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Supply Chains and Temporary Migrant Labour: The Relevance of Trade and Sustainability Frameworks?

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I. Introduction

This chapter considers how labour law can be re-imagined to address the increasing role played by migrant labour in supply chains in the twenty-first century both within the European Union (EU) and in the context of global trade. The chapter begins by identifying some key issues regarding the intersection of supply chains, trade in services and exploitation of migrant workers who move between countries on a temporary basis. It is suggested that various factors enable the divide between the informal (or irregular) and formal (regular) worker to become, in this context, a sliding scale of precarity which can be exploited by the corporate entity at the top of a supply chain.

The chapter then goes on to consider the extent to which the contemporary regulation of EU and global trade seeks to address such issues, suggesting that these rules are insufficient for the protection of those temporarily moving as 'natural persons' as part of trade in services. This is because the worker posted from one jurisdiction to another is deemed not to enter the labour market of the host state and therefore is not treated as a suitable subject for regulation.

It is suggested that a preferable approach may be one emerging within the larger UN framework, whereby it is possible to mobilise under the 2015 Sustainable Development Goals to establish global norms regarding the obligations of states. Both substantive and procedural norms can arise from recognition of the relevance of SDGs, so that there should be scope for participation by workers and their organisations in regulatory strategies concerning supply chains, the terms of trade and treatment of migrant workers.

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II. Connections between Supply Chains, Trade in Services and Migrant Labour

This section of the chapter seeks to introduce the scope of a contemporary problem arising from the intersection of supply chains, trade in services and migrant labour. It is important to consider what may be identified as a 'supply chain', how trade in services remains relevant to such a mode of corporate or business organisation, and where migrant labour fits within this framework.

It is suggested here that contemporary modes of manufacture and service provision, combined with forms of technological change, have led to significant transnational cross-border sites of production and delivery. Multinational corporate enterprises (MNEs) subcontract across national boundaries and, in this way, utilise different legal regimes and lower costs in specific countries. In so doing, there is scope to distance the commercial enterprise which ultimately profits from the labour on which it draws. An increasing feature of global markets is trade in services which, as I shall argue, involves the commodification of work and its usage whether they ultimately can be linked to manufacture of tradeable goods or not. What is evident within this frame is that longer-term migration is no longer a feature of attempts to enhance service delivery or manufacturing. Rather, the evidence suggests that transport of labour to sites of provision (or production) has become increasingly temporary in nature.[1] In so doing, workers experience 'informality' through the insecurity of their immigration status (which does not give them longer-term rights or even any rights to remain in the country in which they are working, thereby affecting their bargaining power in the workplace whether individually or collectively) and their employment status (which may not give them full or indeed any rights under the labour laws of the host state in which their work is situated).

A. Identifying Supply Chains

Supply chains may be understood as 'the cross-border organization of the activities required to produce goods or services and bring them to consumers through inputs and various phases of development, production and delivery'.[2] For the sake of consistency and clarity, I shall use this definition as a basis for analysis in this chapter, including, as an International Labour Organization (ILO) report of 2016 did, the use of foreign direct investment (FDI) by multinational enterprises (MNEs)

[1] For a review of the evidence, see Joanna Howe and Rosemary Owens, 'Temporary Labour Migration in the Global Era: The Regulatory Challenges' in Joanna Howe and Rosemary Owens (eds), *Temporary Labour Migration in the Global Era: The Regulatory Challenges* (Oxford, Hart Publishing, 2016), at 12.

[2] ILO, Report IV: Decent Work in Global Supply Chains, ILC, 105th Session (Geneva, ILO, 2016), at 2.

and engagement of the same through diverse corporate forms and subcontracting in the hiring of labour.[3]

In the literature on 'supply chains' one finds a variety of more specific definitions and analyses. For example, there is frequent reference to 'commodity chains' in the sphere of political economy, namely 'networks of [labor] and production processes whose end is a finished commodity'.[4] In this body of research, the consumption of particular services at various 'nodes' is given considerable attention. In this setting, cheap labour can be drafted to make the production of goods profitable and skilled labour imported to satisfy supply side problems.[5] In a more positive fashion, supply chains (operating around the cross-border production of commodities) can be understood as 'global value chains', to the extent that value is added at each stage (and in each country) of the process. Policy makers in the World Bank have proposed that value should not only be created in the global North where the product is designed, but should extend to (even multiple) countries in the South so as to fuel development.[6] Beyond this, work on 'global care chains' tends to consider the services delivered by women across national borders relating to provision of reproductive labour, including care for the elderly, childcare and the traditional business of women's work such as cooking and cleaning.[7] There has been a move by Nicola Yeates and others to link 'global care chains' to commodity chain analysis around the commodification of care.[8]

The 2016 ILO Report recognised at length the vulnerability of workers in all stages of supply chains, but did not pay specific attention to the situation of migrant workers. In some senses, this may be because the ILO, like the World Bank, sees the benefits for workers in developing and emerging countries of global 'value' chains that provide 'new opportunities for employment … including for workers who had difficulty accessing wage employment or formal jobs, such as women, young people and migrant workers'.[9] However, there is mention in the report of dangers for migrant workers in supply chains by virtue of the ways in

[3] ibid.

[4] Terence K Hopkins and Immanuel Wallerstein, 'Commodity Chains in the World Economy prior to 1800' (1986) 10(1) *Review* 157 at 159, cited in Gary Gereffi and Miguel Korzeniewicz (eds), *Commodity Chains and Global Capitalism* (Westport, CT, Prager, 1994) at 2.

[5] Stephanie Ware Barrientos, '"Labour Chains": Analysing the role of labour contractors in global production networks' (2013) 49(8) *The Journal of Development Studies* 1058.

[6] For a very positive view of their operation and its development potential, see Daria Taglioni and Deborah Winkler, 'Making Global Value Chains Work for Development' (2014) *The World Bank – Economic Premise*, No 143, especially at 1–2 and 8.

[7] See Arlie Hochschild, 'Global Care Chains and Emotional Surplus Value in Will Hutton and Anthony Giddens, (eds), *On the Edge: Living with Global Capitalism* (London, Jonathan Cape, 2000) at 131: 'a series of personal links between people across the globe based on the paid or unpaid work of caring'.

[8] Nicola Yeates, 'Global Care Chains' (2004) 6(3) *International Feminist Journal of Politics* 369; and Nicola Yeates, 'Global Care Chains: A state-of-the-art review and future directions in care transnationalization research' (2012) 12(2) *Global Networks* 135. See also for an extension of this approach, Ann Stewart, *Gender, Law and Justice in Global Markets* (Cambridge, Cambridge University Press, 2011).

[9] ILO, Report IV: Decent Work in Global Supply Chains, ILC, 105th Session (Geneva, ILO, 2016), at 17.

which they enter another country for work, acknowledging that 'the cross-border flows of workers have also resulted in a greater risk of forced labour and trafficking in persons' and that while MNEs may take action to prevent such practices 'there is a risk they may become associated with forced labour through business links to contractors and suppliers who may conceal unlawful practices'.[10] There was also a short discussion of migrant workers' particular vulnerability, in that they 'are often found in non-standard forms of employment',[11] which of course preclude access to standard labour law protections. In this respect, the 2016 Report mentioned 'enforcement gaps', 'fragmentation of norms', alongside particular difficulties for those 'in an irregular situation and in the informal economy'.[12] The scale of this problem was not discussed in any detail, perhaps because it is not possible now to quantify its dimensions when so many workers lie outside the scope of formal legal protections. Moreover, while the ILO report demonstrates an appreciation of supply chains (and migrant labour within them) as an emergent problem, the link to extant trade regimes seems to be absent.

B. The Role of Services in Trade

The emergence of supply chains and the role of workers within them has not emerged in a vacuum, but arguably reflects the growth in cross-border trade in 'services'.[13] Adam Smith termed this 'unproductive labour',[14] but as we shall see it has become the lifeblood of a transnational supply chain economy. The variety of forms that 'services' may take has been ably identified by writers such as Michael Hardt and Antonio Negri,[15] but also Jane Kelsey.[16] This section draws on their analysis and seeks to explain their connection to trade in services, drawing from some earlier work of my own.[17]

Hardt and Negri have described free-standing supply of services as 'immaterial labour', that is, labour not linked to an identifiable 'product'. In this sense, their identification of 'affective labour', traditionally associated with women's work, and

[10] ibid, 26.

[11] ibid, 25, paras 75–76.

[12] ibid, 25 and 32.

[13] The services sector now accounts for approximately 70% of world GDP, as explained in Prakash Loungani, Saurabh Mishra, Chris Papageorgiou, and Ke Wang, *World Trade in Services: Evidence from A New Dataset* (2016) available at http://pubdocs.worldbank.org/en/180141480958603384/World-Trade-in-Service-February-2017.pdf.

[14] Adam Smith, *The Wealth of Nations* (first published 1776; London, Penguin, 1977), 429–30.

[15] Michael Hardt and Antonio Negri, *Empire* (Cambridge, MA, Harvard University Press, 2000), 290–93.

[16] Jane Kelsey, *Serving Whose Interests? The Political Economy of Trade in Services Agreements* (Abingdon, Routledge, 2008), at 119 et seq.

[17] See also Tonia Novitz, 'Evolutionary Trajectories for Transnational Labour Law: Trade in Goods to Trade in Services?' (2014) 67 *Current Legal Problems* 239 at 242–46, from which this analysis is taken and adapted.

the supply of labour by the state providing healthcare and other care work for children, the elderly and the disabled, can be linked to contemporary value care chains, namely the sale of women's reproductive labour across borders.[18] Their categorisation could also be further extended to what has been described as women's 'abject labour', which is also reproductive in character, such as sex work, bar-dancing and commercial surrogacy. These activities can, again, have significant cross-border 'trade' elements, as is evident from recorded forms of trafficking but also market-led choices made by the women concerned.[19] An interesting question, in these instances of reproductive labour, however, is whether they are truly 'immaterial' as it could be said that women's own bodies are commodified within these processes.

Another category identified by Hardt and Negri is 'analytical labour', which poses the difficulty that 'the growth of … knowledge-based jobs … implies a corresponding growth of low-value and low-skill jobs of routine symbol manipulation, such as data entry and word processing. Here begins to emerge a fundamental division of labour within the realm of immaterial production'.[20] This offers an insight into the differential market value of labour which poses problems in global value chains, where the design-based labour in the North is more highly valued and rewarded than that in the global South. Despite World Bank advisers' best intentions, it seems that such stark divisions pose barriers to development.

Also useful for our purposes is Hardt and Negri's idea of the decentralisation of production through 'networks',[21] or what Kelsey describes as 'labour for institutionalised production'.[22] Kelsey views these as 'services related to manufacturing, mining, forestry, fisheries and agriculture, the placement and supply of persons in activities such as construction, and supply chain operations such as transport and distribution'.[23] This category of services seems more concerned with subcontracting than with the absence of a product. As I have observed elsewhere, a contractor may be on site to provide a 'service', for example to cook, to design, to draft and there may be a product at the end of the day, such as an item of food, an architectural plan, or a legal contract. Yet we talk about catering services, design services and legal services as if there were no end product in sight. In the same way, agencies can also be regarded as providing 'services', even though their 'service' is to supply people to do a job which may also involve production of a manufactured item.[24] Subcontracting of labour through global supply chains in this way allows additional profit to be made by the supplier of the labour (usually the recruitment and placement agency) before the workers begin to make the products in question.

[18] Kelsey, *Serving Whose Interests?*, above n 16 at 119 et seq.

[19] Prabha Kotiswaran, 'The Laws of Social Reproduction: A Lesson in Appropriation' (2013) 64(3) *Northern Ireland Legal Quarterly* 317; and Prabha Kotiswaran, 'Abject Labors, Informal Markets: Revisiting the Law's Re(Production) Boundary (2014) 18 *Employee Rights and Employment Policy Journal* 111.

[20] Hardt and Negri, *Empire*, above n 15 at 291–92.

[21] ibid, 293–94.

[22] Kelsey, above n 16 at 12.

[23] ibid.

[24] Novitz, above n 17 at 244.

Arguably, what all these manifestations of the term 'services' have in common is that we use the term to signify that instead of services *being a component part of* making a product, the service (or even the worker) *is* the product. Commodification (even of care work) is thereby inherent in this creation of a market in services, especially in the context of multinational companies and franchises operating through commodity chains.

C. The Function of Migrant Labour

Services are now being bought and sold temporarily across borders, as workers are recruited to provide work within the various countries engaged within supply chains at sites of construction (architectural or building services), project management (managerial consultancy, legal, accountancy, IT and human resources services), service consumption (care, catering, cleaning) and even production of goods (delivered through subcontracting or agencies to the factory floors). The focus is now on short-term migration to fill gaps wherever the production or service delivery is based. Indeed, temporary migration is now more common than longer-term migration.[25]

Work will be performed under the ultimate control of a multinational company (usually originating in the global North) in the place (usually although not invariably in the South) that offers the greatest profit margins for the outlay of investment. For example, workers from the South may be supplied through an agency to a subcontractor on a site in the North, such that the larger corporate (or state) interests which benefit from the hiring are not held accountable for the experience of those whose labour is hired cheaply. To offer a second example, migrant labour may be deployed from one country in the South to another country also in the South, where a franchisee or subsidiary of a larger North-based corporation operates to satisfy a temporary skills gap or provide cheap labour for a limited period. In this way, labour migration is changing and the intersection of trade in services within supply chains is linked to these changes.

For example, in the UK, care-worker recruitment is carried out by agencies attached to the National Health Service (NHS). One such agency is the 'Helping Hands Homecare' recruitment service now attached to the NHS, which seeks to place EU nationals, for example from Portugal and Romania, to provide live-in or visiting care for the elderly or otherwise dependent. The overall ratings on review sites do not look problematic (4 stars for the clients and the carers) but the actual comments raise serious concerns.[26] Clients raise concerns over language and

[25] Eric Tucker, 'Intra-Company Transfers and Fissured Workplaces: *CS Wind* and the Challenge of Union Organizing in Canada', Paper prepared for ReMarkLab Final Conference: New Foundations of Labour Law in the Globalised Market Economy? Stockholm, May 2016. See also Howe and Owens, 'Temporary Labour Migration in the Global Era: The Regulatory Challenges', above n 1.

[26] See http://www.nhs.uk/Services/careproviders/ReviewsAndRatings/DefaultView.aspx?id=47580; and https://www.indeed.co.uk/cmp/Helping-Hands/reviews.

qualifications, but also the treatment of carers, with one comment being that 'they were not valued as care workers or adequately supported in their stressful work'. Carers have complained of low pay, long hours, lack of communication and even a 'culture of fear'. Both websites indicate that the commercialisation of care meant that clients and carers viewed the agency as profit-oriented rather than providing adequate assistance or organisation centred on clients' or workers' needs.

This is interesting, given what we already know about the treatment of individual migrant domestic (or homecare) workers in the UK, surfacing in cases before courts regarding their claims arising under contracts of employment of doubtful legality and even torts relating to racial discrimination involving physical abuse.[27] In this respect, the UK Government's immigration provisions under the 'domestic workers visa' has been identified as a contributing factor to the entrapment and subsequent ill-treatment of these workers.[28] It may be that uncertain long-term immigration status for even EEA nationals since the Brexit referendum is playing into insecurity and vulnerability at work. There is now a substantial academic literature emerging on UK care workers, examining their treatment within cross-border supply chains, which are rendered problematic by migrant status compounded by gender,[29] and the difficulty of establishing a standard employment relationship which could lead to coverage by national labour laws.[30]

Another reprehensible example of ill-treatment can be found in Qatar, where an estimated 1.8 million temporary migrant construction workers are engaged in various subcontracted building works. There are allegations of deaths on site and widespread experience of extreme exhaustion and dehydration, including various other forms of what Amnesty International identifies as 'exploitation and abuse'.[31] It should be added that UK businesses, including corporations based in the UK, are actively engaged in investment in Qatar supported by the current UK Government.[32] The ILO gave the Emir of Qatar until November 2016 to make significant changes to the *kafala* sponsorship system, following the publication of the ITUC reports in 2015 and 2016.[33] These experiences of migrant workers are

[27] See Joined cases *Onu v Akwiwu* and *Taiwo v Olaigbe* [2016] IRLR 719 (SC); also *Hounga v Allen* [2014] ICR 847, SC.

[28] For recent comment, see Virginia Mantouvalou, '"Am I Free Now?" Overseas Domestic Workers in Slavery' (2015) 42 *Journal of Law and Society* 329.

[29] Stewart, *Gender, Law and Justice in Global Markets*, above n 8; also Bridget Anderson, *Doing the Dirty Work? The Global Politics of Domestic Labour* (London, Zed Books, 2000).

[30] Leah F Vosko, *Managing the Margins: Gender, Citizenship and the International Regulation of Precarious Employment* (Oxford, Oxford University Press, 2010); LJB Hayes, *Stories of Care: A Labour of Law – Gender and Class at Work* (London, Palgrave Macmillan, 2017).

[31] Amnesty International Report 2015/16: The state of the world's human rights, published February 2016, available at: https://www.amnesty.org/en/documents/pol10/2552/2016/en/. At pp 209–300, there are also reports of inadequate housing, low pay and late wages.

[32] See https://www.gov.uk/government/world/qatar. See, for critical media comment, eg, https://www.theguardian.com/world/2016/nov/09/qatar-world-cup-2022-amnesty-hits-out-at-uk-silence-on-human-rights-during-visit-greg-hands.

[33] *The Case Against Qatar*, ITUC Special Report, March 2014 available at http://www.ituc-csi.org/IMG/pdf/the_case_against_qatar_en_web170314.pdf; and *Qatar: Profit and Loss* (2016) available

illustrative of the role that not only companies but state regulatory frameworks (including those relating to immigration and access to justice) can play in perpetuating forms of exploitation in supply chains. Here, both the responses of the Qatari and UK Governments can attract criticism. Finally, in November 2017, after considerable criticism from the international community, Qatar agreed with the ILO to make substantial reforms from 2018 onwards, which have been endorsed by the ITUC.[34] It will be interesting to see whether other Middle Eastern states now follow suit.

In part, the problems for temporary migrant workers may be the modes of recruitment by subcontractors and agencies, as has been recognised by the 2016 ILO General Principles and Operational Guidelines for Fair Recruitment.[35] These Guidelines specifically recognise the significance of recruitment into supply chains,[36] and are now also the subject of a programme undertaken in partnership between the ILO and European Commission called 'Global Action to Improve the Recruitment Framework of Labour Migration (RE-FRAME)'. Yet, it is not only the process of recruitment that is problematic in the context of commodity chains, but the employment to which the worker is eventually put. Two factors can immediately be highlighted: first, the vulnerable immigration status of the temporary worker and, second, the intentional distancing of that worker from labour law regimes which might offer protection in the state within which they work. In the next section of this chapter, we see that this scenario has been maintained under EU internal trade law and the global World Trade Organization (WTO) General Agreement on Trade in Services (GATS).

III. The Role of Trade Law in Maintaining Vulnerability of Temporary Migrants in Contemporary Supply Chains

Supply chains obviously envisage *geographical* distance. The aim is to pursue the cheapest means of finding, collecting and assembling materials for the purpose of profitable trade. As a result, the processes of manufacture and service supply may be fragmented across national boundaries. This splintering is designed to maximise profitability for the parent company. The cost price of the good or service (to which profit can then be added) is reduced by production or labour involving countries in the South which add value and increase profit margins. For example,

at: https://www.ituc-csi.org/new-ituc-report-qatar-profit-and?lang=en. See a very helpful discussion in https://www.pressreader.com/lebanon/the-daily-star-lebanon/20170414/281702614581573.

[34] See http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_592473/lang--en/index.htm; https://www.independent.co.uk/sport/football/international/qatar-2022-world-cup-workers-rights-kafala-system-migraints-middle-east-a8182191.html; and https://www.ituc-csi.org/ilo-decision-heralds-new-era-for.

[35] See http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/genericdocument/wcms_536263.pdf.

[36] See Guidelines, para 3.1, para 14 and para 15.5.

a corporate entity may depend on its subsidiary in another country to commission the making of goods by a manufacturer, which relies on the supply of primary materials by a distributor from a third country that are then processed by workers hired from an agency from a fourth country.

An interesting question is the extent to which the original corporate entity can be obliged to compensate workers further down the supply chain, overcoming not only the geographical but the *legal* distance that might seem to exist between the parties. There have been interesting innovative strategies suggested, regarding for example claims in tort (involving potential claims of vicarious liability and joint as well as several liability),[37] the development of norms regarding contracts governing each step of the chain,[38] as well as a multiplicity of transparency measures designed to embarrass the parent company.[39] However, the straightforward option of access by a temporary migrant worker to domestic labour law protections is not acknowledged either under EU internal trade or global trade norms. This section of the chapter examines the legal instruments and rules which prevail in both contexts and the exploitation (including human rights violations) to which each can lead. Notably, neither was examined in the context of the 2016 ILO Report.[40]

A. Temporary Work in EU Supply Chains

Workers in the European Union (EU) and European Economic Area (EEA) can migrate by virtue of the right to 'free movement of workers' and, in so doing, can plug the gaps in demand across the common market.[41] In addition, the EU provides a pathway for temporary migrant labour. Exercising their rights to free movement of services, employers may temporarily 'post' workers from one EU state to another.[42]

[37] Vibe Ulfbeck and Andreas Ehlers, 'Tort Law, Corporate Groups and Supply Chain Liability for Workers' Injuries: The Concept of Vicarious Liability' (2016) 13(5) *European Company Law* 167.

[38] eg the International Finance Corporation (IFC) *Policy and Performance Standards on Social and Environmental Sustainability* (2012) PS2, paras 27–29 regarding use of child labour and forced labour in supply chains. See also Anna Louise Vytopil, 'Contractual Control in the Supply Chain. On Corporate Social Responsibility, Codes of Conduct, Contracts and (Avoiding) Liability' (2015) available at: https://business-humanrights.org/en/multinationals-unlikely-to-be-held-liable-for-csr-violations-due-to-lack-of-transparency-research-finds.

[39] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014, amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, Official Journal of the European Union L330/1-330/9; California Transparency in Supply Chains Act 2012 (SB 657); and Modern Slavery Act 2015, s 54. See, for analysis, Susan Ariel Aaronson with Ethan Wham, 'Can Transparency in Supply Chains Advance Labor Rights? A Mapping of Existing Efforts' IIEP-WP-2016-6 available at: https://www2.gwu.edu/~iiep/assets/docs/papers/2016WP/AaronsonIIEPWP2016-6.pdf.

[40] See above n 1.

[41] See Art 45 of the Treaty on the Functioning of the European Union (TFEU).

[42] See Art 56 of the TFEU and Directive 96/71/EC of the European Parliament and of the Council of 16.12.96 concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1 (Posted Workers Directive).

According to a judgment of the Court of Justice of the European Union (CJEU) in *Rush Portuguesa*,[43] when a service provider sends a worker temporarily to another EU Member State for the delivery of services, ordinary work permit requirements are inappropriate, because such a worker returns after the completion of the service and, notably, does not at any time gain access to the labour market of the host state. However, the judgment in *Rush* did contemplate a discretion for the state in which the work was carried out to impose their labour standards on the employer and worker engaged in such temporary posting.[44]

Article 1(3) of the Posted Workers Directive now clarifies when posting takes place: through a contract between the undertaking employing the posted worker in one State and the party for whom the services are intended in another; via an inter-corporate transfer within a company or group of companies across EU national boundaries; or where an agency hires out a worker from one Member State to a user undertaking in another Member State.[45] These are classic forms of subcontracting across national borders within supply chains.

However, the Posted Workers Directive also limits the discretion of the state (acknowledged in *Rush*) to regulate labour standards with respect to such workers. States must, in the construction industry, lay down minimal standards for posted workers regarding matters set out in Article 3(1) of the Posted Workers Directive, and can do in respect of other industries under Article 3(10). The legitimate scope of regulation in Article 3(1) encompasses provisions relating to pay, hours and holidays, health and safety, provision for pregnant workers and maternity leave, and equality of treatment between men and women, as well as 'other provisions on non-discrimination'. It is clear, since the controversial case of *Laval*, that a member state may not be able to impose its collective bargaining procedures or terms arising from collective agreements on a service provider posting workers, for to do so is to prevent a service provider being able to ascertain potential liabilities before applying for a contract.[46] There may be a right to strike (under, inter alia, Article 28 of the EU Charter of Fundamental Rights), but it is not wholly operative in this context.[47] Terms from a collective agreement must be given legislative effect to be

[43] Case C-113/89 *Rush Portuguesa Lda v Office national d'immigration* [1990] ECR I-1417.

[44] ibid, para 18.

[45] Much of this analysis is taken from Tonia Novitz, 'Collective Bargaining, Equality and Migration: The Journey to and from Brexit' (2017) 46(1) *Industrial Law Journal* 109 at 124 et seq.

[46] Case C-341/05 *Laval un Partneri v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767 (*Laval*), para 110: 'collective action such as that at issue in the main proceedings cannot be justified in the light of the public interest objective … where the negotiations on pay, which that action seeks to require an undertaking established in another Member State to enter into, form part of a national context characterised by a lack of provisions, of any kind, which are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for such an undertaking to determine the obligations with which it is required to comply as regards minimum pay.' See also for exploration of the Nordic context for this decision, the work of the FORMULA project led by Professor Stein Evju in Stein Evju (ed), *Cross-border Services, Posting of Workers, and Multilevel Governance* (Oslo, University of Oslo, 2013); and Stein Evju (ed), *Regulating Transnational Labour in Europe: The Quandaries of Multilevel Governance* (Oslo, University of Oslo, 2014).

[47] See *Observations on Freedom of Association and Protection of the Right to Organise Convention No 87 1948* United Kingdom (2010) at 208–09; and Report (2013) at 196.

effective as the means of regulation under Article 3(1), setting, for example, terms regarding pay, hours and holidays.

The limited ability of posted workers to enforce what domestic labour law rights they can claim in the host state has been evident in some high-profile incidents, including those occurring in the Flamanville nuclear powerplant in France where there were deaths on site alongside non-payment of wages.[48] A result was the adoption of a Posted Workers Enforcement Directive in 2014, which makes specific reference to health and safety inspectorates as well as trade unions in the enforcement of posted workers' rights.[49] The Court of Justice has also now indicated that local trade unions may at least assist posted workers in individual claims regarding non-payment of wages to which they were clearly entitled,[50] although it might also be observed that the UK Regulations implementing this Directive (effective as at June 2016) do not mention the role of trade unions as agents for enforcement and are limited to the enforcement of posted workers' rights solely in the construction sector.[51] In reality, posting of workers across Europe has been found to be significant not only in construction, but also in manufacturing, road transport, processing and in various service sectors, including care, medical and business services. It also arises in terms of seasonal agricultural work.[52] Posting through agencies is also becoming a more common phenomenon.[53]

An example of the latter was the troubling case of Bogdan Chain, a Polish worker, seemingly brought by him against an Irish recruitment company, Atlanco Rimec, over unpaid social insurance.[54] Atlanco were headquartered in Dublin but registered in Cyprus, so *Bogdan Chain v Atlanco* began in the District Court in Nicosia, Cyprus – and was then referred to the European Court of Justice (CJEU). However, Chain claimed that he did not know about the case, which was initiated by a Belgian legal firm that formerly represented the Atlanco Rimec Group

[48] *Working conditions of posted workers in the EPR construction site in Flamanville (France)*, 27 June 2011, Parliamentary Question for oral answer to the Commission, Rule 115, Stephen Hughes, Alejandro Cercas, Rovana Plumb, Pervenche Beres, Estelle Grelier, on behalf of the S&D group. O-000168/2011. See text at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+OQ+O-2011-000168+0+DOC+XML+V0//EN; and Sarah Clarkson, GMB Brussels, 'Why free movement of labour must guarantee equal treatment for workers: the case of posted and seasonal workers', presentation delivered at IER Seminar, Developments in European Employment Law, 21.3.12.

[49] Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') Text with EEA relevance (the Enforcement Directive), especially Art 11(3).

[50] See also Case 396/13 *Sähköalojen ammattiliitto ry v Elektrobudowa Spółka Akcyjna*, judgment of 12 February 2015.

[51] The Posted Workers (Enforcement of Employment Rights) Regulations 2016 SI 2016/539.

[52] European Commission, *Commission Staff Working Document, Impact Assessment*, Strasbourg, 8.3.2016 SWD(2016) 52 final, at 8.

[53] Rutvica Andrijasevic and Devi Sacchetto, '"Disappearing Workers": Foxconn in Europe and the Changing Role of Temporary Work Agencies' (2016) *Work, Employment and Society* 1.

[54] C-189/14 *Bogdan Chain v Atlanco Ltd*, 11 June 2015, Request for a preliminary ruling.

(the company named as defendant). This state of affairs was exposed by Frank Shouldice at RTE in Ireland, whose investigations led him to find Chain in Poland apparently suffering from a work-related injury for which he had not been compensated and seemingly unaware of the case he had supposedly brought for social security compensation. The CJEU heard detailed legal arguments on 12 March 2015, but eventually abandoned the case, which seems to have been an attempt to set up a test case that could legitimate some of Atlanco's practices as an agency around social insurance (under a market rationale, given recent judgments regarding the claims of posted workers and workers exercising free movement rights).[55] The material on the EU website has vanished.[56] This is perhaps the ultimate in commodification of the litigant – achieved again by forms of *geographical* and *legal distance*. The injured migrant worker did not complain himself. He lacked access (both geographical and financial) to the services of a Belgian law firm or the Cypriot courts and the Polish courts could not help him.

In 2016, the European Commission announced proposals for further reform of the Posted Workers Directive on the basis that the scale of so-called temporary posting by service providers is growing (since 2012 by almost 49 per cent) and that the effects have been deleterious.[57] Further, the Commission has found that posted workers usually earn substantially less (often up to 50 per cent less) than local workers for the same job, affecting the ability of local workers to find employment when the cost of their labour is so undercut.[58] The Commission directly relates to supply or, as they term it, 'subcontracting' chains. There is to be a 'new rule' which gives the faculty to Member States to oblige undertakings to subcontract only to undertakings that grant workers certain conditions on remuneration applicable to the contractor, including those resulting from non-universally applicable collective agreements. This is only possible on a proportionate and non-discriminatory basis and would thus in particular require that the same obligations be imposed on all national subcontractors.[59] However, the 2018 amended Directive[60] makes no such provision.

[55] Starting with Case C-341/05 *Laval un Partneri v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767; see also for recent trends Rebecca Zahn, '"Common Sense" or a Threat to EU Integration: The Court, Economically Inactive EU Citizens and Social Benefits' (2015) 44(4) *Industrial Law Journal* 573.

[56] http://curia.europa.eu/juris/liste.jsf?language=en&num=C-189/14#.

[57] Commission Proposal to amend the Posted Workers Directive COM(2016) 128 final. These estimates would seem to be based on the use of portable social security (known as 'A1') documents, which record posting. A 2016 study produced for the European Parliament Committee on Employment and Social Affairs stressed that there is likely to be more posting that is not documented in this fashion, but does not have access to reliable sources of statistical evidence. Instead, the study highlights a very rapid increase in the use of posting in particular sectors after the financial crisis, which include the construction sector, but also manufacturing, education, health, care and social work. See European Parliament, Study for the Committee on Employment and Social Affairs, *Posting of Workers Directive – Current Situation and Challenges* (2016) IP/A/EMPL/2016-07 available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2016/579001/IPOL_STU(2016)579001_EN.pdf.

[58] ibid.

[59] ibid, 7–8.

[60] Dir 2018/957/EU of the European Parliament and of the Council of 28 June 2018 amending Dir 96/71 concerning the posting of workers in the framework of the provision of services.

B. GATS Mode 4 and FTA Provision for Temporary Movement of Natural Persons in Supply Chains

There is implicit endorsement in the General Agreement on Trade in Services (GATS) of the legitimacy of a human element to trade in services, whereby temporary migrant labour is treated in a manner akin to 'posted work' under the trade rules of the EU under what is known as GATS Mode 4. An Annex on Movement of Natural Persons Supplying Services under the Agreement seems to reiterate the view taken in an EU context that such persons do not seek access to the labour market of the state to which they are posted.[61] As such, these workers would seem to lie outside the remit of the host state's labour laws.

There is also an explicit statement in paragraph 4 of the Annex to the effect that, if these do not affect their trade commitments, a WTO Member State may take 'measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders'. In other words, unlike posted work within the EU, WTO states retain discretion in relation to their immigration laws in relation to trade in services even when these contribute to forms of exploitation.[62] Arguably, this combines the worst of the EU posted workers' regime with an international agreement that allows temporary workers to be rendered additionally vulnerable due to their insecure immigration status.

Similar concerns may arise under a free trade agreement (FTA). Free trade agreements dealing with services can be regarded as authorised under WTO rules under Article V bis and Article V of the GATS. Article V bis GATS allows for integration of labour markets but only if the relevant agreement (a) exempts citizens of parties to the agreement from requirements concerning residency and work permits; and (b) is notified to the Council for Trade in Services. The EU–EEA is one such labour integration agreement. More common are FTAs permissible under Article V of the GATS, which contemplates 'substantial sectoral coverage' and non-discrimination measures. An Article V GATS agreement can include movement of natural persons and indeed a chapter regarding temporary movement of natural persons, as is common in EU new generation trade agreements, such as EU–Korea,[63] EU–Singapore[64] and the Comprehensive Economic Trade Agreement (CETA) between the EU and Canada.[65]

An example of the potential effect of an FTA on regulation of workers temporarily resident in another country comes from New Zealand (NZ), which has

[61] Case C-113/89 *Rush Portuguesa Lda v Office national d'immigration*, 27 March 1990, [1990] ECR I-1417.

[62] See above nn 31–34.

[63] See Art 7.17, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2011:127:FULL&from=EN.

[64] See Ch 8, available at http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151747.pdf.

[65] See Ch 10, available at: http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/.

signed such an agreement with China.[66] In NZ, KiwiRail Ltd, an entirely state-owned enterprise, had purchased locomotives from a state-owned company in China, CNR Corporation Ltd. On arrival in NZ, the locomotives were found to contain asbestos. CNR then sent 40 workers, not hired directly but through two different subsidiary companies, to NZ to remove the asbestos and rebuild the locomotives, which was dangerous work. The companies refused to disclose the workers' remuneration, although one company said that the salary paid was what was paid in China, plus a daily allowance for working abroad. Insufficient disclosure was made by the subsidiaries or the workers to determine whether there was compliance with either the minimum NZ employment standards set out in relevant legislation or the terms of the multi-employer collective agreement (MECA) to which KiwiRail is a party. A NZ Ministry of Business, Innovation and Employment (MBIE) investigation revealed no answers, but found no evidence that the Chinese workers lived in cramped conditions or had inadequate food, despite the allegations made by local NZ workers in this regard.[67] Curiously, the MBIE inspectorate noted:

> it is also unclear that [New Zealand minimum employment standards law] would apply to or be enforceable against CNR in the circumstances in which the workers are working in New Zealand. Having taken advice, it is concluded that in all the circumstances of the case, it is more than likely that minimum standards law would not apply.[68]

In other words, there is an assumption that (like posted workers in the EU) the posted Chinese workers would be hired predominantly on terms set under the laws of their home state and not the host state. Further, unlike Article 3 of the Posted Workers Directive, no exceptions are envisaged in relation to this general rule.

The Rail and Maritime Transport Union (RMTU), representing the local NZ workers, however, expressed alarm at such findings. First, the RMTU was concerned that the outsourcing of labour was in breach of the MECA where it undercut the cost of NZ labour, a concern which the European Commission has identified in the EU context. Also, the RMTU argued that the work carried out by the temporarily resident Chinese workers through the supply chain should be declared to be 'subject to New Zealand minimum code legislation' and that KiwiRail was in breach of statutory duties of good faith. KiwiRail responded that, as they were not the employers of the Chinese workers, they had no legal obligations to prevent exploitation and no knowledge or control. As CNR (the Chinese parent company from which they bought the asbestos-contaminated locomotives) was not party to the MECA and had no direct relationship with the

[66] https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/china-fta/.

[67] Ministry of Business, Innovation and Employment, *Summary of Labour Inspectorate Investigation of Alleged Breaches in Employment Standards of the Chinese Workers at KiwiRail's Workshops* 17 April 2015.

[68] ibid, at 10.

RMTU, the union was precluded from seeking enforcement of the collective agreement against that commercial entity. The Employment Relations Authority in NZ subsequently refused to refer the matter for a Court to determine.[69] The RMTU General Secretary put a question which in NZ (as elsewhere) remains unanswered: 'If New Zealand employment law doesn't cover workers who are working in New Zealand … Where does it begin and when does it end? What would have happened if China loco had sent out some 15-year-old kids or younger? Would we say that was acceptable?'[70]

So, this raises an important question: in protecting migrant workers within supply chains in the context of trade in services, *who* are we aiming to protect and from *what*? Do we need the migrant workers themselves to make complaints and in doing so exercise their own personal agency? If so, do we need to establish the conditions that make it safe for them to complain (that goes beyond concerns merely over recruitment identified by the ILO Fair Recruitment Guidelines)? Chinese workers potentially subject to black jails and brainwashing centres (the successors to 're-education through labour' camps)[71] on return from a temporary assignment may be particularly reluctant to be seen to make trouble, as have been the workers on construction sites in Qatar.

If we do not require an actual complaint, is it only the most vulnerable, the trafficked and the children whom we seek to protect? Or should all workers, even when temporarily posted, be granted equal rights to home workers? And who should enforce these rights on their behalf?

There is always the risk that a union will be acting in a protectionist fashion to protect host state jobs for workers already resident in the host state, thereby obstructing aspects of enhanced income (the potential for real value in a global value chain) for those in the global South. Would we rely on *jus cogens* to assert national protection from the worst abuses, perhaps focusing on ILO core labour standards as human rights (as identified in the ILO Declaration on Fundamental Principles and Rights at Work 1998) and perhaps adding in health and safety for good measure (as an asbestos case like this one suggests we should)? Or do we assert the sovereignty of states to assert a set of measures which also reflect home state workers' interests in only a limited range of matters, as the PWD does?

[69] [2015] NZERA Wellington 105, 5560304, determination of 30 October 2015.

[70] 'RMTU case against KiwiRail's use of Chinese workers heads to ERA', available at http://stuff.co.nz/business/71462127/RMTU-case-against-Kiwirails-use-of-Chinese-workers-heads-to-ERA.

[71] See Amnesty press release December 2013, available at: https://www.amnesty.org.uk/press-releases/china-abolition-re-education-through-labour-camps-just-cosmetic-change; and the more recent report regarding the experience of a Swedish human rights activist at: https://www.theguardian.com/world/2017/jan/03/human-rights-activist-peter-dahlin-secret-black-prison-xi-jinpings-new-china. The term 'black jail' denotes an unofficial and undocumented place of detention where it is known that detainees are held, but for which the state refuses to accept responsibility. 'Brainwashing centres' as described by Amnesty International use a variety of techniques to persuade detainees to renounce their religious or other beliefs.

An alternative could be to utilise Article XIV of GATS, which would enable action to be taken by the host state on grounds of, for example, (a) 'public morality', (b) human life and health, or such matters as 'privacy', 'confidentiality' or 'health'. Or could we amend the Annex on Movement of Natural Persons to craft a solution particular to supply chains mirroring the European Commission proposal in respect of posted workers? My suggestion is that such questions might be answered with reference to the evolving United Nations (UN) role in the promotion of sustainable development which chimes with human rights protections, recognising the role of the state in this context.

IV. Sustainable Development Goals as a Basis for State Action to Protect Migrants in Supply Chains

In the ILO 2016 report on *Decent Work in Global Supply Chains*, different methods of governance are identified which might address the problems associated with supply chains: public, private, social partners' and multilateral initiatives.[72] While softer private and social partner initiatives may be of limited assistance for temporary migrant workers,[73] the ILO is correct to identify as highly problematic the failure of states to 'promote compliance and enforce national labour laws and regulations, and to ratify and implement international labour standards'.[74] One difficulty, however, is that the ILO report does not acknowledge, in the context of 'multilateral initiatives', the extent to which the EU and global legal regimes regarding trade in services may affect outcomes for workers in supply chains. Perhaps for this reason, the multilateral initiatives identified in the ILO report seem unduly narrow. They also fail to consider how the emergence of a normative order oriented around sustainable development might assist in reshaping state conduct alongside the rules of trade. This final section of the chapter flags the potential role for state action in the prevention of exploitation of temporary migrant workers within supply chains, with reference to the Sustainable Development Goals (SDGs) set out in the Resolution adopted by the UN General Assembly on 25 September 2015: *Transforming our world: the 2030 Agenda for Sustainable Development*.[75]

A. The Idea of Social Sustainability and its History

There are arguably two strands of international legal history that led to the current SDGs. One is the powerful idea of environmental (inter-generational)

[72] See above n 2, at 40.
[73] *cf* text accompanying nn 37–39.
[74] See above n 2, at 40.
[75] A/Res/70/1, available at https://sustainabledevelopment.un.org/post2015/transformingourworld/publication.

sustainability. This has its origins in the Stockholm Conference on the Human Environment of 1972 and the resultant 'Stockholm Declaration of Principles', with the Brundtland Report coining the phrase 'sustainable development' 15 years later.[76] The other is the increasing significance of an economic and social 'development' agenda. This intra-generational aspect received UN recognition in the 1972 Declaration under Principles 1 and 8,[77] but was more powerfully acknowledged in the UN Declaration on Right to Development.[78] In particular, Article 1 of the 1986 Declaration stresses that idea of 'economic, social, cultural and political development' as 'an inalienable' human right, which arguably maps on to the conception of Amartya Sen of 'development as freedom'.[79]

Sen resists the idea that humans can be regarded as commodities but wishes to see them exercise individual and collective agency at the level of the state, so as to determine what capacities are to be valued and able to be pursued. In this he is not prescriptive:

> It is not being suggested that there is some unique and precise 'criterion' of development in terms of which the different development experiences can always be compared and ranked. Given the heterogeneity of distinct components of freedom as well as the need to take note of different persons' diverse freedoms, there will often be arguments that go in contrary directions. The motivation underlying the approach of 'development as freedom' is not so much to order all states – or all alternative scenarios – into one 'complete ordering', but to draw attention to important aspects of the process of development, each of which deserves attention.[80]

Nussbaum is more determined to identify plausible bases for capabilities. She takes each person as 'an end', 'holding that the crucial good societies should be promoting for their people is a set of opportunities, or substantial freedoms'. Her concern is with addressing '*entrenched social injustice and inequality*, especially capability failures that are the result of discrimination or marginalization. It ascribes an urgent *task to government and public policy* – namely, to improve the quality of life for all people, as defined by their capabilities'.[81] For this reason, she offers a list

[76] See Report of the World Commission on Environment and Development: Our Common Future (1987), esp chs 2 and 3, available at https://sustainabledevelopment.un.org/post2015/transformingourworld/publication.

[77] Principle 1 stated that: 'Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.' Principle 8 recognised that: 'Economic and social development is essential for ensuring a favorable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life.'

[78] GA Resolution 41/128 4 December 1986, available at: http://www.unhchr.ch/html/menu3/b/74.htm.

[79] Amartya Sen, *Development as Freedom* (Oxford, Oxford University Press, 1999).

[80] ibid at 33.

[81] Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge, MA, Harvard University Press, 2011), at 18–19.

of 'Central Capabilities', of which two Central Capabilities, affiliation and practical reason, play an 'architectronic' role – 'they organize and pervade the others'.[82] These are also skills that are universally valued, arguably because they promote intergenerational and intragenerational policy solutions, which can operate in durable, that is, sustainable ways. This vision is one which is arguably manifested in the 1992 Rio Conference on Environment and Development (and its famous Declaration of Principles).[83] Principle 10 outlined the importance of 'participation of all concerned citizens at the relevant level' including women, young persons and indigenous peoples (Principles 20–22).

While the Millennium Development Goals have been criticised as target-ridden and donor-centric rather than qualitative and participatory,[84] this talisman of participation was again picked up in the Johannesburg Declaration of 2002. That instrument recognised the particular effects of globalisation on sustainability,[85] but also the importance of participation in policy formation,[86] and made an explicit link between sustainability and the ILO Declaration of Fundamental Principles and Rights at Work 1998.[87] In this way, development becomes less a matter for technical experts and more a matter for engagement, requiring protection of human rights and (at least) core labour standards by the state alongside multilevel deliberation (and arguably international cooperation) as to their realisation.

B. The SDGs on Migration, Supply Chains, Human Rights and Participation

It is evident historically that sustainability discourse gives us an avenue to link human rights to an analysis of the treatment of labour. Certainly, the 2015 SDGs stress the importance of protecting those rendered vulnerable by migration. For example, the UNGA SDG Resolution states:

> We recognize the positive contribution of migrants for inclusive growth and sustainable development. We also recognize that international migration is a multidimensional reality of major relevance for the development of countries of origin, transit and destination, which requires coherent and comprehensive responses. We will cooperate internationally to ensure safe, orderly and regular migration involving full respect for human rights and the humane treatment of migrants regardless of migration status.[88]

[82] ibid, 33–39.

[83] See http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm/.

[84] See http://www.unmillenniumproject.org/goals/gti.htm; criticised, e.g., by Jan Vandemoortele, 'The MDG Conundrum: Meeting the Targets without Missing the Point' (2009) 27(4) *Development Policy Review* 355; Maya Fehling, Brett D Nelson and Sridhar Venkatapuram, 'Limitations of the Millennium Development Goals: a literature review' (2013) 8(10) *Global Public Health* 1109; and Jason Hickel, 'The True Extent of Global Poverty and Hunger: Questioning the Good News Narrative of the Millennium Development Goals' (2016) 37(5) *Third World Quarterly* 749.

[85] See para 14. Available at http://www.un-documents.net/jburgdec.htm.

[86] para 26.

[87] para 28.

[88] See above n 75 at para 29.

This statement, which chimes with SDG 8.8, may not constitute explicit recognition of the precarity of temporary migrant labour, but arguably comes closer to this than any prior UN action. For example, recognising the drivers for such migration, SDG10.c makes specific provision for migrant workers to send 'remittances', that is, a portion of their salary, home. However, it is arguably disappointing that the only express reference to 'supply chains' is in an environmental capacity regarding food waste (under SDG 12.3).

In terms of the 'labour rights' specifically mentioned in the UN Resolution and SDG8, these do not obviously indicate recognition of 'freedom of association'. The statement in paragraph 27 of the Resolution is limited to eradicating 'forced labour and human trafficking and … child labour in all its forms', which are really only two of the four core labour standards recognised in the ILO Declaration on Fundamental Principles and Rights at Work, but it has to be also acknowledged that effective protections by states of even these two would make a concrete difference to construction workers in Qatar.[89]

There is further a nod to capabilities theory with the subsequent statement that: 'All countries stand to benefit from having a healthy and well-educated workforce with the knowledge and skills needed for productive and fulfilling work and full participation in society.' So, the answer to my question regarding the list of human rights or labour standards to be protected under FTAs (or indeed GATS Mode 4) may not be so very limited after all. They may include health and safety, as well as training, and even adequate remuneration. Potentially linking also to Nussbaum's ideas regarding affiliation and practical reason, is the statement in SDG 16.7 that the aim is to: 'Ensure responsive, inclusive, participatory and representative decision-making at all levels.' One would hope that this principle is to be applied to the workplace – for acknowledgement of this participatory aspect of sustainability would seem to connect to the entitlements of civil society (including trade unions) in the Johannesburg Declaration.[90] For these reasons, the ILO when considering 'strengthening development cooperation to improve rights and conditions in global supply chains'[91] may find the language, values and mobilisation behind SDGs to be helpful.

Indeed, a link can be made here between achievement of sustainability and the activities of international organisations relating to trade. One key target in SDG17 is to achieve 'a universal, rules-based, open, non-discriminatory and equitable multilateral trading system under the World Trade Organization',[92] presumably relating not only to trade in goods, but trade in services too. There may be a route

[89] See discussion at nn 31–34 above.

[90] See para 26 of the Johannesburg Declaration on Sustainable Development 2002, discussed in Tonia Novitz, 'The Paradigm of Sustainability in a European Social Context: Collective Participation in Protection of Future Interests?' (2015) 31(3) *The International Journal of Comparative Labour Law and Industrial Relations* 243 at 245–46.

[91] See above n 2 at para 202 and p 66.

[92] SDG 17.10. See above n 73.

here towards reform of the most problematic trade rules, whether through the Doha Development Agenda or otherwise.

V. Conclusion

This chapter has reviewed the potential and proven connections between supply chains, trade in services and temporary migrant labour. It has argued that current rules for trade in services both within the EU and internationally are unsustainable in that they can lead to problematic forms of exploitation. The chapter has explored the potential for connections between a sustainability and a human rights agenda, suggesting that states must be encouraged to address the ways in which immigration rules promote exploitation in breach of the 'social pillar'.

Further, following on from sustainable development principles, states should retain responsibility for protection of those who work within their territory and must make provision not only for access to justice, but the means to exercise agency. It is conceded that this is a bold set of claims, which have only received nascent protection on the international stage. But, at a time of trends towards nationalism and protectionism, it is arguable that it has never been more urgent for our rules of trade to be seen to benefit all – to be genuinely global value chains – and to be legitimate according to accepted sustainability and human rights standards.

There is therefore a case for reforming the current rules of global trade, so that sustainable development objectives (and their associated human rights protections, including substantive and procedural rights for workers) can be more closely integrated within GATS. The EU Enforcement Directive in respect of posted workers demonstrates the scope to amend and improve temporary work regimes within supply chains; it may be time for the WTO to enable (if not encourage) comparable protections for workers and even be as ambitious as the European Commission's 2016 proposals. If we are to take human rights provisions, guarantees of labour standards and sustainable development chapters in FTAs seriously,[93] we might expect more attention to their enforcement regarding temporary migrant workers within host states.

Further, it might be possible to supplement the amendment of trade provisions with more rigorous participatory measures. These might be legislative provisions to promote organisation and representation of migrant workers in supply chains, which could perhaps entail representation on a works council at local levels, but

[93] See ILO, Assessment of labour provisions in trade and investment arrangements (Geneva, ILO, 2016) available at: http://www.ilo.ch/global/publications/books/WCMS_498944/lang--en/index.htm. For discussion of the relative merits of human rights and sustainable development chapters, see also Lore Van den Putte and Jan Orbie, 'EU bilateral trade agreements and the surprising rise of labour provisions' (2015) 31(3) IJCLLIR 263 and also Lorand Bartels, 'Human rights and sustainable development obligations in EU Free Trade Agreements' in Legal Studies Research paper Series, University of Cambridge Faculty of Law, Paper No 24/2012, http://www.academia.edu/1902855/Human_rights_and_sustainable_development_obligations_in_EU_free_trade_agreements.

also more stringent protections from dismissal and deportation in the event of acting as a representative or voicing opinions directly to an employer. Such an initiative would, as noted above, be consistent with the emergent ILO Fair Recruitment Guidelines.[94] In this context, we might draw on norms beginning to be set in international framework agreements regarding core labour standards and their implementation.[95] In other words, we need human rights, but also, as Sen and Nussbaum acknowledge, agency through voice for all persons whether migrant labour or not (and temporary or otherwise). This entails practical as well as legal means of ensuring access and protection within a supply chain. There will have to be greater attention to the details, practicalities and legal status of procedures which mediate between economic and social objectives, as well as the agency of the actors within them.

These suggestions may seem counterintuitive to some. We are, after all, discussing global trade within supply chains that by their very nature traverse national boundaries, thereby limiting the jurisdiction of the state over their operations. However, my point is that, in relation to labour within their territory, states can play a key regulatory role which the international community need not discourage or indeed abandon, but can rather reinforce. That objective can be achieved by utilising what is being learnt about the dimensions of sustainable governance and using acceptance of these principles to guide reform of trading rules. International law can, in this way, bolster the role of government in the protection of temporary migrant workers, thereby setting fairer standards for competition in trade in services when delivered by natural persons.

[94] See above n 35.

[95] Hans Wolfgang Platzer and Stefan Rüb, 'International Framework Agreements: An Instrument for Enforcing Social Human Rights?' (2014) Friedrich Ebert Stiftung Working Paper, available at https://www.hs-fulda.de/fileadmin/user_upload/Zentren_und_Verbuende/Cinteus/Europaeische_und_globale_Arbeitsbeziehungen/Veroeffentlichungen/PlatzerRueb_2014_IFAs_and_Social_Human_Rights.pdf; Cesar F Rosado Martin, 'Organizing with International Framework Agreements: An Exploratory Study' (2014) 4 *UC Irvine Law Review* 727; also Aalt Colenbrander, 'International Framework Agreements' (2016) 12 *Utrecht Law Review* 109.