

LABOUR AND SOCIAL JUSTICE

SUPPLY CHAIN GOVERNANCE

Arguments for worker-driven enforcement

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Social auditing has proven to be ineffective in addressing rights violations of workers in supply chains.



By contrast, worker-centred enforcement – where workers participate in the design and oversight of enforcement mechanisms – enables workers to bring labour rights violations to the attention of enterprises without fear of retaliation.



This brief summarises evidence of social auditing failures, offers arguments for worker-centred enforcement, and identifies key features of worker-centred enforcement mechanisms that best support the stated aims of an European human rights due diligence legislation.

SUPPLY CHAIN GOVERNANCE

Arguments for worker-driven enforcement



Enforcement and access to justice will play a key role in determining whether forthcoming European Union legislation will protect workers in supply chains from labour rights violations.



This brief makes three key arguments regarding access to justice: First, legislation should cover all workers, irrespective of their employment status, in all tiers of the chain. Regulating only some (permanent) employees in tier one factories not only excludes most supply chain workers, but also incentivises suppliers to informalise the workforce. Second, inclusion is a gender issue because women are over-represented in outsourced and subcontracted employment arrangements.



Third, non-judicial enforcement should not be left to private sector social auditing, which has proven to be ineffective in addressing rights violations of workers in supply chains. Access to justice is only realisable if state investigation and enforcement is complemented by bottom-up, work-driven enforcement, i.e., there is »meaningful engagement« with workers on all aspects of due diligence, including the design and oversight of enforcement mechanisms.

For further information on this topic:

<https://www.fes.de/themenportal-die-welt-gerecht-gestalten/weltwirtschaft-und-unternehmensverantwortung/>

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1 INTRODUCTION

On 15 September 2021, fifteen labour and human rights organisations wrote an open letter to the European Union pointing out the deficits of social auditing and arguing for a »robust liability regime« that ensures victims of corporate abuse enjoy access to justice and remedy.¹ On 9 November 2021, seven networks of homemaker organisations and trade unions claiming to represent millions of workers from Bangladesh, Cambodia, India, Indonesia, Pakistan, the Philippines, Sri Lanka, Thailand, and Vietnam published an open letter to EU commissioners essentially arguing that a proposed human rights due diligence directive must apply to all workers in all tiers of the supply chain.² Since the most vulnerable workers in supply chains are women, the letter further notes, the scope of the proposed EU directive is also a gender issue. The letter calls for the forthcoming directive to mandate gender-responsive, worker-designed complaint and grievance mechanisms »embedded within a comprehensive enforcement strategy.«

Enforcement and access to justice and remedy for workers are key concerns for labour rights advocates and for EU policy makers who seek to improve on the weak enforcement mechanisms of social auditing, that is, the enforcement strategy that enterprises and multistakeholder bodies use to monitor suppliers' compliance with their labour codes. It is widely accepted that social audits, conducted typically by private sector firms, have failed to protect workers from gross violations of their labour rights and even from death (Anner, Bair and Blasi 2013; CCC 2019; Judd and Kuruvilla 2020; CCC 2021). Ali Enterprises, a garment factory in Pakistan received a clean audit a mere three months before structural deficiencies led to a fire that killed 260 workers and left another 32 injured (Terwindt and Armstrong 2019). Similarly, the Tazreen factory in Bangladesh caught fire in 2012, killing more than 112 workers and, in 2013, the Rana Plaza building in Bangladesh collapsed, killing 1,134 workers

and leaving thousands injured and traumatised. In each case, the factory had received a clean audit.

The European Coalition of Corporate Justice (ECCJ 2020) maintains that a robust enforcement strategy consists of three elements:

- Member states must »designate competent investigating and enforcement authorities« to ensure compliance with legislation.
- Enterprises and auditors must be held liable for the harm suffered by workers in their supply chains unless they can show that they »acted with due care and took all reasonable measures« to prevent the harm. The defendant should bear the burden of proof that it does not have a relationship with the entity that caused the harm and that it took reasonable care.
- Legal actions should only prescribe after five years, and EU courts should have jurisdiction irrespective of any proceedings against subsidiaries, suppliers, or subcontractors outside the EU.

Inspections and judicial enforcement mechanisms are indeed critical. Yet most supply chain workers cannot institute legal proceedings because they do not know whom to sue. Attempts to identify the name of the brands whose products they make carries significant risks. Factory supervisors and the intermediaries who contract homeworkers – women who produce for factories from home³ – threaten workers with dismissal if they try to identify the brands. Thus, the focus of »Supply Chain Governance« is on non-judicial enforcement mechanisms – or worker-driven enforcement – to complement inspections and judicial enforcement strategies.

The first section of this brief explains worker-driven enforcement. The second section asserts that effective enforcement

¹ See »Open letter to EU policymakers on social audit failures«, 13 September 2021, https://cleanclothes.org/filerepository/social_auditing_open_letter_to_eu_policymakers_final_130921.pdf/view

² See »Open Letter to European Union Policymakers,« from HomeNet International; HomeNet South Asia; HomeNet SouthEast Asia; Asia Floor Wage Alliance; WIEGO, National Trade Union Federation, Pakistan, 9 November 2021, <https://www.wiego.org/resources/open-letter-european-union-policymakers>.

³ International Labour Organization's Home Work Convention, 1996 (no. 177), defines home work as »work carried out by a person, to be referred to as a homemaker, (i) in his or her home or in other premises of his or her choice, other than the workplace of the employer; (ii) for remuneration; (iii) which results in a product or service as specified by the employer, irrespective of who provides the equipment, materials or other inputs used, unless this person has the degree of autonomy and of economic independence necessary to be considered an independent worker under national laws, regulations or court decisions.«

is only possible if workers know the names of the brands and retailers for whom they produce goods or provide services. Calls for supply chain transparency are generally understood to mean that enterprises should make public the names and locations of the factories that produce their goods and services. For workers to access justice, however, requires a more comprehensive approach to transparency. The brief argues that legislation should make it mandatory for enterprises to oblige their suppliers to provide every worker in their supply chain with a written contract that includes the names of the brands for whom they produce. Attempts to conceal the names of brands should constitute an offence.

The third section discusses, from an access to justice perspective, some of the reasons why legislation should apply to all workers in all tiers of the chain. For instance, the structure of supply chains is complex due to production being sub-contracted and outsourced to other factories, workshops and homes; legislation that covers only a small part of the workforce will leave most supply chain workers unprotected. An even more compelling reason is evidence revealing that realising rights for only some workers incentivises increased informalisation of other workers, usually meaning women; thus, if labour rights are enforced only for permanent employees in the first tier of the chain, the cost of their protection is borne by other workers in the chain. Some workers, often men, are therefore protected at the expense of other workers, most often women.

The fourth section explores the reasons for the failure of social auditing as an enforcement strategy to protect workers from human and labour rights' violations and argues that non-judicial enforcement must be worker-driven. The fifth section again summarises the key arguments and concludes then with recommendations for inclusion to draft effective international law instruments, including EU legislation to regulate supply chains.

2 WORKER-DRIVEN ENFORCEMENT

Worker-driven enforcement embodies three ideas. The first is that it challenges top-down enforcement strategies designed without the participation of the intended beneficiary -workers, who uniquely know how their human and labour rights are violated. Outhwaite and Martin-Ortega (2019) argue that a »worker-driven« approach is a more comprehensive than »worker-centred« strategies, which tend to limit worker participation to inspections. Worker-driven denotes that workers are involved in every aspect of supply chain governance – including in legislation intended to protect them, in designing and supervising complaint and grievance mechanisms, and in remediation processes.

The second idea is that worker-driven enforcement champions industrial democracy for all workers, not only those who are protected by labour laws (Reinecke and Donaghey 2021). Siegman and Iocco (2017) have observed that work, particularly in the global South, has outgrown the traditional labour law concepts of »employee« and »trade union«:

[T]rade unions' limited presence in workplaces and the fact that coverage of initiatives is sometimes limited to the upper tier of complex value chains, raises the question in how far innovation is union- rather than worker-driven? Especially sex, migrant and domestic workers' voices during the Forum spoke of a widespread crisis of representation in the global labour movement, which has been slow to acknowledge that the ranks of the working class are filled with a more diverse crowd than permanent, male, industrial employees.

Although trade unions are beginning to organise non-standard workers, they do not yet represent all the workers in supply chains. Workers should therefore be able to »democratically choose who represents their interests« (Reinecke and Donaghey 2021, 15).

The third idea is that »issues of decent work are inherently political, rather than technical« (Reinecke and Donaghey 2021, 14). It reminds that power relations are inherent in employment relations. Most supply chain workers in many industries are first generation female workers from poor families and likely migrants. This exacerbates the already unequal power balance in the employer-employee relationship. The power imbalance must be mediated, and compliance should not be outsourced to the private sector for profit.

Worker-driven enforcement mechanisms typically share these five characteristics:

- Trade unions and organisations concerned with workers from supplier countries are represented on independent bodies that oversee complaints and grievance mechanisms.
- Workers are represented by organisations of their choosing, particularly if trade unions are not independent of political parties, or their organisations are not registered as trade unions.
- Complaint and grievance mechanisms are co-designed with workers and their organisations to be gender sensitive, accessible, and predictable and to protect worker identities.
- Workers and their organisations know their rights and know how the complaints and grievance mechanisms work.
- Mechanisms to prevent retaliation are agreed to, and suppliers who retaliate against workers for organising or lodging a complaint face disciplinary proceedings.

3 SUPPLY CHAIN TRANSPARENCY

For workers to be able to access justice, they need to know the names of the brands and retailers whose products they make. With this in mind, in 2016, a coalition of global union federations and nine labour rights organisations started the Transparency Pledge,⁴ an initiative encouraging enterprises in the garment sector to publish the names and locations

⁴ See Transparency Pledge, <https://transparencypledge.org/>.

of the factories that make their products. If workers and trade unions know that their factory supplies particular brands, it enables them to alert those brands and retailers to human rights violations. It provides an early warning system for the brands and retailers to identify, prevent, or mitigate violations in these factories. The coalition initially engaged with 40 enterprises to sign the pledge and to publish the names and addresses of their suppliers. In 2019, the Fashion Transparency Index reported that of 200 surveyed enterprises in the garment sector, more than 70 had published the full details of their major suppliers on their websites (Transparency Pledge 2019).

There is little transparency outside the garment industry, but even in the garment industry a more robust transparency regime is needed. Most workers do not work in the factories that are primary suppliers to brands and retailers, known as tier one factories. Rather, they work in secondary factories, workshops, and homes. Often, they do not know who they produce for, and threats of dismissal by their factory bosses disincentivise them from finding out. Indeed, a more comprehensive notion of transparency is needed.

The ordinary worker does not own a computer or speak a European language, including English. Regardless, the onus should not be on workers to scour untold numbers of websites to determine whose products they make. For workers to be able to access justice, legislation should include transparency clauses that make it mandatory for brands and retailers to oblige their suppliers to ensure that every worker in every tier of the chain, including homeworkers, has a contract written in their mother tongue that includes the names of the brands for which they are producing goods. Enterprises could include such an obligation in their supplier contracts.

4 LEGISLATIVE PROTECTIONS FOR ALL SUPPLY CHAIN WORKERS

Subcontracting is intrinsic to the structure of supply chains in many industries, including construction (Davies et al. 2011; ETUC 2021); food, agriculture (ETUC 2021), and electronics (Martin-Ortega 2018). This section focuses on the garment sector because the workforce is significant – employing approximately 50 million people, most of them women – and, as noted by the Organisation for Economic Co-operation and Development (OECD), workers in the garment sector are particularly vulnerable to human rights' violations (OECD 2017).

In garment chains, like other labour intensive, consumer-goods supply chains, the buyer – typically a retailer or a brand-name merchandiser – determines what is produced, by when, and for how much (Gibbon and Ponte 2008; Gereffi 2014). In these buyer-driven chains, suppliers compete to produce goods as cheaply and as quickly as possible (Pieper and Putri 2017; Anner 2019a). The competition is intense. An International Labour Organization study (ILO 2017) found that up to 50 percent of 1,450 suppliers surveyed had at some

point contracted for below cost prices because they hoped it would secure future orders.

Suppliers employ three strategies to reduce the cost of production: they pay less than the statutory minimum wage⁵; they coerce workers to work overtime without pay and increase their hourly production targets (Anner 2019a; Vaidyanathan 2020); and they outsource production to smaller factories, workshops, and homeworkers. The focus here is on this last strategy – outsourcing.

South Asia and Southeast Asia are collectively known as the »garment factory of the world« because they produce most of the world's clothing (ILO 2020). In several Asian countries, approximately half the workers in the garment sector are subcontracted and work in workshops and in their homes. In India, 89.9 percent of workers in the garment sector work in small and medium enterprises (Thomas and Johny 2018). Many of these enterprises also subcontract to homeworkers. A recent survey of 340 garment factories in Delhi and Bengaluru showed that 58 percent of surveyed factories outsourced to homeworkers who work from their homes (Anner 2019b). Factories outsource such tasks as embroidery and screen-printing, things that cannot easily be done in a factory, but also cut-make-and-trim, thread-cutting, label insertion, and ironing and packaging. Typically, an intermediary, or contractor, delivers the garments and threads to homeworkers' homes and fetches the completed goods. Homeworkers may be permanent and work between seven and twelve hours a day six days a week, or they may only be employed when the factory has an oversupply of work (Von Broembsen 2018).

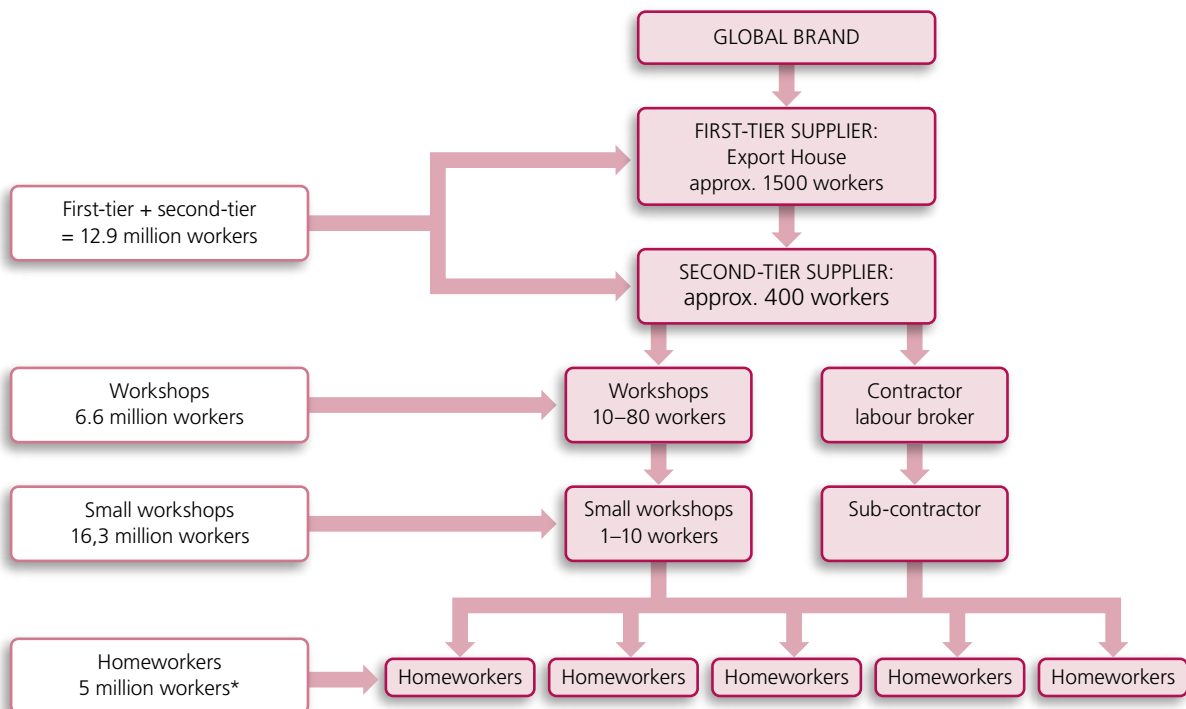
Figure 1 illustrates a typical supply chain in Tirupur, India, which is known as the »T-shirt factory of the world,« because more than 200 brands source their knitwear from Tirupur. The numbers on the left-hand side of the figure relate to India as a whole and indicate that the majority of workers in the garment industry work in workshops and homes.

Data collected by the Asia Floor Wage Alliance (AFWA) in tier one garment factories in five countries suggest that most workers, particularly since COVID-19, are being employed on fixed-term contracts. Even if they are statutorily entitled to social protection and automatically become permanent employees after two years of continuous employment, factories can still terminate their employment just before the contract period expires to avoid statutory obligations. Since the Covid-19 pandemic, suppliers have engaged in additional informalisation strategies to shift production risks and costs to employees, and some governments have unilaterally amended labour laws to reduce labour protections.

The farther down the chain one goes, the less workers earn, and the more production costs and risks the workers carry.

⁵ For example, an ILO study in 2016 found that seventy-four percent of female garment sector employees did not receive the statutory minimum wage, particularly those employed in the Philippines, India, and Pakistan (ILO 2016).

Figure 1:
The supply chain in Tirupur, India



*Raveendran et al. 2013
*Thomas and Johnny, 2018

This structure of the chain is based on action-research findings by HomeNet South Asia.

Before COVID-19, homeworkers earned between one-half and one-third of their country's minimum wage and carried the cost of electricity and equipment, such as sewing machines, needles, and scissors (Zhou 2017; Von Broembsen 2018). The ILO Home Work Convention (1996) states that homeworkers should be afforded the same rights and entitlements as other supply chain workers. Yet, only in Thailand, the Philippines, and Sindh province, Pakistan, do homeworkers enjoy statutory recognition, but even in these places, the legislation is not enforced.

When factories are audited for compliance with labour codes, it incentivises them to maintain one factory that complies with codes and to subcontract to other factories that are not audited and do not comply with the codes (CCC 2005). This practice is not confined to the garment sector. LeBaron, Lister, and Dauvergne (2017), reporting on five sectors, found outsourcing and subcontracting to be ubiquitous in all of them. The authors argue that social auditing drives »unauthorized subcontracting,« as it allows suppliers to »limit their legal responsibility.« If legislation applies only to employees in tier one factories, not only will it exclude a significant percentage of the workforce, but it will likely incentivise suppliers to informalise the workforce. Since the lower tiers are mostly unregulated,⁶ suppliers can do so with impunity.

In one of the first studies disaggregating labour in supply chains, Barrientos, Gereffi, and Rossi (2011) studied the effect of labour codes on all categories of workers, including

subcontracted workers. They concluded that if codes do not cover all workers, irrespective of their employment status, the cost of »upgrading« employees is borne by workers who are not covered by audits.

Interviews with 38 auditors confirm the limitations of auditing only tier one factories: »[The auditors] explained that because many exploited workers are technically employed by labor providers and contractors at off-site production facilities, they are thus not officially on the books, and so auditors had little scope to detect or address this issue« (LeBaron, Lister, and Dauvergne 2017, 970). These »exploited workers« are mostly women, who are concentrated in temporary work, casual work paid by the piece, and homework (Rossi et al 2021). Although they work long hours,⁷ their employment is insecure, which increases the likelihood of coercive employment practices: women are less likely to unionise because they fear that it invites discrimination and dismissal,

⁶ India's Contract Labour Act covers subcontracted workers, subject to three significant exclusions: (i) establishments or contractors that employ fewer than 20 workers; (ii) work of an intermittent or irregular nature; and (iii) homeworkers/ industrial outworkers.

⁷ According to a study in the Philippines, during the low season, homeworkers worked between three and six hours a day, whereas in high season they worked up to 18 hours a day (Sudarshan, Venkataraman, and Bhandari 2007). In Indonesia, half of surveyed homeworkers laboured less than 35 hours a week, but one third worked more than 48 hours per week. In Thailand, three out of every four homeworkers worked more than 40 hours per week (Hast 2011; HomeNet Thailand 2013; von Broembsen 2018).

and they are more likely to suffer sexual harassment (Auret and Barrientos 2004; AFWA 2021).

5 THE FAILINGS OF SOCIAL AUDITING

Social auditing as an enforcement strategy is in part in response to the failure traditional enforcement mechanisms. Traditionally, states enforce labour regulation through (1) complaints-driven investigations, with the state responding to complaints made by individual workers or trade unions about specific labour rights violations; (2) proactive investigations by state inspectors, including surprise visits and steep fines as incentives for factories to comply with labour laws; (3) comprehensive coverage of factories in particular industries through inspectors specialised in them; and (4) self-regulation by factories (Fine and Gordon 2010). According to Fine and Gordon (2010), these enforcement strategies are ineffective in protecting supply chain workers even in the global North because of the complex structure of contemporary supply chains. Governments in the global South face additional challenges in the form of perverse incentives. They compete with each other to supply low-value consumer goods for global supply chains to create jobs; to satisfy domestic demand; to act as a springboard for other sectors through backward linkages; and to generate hard currency that can finance more capital-intensive industries (Palpacuer, Gibbon, and Thomsen 2005). Stiff competition disincentivises states from enforcing labour laws, which arguably increase the costs of production (Anner 2019a; LeBaron, Lister, and Dauvergne 2017). In addition, because many countries are hostile to trade unions, trade union enforcement of labour laws is weak (Finnegan 2013).

Over the last 30 years, in response to pressure from civil society, multinational enterprises (MNEs) have played a role in enforcing labour standards to address sweatshop conditions in their supply chains. They developed their own codes of conduct or joined multistakeholder initiatives (MSIs), comprised of enterprises, trade unions, and NGOs.⁸ Some MSI codes of labour practice incorporate core ILO conventions and require suppliers to comply with national labour legislation (Auret and Barrientos 2004). These codes are generally enforced in two ways: first, MNEs include a contractual provision in agreements with key suppliers that the supplier must comply with their code, and second, compliance is monitored through audits by the MNE or an auditing company and, in some cases, by the MSI. Most audits are conducted by accredited auditing companies appointed either by the brand/buyer or by the factory/suppliers (CCC 2019).⁹

Auditors visit factories for one to three days armed with checklists that correspond to the labour practice code (CCC 2019; Terwindt and Armstrong 2019). Typical social audits consist of a document and systems review, site inspections, and interviews. Document and systems review include reviews of employment contracts, payment schedules, personnel files, and personnel rules and safety procedures (Hunter and Urminsky 2003; Terwindt and Armstrong 2019). Auditors conduct site inspections to assess the work environment and the health and safety of workers. Some audits include inspections of spaces used for union meetings (Hunter and Urminsky 2003). Interviews are held with management, workers, and in some cases with officials of the most representative trade unions and with local communities, including NGOs. In the worst case, the workers are selected by managers, and in the best case, they are randomly selected and their interviews take place off-site and after hours (Hunter and Urminsky 2003). Interviews are conducted in the worker's mother-tongue; questions are open-ended and cover »practices and procedures at the factory, wages, health and safety, food and disciplinary practices« (Terwindt and Armstrong 2019). At best, the interviewer can speak the language or has his or her own translator. At worst, the factory management translates for the workers (CCC 2005). If the auditor finds that a supplier has failed to comply with provisions of the code, the supplier fails the audit, and the auditor issues recommendations with a corrective plan to be implemented according to an agreed upon time frame (Auret and Barrientos 2004; Terwindt and Armstrong 2019).

Several studies argue that social audits can be used to help eradicate child labour, forced labour, and occupational health and safety risks in tier one factories, but all agree that social audits fail to address the systemic issues that workers face: low wages, gender-based violence, chronic unpaid over-time, harassment and discrimination, and denial of fundamental rights to freedom of association and collective bargaining (Anner 2012; ITUC 2012; LeBaron, Lister, and Dauvergne 2017; CCC 2019; CCC 2021). The reasons include the following:

- *Reports not made public:* Without access to reports, trade unions and workers cannot support brands to ensure that their suppliers comply with labour codes and human rights due diligence (HRDD) legislation (Terwindt and Armstrong 2019; CCC 2019).
- *Conflict of interest:* Auditing is big business, and auditing companies need to keep their clients. Current estimations value the global auditing business at \$15–80 billion a year (LeBaron, Lister, and Dauvergne 2017; Terwindt and Armstrong 2019). Auditing companies and multi-stakeholder bodies are not financially independent of the enterprises for whom they conduct audits. A conflict of interest is therefore baked into the social audit regime, which disincentivises auditors from identifying human rights violations in their clients' supply chains (Short, Toffel, and Hugill 2016; Ruwanpura 2016; LeBaron, Lister, and Dauvergne 2017; CCC 2019). Indeed, according to Harvard professors Short, Toffel, and Hugill (2016, 1881), »In some circumstances, these relationships may go from

⁸ The Business Social Compliance Initiative (BSCI) is the largest social compliance initiative. Smaller multistakeholder initiatives include the Ethical Trading Initiative (ETI) in the United Kingdom, Social Accountability International (SAI) Fair Labor Association, in the United States and the German Partnership for Sustainable Textiles in the European Union.

⁹ Examples of such companies include SGS, Bureau Veritas, ELEVATE, RINA, SGS, TÜV Rheinland, and ELEVATE. See CCC 2019.

cozy to corrupt if familiarity between auditors and management emboldens managers to pressure or even bribe auditors to report good results.« Fraud is reportedly rife (LeBaron, Lister, and Dauvergne 2017);

- *Inadequate instrument for enabling rights*: Freedom of association and collective bargaining are often referred to as enabling rights because they enable workers to realise other rights. A checkbox approach cannot identify whether these enabling rights are respected and supported (Anner 2012; ITUC 2012; CCC 2021).

For these reasons, worker-driven enforcement is far more effective in ensuring compliance.

6 GENDER-SENSITIVE, WORKER-DRIVEN ACCESS TO JUSTICE

From the literature, it is possible to discern six criteria that characterise gender-sensitive, worker-driven supply chain governance:

6.1 Workers and their organisations are consulted in all aspects of due diligence

The OECD Guidelines for Multinational Enterprises (2011) assert that enterprises should have »meaningful engagement« with »affected stakeholders« throughout its due diligence process. Workers and trade unionists, homeworkers' organisations, and women's and labour rights organisations should also be consulted when legislation is being drafted to protect their labour and human rights (CCC 2021). The OECD Guidelines (2011) list such participatory methods for engagement as focus groups, participatory assessments, and worker interviews. The Asia Floor Wage Alliance, a transnational, female-led network of Asian trade union and labour rights organisations has used participatory approaches to elicit female workers' input into the design of complaint mechanisms to address gender-based violence in the workplace. They establish and support Women's Leadership Committees to engage directly with brands on gender-based violence.

6.2 Workers are represented by organisations of their choosing

Workers should be represented by trade unions, but there are situations where this is not feasible. Many migrant workers are not unionised, and homeworkers are often organised as cooperatives or voluntary associations that are not recognised as trade unions by the labour laws of the country. In some countries, trade unions are not independent of political parties. Each category of workers should choose the organisation to represent them. Although women's and labour rights organisations may support workers to participate in the process, they should not be a substitute for workers voices (Outhwaite and Martin-Ortega 2020).

6.3 Workers participate in the design of complaints and grievance mechanisms

The OECD Guidelines state that enterprises should ensure that there are »operational-level grievance mechanisms« which »act as an early-warning system« that workers' rights

are being violated. The guidelines also state that complaint and grievance mechanisms must be »equally accessible to all parties,« to women workers in particular, and must be predictable, fair and transparent (OECD 2011).

Social norms may prevent women from complaining without first obtaining permission from a man; they may also face retaliatory sexual harassment and abuse. Childcare and domestic responsibilities might constrain women's access to mechanisms that require a lot of time or are only accessible at specific times. Only the workers themselves know their particular constraints. Therefore, women and their representative organisations from each tier of the chain and from different statuses of employment – full-time workers, permanent employees, fixed-term contract workers, casual workers paid by the piece, homeworkers – should participate in designing complaint and grievance mechanisms.

Many barriers to accessibility are best identified by workers. For example, in tomato supply chains in Florida, workers identified language and hours as key barriers. As a result, a 24-hour hotline was set up for workers to make confidential complaints in their own language (Asbed and Hitov 2017). In Sindh province, Pakistan, homeworkers' input resulted in the Sindh Home-Based Workers Act, prohibiting homeworkers from having to pay a fee to access a complaint mechanism and giving them three years to report an incident. The complain process of the Bangladesh Accord on Fire and Building Safety, a legally enforceable agreement that was concluded between trade unions and brands in the garment sector after the collapse of Rana Plaza factory in 2013 (and renewed in 2021) provides that once a worker has filed a complaint – by calling the Accord Safety Complaints hotline, by email or in-person – the accord complaints handler follows up. The worker can choose whether to remain anonymous (ILRF 2019).

6.4 Worker organisations (including trade unions) are represented on the bodies that oversee complaints and grievance mechanisms

Complaints and grievance processes should be overseen by independent bodies and trade unions or in specific cases worker organisations should be represented on these bodies. There are good examples in the electronics and garment sectors of how these bodies can be constituted.

Electronics Watch, a labour rights organisation engaged in the electronics sector has established committees that oversee complaints and grievance processes, with worker representatives serving on these committees (Outhwaite and Martin-Ortega 2019). In the garment sector, the steering committee that oversees the implementation of the Bangladesh Accord has equal representation from trade unions and brands. In the Sindh Province, Pakistan, the Sindh Home-Based Workers Act provides that workers have equal representation to the Labour Department and the employers on Arbitration committees. In Thailand, the Homeworkers' Protection Act of 2010 establishes a 'Home Work Protection Committee' which is comprised of senior government

officials (from labour, public health and provincial and local administration), manufacturers' and homeworkers' representatives.

6.5 Employers who retaliate against workers must face disciplinary proceedings

Workers fear that if they complain they will be dismissed or, if subcontracted, lose work. Legislation should ensure that an employer who retaliates against a worker for filing a complaint faces a disciplinary process. In Lesotho, a provision to this effect is included in agreements between brands and workers to combat gender-based violence in its garment industry. Disciplinary processes are triggered when workers who complain face retaliatory actions by their employers (WRC 2021).¹⁰

In the United States, the disciplinary process of the Fair Food Program, an initiative to address human rights violations of migrant workers in tomato supply chains, works as follows: The person »responsible for the retaliation« is either fired immediately or given a written warning and »reprimanded in front of the affected workers.« If they retaliate a second time, they are summarily dismissed. The worker receives reinstatement, and the entire workforce is apprised of the process. This encourages everyone to use the complaints process and »to act as the first line of risk prevention and redress« (Asbed and Hitov 2017, 523).

6.6 Workers must know their rights

For workers to enforce their rights, they need to know their rights and how complaints and grievance mechanisms work. Education and awareness – of suppliers and *all* workers – is critical to enforcing due diligence legislation. According to the *OECD Due Diligence Guidelines for Responsible Supply Chains in the Garment and Footwear Sector* (OECD 2017), an enterprise should communicate both publicly and directly to »affected stakeholders« how its due diligence system works, including how the complaints and grievance mechanism functions.¹¹

Experience shows, however, that communication and training alone do not lead to workers using complaints mechanisms. A review of good practice examples of worker-driven enforcement suggests two important additions. First, training for all workers should be in their mother tongue, and the methods should be designed and offered by labour rights or women's organisations, or by other workers. For example, in Lesotho, the agreements between global sector trade unions, Lesotho trade unions, and women's rights organisations with jeans manufacturers Nien Hsing Textiles, Levi Strauss, the Children's Place, and Kontoor to combat gender-based violence provide that the curriculum be designed by the Solidarity Center and the Workers' Rights Consortium and delivered by Lesotho trade unions and women's rights organisations, which the workers trust. Importantly, workers

are paid their full wages or piece-rates during the training (WRC 2019).

In the agri-food sector, the Fair Food Program has found »worker-to-worker education« to be most effective in raising awareness about rights:

By arming each and every worker with a full knowledge of – and readily available reference materials about – their rights under the Code, the FFP effectively deputizes tens of thousands of workers as frontline defenders of their own human rights. [W]orker-to-worker education, when coupled with the Program's twenty-four-hour complaint line, provides a quantity and quality of ongoing oversight that would be virtually impossible for any government agency, here or abroad, to replicate, (Asbed and Hitov 2017, 520).

The programme pays workers to train other workers on their rights and to identify and address any barriers that might hinder workers from participating in training programmes. As a result, workers use the complaints process, but more importantly, »growers, crew leaders, and field supervisors all know that workers are aware of their rights and know what to do if those rights are violated.« Therefore, they don't violate their rights (Asbed and Hitov 2017, 520).

Second, training is most effective when combined with organising. For example, the Asia Floor Wage Alliance's factory-level »safe-circle« approach to organising empowers women to identify and address gender-based violence in a safe setting.

7 CONCLUSION: RECOMMENDATIONS FOR EFFECTIVE LEGISLATION

In sum, two key arguments have been made. First, legislation should cover all workers, irrespective of their employment status, in all tiers of the chain. Regulating only some (permanent) employees in tier one factories, not only excludes most supply chain workers, but incentivises suppliers to informalise the workforce. Since the lower tiers are mostly unregulated, they could do so with impunity. This is also a gender issue because women are over-represented in outsourced and subcontracted employment arrangements.

One way to include homeworkers is for enterprises to contractually oblige their suppliers to ensure that all tiers of the supply chain keep a register of the names and contact details of all contracted homeworkers along with copies of their individual contracts. In accordance with OECD Guidance (2017), the register should include a record of the quantity of goods produced by each homeworker and the amount

¹¹ Such information would include the enterprise's method for assessing risks; its reasons for prioritising some risks over others; how it engages with its stakeholders; findings against its suppliers; its corrective action plans for suppliers; and details of grievances and how it has addressed the complaints. Communication should be »relevant, accurate, current, clear and user-friendly« and accessible to its intended users.

¹⁰ See WRC n.d.

and basis of their pay. National legislation by EU member states could create a statutory duty to this effect.¹²

Second, non-judicial enforcement cannot be left to private sector social auditing. Access to justice is only realisable if states »designate competent investigating and enforcement authorities« (ECCJ 2020) and this is complemented by bottom-up work-driven enforcement strategies outlined above. It is surely in the interests of enterprises to support worker-driven enforcement, both to avoid liability and to meet their responsibilities to identify, prevent, mitigate, and remedy human rights violations that occur in their supply chains.

Effective human rights due diligence legislation should accomplish the following:

- a) Cover all workers. Protection should be irrespective of employment status and apply to all tiers of the supply chain.
- b) Mandate worker and their organisations' participation in every aspect of the due diligence process. Participation should range from the law-making process to the design and implementation of complaint and grievance mechanisms. Enterprises should ensure »meaningful engagement« with all workers and their organizations at all tiers of the supply chain during each stage of the due diligence process: identifying, preventing, mitigating, and remedying human rights violations.
- c) Permit all workers to be represented by organisations of their own choosing. This especially applies to female workers.
- d) Include a transparency provision requiring contracts for all workers and for the contract to include the name of the brand(s)/retailer(s) for which they produce goods
- e) Require brands to pay for training of all workers on their labour rights. At all tiers, every worker along the supply chain should know for whom they produce goods; know their rights; and know how complaint and grievance mechanisms work. Training must be designed and provided by labour rights and women's organisations or by workers.
- f) Embed non-judicial enforcement mechanisms within a comprehensive enforcement strategy. The mechanisms must (1) provide for civil liability of directors and auditors and prevent audits and certifications from serving as safe harbours for corporations to avoid civil liability, and (2) address barriers to accessing justice, such as short limitation periods for bringing judicial actions and a reversal of the burden of proof from plaintiffs to respondents.
- g) Establish freedom of association and trade union rights as integral to access to justice. Enterprises that fail to act against suppliers who dismiss workers for organising should be held liable.

¹² How the EU directive could include all workers in all tiers of the chains is addressed in the platform of demands that organisations of homeworkers submitted to the European Commission (see note 1) as well as in OECD 2017, module 12.

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