Accountability within GVCs as part of post COVID-19 transformative agenda

By:

Kinda Mohamadieh

November 16, 2020

The COVID-19 crisis as a reminder of fragilities and vulnerabilities entrenched in GVCs

Global value chains (GVCs), as a dominant form of capitalism today, have been a vehicle for entrenching the concentration of economic resources and power in the hands of multinational corporations. While COVID-19 compounded health and economic crisis, reports emerged that suppliers in the garment industry value chains have been facing mounting challenges as a result of unreasonable demands from big clients, mainly corporations in the United States and the United Kingdom. These included cancellations of orders and contracts for goods that were ready or in the manufacturing phase. They also included requests for discounts on outstanding payments and for goods in transit, and extensions on previously agreed payment terms. For example, between the time that the coronavirus pandemic took holdand March 2020, "more than half of Bangladesh

suppliers have had the bulk of their in-process, or already completed, production cancelled," despite the contractual obligations underpinning these orders. Many of the corporate clients have utilised *force majeure* clauses included within their contract with the supplier to justify their actions. Even where companies are abusing the *force majeure* clauses, their contractual counterparts (i.e., the suppliers in developing countries) will probably not be in a position to pursue legal action in quest of their rights and are, therefore, left without a remedy.

These pressures on the lower end of GVCs are undertaken by big corporations that are likely to be accessing support from stimulus packages offered by their governments. Such behaviour from large companies in industrialized economies is tantamount to exporting part of the burden of the economic crisis down the value chain to entities that do not have access to liquidity and government subsidies enjoyed in the United States and European countries, and where the most vulnerable workers and entities reside. Meanwhile, impoverished workers are left to lift part of the burden off the shoulders of multinational companies. In effect, these trends reflect an upholding by big corporations of their commitment to the primacy of shareholder value at the expense of workers whose sweat enabled the profits accruing to those at the top of the value chain.

The squeezing down by multinational companies on the lower end of the supply chain is reflected in multiple interconnected pressures on the economic conditions of developing countries, including through factory closures, unpaid workers and clampdown on government tax revenue, which itself means less investment in public systems and support to local workers and the local industry. Overall, the International Labour Organization estimates that there are 450 million people working in global supply chains across multiple sectors including the car industry, garment manufacturing, jewelry and food, among others. This is in addition to the untold numbers working in domestic supply chains. The latter are also significantly impacted as a result of decisions taken by multinational corporations, especially those that shape the practices of their subsidiary companies in developing countries. Without their jobs, thousands of workers at the lower end of GVCs are left on the brink of the poverty and, in some instances, extreme poverty. These are constituencies who rarely earn enough to accumulate savings, which means that without their jobs, their

families' access to food and education is jeopardized. What we are witnessing during the COVID-19 crisis is a more intense version of the continuous story of fragilities and vulnerabilities in the lives of those who depend on jobs at the lower end of GVCs. Their story goes beyond weak contractual terms and imbalances between the contracting parties. It is also the story of an economic and developmental model underpinned by vulnerabilities, rising unemployment, inequalities, poverty, and violations of economic and social rights.

Such stories show that private ordering is not enough to guarantee rights in such a context where power imbalances are endemic. It also reveals hollowness in the responsible sourcing narrative and voluntary commitments to human rights due diligence that we often hear of and read about in corporate reports. These imbalances and pressures are enabled by contracts that lack required guarantees as well as the lack of clear obligations on business entities set by their Home and Host States. This has led to major imbalances between the rights and privileges offered to businesses and the obligations they have under the law.

The quest for mandatory due diligence and accountability within GVCs

States do have existing obligations under international human rights law to regulate the conduct of their businesses when operating domestically or abroad. Business responsibilities in regard to respecting human rights, including labour rights, require the undertaking of human rights due diligence throughout their chain of operations. This is a clear statement under the UN Guiding Principles (GPs) on Business and Human Rights. The GPs are considered to be an issue of consensus among the international community and have come to be described as 'a blueprint for the steps all states and business should take to uphold human rights'.

The concept of human rights due diligence, as developed under the GPs, covers the 'business relationships' of business entities, which are understood to include "relationships with business partners, entities in [their] value chain, and any other non-State or State entity directly linked to [their] business operations, products or services". This notion therefore extends beyond the corporate legal structure to cover relationships within the GVC. Yet, the main

shortcoming of the GPs has been the casting of human rights due diligence as an expectation and not an obligation. In that sense, it does not depart from the mainstream orthodox economic theory that situates the role of the State as a facilitator of business, that sets expectations of business, but does not actively engage in regulating business. Such an approach has created confusion and has been identified as potentially problematic in practice. Bonnitcha and McCorquodale have pointed out that this approach creates uncertainty about the extent of businesses' responsibility to respect human rights and about "how that responsibility relates to businesses' correlative responsibility to provide a remedy in situations where they have infringed human rights". Since the GPs were released, there has been a limited number of interventions by States to develop their domestic legal framework in a way that reflects this global consensus and clarifies the obligations of companies when conducting business domestically or internationally, including through GVCs.

Lately, certain courts dealing with parent company liability in tort claims have adopted a broad approach to the duty of care that extends beyond the boundaries of the formal corporate structure. The recent decision on jurisdiction by the UK Supreme Court in a case against the UK mining company Vedanta for its operations in Zambia that harmed local communities is a good example. In this case, and for the purposes of the duty of care assessment, the Court looked at the level of supervision/control exercised by the parent on its subsidiary's particular activity leading to the damage. It recognized that there is no limit to the models of management and control which may be put in place within a multinational group of companies. Such an approach could be applied to other triangular relationships within a supply chain, such as that between a purchasing company and a supplier.

Yet, the lack of clear legal obligations on corporations creates challenges for accountability and justice. The essence of the Court's finding of the duty of care assumed by Vedanta rested on the details of its relation with its subsidiary, particularly its actions that caused the harm. It seems that judgment was influenced by voluntarily published materials in which Vedanta was considered as asserting its own assumption of responsibility for the maintenance of proper standards of environmental control over the activities of its subsidiaries, and in particular the operations at the mine in Zambia. The Court noted that whether group-wide policies give rise to a duty of care and subsequently potential legal

liability depends on how the parent company was involved in these group-wide policies, whether it took active steps by training, supervision and enforcement vis-a-vis the subsidiary. The Court also pointed that the "very omission [of declaredsupervision and control of its subsidiaries] may constitute the abdication of a responsibility which [the company] has publicly undertaken". It is therefore welcomed that the Court has considered that group-wide policies of the parent company, the agreements between the parent and subsidiary entities, as well as the public proclamations by the parent company, provide the basis on which to assess whether the company has assumed a responsibility towards the impacted communities. However, the UK Court's finding that the assumption of responsibility emerges from voluntary proclamations, and not from an obligation, could be problematic "given the potential chilling effect it will have on companies' willingness to conduct human rights due diligence lest it results in the creation of a duty of care." This means that, as long as due diligence remains confined to an expectation, not doing anything can shield companies from liability. In addition, as long as an obligation is lacking, access to justice for parties impacted by a company's conduct could depend on the voluntarily proclamations of the company itself.

Potentialities under the Current International Agenda?

Discussions pertaining to an international legally binding instrument on business and human rights, taking place at an intergovernmental working group established under the auspices of the UN Human Rights Council, seem to be heading towards addressing this shortcoming. Such a treaty, if agreed, could potentially clarify States' obligations to enact domestic regulations with extraterritorial reach in order to regulate the conduct of their national businesses when investing and operating abroad. The proposed treaty (currently discussed in the second revision of the draft negotiation text) provides that "State Parties shall regulate effectively the activities of all business enterprises domiciled within their territory or jurisdiction**,** including those of a transnational character. For this purpose States shall take all necessary legal and policy measures to ensure that business enterprises … within their territory or jurisdiction, or otherwise under their control, respect all internationally recognized human rights and prevent and mitigate human rights abuses throughout their operations". It also provides that the due diligence obligation should cover any actual or potential human rights abuses that may

arise from business entity's "own business activities, or from their business relationships". The latter is defined under the draft text as "any relationship between natural or legal persons to conduct business activities, including those activities conducted through affiliates, subsidiaries, agents, suppliers, partnerships, joint venture, beneficial proprietorship, or any other structure or contractual relationship as provided under the domestic law of the State, including activities undertaken by electronic means".

The reform of international investment agreements (IIAs) could be another site for balancing the rights and obligations of businesses and enhancing accountability and providing grounds for legal liability within the GVCs. While IIAs linkages to GVCs are often portrayed in terms of liberalization and facilitation of investment, IIAs could also serve as a space for clarifying the obligations of investors. While this is a major gap in existing IIAs, UNCTAD points that a salient feature of new IIAs is the balance between investor protections and investor obligations through the investor's duty to comply with Host State domestic laws and regulations, abstain from corruption, uphold labour rights, and undertake impact assessments. Remedying flagrant gaps in the traditional content of IIAs requires clarifying investors' obligations in the context of their activities as well as providing remedies for third parties that could potentially be impacted by the investors' practices. This includes clarifying the standards of liability that ought to be applied in cases of breach and clarifying that an investor could be sued in their Home State courts in case of a breach.

This blog is in part based on an article by the author entitled "Corporate power and States' (in)action in response to the COVID-19 crisis" (July 2020), published by the Third World Network, available at: https://twn.my/title2/briefing_papers/twn/Corporate%20power%20TWNBP%20Jul%202020%

View online: Accountability within GVCs as part of post COVID-19 transformative agenda

Provided by Afronomicslaw