights responsibilities, including through an effective, efficient and inclusive due diligence process.[56]

Another important pitfall concerns the specific issue of *corporate respect in the supply chain*. As already mentioned, this pillar uses two concepts in relation to the attribution of responsibility to the enterprise. The first is *contribution to harm*, occurring for example where a decision or action taken by a global buyer creates strong incentives for a foreign supplier to breach international labour standards. Self-evidently, in this scenario the responsibility to respect is grounded in the enterprise's *own* impacts. The second concept is the enterprise's responsibility to act in order to seek to *mitigate* the occurrence of negative impacts caused by its direct suppliers or even sub-tier suppliers, even if it has neither caused not contributed to harm. In this second crucial scenario—as it has been reported by the Office, serious labour abuses often occur in the *periphery* of transnational groups or networks—a sound foundation justifying the lead firm's responsibility to act (from using leverage to minimise impacts to termination of the relationship) is missing.

Further shortcomings relate, lastly, to the fact that this pillar articulates the concept of human rights due diligence at a high level of abstraction. As a result, by employing an ambiguous and imprecise language, it leaves many critical questions unanswered, such as: what *labour rights adverse impacts* are (for example, related to the right to just conditions of work); what the scope of adequate *labour rights due diligence* should be; how *labour rights risks* should be measured; how the concept of *leverage* should be applied and what exactly constitutes *severe* labour rights abuses.[57]

[54]See e.g. Muchlinski (2015), pp. 334–339; McCorquodale et al. (2017), pp. 198–201.

[55]See, *ex multis*, Cossart et al. (2017); Grado (2018b), pp. 244–250.

[56]UN Human Rights Council (2018), paras. 25 and 27.

[57]For further critical analysis of this concept see e.g. Deva (2013), pp. 93–103; Trebilcock (2015).

The limits of the UN Framework's second pillar further confirm that the governance labour systems pinpointed in the 2016 ILC conclusions may *not* be adequate for the purpose to achieve decent work in GSCs.

4 The (2017) ILO Programme of Action and the Roadmap on Decent Work in GSCs

In March 2017, the Governing Body adopted a Programme of Action and a Roadmap specifically aimed to address decent work in GSCs through a comprehensive and coordinated framework.

The former, anchored in the core pillars of the ILO Decent Work Agenda and started in 2017, is finalised to create change in a number of critical areas over a period of 5 years (2017–2021).[58] It has five areas of action that it will pursue, including: (1) *knowledge generation and dissemination* (for timely and effective generation of evidence-based knowledge and the establishment of a knowledge and research capacity to support and promote strategies to achieve decent work): (2) *capacity building* (in order to improve capacity of tripartite constituents and enterprises to engage in successful sustained efforts at the national, sectoral, regional and international levels to advance decent work in GSCs); (3) *effective advocacy for decent work in GSCs* (that is focused advocacy for advance decent work in supply chains at national, sectoral, regional and international levels, with the core of these key advocacy messages being the promotion of ratification and implementation of key international labour standards); (4) *policy advise and technical assistance* (that is strategic and coherent policy advise and technical support by the Office to enable governments, business and social partners to develop and implement a target mix of policies for reducing decent work deficits and governance gaps): and (5) *partnership and policy coherence* (that is the intensification of ILO's work with UN agencies, multilateral institutions, other international forums and GSCs actors to develop and promote policies that advance decent work in GSCs).

Additionally, the Programme endorses the nine ILO technical areas of action suggested by the 2016 ILC conclusions. For each of these technical areas, specific deliverables and a timetable for action are provided; each deliverable, in turn, is linked to one of the five aforementioned areas of action.[59]

Furthermore, the Programme is expected to be coherent with the UN Guiding Principles, paying close attention to those of them related to the (already explained) different responsibilities of lead firms in their GSCs.

Finally, the Programme of Action also foresees three further significant meetings (already called for by the Governing Body in November 2016): (1) in 2017, a tripartite Meeting of Experts to identify possible action to promote decent work

[58] ILO (2017a).

[59] Ibid., Appendix.

and CLS in EPZs; (2) in 2018, a meeting on cross-border social dialogue, as called for in the 2013 ILC conclusions on the recurrent discussion on social dialogue, to address decent work in GSCs, including human rights due diligence; and (3) in 2019, a meeting—following a midterm report by the Office—on the three elements indicated in the last paragraph of the 2016 ILC conclusions.

As to the Roadmap, it was developed in order to identify concrete and prioritised areas of action.[60] For the period 2017–2018 the Office was tasked: (1) to prioritise the first two areas of action (knowledge generation and dissemination and capacity building); (2) to start with selected elements from the other three areas of action in order to ensure smooth progress over 5 years; and (3) to ensure logical sequencing among all five areas of action. With respect to the Roadmap for 2019–2021, the specific steps it includes are: (1) midterm stocktaking and continued implementation of all five areas of action; (2) preparation of a midterm report and its presentation to the Governing Body in November 2019; (3) final consolidated assessment of progress of the Programme of Action, last 3 months of 2021; and (4) preparation of a final report and its presentation to the Government Body in October 2022.

5 The (2017) Revised Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy

A further relevant development within the Government Body's initiatives on decent work in GSCs took place in March 2017, when it adopted a new ILO MNE Declaration text with two annexes.[61] Being this instrument analysed in another chapter of this volume, we will confine our comment on the main positive/critical elements which were introduced in the 2017 version.[62] As widely known, the ILO MNE Declaration is the only Organization's instrument that provides direct guidance—inter alia—to MNEs on a broad range of issues, such as employment promotion, non-discrimination, security of employment, training, conditions of work and life, and industrial relations. However, it is important to underline that the pre-2017 version covered only the hierarchical form of GSC's governance; did not address the responsibilities of entities within the corporate group and did not include a dispute resolution procedure.

The recent revision has added (only a few) principles (addressed to MNEs) related to specific decent work issues, such as the elimination of forced or compulsory labour; wages, benefits and conditions of work; and, remedies for abuses of human rights. More importantly, by outlining the fact that on the issue of human rights states and enterprises have different roles, the revised text refers to the

[60] ILO (2017b).

[61] ILO (2017c).

[62] See also Grado (2018a), pp. 223–230 for a detail analysis and the contribution by Jernej Letnar Černič in this volume.

corporate responsibility to respect as called by the UN Guiding Principles.[63] However, it must be also highlighted in this regard that the corporate's responsibility to respect is not perfectly aligned with the UN Guiding Principles related to the Framework's second pillar. First of all, this is because by affirming that MNEs should respect CLS *throughout their operations*,[64] the responsibility seems to be limited to the violations committed by their overseas subsidiaries. Second, because the new text states that MNEs should use their leverage to *encourage* their business partners to provide effective remediation for abuses of internationally recognised human rights.[65] This is in line with UN Guiding Principle 22 according to which when adverse impacts are solely directly linked to the enterprise's operations, products or services by a business relationship, the responsibility to respect human rights does not require that the enterprise itself provide for remediation, *though it may take a role in doing so*. However, the same UN Guiding Principle clearly states that when a corporation is *contributing* to harm, it should *provide* for remediation.

The last significant limitation of the 2017 version relates to the fact that, contrary to the invitation of the 2016 ILC conclusions, it does not establish mechanisms or instruments to mediate, settle and/or provide remedy for disputes between MNEs and workers' organizations. Significantly in this respect**,** Annex II (*Operational Tools*) only includes: a regional follow-up mechanism; the Declaration's promotion by tripartite appointed national focal points; its promotion by the Office; company-union dialogue; and an interpretation procedure. Therefore, it is evident that the focus remains on *promotion* of the *voluntary* principles envisaged in this instrument.

6 Decent Work and Protection of Fundamental Principles and Rights at Work in *Export Processing Zones* (EPZs)

As to the first technical Meeting of Experts on EPZs, in March 2017 the Governing Body established its agenda charging significantly and specifically with: (a) discussing possible action to promote decent work and CLS for workers in EPZs; and (b) adopting conclusions which will provide guidance on the content and modalities for an action plan on EPZs as called for in the 2016 ILC conclusions on decent work in GSCs.[66] Against this backdrop, on November 2017 the Office published a background report (Sect. 6.1) that was followed by the adoption of a set of conclusions (Sect. 6.2); finally, on March 2018 the Governing Body adopted follow-up action (Sect. 6.3).

[63] ILO (2017c), para. 10.

[64] Ibid., paras. 25, 27, 30 and 47.

[65] Ibid., para. 65.

[66] ILO (2017d), para. 405.

6.1 The Background Report of the ILO Office

The Office report, consisting of a background and four chapters, is worth here of a short analysis and comment in the light of specific situations in EPZs, where decent work deficits are widespread.[67]

First of all, its background[68] underlines that—though the ILO has a long history of examining and discussing employment, labour rights and social issues in relation to EPZs—since 2008 there is however a gap in knowledge on how EPZs affect decent work.

The report's first chapter (*EPZs: Purpose, how they work and estimated numbers*)[69] starts by highlighting that estimates of the number of EPZs are few and far between. In 2006, the ILO counted 3500 EPZs (or similar zones); since then, no comprehensive survey on the phenomenon is available. However, the United Nations Conference on Trade and Development (UNCTAD), in turn referring to an article in The Economist, suggested that as of 2015, there were over 4500 EPZs, over 3000 more than 20 years previously.[70] On the issues of variety and evolution of EPZs, this chapter underlines that discussions over EPZs have been impeded by the fact that they have been defines in various ways. The ILO, for example, defines them as "industrial zones set up to attract foreign investors, in which imported materials undergo some degree of processing before being exported again".[71] However, it highlights that a common characteristic in all definitions used by different international institutions is that a zone is an enclave, both in terms of its geography and its exceptional regulatory and institutional features, even if it has interactions with the economy outside the special zone. These enclaves are created by government policy to promote FDI and exports and have become increasingly common among countries seeking export-led economic growth. With regard to the objectives of EPZs policies, they are numerous: attraction of foreign exchange earnings, which can be used to import crucial capital and materials for production; spur industrialisation; participation in global economies; technology transfers; address other development issues (such as tackling unemployment); and creating employments for workers, whose earnings can further stimulate economic development. The main incentives offered to attract foreign investors to EPZs are fiscal exemptions but also weak protection of workers' rights as well as exemptions or derogations from national labour rights.

The report's second chapter (*Impact of EPZs on fundamental principles and rights at work*)[72] describes the challenges and deficits posed by these zones on CLS. On the issues of freedom of association and collective bargaining, it confirms

[67] ILO (2017e).
[68] Ibid., pp. 1–2.
[69] Ibid., pp. 3–17.
[70] UNCTAD (2015), p. 4.
[71] ILO (1998b), p. 3.
[72] ILO (2017e), pp. 19–27.

that violations of these rights in EPZs are common in developing countries. With regard to discrimination in EPZs, the most prevalent challenge relates to gender discrimination. Finally, with regard to child labour and forced labour, this chapter underlines that the former is more likely to occur upstream in the production chain while the latter may appear in EPZs link to migrant workers who are required to pay recruitment fees and transportation before they are allowed to leave their jobs.

The report's third chapter (*Other elements of decent work in EPZs*)[73] focuses, respectively, on employment creation, job stability, skill development, hours of work, wages, occupational safety and health (OSH), social protection, labour inspection and social dialogue.

With regard to employment creation, EPZs generate direct employment, but the latter varies significantly between countries and has often been disappointing. On the issue of stability of employment, EPZs tend to have a high rate of turnover of workers, due to the use of fixed-term contracts and the intensive nature of the work. As skill development is concerned, despite progress in many EPZs, it still lags behind in many countries. With regard to wages, different studies indicate that EPZs pay higher wages, but without implying that they are decent or liveable wages. On the issue of hours of work, in EPZs they tend to be long, exceeding legal limits, due to—on the demand side—poor supply chain management and—on the supply side—the low wages paid to workers. With regard to OSH in EPZs, violations of OSH legal requirements have been documented in many countries. Additionally, the repetitive manual labour involved in EPZs work exposes workers to significantly higher risks of serious injury. As far as social protection is concerned, workers in EPZs in developing countries are more likely to have social protection such as health care and social security than non-EPZ workers; however, social protection in law does not always materialise in practice. On the issue of labour inspection, even if national labour law includes EPZs within its scope, these laws are often not enforced in the majority of countries. Frequently, the problem lies in the labour inspectorates as a whole: in many countries, they are under-resourced in terms of staff levels, transportation and materials. Finally, with regard to social dialogue, the report underlines that it can help to improve decent work outcomes in EPZs.

The report's last chapter (*Conclusions and suggested points for discussion*)[74] affirms that EPZs present a mixed picture. On the one hand, they have generated exports and foreign exchange as well as created jobs and employment opportunities for certain groups, young women in particular. On the other hand, EPZs are characterised by problems in the protection of especially the first two CLS and workers' rights concerning hours of work and OSH. Therefore, the chapter highlights the role that the ILO could play in providing assistance to tripartite constituents in countries operating EPZs to better promote decent work and protect CLS, for example by means of its decent work country programmes or by developing comprehensive guidelines.

[73] Ibid., pp. 29–40.

[74] Ibid., pp. 41–42.

In the light of the above, the report—admittedly—provides for interesting reading on labour rights and working conditions in some EPZs which are often the result of the unwillingness of host countries to implement their own labour law. However, by considering EPZs *exclusively* within their national context, it does not provide an analysis on the linkages between those zones and GSCs, that is on the relationship between (home) lead firms' actions and omissions and the violations of international labour standards by their foreign subsidiaries and/or suppliers operating in (host states') EPZs. This is in our opinion a missed opportunity, especially in the light of previous ILO studies on the subject. Indeed, in 1998 the latter already recognised that "changes in production chains are clearly beyond the control of a zone-operating country and its social partners" and therefore recommended ILO research activities "on the practices of transnational enterprises, in view of the particular relevance of this subject for EPZs".[75]

6.2 *The Achievements of the Tripartite Meeting of Experts on EPZs*

The tripartite Meeting of Experts was convened from 21 to 23 November 2017; it reviewed the report prepared by the Office; and, by consensus, adopted a set of conclusions as well as recommendations for follow-up.[76] Being EPZs a key segment of GSCs, a brief illustration of and comment on the Meeting's final text seem to be very relevant to the end of our study.

The conclusions start by underlining that there are limited recent empirical studies on EPZs in general, on decent work impacts of EPZs and on the protection of CLS for workers in EPZs. Although there seems to be a general trend towards an increase in the number of EPZs and the countries using them since the last ILO count in 2006, the conclusions add that the approximately 10-year gap in knowledge underscore the need for up-to-date information and counsel against a one-size-fits-all approach.[77]

On the issue of opportunities offered by EPZs,[78] according to the conclusions the latter have helped to, respectively, attract foreign exchange earnings; stimulate domestic enterprises to move up in the value chain; create formal employment especially for young women; and, give workers higher wages as well as include them in social protection schemes.

With regard to the challenges and deficits in realising fundamental rights and decent work,[79] the conclusions underline their presence in many EPZs. More in detail, (a) workers commonly face barriers to exercising their right to organize and

[75]ILO (1998b), p. 15; ILO (1998a), para. 32.

[76]ILO (2017f).

[77]Ibid., para. 3.

[78]Ibid., para. 4.

[79]Ibid., para. 5.

union may face barriers and discrimination; (b) collective bargaining remains rare; (c) women workers are at risk of harassment and discrimination in the workplace; (d) in some cases workers face delays in payment or non-payment of wages due upon dismissal, and social protections in law do not always materialise in practice; (e) hours of work tend to be too long, putting workers at greater risk of accidents and injuries; (f) forced overtime can also exist; and (g) migrant workers are particular vulnerable.

On the additional actions that governments should take to further promote decent work and protection of CLS in EPZs, the conclusions elaborate many recommendations.[80] In particular, (a) government EPZ policies should ensure that worker's rights are protected and that, at a minimum, CLS are not compromised in any policy to attract investors to EPZs; (b) where appropriate, access to incentives in EPZs should be conditioned on a commitment to upholding decent work; (c) governments should place a high priority on strengthening labour inspection systems in both EPZs and the broader economy in countries where they are currently inadequate to fully protect workers' rights; (d) access to remedy should be speedy and fines for violations of worker's rights should be sufficiently dissuasive; (e) governments should ratify conventions and apply the provisions of ratified conventions in law and practice to the whole of the country, including EPZs; and (f) they should promote collective bargaining and ensure an enabling environment for sustainable industrial relations; improve working conditions and social protection; and support enterprises to undertake due diligence.

As far as enterprises are concerned,[81] the conclusions highlight that because EPZs are often linked to GSCs, their strategies for sourcing may also impact the rights of workers in EPZs in significant ways. Therefore, all companies are called to respect workers' rights and use their leverage to take steps to ensure that the rights of workers in their supply chains are also respected and that workers have access to remedy when their rights are violated, as advocated for in the UN Guiding Principles and the ILO MNE Declaration.

On the role of employers' organizations,[82] they should encourage and support enterprises to respect CLS and promote decent work; abide by national law; support public labour inspections in EPZs; carry out due diligence; and use their leverage with business partners in their value chains to advance CLS and decent work. Employers' organizations should also engage in social dialogue concerning policies to promote decent work in EPZs.

On the role of workers' organizations,[83] they should provide targeted support to workers in EPZs (in particular women, youth, migrant workers and refugees) and also engage in social dialogue at all levels.

[80] Ibid., paras. 8–10 and 12–14.

[81] Ibid., para. 11.

[82] Ibid., para. 15.

[83] Ibid., para. 16.

On the role of the multilateral system,[84] the conclusions recognise its possible contribution to strengthen governance in EPZs and promote policy coherence at global levels in areas impacting EPZ development, such as policies on inclusive and sustainable growth, trade and investment policies, industrialisation and SME development strategies, and protection of human rights.

Finally, the conclusions suggest that the ILO could provide support to tripartite constituents in countries operating EPZs to better promote decent work and CLS.[85] Support could include the following: (a) improve the knowledge base to obtain up-to-date information and a more holistic picture of the nature of EPZs; (b) strengthen the capacity of national labour inspection systems, including inspections in EPZs; (c) promote and expand the Enabling Environment for Sustainable Enterprises programme to include EPZs; (d) provide technical assistance to tripartite constituents; (e) advocate for ratification and implementation of the fundamental conventions, as well as relevant standards on OSH and social protection; (f) support the social partners to engage in industrial relations and broader social dialogue to reduce labour deficits in EPZs; (g) build capacity of employers' and workers' organizations, and through them, enterprises and workers operating in EPZs; (h) address shortages of skilled labour, including in EPZs; (i) provide technical assistance to governments and social partners in mainstreaming CLS and decent work in EPZs; (j) document good practices by governments, social partners and enterprises in realising CLS in EPZs and share these experiences more broadly; and (k) support the development of social dialogue at all levels. In addition, with regard to the multilateral system,[86] the ILO should: (a) intensify the collaboration with international organizations to ensure better understanding of the role of EPZs in the context of the 2030 Agenda for Sustainable Development; (b) cooperate with international financial institutions and regional banks to further promote decent work and respect of CLS in EPZs; (c) work with the G20, taking into account its recent commitment to promote sustainable GSCs; and (d) engage in UN Development Assistance Frameworks and with the World Association of Investment Promotion Agencies to increase the effectiveness, sustainability and alignment of EPZs with the Sustainable Development Goals and the Decent Work Agenda.

Finally, the conclusions suggest that the above actions should be concrete and aligned with existing ILO programmes e.g. the Programme of Action on decent work in GSCs.[87]

The concluding text is welcomed for several reasons. First of all, in the light of limited recent empirical studies on EPZs, it recommends the updating of the ILO's knowledge base and the development of a more *holistic* picture of the nature of EPZs which—in our opinion—should include zones' linkages with *domestic* producers but also with *foreign* lead firms. Second, in a balanced way the conclusions highlight

[84] Ibid., para. 17.

[85] Ibid., para. 18.

[86] Ibid., para. 19.

[87] Ibid., para. 20.

both *positive* and *negative* aspects of EPZs related to decent work and CLS. Third, they underline the importance of *protecting* freedom of association and collective bargaining for workers in EPZs as well as promoting social dialogue. Fourth, the conclusions recognise the *special* role to be played by (host) governments which are often undermining their duty to protect labour standards in EPZs. Finally, and in contrast to the pre-meeting report of the Office, they also recognise the *responsibilities* of all companies to *respect* worker's rights in EPZs. On this last point and pending the publication of the full report of the Meeting's proceedings, it is difficult to understand why the conclusions refer only to the responsibilities of corporations to *use their leverage* to take steps to ensure that the workers' rights in their supply chains are respected, without mentioning that the indecent working conditions in EPZs may be in part also driven by *demand* from lead firms operating outside national borders.

6.3 The (2018) Decision of the ILO Governing Body on the Follow-Up Action on EPZs

On February 2018, the Director-General elaborated the first supplementary report.[88] It refers to the main recommendations addressed to the constituents and to all ILO supportive actions elaborated by the Meeting of Experts for follow-up; the latter, if adopted by the Governing Body, would form the basis for an action plan on EPZs, as called for in the 2016 ILC conclusions on decent work in GSCs. However, during the 332nd Session of the Governing Body (March 2018) the employers' representatives expressed great concern about the creation of a stand-alone action plan on EPZs, because it could duplicate efforts and would be based on outdated information; instead they suggested to incorporate all the recommendations addressed to the ILO into existing initiatives and action plans.[89] This proposal was shared by many governments' representatives.[90] Therefore, at the end of the discussion, the Governing Body took note of the outcome of the Meeting of Experts, endorsed its conclusions and requested the Director-General to include the recommended follow-up action in the implementation of subsequent programmes and budgets. Self-evidently, this decision is a missed opportunity because an action plan—as proposed by workers' representatives—could have assessed *specific* EPZs with decent work deficits and the role of *all* stakeholders, including the responsibility of leads firms for those deficits.[91]

[88] ILO (2018a).

[89] ILO (2018b), paras. 311–312.

[90] Ibid., paras. 314–315.

[91] Ibid., para. 308.

7 Concluding Remarks

As already mentioned, the 2016 ILC concluding text on decent work in GSCs is very significant for several reasons. First of all, for the first time in the 100-year history of the ILO, it addresses what has become one of the key features of economic globalization. Second, the conclusions recognise the potential of GSCs in advancing the prospects of decent work conditions for millions of workers across the globe but, also, the dangers posed by this complex transnational production model and its significant impact on workers' rights. Third, they expand the role of the ILO itself in working on GSCs' issues, by mandating the Organization to use its traditional means such as technical cooperation, research, information and communication, promotion of social dialogue, coordination with other international organizations and—most *importantly* (even though only *eventually*)—*standards-setting* activities. Finally, the concluding text emphasises that the responsibility to implement effective and efficient legal labour regimes lies primarily with the state (which must act in collaboration with workers' and employers' organizations). However, it also suggests that effective governance of GSCs involves a role for the private sector as well. Significantly in this respect the conclusions refer many times to the businesses' responsibility to respect human rights in their supply chains and the due diligence processes aimed at reducing or eliminating their negative impacts on—inter alia—labour-related human rights. Admittedly, however, the introduction of the concept of *labour rights due diligence* and especially its possible *hardening* into national regulatory frameworks via a new ILO convention led—as foreseeable—the employers' representatives to develop a defensive strategy to ensure that any progress on that concept would be painstakingly small. On this last point it is worth underlining, first of all, that according to the Programme of Action on decent work in GSCs the ILO Helpdesk for Business on International Labour Standards has the task of providing enterprises with information on specific country situations, laws and regulations, including on the implementation of labour rights due diligence.[92] The latter, being a free and *confidential* service of the Office that provides answers to individual questions,[93] has no mandate to develop guidance on what the concept of labour right due diligence requires and, self-evidently, is not intended to adjudge enterprises' compliance with international labour standards. Similarly, the new (2017) version of the ILO MNE Declaration, by only referring in one paragraph to the corporate responsibility to respect human rights, does not clarify—in fact—the ambiguities of the labour rights due diligence concept. Additionally, this instrument is still characterised by the lack of any oversight mechanism. Last but not least, the follow-up action on EPZs endorsed by the Governing Body in 2018 calls on employers' organizations for encouragement and support enterprises to respect CLS and carry out due diligence, without any involvement of ILO's bodies or services.

[92]ILO (2017a), para. 27.

[93]ILO (2017c), Annex II, para. 1.c.

In the light of the above, the perspective of the ILO's reframing of global labour governance through public vertical regulation becomes very tenuous, depending on the position that the governments' representatives will assume in the future. Hopefully, therefore, the next two tripartite meetings—respectively—on cross-border dialogue and human rights due diligence (scheduled for the end of 2018 but postponed in 2019) and on the adequacy of ILO's instruments to govern GSCs (scheduled for 2019) will suggest, at least, the adoption of a guidance on how the due diligence process applies to labour rights. The latter, by limiting enterprises' ability to selectively interpret and apply labour-related human rights, is—in our opinion—an essential element of any effective and legitimate public labour rights due diligence regulatory initiative. Without this intervention by the ILO, its efforts to promote decent work in GSCs are likely to be seen as the elephant that gave birth to a mouse.

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