

JOINT EMPLOYER LIABILITY LEGAL STRATEGY

**Holding Global Apparel Brands Legally
Liable for Labour Rights Violations in
their Supply Chains in Asia**

LEGAL BRIEF

**Legal Actions by Garment Workers' Unions in Asian
Production Countries Holding Global Apparel Brands
Liable as Joint Employers for Payment of Workers'
Wages and Benefits during Covid-19**

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I. Strategy to Bring Legal Accountability within Global Garment Supply Chains

The governance of global garment supply chains has received growing international attention, with the question of accountability of global apparel brands towards garment workers in their supply chains forming the central focus of the discourse. Yet, glaring gaps in the largely unregulated governance of global supply chains continue to permit and perpetuate structural inequalities within garment supply chains, where global apparel brands extract profits from a poverty-level and flexible workforce, comprising predominantly women workers in Asian production countries. *The accumulation of profits by global apparel brands is directly linked to their ability to evade legal liability* for widespread labour and human rights violations in their supply chains, which have long lasting impacts on the lives and livelihoods of Asian garment workers and their households.

Global brands benefit from the false assumption that they are merely “buyers” in the garments market in Asian countries. The falsity of this assumption has been further shrouded by brands’ guarded opacity in their supply chains. All this has prevented a commensurate legal paradigm from being articulated within global supply chains. As “buyers,” brands have promoted a well-known *race-to-the-bottom* with regard to wages and pricing models among governments of Asian production countries who have diluted labour protective frameworks and repressed wages to attract the businesses of the brands. As “buyers,” brands with their enormous economic power have generated fierce competition between suppliers across Asian countries, who, considered as “independent contractors,” are forced to lower the costs of garment production for the brands. Suppliers have had to absorb the risks of production or volatile global apparel markets, by operating on razor thin margins and pushing costs associated with competition and risk onto workers.

The absence of legal accountability to fix corporate responsibility for harms caused to workers in global garment supply chains was most keenly felt during the Covid-19 crisis. On the one hand, the damaging purchasing practices of brands that have continued unchecked for decades have left garment workers with no resilience to tide over crisis. Workers have little freedom to challenge the norm of precarious employment accompanied by low and insecure wages that trap them in a cycle of poverty and indebtedness across generations. During the pandemic, a massive humanitarian crisis hit garment workers as they rapidly lost employment and wages. Workers had no ability to hold brands legally accountable for their hazardous actions and to push them to adopt poli-



cies that ensure the very minimum for poverty-level workers during a severe crisis, such as continued secure employment and timely payment of full wages.. As a result, workers were pushed to the brink of survival financed by crushing debt, and have received little relief a year into the pandemic.

The Asia Floor Wage Alliance (AFWA) has developed a legal strategy based on the concept of “joint employer liability” in order to address unregulated governance gaps in global supply chains. This legal strategy gives garment workers and their unions the possibility of using labour protective frameworks within Asian production countries to challenge the practices of global apparel brands that lead to extreme and wanton labour exploitation.

Using the joint employer liability legal strategy garment workers and their unions in four Asian production countries – India, Indonesia, Sri Lanka and Pakistan – have filed legal claims within their national jurisdictions. They have held global apparel brands liable as joint employers, along with their suppliers, under national laws, for wage violations in their supply chains during Covid-19. This legal strategy is being explored in Bangladesh and Cambodia as well.

Articulating the Legal Paradigm Implicit in Global Garment Supply Chains

During the pandemic, manufacturing contracts between brands and their suppliers were brought under scrutiny, particularly regarding the moral and legal grounds of the force majeure clause, which allows brands to cancel orders and in some cases not even pay for the orders already supplied under the contract without any legal or financial liability.¹ The joint employer liability legal strategy places greater scrutiny on these manufacturing contracts, using national laws and jurisdictions in production countries. It lays bare the current false, but normalised, assumption about brands being “buyers” with an arm’s length distance from the suppliers in garment supply chains, thereby evading liability towards workers.

The joint employer liability legal strategy questions the premise of brands as “buyers” in the garments market, and aims to precisely articulate the brand-supplier relationship, leading to the development of a corresponding legal paradigm such that garment workers and their unions, as well as Asian production countries, can reclaim agency to compel legal accountability within garment supply chains through legal processes within their national jurisdictions.

The strategy bases itself on the following undisputable facts that can help reassess the structure of the global apparel industry:

¹ “Farce majeure: How global apparel brands are using the Covid-19 pandemic to stiff suppliers and abandon workers,” Accessed from: <https://www.workersrights.org/research-report/farce-majeure-how-global-apparel-brands-are-using-the-covid-19-pandemic-to-stiff-suppliers-and-abandon-workers/>



- **Explicit contracts for production exist between brands and suppliers:** The relationship between brands and their suppliers, contrary to common perception, is neither based on the arm's length principle of a commodity garments market nor on purchase agreements for garments. Rather, the current business model of global garment production requires brands to engage suppliers in Asia through manufacturing contracts.
- **Implicit employment contracts exist between brands, suppliers and workers in their supply chains:** It is on the basis of these contracts for production between brands and their suppliers, that suppliers enter into employment contracts with workers for fulfilling their contractual obligations to manufacture products for the brands. While explicit employment contracts are solely between suppliers and workers in the supply chain, the contracts for production between the brand and the supplier imply the need for, and is the basis upon which, these employment contracts are formed.

This articulation of the relationships between brands, suppliers and workers is a correction to the currently held erroneous assumption of brands as “buyers” of commodities, namely, garments. It makes possible the development of a legal paradigm in which garment workers and their unions can demand that both the explicit contracts for production between brands and their suppliers and resultant implied contracts of employment are linked and come under the purview of national jurisdictions of the Asian production countries, where both the contracts are executed.

Delineating the Problematic of Employment Relations in Global Supply Chains

Social justice forms the core objective of establishing legal employment relationships in order to determine legal liability for labour rights violations. It is based on the fundamental recognition that socio-economic inequalities underlie the relationships between capital and wage labour. At the heart of the process of establishing legal employment relationships lies the dichotomy between an “employee” and an “independent contractor” with the former being susceptible to direct exploitation by the employer who wields greater power in the work contract, while the latter is considered to be an “equal” party to the work contract.

The judiciary has played an important role in determining employee-employer relationships in order to ensure that workers who are identified as “employees” have access to statutory entitlements and are protected from labour rights violations. Asian countries have extensive labour laws and regulations meant for protecting workers’ wages and benefits, won through long and difficult labour struggles, in order to protect the interests of workers vis-à-vis exploitation by



employers. The joint employer or joint liability concept is well-developed within national legal systems, both in the home countries of brands, as well as in production countries. The concept has developed in response to the evasion of labour protective legislation, such as wage laws, through fictitious arrangements that seek to deny proper employer-employee relationships.

It evolved in the context of subcontracting, where employers rely on labour contractors to hire workers, allowing them to evade costs incurred for being in compliance with labour protective legislation. The joint employer liability concept allows workers to claim wages and benefits from large companies that engage contractors to hire workers and perform manufacturing activities of the company. The concept can be expanded, with some distinctions that are explored further below in this Brief, to the garment sector, which, across countries, is characterised by multi-tiered contracting systems leading to a high prevalence of labour exploitation through violations of wage protection laws.

These laws have not been applied to global apparel brands, who are able to evade legal liability towards workers in their supply chains by falsely posing as “buyers” in opaque supply chains, while retaining power and control over work and production processes. The contracting out of production by transnational corporations, through global garment supply chains has created immense challenges in protecting the rights of workers in Asian production countries from exploitation. The production of garments takes place within Asian supplier factories, which employ Asian garment workers for the purpose of fulfilling contracted production by global brands, who own, market and sell these garments across the globe. This transnational contracting of production and employment present a challenging scenario before national legal systems:

- **Shift in traditional business models:** The contracting out of entire production activities of transnational corporations to other Asian production countries confounds national legal systems. Asian suppliers who manufacture the garments owned, marketed and sold by the brands are considered independent contractors, and brands are considered independent buyers engaged through a purchase agreement. However, brands do not have their own manufacturing facilities, and rely on these suppliers for the manufacturing of their products, while suppliers do not have access to the consumer market and cannot run their businesses without manufacturing orders from the brands. In business terms this has resulted in a symbiotic relationship between the brands and the suppliers exemplified by the long-term production contract between these two parties.
- **Core business of brands shift to design, marketing, and retailing:** Brands have dis-invested from production units to reduce their business risk and costs; yet their core business is integrally linked to the continued produc-



tion of their uniquely branded products. Brands have sustained this essential production flow by acquiring manufacturing capacity from the production units of suppliers. In essence, brands have offshored necessary branded production through contracting.

- **Recognition of joint employer in global supply chains:** Most of the suppliers have long-term, dedicated relationships with brands through contracts for manufacturing entered between suppliers and brands. In order to undertake production for the brands, suppliers enter into contract of employment with workers under employment laws in their countries. The nature of contract for manufacturing between brands and suppliers shapes, conditions and controls the employment contracts between suppliers and workers. It is therefore evident that the contract for manufacturing and employer contract are linked.
- **Legal forums for adjudicating disputes related to transnationally linked employment relations:** Disputes arising out of the transnationally linked employment relationships can be pursued through legal forums in both the home country of brands as well as the home countries of suppliers. AFWA has developed a legal strategy appropriate for legal forums in home countries of suppliers where workers and their unions have the most agency.

During the pandemic, several large supplier organisations appealed to brands to carry out responsible purchasing practices without which the fundamental rights of millions of garment workers in Asia would be violated.² Their appeal underscores the falsity of the common framing of the relationship between brands and suppliers as mere purchase agreements between a ‘buyer’ and ‘independent contractor.’ Complex global supply chains with contractual relations of production and employment embedded within them but hidden from public view pose challenges to national legal systems in Asian production countries.

The joint employer liability legal strategy seeks to reveal beneath the corporate veil of the commercial agreements between brands and suppliers, the joint nature of production and implicit employment relations between brands, their suppliers, and workers in garment supply chains. National jurisdictions are asked to examine explicit contracts for production and implied employment contracts between brands, suppliers and workers on the basis of the following standards:

- **Degree and nature of control** exercised by global apparel brands over their suppliers and workers in their supply chains – including decisions on order cancellations, payment schedules, quality, pricing, and delivery

² “Joint Statement on Responsible Purchasing Practices amid the COVID-19 Crisis” Accessed from: https://bgmea.com.bd/page/Joint_Statement_on_Responsible_Purchasing_Practices_amid_the_COVID-19_Crisis

models that can be forcibly and unilaterally imposed by the brands based on their business requirements.

- **Economic dependency** of the suppliers' business operations on the actions of the global apparel brands, without whom they cannot continue their businesses.
- As a result of the above, the high level of **economic harm** that the actions of apparel brands can cause to workers in their supply chains, in terms of loss of employment and wages, becomes evident.

Based on the examination of the above standards, the joint employer liability strategy allows garment workers and their unions to submit before their national jurisdictions that brands and their suppliers are liable as joint employers towards workers in their supply chains. In a globalised world, the concept and principles that create liability have to be reformulated to deal with this new transnational relationship and to become open to multiple jurisdictions for enforcement.³



³ See, e.g. Court case presentations accessed from “Event: Suing Goliath: The struggle for justice in cases of corporate abuse abroad,” <https://corporatejustice.org/wp-content/uploads/2021/06/Suing-Goliath-event-presentation.pdf>. The event presented the most relevant recent judicial proceedings against EU business seeking remedy for alleged human rights abuses and environmental harm abroad and discussed the barriers to justice victims face and how the future EU directive on corporate due diligence should help remove them. Organised by the European Coalition for Corporate Justice and Friends of the Earth Europe, co-hosted by the RBC Working Group of the European Parliament.

II. History of Joint Employer and Joint Liability Concepts

The concept of joint employment and liability, as it evolved within different legal systems can be re-examined and applied to contractual relations of production and employment between brands, their suppliers, and workers in their supply chains.

Evolution of Joint Employer Liability in Jurisprudence

The judicial role in establishing employment relations is of great significance, with tests developed within common law playing an important role in determining whether a worker is an employee or an independent contractor. The development of common law to provide scope for joint employer liability can be traced through UK and US jurisprudence.

In the UK, judicial tests are concerned with determining whether the work contract is a **contract of service** or a **contract for service**, the former indicating employee-employer relationships and the latter pertaining to independent contractors.

The control test was developed as the primary test for establishing employee-employer relations, with the court stating that, “a servant is a person subject to the command of his master as to the manner in which he shall do his work.”⁴ The control test establishes employment relationships where the employer has control over the manner in which the work was performed by the worker. Direct supervision and control were stressed as the control test developed in the context of economic relations in Britain on the cusp of the Industrial Revolution, where the system of wage labour directly hired, supervised and paid by petty capitalists was predominant.

However, a change in the nature of the economy from the 1940s, where small scale production was replaced by large corporations, led to a shift in the relationship between employers and workers. Personal supervision and control were no longer defining features of employment relations.⁵ As a result, in 1953, Lord Denning developed the organisation test by stating that, “the test of being a servant does not rest nowadays on submission to orders. It depends on whether the person is part and parcel of the organisation.”⁶ According to the organisation test, a worker is an employee if they are found to be an integral part

⁴ *Regina v Walker* (1858), 27 L. J. M. C. 207

⁵ Carrigan, F. (2016). “Class Analysis and the Contract of Employment,” *Canterbury Law Review* (22): 207-234.

⁶ *Bank Voor Handel en Scheepvaart N. v. V Slatford and Another* (1953) - 1-Q.B.-248, UK

of the business. Even recent jurisprudence in the UK Supreme Court case on Uber has made it clear that if the principal company has a significant amount of control on how the independent contractor delivers their service, then those working for the service provider can be treated as employees. In this case, the written contract between Uber and the drivers, which considered “drivers” as “independent contractors,” was disregarded as it contracted out certain statutory protection.⁷

The English common law is also expanding the concept of liability, as seen in the cases of corporate abuse involving Vedanta, Shell and Chandler.⁸ It could be argued that the principles which create liability in the brands’ own national jurisdiction can be extended to the national jurisdiction of the suppliers where they enter into contracts for manufacturing. In order for brands’ contractual relationship with their suppliers to be executed, joint management of production activities is implicitly required. Brands’ global policies, advice to suppliers, and overall control over the production process have been defective, leading to human rights violations.

In the US, the control test became the primary test used in courts in cases of misclassification of employment, where workers were wrongly labelled as independent contractors, rather than as employees. Judicial interpretation of the standards of the control test stressed disproportionately on physical control stating that employment relations exist where the employer “retain the right to direct the manner in which the business shall be done, as well as the result to be accomplished,” or, in other words, “not only what shall be done, but how it shall be done.”⁹ As the system of subcontracting grew, large companies relied on this interpretation to evade responsibility toward workers, as they engaged contractors to recruit, supervise and pay workers. The common law’s narrow interpretation of employment relations using the standards of control test has been critiqued for undermining the US Fair Labour Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (AWPA).

A historic case in the US was the United States v. Silk, where the Supreme Court dropped the consideration whether control was exercised directly or indirectly

7 Uber BV and others (Appellants) v Aslam and others (Respondents), The Supreme Court, UK, Judgment given on 19 February 2021. <https://www.supremecourt.uk/cases/docs/uksc-2019-0029-judgment.pdf>. Case details <https://www.supremecourt.uk/cases/uksc-2019-0029.html>.

8 Court case presentations accessed from “Event: Suing Goliath: The struggle for justice in cases of corporate abuse abroad,” <https://corporatejustice.org/wp-content/uploads/2021/06/Suing-Goliath-event-presentation.pdf>. The event presented the most relevant recent judicial proceedings against EU business seeking remedy for alleged human rights abuses and environmental harm abroad and discussed the barriers to justice victims face and how the future EU directive on corporate due diligence should help remove them. Organised by the European Coalition for Corporate Justice and Friends of the Earth Europe, co-hosted by the RBC Working Group of the European Parliament.

9 Goldstein, B., M. Linder, L.E. Norton II et.al. (1999). “Enforcing Fair Labour Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment,” *UCLA Law Review*.



in order to establish employment relations.¹⁰ The US jurisprudence shifted its focus to whether the workers were employees as a matter of economic reality, where primary standing was given to where the control over profits lay. In this test, the fundamental economic reality of the relationship is considered to evaluate which persons or entities the workers are dependent on for their wages and working conditions. The economic reality test finds its roots in the FLSA and AWPAs, which use the standard of “permit or suffer to work.” “Permit” means to give approval to the fact that work is taking place, while “suffer” means failure to prevent the work from taking place. It holds liable those persons or entities who failed to prevent the violation from taking place even though they had the power to do so.

In the UK, the economic reality test developed in the US was cited to develop the multiple test which takes into account a range of factors relevant to the work contract in order to establish employment relationships to answer the fundamental question as articulated by J Cooke, “is the person who has engaged himself to perform these services performing them as a person in business on his own account?”¹¹

The Liberty Apparel case represented a landmark victory for garment workers in the US and took the joint employer liability concept forward, with the US Supreme Court ruling that the company was a joint employer of workers hired by their contractor to work in a factory producing garments for the company.¹²

The evolution of the jurisprudence in both the UK and US through various tests provides basis for the following:

- **Unmasking of true employment relations:** It allows true employment relations and resulting liability to be identified even where it is obfuscated as in the case of large companies which contract out production, and related hiring, supervision and payment of workers.
- **Fixing responsibility on those who benefit from business:** Responsibility towards workers is firmly placed on all persons and entities who ultimately benefit from the business by identifying with whom control and accumulation of profits takes place.

It also allows the establishing of joint employers and joint liability, by identifying as employers all persons and entities on which the worker is dependent as a matter of economic reality:

- It may identify a **true/principal employer** on behalf of whom workers are hired by a contractor or agent.

¹⁰ *United States v. Silk*, 331 U.S. 704 (1947), Supreme Court, USA

¹¹ *Market Investigations Ltd v Minister for Social Security* [1969] 2 QB 173, UK

¹² *Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61 (2d Cir. 2003), USA

- It may identify a person or entity as a **joint employer or secondary employer** to workers who are employed by another primary employer.

Joint Liability in the Context of Commercial Laws

Joint liability is also well established in commercial laws, and the application of the concept to contractual relationships of production and employment in global supply chains can be examined.

In commercial contracts, two or more people can be made responsible for the loss suffered by a third party, including financial facilities and leasing facilities by banks or other financial institutions, where partners, guarantors or promisors are held jointly liable for unpaid amounts of damages. It can be examined whether brands can similarly be considered jointly liable for the payment of wages to workers when the supplier fails to do so. Additionally, in company or corporate laws, directors can be held jointly liable for benefitting at the expense of creditors. Directors can also be held jointly liable in the case of corporate delicts that inflicts harm or loss to a third party. It can be examined whether the same principles can be extended to brands, to be held liable for the non-payment of wages and benefits by their suppliers, and the resultant harm or injury caused to workers.

The **principle of lifting or piercing the corporate veil** allows one business to be held accountable for the actions of the other, after examining their relationship, to see if they are controlled, in reality, by one and the same entity. The courts may refuse to uphold the separate existence of the company where the sole reason of it being formed is to defeat law or avoid legal obligations. It can be examined whether the brands' practice of shifting production to another country where their suppliers are presented as separate entities or independent contractors to shift the liability of the brand arising out of production can be viewed as a modern form of corporate veil applicable in global supply chains.

Based on these principles, if it is found that the brands and their suppliers are long-term partners, and suppliers are functionally integral to brands' business, and act as one and the same business for the purpose of a core business activity of manufacturing, and resulting employment of workers, then all of the parties are jointly liable for the contracts entered into by one party. Even though explicit employment contracts only exist between the supplier and workers in the supply chain, both brands and suppliers can be held as jointly liable to workers, and the extent of the liability of each establishment can be determined in court.



III. Standard Elements of Contracts of Production between Brands and Suppliers

The contracts of production between brands and their suppliers have certain elements, which need to be examined in the light of tests for deciding joint employer relationship of both brands and suppliers to workers in the garment supply chains. In these tests, importance is given to the economic reality of the relationships, rather than the textual language of the commercial contract. This means that even though explicit employment contracts are between the suppliers and workers, this does not exclude brands from being recognised as employers of workers. Additionally, even though the contracts between brands and the suppliers might exclusively mention that brands are not employers of workers hired by their suppliers, and these contracts are found to be legitimate, brands are not shielded from being considered potential employers of workers, as preference will be given to the substance, rather than the form of these relationships.

The question of whether brands are joint employers of, or jointly liable towards, workers in their supply chains is ultimately a question of fact and law. The joint employer liability legal strategy allows garment workers and their unions to submit their claims within their national jurisdictions for courts to examine the facts of the relationship to determine the following:

- Whether there is a **master/servant or principal/agent relationship** between the brands and their suppliers, such that brands are found to be the true or joint employers of workers who are hired, supervised and paid by their suppliers.
- Whether both brands and suppliers are joint employers of workers as their businesses are **functionally integral and inter-dependent**, acting as one and the same establishment for the purpose of carrying out their core business activity of manufacturing for which workers are hired.
- Whether both brands and suppliers are joint employers, who are jointly liable towards workers, as workers **depend on both brands and suppliers as a matter of economic reality**, and both parties benefit from workers who are an essential part of their businesses.

Brands Power to Control Workers in their Supply Chains

Control is not determined by whether it is actually exercised or not, but by whether brands have the *power to control* their suppliers and workers in their supplier factories.

The overall production processes in supplier factories, including the number and organisation of work across production lines, such as the number of workers in each production line and their work or job roles in the factory, are determined by the **requirements**, such as quality, delivery schedule and costing, put forth by the brands. The production processes, in turn, set the work processes of workers in the factory, including what work is performed by them and the manner in which they perform the work.

The contracts for production have **minute and detailed product specifications** that suppliers must follow to manufacture the products of the brands. The control over production is determined by the degree of specificity for the product; in other words, there is a correlation between degree of specificity and degree of control over the production process. The specifications define the brand value of the product and require stringent quality checks at various stages of the production process. Such a process has implications for both employment supervision and cost. Each such quality check has the inherent possibility of rejection which has its own cost implications. The detailed nature of, and the high bar set by these specifications means that production processes followed in supplier factories are controlled and determined by the brands' requirements. Through the contracts, brands are able to determine the sourcing and type of raw materials to be used, design of the garments, quantity and quality of the garments produced, timeline within which production is to be completed, and the delivery models for the products to be shipped to the brands. In addition to this, brands retain the prerogative to **cancel or reject orders** without any reason, and without any liability, at any point in the production process.

In summary, the production processes and the extent and nature of supervision over work are determined by requirements and specifications of the brands. Therefore, supervision and work roles of workers are integrally controlled by brands' direction, decisions and actions.

In addition to this, production managers or quality controllers are employed by the supplier to control and supervise the work performed by workers on a daily basis, without which the high level of compliance to specifications required by the brands cannot be achieved. The **production managers or quality controllers act as agents of the brand**, who supervise and control workers on behalf of the brands. They might require workers to re-do work or face penalties if it does not match the requirements of the brands.

Brands may also **conduct quality audits** at any point in the production process, and as a result, may demand changes in any aspect of the production or work processes in the factory or manner of managerial control. They may also demand corrections in products that have already been manufactured, change the timeline within which they must be produced, ask for products to be re-



manufactured, or reject products that deviate from their standards to even a small degree.

Workers as Integral to the Business Model of Brands

The structure of the global apparel industry needs to be examined to determine whether workers in the supplier factories of brands, who manufacture the garments for the brands, are considered an integral part of the businesses of brands.

One, the offshoring and contracting out of production by brands to suppliers in Asia do not of its own accord translate to manufacturing no longer being a part of the core business of brands. Brands do not own their own production facilities anywhere in the world, but rely on workers hired by their suppliers to manufacture the garments that they own, market and sell. Their ability to **run their business and accrue profits, through advertising and retail, is directly linked to the manufacturing work** performed by workers in their supply chains.

Second, the **production capacity of suppliers, including workers, are completely dedicated to the production of garments of the brands**. Even if suppliers are producing for several brands, they dedicate part of their production lines, and workers engaged in these production lines, to perform manufacturing exclusively for a specific brand. The suppliers do not own these products, over which the brands retain control and intellectual property rights. It can be argued that the production capacity of the suppliers, including workers hired by the suppliers, are partitioned out to the brand for its manufacturing activities. This means that the production facilities owned by the suppliers, and manufacturing carried out by workers therein, form an integral part of the businesses of the brands.

Third, as per their own admission, brands **establish long-term relationships and work in close contact with their suppliers** to manage their combined business activity of manufacturing the garments of the brand. Many brands play a central role in the business decisions taken by their suppliers, requiring complete transparency and access to their business information, including information on the hiring, management and payment of workers. They engage suppliers in mandatory training programmes for the welfare of workers or business improvement such as digitising of wage payments. Brands also conduct audits of labour practices in their supplier factories, and engage in remediation of labour disputes. This points to suppliers and brands undertaking joint management of manufacturing activities and workers hired for this purpose.

The above also points to the control of brands over suppliers and workers – where brands are able to influence to a great degree the management of the



suppliers' business and their business decisions regarding their production facilities and workers.

Economic Dependency of Workers on Brands

Suppliers are **dependent on orders from brands for setting up and continuing their business operations**. Suppliers cannot own, market or sell the products which are produced in their factories based on contracts for production with brands. Brands retain ownership over the product and its intellectual property, and the right to market and sell the products. The suppliers' businesses cannot exist independently of the brands, and they are completely dependent on the brands for marketing and selling the products that they produce for the brands.

Workers in the supplier factories are also economically dependent on brands for their wages and employment, with the policies of the brands determining whether they will be paid and how much they will be paid. Suppliers are able to employ or pay workers based on full and timely payments on existing orders, and assurance of continued orders from brands. Irresponsible actions by brands, as evidenced during the pandemic, including cancellation, rejection or reduction of orders, delayed payments, or demand for discounts directly translates to business losses for suppliers. They pass on costs to workers in terms of terminations, layoffs, or under payment and non-payment of wages and benefits. The contracts for production allow brands to demand changes to the products already manufactured, change the quantity of orders, and schedules for production such as reduction in lead times. This has a direct impact on the working conditions of workers – resulting in changes in work hours, production targets, and overtime.

Suppliers are bound by **competitive pricing models** followed by the brands, which sets their margins. The pricing model includes labour costs set at the minimum level required by national laws, making it impossible for suppliers to pay workers improved wages or benefits. National floor wages in Asian countries already present extremely low, poverty-level wages, with several studies revealing that pricing models of brands barely meet compliance with even national standards. Research has revealed that the low and competitive pricing demanded by brands are key reasons for precarious employment contracts and wages, and even gender-based violence and harassment at the factory floor which is closely related to productivity and profits. Since their wages, benefits and work conditions are set by the requirements of brands, workers are unable to bargain with their suppliers for higher wages, secure employment, or better conditions of work.

This results in workers being unable to meet their household consumption requirements, improve their standard of living, or save, leaving them indebted,



without any form of job security. The pandemic led to an aggravation of these circumstances, pushing workers to the brink of survival, and causing economic uncertainty as they lose employment and wages for indefinite periods. Brands' actions have resulted in direct human rights impacts for workers, and their households due to loss of meagre assets and severe, long-term indebtedness, as well as the inter-generational transfer of poverty due to reduced access to food and nutrition, healthcare, and education.

Brand Liability due to Economic Harm Caused to Workers

The **third-party tort liability of brands** towards workers in their supply chains can also be invoked.

If a master/servant or principal/agent relationship exists between the brands and suppliers, the liability of brands towards workers can be invoked regardless of whether they are identified as joint or true employers of workers. The tortious liability of brands towards workers can also be invoked through the **principle of vicarious liability**, which makes the master liable for the actions of a servant, even if the servant was acting independently of the master's orders. It is based on *maxim respondeat superior* which means "let the principal be liable." It also derives the validity from the *maxim qui facit per alium facit per se*, which means "he who does an act through another is deemed in law to do it himself." If brands are viewed as a principal/master, then they can be held vicariously liable for the actions of their suppliers, or agents/servants.

On the one hand, most brands promise workers in their supply chains, through their codes of conduct or public announcements, secure employment, adequate wages, and a minimum standard of working conditions, at the very least in compliance with national laws in production countries. However, garment workers in the supply chains of these brands have faced severe economic harm due to the brands refusal to uphold this promise during the pandemic by assuming responsibility and taking action to mitigate the effects of the pandemic on workers. Promissory estoppel is a legal principle that a promise is enforceable by law, even if made without formal consideration, when a promissor has made a promise to another party, who then relies on that promise to their detriment or harm. Far from honouring their commitments, brands have done the contrary by engaging in actions such as order cancellations, deferred payments, demands for deep discounts and reductions in new orders during the pandemic, having long lasting adverse impact on workers' lives and livelihoods.

In addition to this, the purchasing practices of brands, well before the pandemic, have been identified, as causing economic harm to workers. The **doctrine of unjust enrichment** requires one party to compensate or provide remedy to the other, if the first party has been enriched at the expense of the other in a man-



ner that is viewed as unjust by law. Brands' enrichment on the basis of labour exploitation, before and during the pandemic, within their supply chains can be viewed as unjust enrichment.



IV. Joint Employer Liability Complaints Analysis From Asian Production Countries

The joint employer liability legal strategy developed by AFWA is being used by garment workers and their unions in India, Indonesia, Sri Lanka, and Pakistan to hold brands liable as joint employers for the non-payment or under-payment of workers' wages and benefits during the Covid-19 pandemic. In Cambodia and Bangladesh, legal analysis is being or has been conducted. In all countries, workers and their unions have contextualised the legal strategy using national laws to submit before their national jurisdictions that brands must pay the full or remaining portion of the wages and benefits owed to workers during the period of the pandemic, where their suppliers have failed to do so.

1. India

In India, a total nationwide lockdown was in operation from 25th March 2020, well into May 2020, after which lockdown restrictions were relaxed in phases. During this period, garment factories in the country faced total shutdown, with workers being laid off overnight. In many factories, workers lost wages for the entire period of the lockdown, whereas in others, some of the workers were paid partial wages. The non-payment or partial payment of wages were based on arbitrary decisions by suppliers.

As a response, garment workers unions in India have filed complaints based on the fact that employers were statutorily bound and therefore legally liable to pay wages to workers based on the orders passed by the government, stating that employees will be deemed to be on duty and face no consequential deduction in wages for the period of factory shutdown during this period. Subsequently, the Indian Supreme Court asked employers and employees to negotiate on wage payments for the lockdown period mutually. The complaints have been filed, at the first instance, with local labour departments, as an industrial dispute, where a conciliation officer appointed by the government is tasked with investigation of the complaint and leading conciliatory proceedings.

Scope for Multiple or Joint Employers

In India, “employer” and “industry” has been defined to provide scope for multiple or joint employers:

Under the Minimum Wages Act an employer refers to a person who employs another person directly or through another person:

Section 2(e) “employer” means any person who employs, whether directly



or through another person, or whether on behalf of himself or any other person, one or more employees...”

Under the Industrial Disputes Act, “industry” refers to a systemic activity carried on by co-operation between an employer and his workmen, regardless of whether they are employed directly or through an agency.

Principal-Employer Liability and Control Test

The petitions filed draw upon the pre-existing notion of principal employer liability in Indian law, where the principal employer is made liable for the payment of wages when the contractor fails to do so. The petition has drawn on the evolution of this notion through case law in order to apply the concept to global apparel brands contracting out their production to Indian suppliers.

The principal employer, under the Payment of Wages Act, is defined as “*the person, who, or the authority which, has the ultimate control over the affairs of the establishment.*” The petitions argue that international brands must be viewed as principal or joint employers of workers as they retain ultimate supervisory and economic control over the supplier factory and workers.

Indian courts have held that the principal employer, rather than the immediate employer, would be liable based on the extent of supervisory control:¹³ “*If the petitioner, as a principal employer, is having the supervisory control over stitching of garments entrusted to the immediate employer and is having the right to reject them, then it goes without saying that the immediate employer is none else than a person employed by the principal employer for stitching garments, by engaging employees in a different place.*”

It was also observed that the degree of control and supervision would be different in different types of businesses and that it was enough that:¹⁴ “*if an ultimate authority over the worker in the performance of his work resided in the employer so that he was subject to the latter’s direction that would be sufficient.*”

Principal-Employer Liability Based on Sham Contracts

Under labour law in India, employer liability is an often-used concept for determining cases relating to the employment of contract labour under the Industrial Dispute Act. While trying to determine liability, labour courts/adjudicators often examine whether the contract is “genuine” or merely a ruse to evade legal liability to comply with labour laws and regulations.¹⁵ The petitions examine how contract between the brand and the supplier is a “sham contract” and a

¹³ *Thirupur Exports Madras vs Dy. Regional Director Esic Madras*, 17 March, 1994, Madras High Court, India

¹⁴ *Silver Jubilee Tailoring House vs Chief Inspector Of Shops*, 1974 AIR 37, Supreme Court of India

¹⁵ *Steel Authority Of India Ltd. & ... vs National Union Water Front*, (2001) 7 SCC 1, Supreme Court of India

ruse through which the brand can evade statutory liability to comply with labour laws and regulations (as described above). The petitions point out how any clause in the contract giving “indemnity” to the brand from being liable for loss of employment or wages of the workers cannot be valid and is in violation of law.

Principal Employer Liability Based on Integration and Economic Reality Factors

Indian courts have argued that the element of supervision and control of work is no longer the exclusive factor to determine employment relations, and the control test as it is traditionally applied is no longer the only relevant criterion. Rather, the integration test and the economic reality test have been given precedence.¹⁶

It has been held by Indian courts, that when two concerns are so closely connected with each other and the affairs of one concern are controlled by the other and the concern has no independent volition, the corporate veil must be lifted and both the concerns should be treated as one for the purposes of determining the workers’ rights under labour adjudication.¹⁷ The petitions argue that there is unity of ownership, management and control, and functional integrality between the businesses of the brand and the supplier, and they are so related with each other that in the ordinary business sense, the units form one “establishment.”

The petitions have been filed in the context of several Indian suppliers releasing a statement that their inability to pay workers is a direct result of brands that source from them making delayed, reduced payments and canceling orders.¹⁸ They state that the brands have total economic control over the workers’ subsistence, skill, and continued employment in the supplier factory. This test must take precedence over the traditional form of control through direct supervision. In fact, the petition claims that it is the extent of control over production as incorporated in the contract of production that translates into supervision of the work. Furthermore, the work supervision is framed and monitored by brands’ representatives at the work site.

On the basis of the above, the petitions state that the contract between the brand and supplier is in effect a contract of agency where the supplier is an agent and has been hired to supervise the work and production process carried out by the workers for the brand. Moreover, the supplier is carrying out the work

¹⁶ *Management Of Swatantra Bharat ... vs Workmen Of Swatantra Bharat Mills*, 1996 II LLJ 67, Delhi High Court, India

¹⁷ *The Associated Cement Companies vs Their Workmen*, Supreme Court of India, 1960 (1) LLJ 1; 1959 AIR 967

¹⁸ “Covid-19: Exporters urge global buyers not to cancel orders” Accessed from <https://retail.economictimes.indiatimes.com/news/apparel-fashion/apparel/covid-19-exporters-urge-global-buyers-not-to-cancel-orders/74791994>



of the establishment of the principal (brand) on its premises, but the brand has ultimate control over the affairs of the establishment of the supplier.

2. Indonesia

In Indonesia, the No Work No Pay policy was imposed by supplier factories on garment workers throughout 2020 to offset order cancellations or reduction in orders by brands due to the pandemic. As a result, workers across factories, faced several days of layoff throughout 2020, with partial or no pay for non-production days where they did not receive work. The Indonesian government, as a measure to protect wages, requested employers to discuss in advance with trade unions or workers' representatives at the company level, and take all alternative measures before laying off workers without payment. However, the No Work No Pay policy imposed by most factories was without consultation with workers or their unions.

As a response, garment workers and their unions in Indonesia are filing complaints with the Indonesian civil courts. The complaints are being filed in the civil court as they are challenging the contracts for production between brands and their suppliers, asking the court to determine whether these contracts can be considered employment contracts as per Indonesian law. They are submitting before the civil court that the contracts for production are in reality, multi-tiered employment contracts between different levels of the global garments supply chains, making the brands jointly and vicariously liable for workers in their supply chains.

Economic Reality as Primary Factor in Employment Relations

The Indonesian law (based on Classical Dutch Indies Law) states that if there is a dispute whether a contract is an employment contract or a commercial contract, then the disputed contract would be considered an employment contract. This law bases itself in the fundamental economic reality of the relationship between two parties. If two parties are economically inter-dependent, then the contract between them, even if it takes the form of a commercial contract, is considered to be in substance, an employment contract.

The complaints argue that the contracts for production between the brands and supplier, are, as a matter of economic reality, employment contracts. This is because the brands are able to accrue profits by contracting out production to suppliers in Indonesia or other Asian countries. This strategy is a key component of the brands' core business without which they would lose significant portions of their profits. At the same time, the suppliers are completely economically dependent on the brands as they do not have the right to reproduce the design or sell the products of the brand. They are dependent on the brands



who retain ownership over the product for income from the marketing and sale of the garments.

Control Factors Establish Master/Agent Relationship

In addition to this, the Indonesian law states that a commercial contract cannot exist between two unequal parties.

As the brands wield ultimate control over their supply chains, the contracts for production between the brands and Indonesian suppliers would be viewed as employment contracts between a master and servant. The concrete evidence for this is established through the Intellectual Property Rights (IPR) that are retained by the brands, as an intangible asset that allows the brands to hold monopoly power over the supply chains.

The contracts for production, through the IPR of the brands, allow the brands to establish supervisory and economic control over the suppliers. The brands provide licenses to the suppliers to manufacture their products based on the terms set out in the contracts for production, including the right to supervise, reject or demand that suppliers re-do the product if they do not comply with the standards. The IPR also allows the brands to have economic control over the supplier, as the supplier does not have the right to sell the products, whose intellectual property is owned by the brands. If the brands reject or cancel orders, the suppliers do not have access to marketing and retail facilities of the brands, through which they earn their margin of profits.

The control of the brands over the suppliers, according to Indonesian law, makes the contracts for production between the brands and the suppliers also into employment contracts. Therefore, a master/servant relationship exists between the brands and the suppliers. The suppliers employ workers on behalf of the brands in order to manufacture the products of the brands.

Vicarious Liability Arises from a Master/Servant Relationship

Article 1367 of the Indonesian civil code states:

“Masters and those who appoint others to represent their affairs, are responsible for the damages incurred by their servants or subordinates in doing the work for which these persons are used”;

Therefore, in a master/servant relationship, the master (superior) is responsible for tort actions performed by the servant (subordinate) in doing his job.

Based on the above factors, the complaints filed in Indonesia argue that there is no reason for the brands and suppliers to be considered as parties of equal and independent commercial contracts. Rather, the contracts between them,



as per law, are employment contracts, and this concept can be extended to limited liability corporations such as the brands and their suppliers.

3. Sri Lanka

In Sri Lanka, two waves of Covid-19 resulted in mass dismissals of workers without the payment of compensations, layoffs and the non-payment or under-payment of wages through the period of 2020. Several factories terminated workers overnight without payment of compensation, while others continue to employ workers on basic pay, without payment of additional benefits or overtime despite long hours of work and increased production targets. Several workers have been terminated on the guise of factory closure, only to have the factory re-open after a few months employing fewer workers on more insecure contracts. The unanimous reason provided by suppliers for their actions is order cancellations and reduction of orders by brands.

As a response, garment workers' unions in Sri Lanka have filed complaints, at the first instance, with the Labour Commissioner, demanding that an investigation be initiated into labour rights violations perpetrated by the suppliers and brands, as well as the contracts for production between the brands and the suppliers which permit these violations and make brands jointly liable towards workers.

Scope for Principal or Joint Employer in Sri Lankan Labour Law

Sri Lankan labour laws define employer and worker broadly to provide scope for principal or joint employers to exist:¹⁹

- An employer is 'a body of employers' 'who on behalf of any other person employs any workman.'
- A worker is a person 'employed to perform any work in any trade' and 'any person ordinarily employed under any such contract' to 'execute any work or labour'.

Judicial interpretation has also supported and extended such a definition of employer to cover three types of employment relationships: (a) any person who employs any workman; (b) any person on whose behalf any other person employs any workman; and (c) any person who on behalf of any other person employs any workman.²⁰ In this interpretation, employer has been defined broadly to include the person who is employing a worker directly, or through an agent, as well as the agent who employs a worker on behalf of another person.

In Sri Lankan laws and their judicial interpretations, all parties who constitute a

¹⁹ Industrial Disputes Act, 1950, Sri Lanka

²⁰ *Carson Cumberbach & Co. Ltd. v Nandasena*, 77 N.L.R. 73, Supreme Court, Sri Lanka

'body of employers' can be interpreted as having contractual obligation for the payment of wages to workers. The body of employers can constitute the principal/master on whose behalf workers are employed, along with the servant/agent who employs the workers on behalf of the principal/master. Both parties may, therefore, be viewed as joint employers sharing liability towards workers.

Brands and Suppliers as Joint Employers of Workers

The concept of joint employer liability has developed in Sri Lankan common law. Using the control, integration and economic reality tests, Sri Lankan courts have consistently held that a combination of factors must be considered which form a nexus between the employer and worker in order to establish employment relations, including the payment of wages, control in the way the work is done or control over the terms of employment.²¹

Therefore, complaints filed by garment workers and their unions, name brands and their suppliers as joint employers of workers in the supplier factories. This is because the contracts of production entered into by the suppliers and the brands form the basis of the employment contracts between suppliers and workers in the supplier factories. If the contracts for production between the suppliers and the brands are altered or revoked, then the employment contracts between the suppliers and workers are also altered or revoked. The brands exercise economic control over the suppliers through the contracts for production, without which the businesses of the suppliers cannot exist. Workers are in turn completely dependent on the brands for their employment, wages and working conditions.

Control Factors in Determining Joint Employment

The control test has been used in Sri Lanka to identify shadow employers who evade legal liability by hiring workers through a third party. Sri Lankan courts have established that when a company exercises control over employees hired by another party, then the contract between the company and the other party is a subterfuge to overcome the application of labour laws.²²

The complaint argues that since brands are able to exercise direct and indirect supervisory and economic control over workers in their supplier factories, they are shadow employers of the workers, while suppliers act as contractors who provide the factory site, tools and workers to the brands. This is because the suppliers offer all or part of their production lines to the brands during the period in which they have entered into a contract for production. The production capacity in the factory, including workers, are therefore, mandatorily dedicated to work according to the brands requirements during the period of the contract

²¹ *De Silva v. Associated Newspapers of Ceylon Ltd*, 1978-79, 2 S.L.R., 173, Court of Appeal, Sri Lanka

²² *Ceylon Mercantile Union V. Ceylon Fertiliser Corporation*, Supreme Court, 1984



for production. Workers are exclusively trained, and asked to follow the designs provided by the brands for the production of the garments of the brands.

Workers as Integral to the Joint Business Model of Brands and Suppliers

The complaint argues that the contracts of production between the suppliers and brands are business agreements for jointly carrying out the business of the global apparel industry. Suppliers' core business forms the leasing out or contracting of their production capacity including labour to the brands. Suppliers cannot run their business in the absence of workers who work on a daily basis to meet production targets for the brands. Brands, on the other hand, rely exclusively on suppliers to employ workers who will manufacture the garments of the brands, without which they cannot engage in marketing and retail of their products to earn profits. Workers play an integral role in the business of the global apparel industry conducted jointly by the brands and suppliers through global garment supply chains, and form an essential part of the individual businesses of both suppliers and brands as a matter of economic reality.

Based on the above factors, the complaints argue that the contracts for production form agreements between suppliers and brands to perform business jointly in global garment supply chains, and, therefore, jointly employ, supervise and control workers to perform the integral and essential business activity of manufacturing.

4. Pakistan

In Pakistan, the imposition of a total lockdown from March to May 2020, resulted in the shutdown of garment factories and suspension of their operations, leading to the non-payment of workers' wages during that time.

Trade unions filed a legal notice with the Sindh Chief Minister, Labour Minister, Human Rights Minister, Secretary of Labour and Human Rights Resources Department Sindh and Director General Labour Sindh, on behalf of workers from 12 garment supplier factories located in Karachi, Sindh.

Economic Harm of Brand Actions on Workers in Violation of Fundamental Right to Life

The complaint focused on the economic harm caused by the actions of brands on workers in their supplier factories, including starvation, impoverishment, indebtedness and the inter-generational transfer of poverty. According to the notice, the non-payment of lockdown wages and resultant economic harm to workers is in contravention to the constitutional rights available to workers to protect them against exploitation and their fundamental right to life.



According to Article 3 of the Constitution of Pakistan, 1973, on the Elimination of Exploitation, *“The State shall ensure the elimination of all forms of exploitation and the gradual fulfilment of the fundamental principle, from each according to his ability, to each according to his work.”* Article 4 states the Right of individuals to be dealt with in accordance with law, in particular:

“No action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law;

No person shall be prevented from or be hindered in doing that which is not prohibited by law; and

No person shall be compelled to do that which the law does not require him to do.”

Doctrine of Principal Agent Liability

The joint employer liability of brands for the violation of the fundamental right of workers to life, through the payment of full and timely wages, has been established by the Doctrine of Principal Agent Liability,²³ where the explicit and long-term contractual relationship between brands and their suppliers, is viewed as giving rise to implied employment contracts between brands and suppliers with workers employed in the supplier factories to manufacture the garments of the brands.

Precedent for Joint Employer Liability

The Baldia factory fire case represented one of the worst industrial accidents in Pakistan, which led to the loss of 258 workers'. The brand sourcing from the factory, KiK, through an agreement with the labour organization PILER, agreed to pay an amount of 1 million USD as immediate relief. Through the intervention of the International Labour Organization (ILO) based on compliance with the C 120, the employment injury convention, KiK paid an amount of 5.15 million USD to cover the gap in benefit for loss of earnings, medical and allied care and rehabilitation (C121 gap benefits). Kik also entered into an agreement with unions and civil society organisations to prevent future accidents through an institutional agreement. This implies the joint employer liability of the brand, which should similarly be invoked in the case of non-payment of wages during the Covid-19 lockdown period, with brands being held jointly liable to workers based on all core ILO conventions.

This legal notice sent to the provincial government can form the basis of a complaint in the Supreme Court of Pakistan against the violation of fundamental rights of workers by suppliers in Pakistan and international brands which manufacture their garments in these factories.

²³ *The Contract Act, 1872*

5. Cambodia

In Cambodia, several garment factories totally or partially shut down their operations across the period of the pandemic in 2020. This resulted in the suspension of workers for several weeks or months, due to delayed payments, order cancellations or reduction in new orders by brands.

In Cambodia, garment workers' unions are in the process of drafting petitions to their Labour Minister in order to demand that brands contribute to the payment of wages of workers in their supply chains, for the period of their suspension from work. Citing the Cambodian Prime Minister's promise in February 2020, that 60 percent of the minimum wage (equivalent to 114 USD) will be paid to factory workers during the Covid-19 period, the petition states that both the government and suppliers have contributed based on their capacities towards this amount, with 40 USD provided by the government and 30 USD provided by the suppliers.

The petition argues that brands who are using Cambodia and its workers as main manufacturing centre for the production of their garments have to take responsibility for the remaining amount, and that it is unfair and improper that no contribution has been made by brands. It argues that the contracts for production between the brands and suppliers fall under the commercial law in Cambodia. Under these contracts for production, and as a consequence of these contracts for production, the suppliers in Cambodia enter into employment contracts to manufacture garments in order to fulfill their obligations towards brands.

Section 1 of the Cambodian Labour Law states that "... relations between employers and workers resulting from employment contracts to be performed within the territory of the Kingdom of Cambodia, regardless of where the contract was made and what the nationality and residences of the contract parties are...". Reading the commercial contract between brands and suppliers and the employment contract between suppliers and workers together makes it evident that the employment contracts are implied in the commercial contracts.

The Labour Law refers to "employers" (plural) which implies that there can be multiple employers responsible for an employment contract. This is an internationally accepted notion that an agent can enter into an employment contract on behalf of the principal in which case both principal and agent are responsible for the creation of an employment contract. Therefore, the petition submits that the brands also need to be jointly liable towards workers as they are also party to the contract to hire workers to manufacture garments for retail. The production line becomes the joint responsibility of all parties, that is, the suppliers and brands, who are jointly conducting the business activity of manufacturing and retail.



V. Corporate Accountability in Global Supply Chains through a Ground-Up Approach

There is growing recognition internationally that the governance of global supply chains cannot be left to voluntary corporate social responsibility initiatives, including codes of conduct, and related weak mechanisms for monitoring and re-mediating labour and human rights violations, including auditing firms that negligently report compliance.

Due Diligence Mechanisms for Corporate Accountability

This recognition led to the development of global due diligence mechanisms for transnational corporations in the context of the business and human rights framework. Early on, the Organisation for Economic Cooperation and Development (OECD) introduced its Guidelines for Multinational Enterprises. It provides standards for responsible business conduct in a global context, and set up monitoring and grievance mechanisms to ensure implementation. In 2011, the United Nations Guiding Principles for Business and Human Rights (or Ruggie Principles) were adopted which established the corporate responsibility to respect human rights and defined it as taking measures to “identify, prevent, mitigate, and account for how they address their impacts on human rights”.

Due diligence, as a mechanism, was originally developed in the context of corporate finance, where legal liability may arise from the refusal to exercise the standard of care that a person or business is expected to undertake before entering into an agreement or contract with another party. **However, when adapted to the context of business and human rights, due diligence mechanisms have been critiqued for their inability to enforce corporate accountability for labour and human rights violations in their supply chains through mandatory and legally binding mechanisms.**

Legally Binding and Enforceable Mechanisms for Corporate Accountability

The recognition that transnational corporations must be held accountable for labour and human rights violations in their supply chains is the result of a long and hard-fought movement, which was initially opposed by employers and corporations, but could not be disregarded following the Rana Plaza disaster in 2013. The result was the Bangladesh Accord, an enforceable and binding legal agreement through which workers’ unions can hold brands accountable for a safe work environment in the garment industry. Following this, in 2014, the UN Human Rights Council adopted a resolution to work towards a legally binding instrument to regulate transnational corporations with respect to human rights.



The International Labour Conference (ILC), in 2016, presented an important win for workers within tripartite dialogues, where the demands of the Workers' Group for a Convention on global supply chains which includes provisions for establishing legal accountability of corporations led to the conclusion that there are significant decent work deficits in global supply chains, and a resolution to review current ILO standards, and consider guidance, programmes, measures, initiatives or standards for achieving decent work in global supply chains. The ILC 2016 successfully established governance of global supply chains as an important agenda for future standard setting by the ILO.

Several forms of transnational litigation for corporate accountability have also been evolving over the last two decades. The building of global momentum towards mandatory and enforceable legislation to establish corporate accountability is reflected in the due diligence laws enacted by several European governments, leading to the proposed comprehensive and mandatory due diligence legislation by the European union. Most recently, the Lesotho Agreement led to landmark agreements between brands, their suppliers, and a coalition of labour unions and women's rights advocates to prevent and remediate gender-based violence and harassment in garment factories.

Joint Employer Liability to Establish Liability of Corporations through a Ground-Up Approach

Due diligence mechanisms and legislation which are embedded within a well-accepted international normative framework for upholding and protecting human rights, represent a brand's home country approach that calls on the corporate duty to care for human rights impact within their supply chains. These mechanisms call for brands' obligatory engagement with violations through stakeholders such as trade unions. However, despite such obligations required in due diligence mechanisms, there remain substantial gaps in the unregulated governance of global supply chains, most keenly felt in garment workers' and their unions' inability to challenge the disproportionate power wielded by brands in global supply chains. Such dereliction of duty on the part of brands is not an exception; it has become the rule. The issue is what is the remedy if brands fail in their obligation to engage the union and how unions can access the enforcement and justiciability of this obligation in their own countries, that is production countries. This gap needs to be filled through a legal accountability process that has the capacity of enforcement.

Joint employer liability as a legal strategy is based on a ground-up approach, through which existing laws can be utilised to hold brands jointly liable within national jurisdictions of production countries. It is rooted in the historical struggles of workers and their unions in Asian countries for adequate wages and secure employment as a legal right.



Both approaches converge in their attempts to define and enforce corporate accountability within global supply chains. The joint employer liability legal strategy can complement and strengthen efforts made through due diligence mechanisms and legislation, as well as national legal systems in the home countries of brands. The joint employer liability legal strategy can contribute to these efforts by challenging the status-quo notions in global garment supply chains regarding the structure of the industry, where contracting out of production by brands is viewed as a purchase agreement – it brings the notion of principal and agent or master and servant to the offshoring of production by brands to suppliers in Asian countries. Furthermore, it argues that control factors which indicate employment relationships must be contextualised to global garments supply chain in order to identify and call out the monopolistic power wielded by brands through legal channels. It argues that workers form an integral part of the global apparel business, as they perform the key function of manufacturing the garments that are owned, marketed and sold by brands in order to earn profits through marketing and retail. It brings forth the fundamental economic reality of the relationships within global supply chains, where brands rely on suppliers and workers in Asian production countries for accruing profits, while refusing legal liability for the economic harm that they cause to workers in their supply chains.

