

# *Decent Labour Standards in Corporate Supply Chains*

## The Immokalee Workers Model

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### I. INTRODUCTION

**T**RANSNATIONAL CORPORATE SUPPLY chains have emerged as a dominant approach to global production in the twenty-first century. They are central to the profitable manufacture and distribution of garments, footwear, electronics, toys and other retail goods. They also play a significant part in efficient agricultural production in the United States and elsewhere.

These supply chains are shaped by brand-name retail companies that are in a position to determine what goods are produced, assembled or harvested and in which locations. The brands sit at the top of a network that includes contractors of various sizes, usually in geographically dispersed locations. Tens of millions of individuals work in supply chains, mostly in nations with developing economies. These individuals, predominantly female and often migrants from rural areas or across national borders, labour under harsh and at times abusive working conditions to produce food, clothing or electronic devices for domestic consumption and for export on a global scale. Some labour conditions have improved in recent decades, but progress overall has been limited despite concerted efforts being made through various national and international legal channels and through voluntary private initiatives.

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This chapter begins by briefly discussing reasons why current well-intentioned efforts to protect workers in corporate supply chains have been inadequate to the task. Underlying the shortcomings of public law and private voluntary efforts are two core challenges. One is assuring sufficient levels of worker involvement to guarantee an effective voice in identifying abusive practices, formulating labour standards priorities, and designing a system that can achieve compliance. The second is providing a system of monitoring that is sufficiently comprehensive and rigorous so that enacted or approved standards are in fact meaningfully implemented.

The chapter's main focus is to describe in depth an approach developed in the US agricultural setting by the Coalition of Immokalee Workers (CIW), a worker-based human rights organisation in southwest Florida. Over the past decade, CIW campaigns of worker and consumer pressure have led to negotiated bilateral agreements with national and international retail brands (fast food chains, food service companies and supermarkets) that have implemented a prescribed substantial wage increase and dramatically improved other conditions for tens of thousands of workers in Florida's tomato-growing industry. The agreements are monitored and enforced through an unprecedented programme combining worker-driven complaint investigations and comprehensive audits, co-ordinated by the Fair Food Standards Council (FFSC), a third-party monitor launched by CIW in 2011. This framework of private labour standards agreements negotiated with leading food retail brands and imposing severe market consequences on suppliers who fail to comply—based on extensive annual audits and an omnipresent complaint resolution system in which workers play pivotal roles—offers distinctive lessons for labour relations in global corporate supply chains.

Finally, the chapter presents preliminary thoughts on whether the CIW model can be replicated on a larger scale, such as the Asian garment production industry, which traverses national borders. This is a complicated question, with a number of extrinsic factors militating against simple or unitary solutions. Still, given the scope of success achieved by the CIW and FFSC against what seemed insuperable challenges for decades, it is a question fully worth exploring.

## II. SHORTCOMINGS OF CURRENT PUBLIC AND PRIVATE LAW APPROACHES

### A. Public Norms: National and International

#### *National Regulation*

National labour standards norms have force-of-law impact in principle, but serious challenges exist with respect to implementation of these

norms—especially though not exclusively in developing countries. Some problems are doctrinal. Labour laws typically address only employer–employee relationships, making it difficult to reach often-remote suppliers that have subcontracted with the lead firm. These laws also tend to provide protections for full-time or regular employees rather than irregular, casual or short-term contract labour. Undocumented migrant workers are especially vulnerable in both developing and developed countries; they often have sharply limited rights and remedies and they justifiably fear being deported if they assert whatever rights they have.<sup>1</sup> Finally, labour laws lack authority beyond national borders.

Apart from the doctrinal issues, national regulation in this area faces major structural challenges. One is lack of resources: developing countries often have vastly inadequate numbers of labour inspectors,<sup>2</sup> and these inspectors tend to operate in restrictive bureaucratic contexts, unable to pursue new or distant worksites as an industry reconfigures its production capacities. A related challenge is a lack of will to enforce: data on implementation suggests systematic problems in many developing countries.<sup>3</sup> Cost competitiveness is an important aspect, in that self-interest encourages weak enforcement to avoid production shifts by multinational brands to other suppliers or even other countries. Lack of will may also evolve into corruption or misuse of the monitoring process—sometimes to punish immigrant workers as an auxiliary to law enforcement.<sup>4</sup>

A final structural obstacle is that the low-wage workers whom public regulation is meant to protect too often have limited input into the regulatory design process. Those with vested financial interests in the status quo tend to exercise disproportionate influence—if not outright control—over

<sup>1</sup> See generally Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford, Oxford University Press, 2014).

<sup>2</sup> See, eg ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations* (Geneva, ILO, 2015), addressing Convention No 81 for Bangladesh at 320; for India at 335–36; for Pakistan at 352; for Korea at 338; for Turkey at 361; for Honduras at 334; for Slovenia at 359.

<sup>3</sup> Inspections that regularly are less than thorough or adequate may be due to limited transportation resources, absence of legal staff, and/or lack of power to issue fines. See, eg ILO, *Report of the Committee of Experts* (2015) addressing Convention No 81 for Bangladesh at 320–21; for Colombia at 323–24; for Qatar at 356–57.

<sup>4</sup> See ILO, *Labour Inspection: General Survey of the Committee of Experts on the Application of Conventions and Recommendations on Convention 81* (Geneva, International Labour Conference, 2006) 24–25. Here the ILO criticises inspectors being used to enforce immigration laws in lieu of their primary duty to protect workers. For examples of individual countries using labour inspectors in this way, see ILO, *Report of the Committee of Experts* (2015) addressing Convention No 81 for Luxembourg at 340; for Malaysia at 344; ILO, *Report of the Committee of Experts on the Application of Conventions and Recommendations* (Geneva, ILO, 2014), addressing Convention No 81 for Bulgaria at 358; for Poland at 389–90; for Saudi Arabia at 398; for Spain at 402.

the content and quality of enacted protections. Even in modern democracies such as the US, the constitutional respect accorded to money in the legislative and electoral processes has amplified the role played by wealth in diluting worker-protection outcomes.

For all these reasons, when national laws address minimum wage and working hour standards, or safety and health requirements, implementation is very often lax.<sup>5</sup> To take one example, a recent study of wage practices in the garment supply chain throughout Asia found widespread failure to follow basic legal regulations involving minimum wage, overtime pay, paid holidays and social insurance contributions; the study also reported the presence of dual or triple bookkeeping on a systematic basis.<sup>6</sup> As one respected international labour official observed more than a decade ago, 'labour legislation without inspection is an exercise in ethics, but not a binding social discipline'.<sup>7</sup>

### *ILO Standards*

In its 1998 Declaration of Fundamental Principles and Rights at Work, the International Labour Organization (ILO) identified eight fundamental labour standards conventions that are now widely perceived as benchmarks for human rights in the global workplace.<sup>8</sup> These eight conventions, plus the two governance conventions on the operation of labour inspectorates and on consultation among the ILO's tripartite constituencies,<sup>9</sup> comprise an international foundational structure for assessing government commitment to socially responsible working conditions. Every Asian country

<sup>5</sup> See ILO, *Wages and Working Hours in the Textiles, Clothing, Leather, and Footwear Industries* (Geneva, ILO, 2014) 16–23; SwedWatch, *Play Fair: A Campaign for Decent Sportswear* (Stockholm, SwedWatch, 2013) 9–10.

<sup>6</sup> See Daniel Vaughan-Whitehead, 'How "Fair" Are Wage Practices Along the Supply Chain? A Global Assessment' in Arianna Rossi, Amy Luinstra and John Pickles (eds), *Towards Better Work: Understanding Labour in Apparel Global Value Chains* (Geneva, ILO, 2014) 68, 72–100. See also ILO, *Wages and Working Hours* 22–23.

<sup>7</sup> Francis Blanchard, former Director-General of the ILO, quoted in Wenjia Zhung and Kinglun Ngok, 'Labour Inspection in Contemporary China: Like the Anglo-Saxon Model, but Different' (2015) 153 *International Labor Review* 561, 562.

<sup>8</sup> These eight conventions address freedom of association and collective bargaining (No 87 and 98), non-discrimination (No 100 and 111); forced labour (No 29 and 105); and child labour (No 138 and 182). See generally Janice Bellace, 'The ILO Declaration of Fundamental Principles and Rights at Work' (2009) 17 *International Journal of Comparative Labour & Industrial Relations* 269.

<sup>9</sup> The labour inspection convention (No 81) and the convention mandating consultation among governments, labour organisations and employer organisations (No 144) establish basic norms for monitoring and enforcing labour standards and fostering dialogue among labour, employers and government with respect *inter alia* to ratification and reporting on ILO conventions.

that is heavily involved in garment production has ratified most of these conventions, and some have ratified nine or all ten.<sup>10</sup>

None of these core conventions, however, addresses wage levels and protections. Although the ILO convention concerning minimum wage fixing, which entered into force in 1972, makes special reference to developing countries, only one of the major garment-producing countries in Asia has ratified it.<sup>11</sup>

Moreover, ratification is not the same as effective compliance by national governments. Some countries that have ratified conventions on freedom of association and collective bargaining have banned or restricted trade union activities.<sup>12</sup> Ratifying governments also have in effect accepted regular employer resistance and violations of the right to organise at the factory level.<sup>13</sup> Other governments that have not ratified conventions No 87 or 98 are less than supportive of independent trade unions.<sup>14</sup> This lack of compliance in law and practice is important because union density and access to collective bargaining are generally viewed as integral to developing sustainable labour cost models that can provide for basic wages and hours protection in conjunction with commitments to efficiency and worker effort.<sup>15</sup>

To be clear, ILO norms have played an integral role in the overall effort to promote compliance with transnational labour standards, and many national governments have made progress in implementing and enforcing those norms. In addition, ILO norms now figure prominently in transnational corporations' voluntary efforts to create socially responsible labour

<sup>10</sup> As reported on the ILO website ([www.ilo.org](http://www.ilo.org)), Indonesia and Sri Lanka have ratified all ten; Bangladesh and Cambodia nine of ten; and China, India, Thailand and Vietnam have between five and seven ratifications.

<sup>11</sup> As reported on the ILO website, Sri Lanka ratified Convention No 131 in 1975; more than 20 of the 52 countries that have ratified this Minimum Wage Fixing Convention are in Latin America or Africa.

<sup>12</sup> See European Commission, *Bangladesh Sustainability Compact: Technical Status Report* (Brussels, European Commission, 2015). See also Jim Yardley, 'Fighting for Bangladesh Labor, and Ending up in Pauper's Grave', *New York Times*, 9 September 2012.

<sup>13</sup> See SwedWatch, *Play Fair* (discussing widespread employer abuses in Indonesia) (n 5); Human Rights Watch, 'Whoever Raises their Head Suffers the Most': *Workers' Rights in Bangladesh's Garment Factories* (New York, Human Rights Watch, 2015) (discussing abuses by employers in Bangladesh). See also International Trade Union Confederation, *The 2015 ITUC Global Rights Index: The World's Worst Countries for Workers* (Brussels, ITUC, 2015) 59–63 (describing systematic abuses in Colombia, El Salvador, Guatemala and Honduras, all countries that have ratified conventions No 87 and No 98).

<sup>14</sup> See eg Simon Clarke, Chang-Hee Lee and Do Quynh Chi, 'From Rights to Interests: The Challenge of Industrial Relations in Vietnam' (2007) 49 *Journal of Industrial Relations* 545, 551–53; Chris King-Chi Chan and Elaine Sio-leng Hui, 'The Dynamics and Dilemma of Workplace Trade Union Reform in China: The Case of the Honda Workers' Strike' (2012) 54 *Journal of Industrial Relations* 653, 654–55.

<sup>15</sup> See generally Doug Miller, 'Regulating the "Wage Effort Bargain" in Outsourced Apparel Production: Towards a Model' in Rossi, Luinstra and Pickles (eds), *Towards Better Work* 103, 120–21.

conditions that will appeal to Western consumers and investors, as I will explain in the next section.

Still, the record on the ground in developing nations, where global supply chains are principally located, has been generally disappointing. Apart from the frequent recalcitrance of governments—for reasons noted above—national attempts to encourage or require compliance with ILO standards are no match for transnational firms that already outsource garment, footwear, cell phone or food production to multiple countries. These firms can and do relocate away from efforts at labour standards enforcement that are perceived as threatening to their profit margins. Moreover, without a sufficiently central role for worker organisations, ILO norms are unlikely to be implemented effectively even by dedicated and well-funded government inspectors or courts. Independent worker organisations are better able than bureaucrats to gain the trust of reticent or language-inhibited workers; to gather important testimony and documents away from the workplace and after hours; and to understand and propose adjustments in the operational realities of a particular industry.<sup>16</sup>

## **B. Private Norms: Corporate Codes of Social Responsibility**

Given the complexities of regulating and enforcing labour standards in transnational supply chains, workers' organisations and their allies—consumers, investors, NGOs—as well as corporate management have increasingly pursued private regulatory alternatives. These private systems of labour standards regulation rely primarily on market incentives, generally reinforced by third party certification and monitoring, in an effort to implement decent labour standards protections.<sup>17</sup> Although such private initiatives often invoke public international norms as part of their compliance framework, they face their own set of challenges and limitations.

Since the 1970s, transnational corporations in large numbers have adopted codes of conduct that declare their voluntary commitment to workers' rights, often identifying the fundamental ILO conventions as embodying those rights. Supporters view corporate codes as 'attracting consumers or investors who prefer to engage with a socially responsible company, and [as] mollifying regulators who must allocate their limited resources among

<sup>16</sup> See generally Janice Fine and Jennifer Gordon, 'Strengthening Labour Standards Enforcement Through Partnerships with Workers' Organisations' (2010) 38 *Policy & Society* 552; Janice Fine, 'Strengthening Labor Standards Compliance Through Co-Production of Enforcement' (2014) 23(2) *New Labor Forum* 76, 78.

<sup>17</sup> See generally Martijn Scheltema, 'An Assessment of the Effectiveness of International Private Regulation in the Corporate Social Responsibility Arena' (2014) 21 *Maastricht Journal of European & Comparative Law* 383.

delinquent actors'.<sup>18</sup> Insofar as the codes announce a pledge to promote humane working conditions, and are used to guide or constrain supervisors in their personnel practices, they have contributed to improved labour standards in parts of the global supply chain. For several well-established reasons, however, this form of corporate self-regulation has profound weaknesses.<sup>19</sup>

First, the regulatory landscape in which voluntary compliance programmes typically operate is a far cry from the US or European settings that include independent and active trade unions, a professionalised and essentially reputable labour standards bureaucracy, and a reasonably attentive and unconstrained media community. In the Asian countries that currently form the heart of the global supply chain for apparel, footwear and electronics, inadequate regulatory systems undermine workers' willingness to speak out. Moreover, a thinner knowledge base about levels of pay, working hours and other employment conditions, combined with fearful or uninterested domestic media, contribute to a low level of transparency. In this context, meaningful monitoring and effective sanctions—which are needed if the codes are to avoid being consigned to window dressing—are virtually impossible to achieve.<sup>20</sup>

The primary business response, internal monitoring of code compliance by corporate human rights departments, is simply inadequate when applied to global suppliers.<sup>21</sup> Advance notice of site visits effectively invites suppliers or contractors to engage in deceptive strategies: modifying standard bookkeeping practices, concealing workplace hazards and scripting workers for auditor interviews.<sup>22</sup> Beyond the problems associated with double sets of books and orchestrated worker participation, auditors' interviews are too often conducted exclusively on site at the plant, where workers justifiably anticipate subsequent management questioning or retaliation. These internal factory audits also tend to be patterned after company financial audits; the auditors rely primarily on top-down examination of documentary records rather than time-consuming investigation of shop-floor processes and lengthy worker interviews.<sup>23</sup>

<sup>18</sup> James J Brudney, 'Envisioning Enforcement of Freedom of Association Standards in Corporate Codes: A Journey for Sinbad or Sisyphus?' (2012) 33 *Comparative Labor Law & Policy Journal* 555, 555.

<sup>19</sup> See generally Frederick Mayer and John Pickles, 'Re-embedding the Market: Global Apparel, Value Chains, Governance, and Decent Work' in Rossi, Luinstra and Pickles (eds), *Towards Better Work* 22–29.

<sup>20</sup> See Brudney, 'Envisioning Enforcement' (n 18) 569.

<sup>21</sup> See Mayer and Pickles, 'Re-embedding the Market' (n 19) 28–29.

<sup>22</sup> Brudney, 'Envisioning Enforcement' (n 18) 570 and sources cited.

<sup>23</sup> See Richard Locke, Matthew Amengual and Akshay Mangla, 'Virtue out of Necessity? Compliance, Commitment and the Improvement of Labor Conditions in Global Supply Chains' (2009) 37 *Policy & Society* 319, 332; Axel Marx and Jan Wouters, *Redesigning Enforcement in Private Regulation: The Case of International Labor Governance*, Working Paper No 126 (Leuven, Leuven Centre for Global Governance Studies, 2013) 1, 5–8; Brudney, 'Envisioning Enforcement' (n 18) 571 and sources cited.

Problems of objectivity, depth and transparency may be partially alleviated if monitoring is truly independent. An outside monitoring enterprise is more likely to conduct unannounced site visits, to engage neutral experts for record review, and to interview workers away from the worksite where they should feel less intimidated.<sup>24</sup> Importantly, however, the independent monitor is unlikely to succeed in contacting and communicating with workers away from the plant without the presence of an actively involved trade union or other workers' organisation.<sup>25</sup>

Even for independent monitors and auditors, there remain other obstacles. These monitors are funded by the brands, and thus risk losing clients if they are too assiduous in their criticism of compliance efforts. Moreover, the opaque web of subcontracting relationships often includes short-term agreements and constant shifting between suppliers. Complex arrangements for payroll and benefits distributions may be similarly difficult to penetrate.<sup>26</sup> A clear system of sanctions also must be in place for use against code violators; this requires initiative and leadership from corporate managers rather than outside monitors.<sup>27</sup> Finally, assuming that monitoring identifies problems in a factory or with a subcontractor in several factories, the expense involved in corrective action and subsequent audits to monitor ongoing compliance often results in relocation of production facilities in an effort to maintain acceptable profit margins.<sup>28</sup>

Underlying these obstacles is an inherent tension between corporations' principled espousal of labour standards and their pragmatic insistence on price-driven competition among suppliers. One indicator of this tension is the extent of comparative investment. Corporate personnel and resources dedicated to assuring that the right products arrive at the right locations at the right time and price far outweigh the corporate resources devoted to protecting the human rights of the workers manufacturing, distributing or growing those products.

Not surprisingly, global suppliers in apparel, footwear, electronics and other labour-intensive industries understand that, because corporate management negotiates primarily on price, suppliers must keep costs low in

<sup>24</sup> See generally Social Accountability International (SAI), <http://www.sa-intl.org/>; Worldwide Responsible Accredited Production (WRAP), <http://www.wrapcompliance.org/>.

<sup>25</sup> Brudney, 'Envisioning Enforcement' (n 18) 571–72 and sources cited; Dennis Arnold, 'Workers' Agency and Power Relations in Cambodia's Garment Industry' in Rossi, Luinstra and Pickles (eds), *Towards Better Work* 212, 215.

<sup>26</sup> See Marx and Wouters, *Redesigning Enforcement* (n 23) 7–8.

<sup>27</sup> Brudney, 'Envisioning Enforcement' (n 18) 572 and sources cited.

<sup>28</sup> See Jill Esbenshade, *Monitoring Sweatshops* (Philadelphia, PA, Temple University Press, 2004) 110–11.



order to compete successfully for business.<sup>29</sup> As a result, suppliers operate to a considerable extent outside the soft regulatory framework, concealing this arrangement from the transnational corporations with which they contract for production. Many, if not most, of these corporations continue to do business with non-complying suppliers out of choice, ignorance or perceived necessity.<sup>30</sup> And the level of non-compliance is not curable through auditing approaches that are characteristically top-down, highly centralised and lacking in substantial continuous involvement from workers and their organisations.<sup>31</sup>

### C. Core Shortcomings

Neither the ILO conventions and accompanying national government enforcement machinery nor the private codes of social responsibility have adequately addressed substandard working conditions in the global supply chain. These approaches represent progress, but they also reveal two core shortcomings: insufficient worker participation on the ground in identifying the problems to be addressed within the existing human rights framework, and the absence of a strong organisational approach to monitoring and remediation.

To be sure, it is difficult to develop effective worker participation when freedom of association and collective bargaining rights are discounted or suppressed under national law and practice. And it is difficult to generate effective monitoring and enforcement mechanisms without clear national commitments that include substantial funding. While these twin challenges can hardly be overstated, the structure of corporate supply chains offers possibilities for responsive engagement based on the special role that lead firms often play in co-ordinating and controlling sourcing decisions.<sup>32</sup>

Empirical studies indicate that private governance mechanisms are most effective when these lead firms exert considerable power in their value chain, when consumers and/or advocacy groups can engage in collective action, and when improved workplace conditions align with commercial concerns.<sup>33</sup> These mechanisms appear to be especially effective when lead

<sup>29</sup> See Miller, 'Regulating the "Wage Effort Bargain"' 104. See generally Scott Nova and John M Kline, 'Social Labeling and Supply Chain Reform' in Jennifer Bair, Doug Miller and Marsha Dickson (eds), *Workers Rights and Labor Compliance in Global Supply Chains* (London, Routledge, 2013).

<sup>30</sup> Brudney, 'Envisioning Enforcement' (n 18) 571 and sources cited.

<sup>31</sup> See Marx and Wouters, *Redesigning Enforcement* (n 23) 8.

<sup>32</sup> See generally Arianna Rossi, Amy Luinstra and John Pickles, 'Introduction' in Rossi, Luinstra and Pickles (eds), *Towards Better Work* 3.

<sup>33</sup> See Frederick Mayer and Gary Gereffi, 'Regulation and Economic Globalization: Prospects and Limits of Private Governance' (2010) 12(3) *Business & Politics* art 11.

firms permit or encourage opportunities for worker representation and subsequent participation in decision making about workplace conditions and practices,<sup>34</sup> and when auditors act less like inspectors charged with uncovering code of conduct violations and more like consultants engaged in joint problem solving and sharing of best practices among global buyers and their suppliers.<sup>35</sup> One recent and remarkably successful model that has utilised these mechanisms arises not in the garment or electronics industries but in the comparably challenging arena of agricultural labour.

### III. THE FAIR FOOD PROGRAM AS A MODEL

#### A. Background

In the early 1990s a group of migrant farm workers from Mexico, Haiti and Guatemala, labouring in and around the southwest Florida town of Immokalee, formed the Coalition of Immokalee Workers (CIW).<sup>36</sup> In its initial years, the CIW used community-wide strikes and work stoppages in the tomato fields to pressure Florida growers to improve piece rates and eliminate violence by crew leaders. The coalition also worked closely with the US Department of Justice to investigate and prosecute seven separate farm labour slavery cases in Florida, involving over a thousand workers and fifteen different supervisors.<sup>37</sup>

Agriculture in the United States has long been an exploitive and low-wage industry.<sup>38</sup> Growers in the modern era are able to recruit and retain often-desperate workers from a vulnerable immigrant population. The CIW's efforts to pressure the Florida tomato growers yielded some modest successes, but the coalition was unable to generate substantial wage increases or to force the growers into genuine negotiations. By the end of the 1990s, the CIW shifted its strategic approach in a way that is directly relevant to the dilemma confronting workers in global supply chains.

<sup>34</sup> See Richard M Locke, Fei Qin and Alberto Brause, 'Does Monitoring Improve Labor Standards? Lessons from Nike' (2007) 61 *Industrial & Labour Relations Review* 3.

<sup>35</sup> See Richard M Locke, *The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy* (Cambridge, Cambridge University Press, 2013) 180–81.

<sup>36</sup> See Greg Asbed and Sean Sellers, 'The Fair Food Program: Comprehensive, Verifiable and Sustainable Change for Farm Workers' (2013) 16 *University of Pennsylvania Journal of Law & Social Change* 39, 43. Asbed is one of the coalition's founders. See John Bowe, *Nobodies: Modern American Slave Labor and the Dark Side of the New Global Economy* (New York, Random House, 2007) 27. The CIW is not a traditional trade union and does not engage in collective bargaining—nor do the workers it speaks for have a legal right to do so given their exclusion from the National Labour Relations Act (NLRA) as agricultural employees.

<sup>37</sup> See Sean Sellers and Greg Asbed, 'The History and Evolution of Forced Labor in Florida Agriculture' (2011) 5(1) *Race/Ethnicity: Multidisciplinary Global Contexts* 29, 37–40.

<sup>38</sup> See Asbed and Sellers, 'The Fair Food Program' (n 36) 40–41.

The domestic market for tomato production is highly concentrated. Florida produces virtually all fresh-market field-grown tomatoes harvested between October and May in the United States, and 50 per cent of annual domestic production.<sup>39</sup> The industry estimates that more than 30,000 workers are required to grow and hand harvest this crop.<sup>40</sup>

Based on its own analysis, the coalition determined that major pressure on wages and working conditions came from the corporate food industry and its aggregated purchasing power. As is true in the garment, footwear and electronics industries, fierce competition among corporate brands creates substantial downward price pressures on suppliers or growers, whose response in turn is to impose similar downward pressure on wages and working conditions in their own operations.<sup>41</sup> After determining that the top of the industry would need to be on board, the CIW focused its efforts on brand name retail companies that have consolidated power and market share in several areas: fast food operations (Subway, McDonald's, Burger King and Yum Brands—Taco Bell's parent company); institutional food service providers (Aramark, Compass and Sodexo); and major supermarkets (Whole Foods, Trader Joe's, Kroger, Publix).<sup>42</sup> The CIW strategy was to direct concerted activities by farm workers and consumers at these brands.

## **B. Better Labour Standards for Farm Workers: Four Major Components**

As a workers' organisation, the CIW has approximately 5,100 members out of a total tomato fields-related labour force of over 30,000 at any one time. The great majority of the workforce are undocumented immigrants.<sup>43</sup> Workers join and participate in a range of regularly scheduled activities including Wednesday evening meetings, Sunday women's meetings, Saturday movie nights and the operation of a local FM radio station.<sup>44</sup> A CIW Central Committee meets monthly to review and plan for activities and new approaches; participation in all activities is open and self-selected. The CIW has been described as 'founded in liberation theology-influenced

<sup>39</sup> Fair Food Standards Council, *Fair Food Program 2014 Annual Report* (Sarasota, FL, FFSC, 2014) 6.

<sup>40</sup> *Ibid.*

<sup>41</sup> See 'About CIW', <http://ciw-online.org/about>.

<sup>42</sup> Asbed and Sellers, 'The Fair Food Program' (n 36) 44.

<sup>43</sup> Roughly 80 per cent are undocumented. See Jennifer Gordon, notes from her exchange with Sean Sellers during February 2014 site visit.

<sup>44</sup> Details on the CIW operation are reflected in its various website entries and also in the author's communications with CIW and FFSC personnel since March 2014.

principles of popular education, leadership development, and collective action'.<sup>45</sup> The CIW approach essentially consists of four separate but inter-related components.

*Pressuring the Brands for Bilateral Agreements Featuring a Wage Premium*

The first component was a sustained national campaign generating pressure on the brands, based on an alliance of farm workers and consumers. The campaign used speaking tours, long-distance marches, protests, hunger strikes, online organising, consumer boycotts and other grassroots activities aimed at publicising the purchasing-power role of the large brand retailers, thereby making these brands accountable for labour conditions in their tomato supply chains.<sup>46</sup>

The first buyer that CIW targeted was Taco Bell. It took four years of comprehensive campaigning by workers and consumers before Taco Bell (through its parent Yum Brands) acceded in 2005 to the demands set forth by CIW's Fair Food Program. The company agreed to pay a penny a pound more for its Florida tomatoes. This fair food premium, designed to reverse the downward pressure on farm worker wages, has evolved into a sophisticated set of payment mechanisms by participating brands that generates millions of dollars annually in additional wage payments.<sup>47</sup> Taco Bell also agreed to shift its purchases of Florida tomatoes to growers that complied with a human rights-related code of conduct developed by the coalition.

Subsequently, CIW initiatives led to similar bilateral agreements with other big-name fast food chains: McDonald's (2007), Burger King (2008), Subway (2008) and Chipotle (2012); with national supermarkets: Whole Foods (2008) and Trader Joe's (2012); with institutional food service providers: Compass (2009), Bon Appetit (2009), Aramark (2010) and Sodexo (2010); and more recently, with Walmart (2014), Fresh Market (2015) and Ahold (2015), the parent company of the Stop & Shop and Giant supermarket chains.<sup>48</sup>

It is worth noting that the more recent agreements have been negotiated in the absence of any targeted campaign of public pressure. This development may reflect new participating buyers' felt need to keep up with their competitors who already participate in the Fair Food Program. Alternatively (or additionally), new buyers may independently perceive that participation is valuable for reasons of supply chain risk management, efficiency,

<sup>45</sup> Asbed and Sellers, 'The Fair Food Program' 4 (n 36) 3.

<sup>46</sup> *Ibid* 44.

<sup>47</sup> FFSC, *FFP Annual Report* (n 39) 29, 39–40. The amount increases with each new corporate participant that enters the programme.

<sup>48</sup> *Ibid* 6; Steve Hitov, General Counsel to CIW, personal communication, July 2015.

consumer goodwill or basic fairness. Whatever the explanation, it seems that constant campaigning may not be a necessary element of the model, although the potential for public pressure from workers and consumers almost certainly is.

The basic framework for the agreements includes both parties' recognition that avoidance of conflict between them is valuable consideration. The buyer agrees to provide a designated fair food wage premium; to purchase Florida tomatoes from participating growers and cease purchasing from growers that lose their participating status; and to co-operate with CIW and its independent auditors regarding efforts to verify compliance by growers with the Fair Food Code of Conduct. CIW agrees to refrain from engaging in disparaging protests or demonstrations regarding the issues covered by the agreements, and to conduct operations regarding those issues in the manner described under the Fair Food Program.<sup>49</sup>

Starting in 2007, the Florida Tomato Growers Exchange (FTGE) threatened its members with fines if they complied with the agreements being negotiated between CIW and an increasing number of major brands.<sup>50</sup> Although the FTGE invoked antitrust concerns, the individual contracts negotiated between CIW and each major brand would seem to be vertical agreements, lawful under a 'rule of reason' approach, rather than horizontal restraints of trade.<sup>51</sup>

The FTGE resisted vigorously for years, refusing to pass on the penny-a-pound premium that was being accumulated by the buyers. At one point, millions of dollars were being placed in an escrow fund. In 2010, two large growers began co-operating with CIW; shortly thereafter, the FTGE and CIW signed an agreement pursuant to which virtually all growers have participated on a statewide basis, covering well over 90 per cent of Florida's \$650 million tomato industry.<sup>52</sup>

Between 2010 and 2015, participating buyers contributed almost 20 million dollars in wage premiums to improve farm worker wages. The Fair Food Standards Council (FFSC)<sup>53</sup> monitors the supply chain records to ensure that these premium funds are flowing from buyers to growers, either as monthly lump-sum payments or as a separate item incorporated into buyers' day-to-day purchases.<sup>54</sup> Workers receive 87 per cent of the premium

<sup>49</sup> Steve Hitov, personal communication, March 2014 and June 2015.

<sup>50</sup> Steven Greenhouse, 'Tomato Pickers' Wages Fight Faces Obstacles', *New York Times*, 24 December 2007.

<sup>51</sup> See US Senate, *Ending Abuses and Improving Working Conditions for Tomato Workers: Hearing of the Committee on Health, Education, Labor, and Pensions*, 110th Cong, 56–60 (2008) (prepared statement of 26 law professors regarding legality of tomato growers' compliance with agreements between farm workers and fast-food companies).

<sup>52</sup> FFSC, *FFP Annual Report* (n 39) 6.

<sup>53</sup> The FFSC is a third-party monitor launched by CIW in 2011.

<sup>54</sup> See FFSC, *FFP Annual Report* (n 39) 39–40.

funds as a line-item bonus on their pay checks. Growers are permitted to retain 13 per cent to offset increased payroll taxes and administrative costs.<sup>55</sup> Notably, brands are thus financially contributing to their suppliers to help them defray costs associated with establishing a suitably transparent wage increase structure.

*A Worker-Driven Code of Conduct, Reinforced by Effective Complaint Resolution*

In addition to wage premiums, one key element of the Fair Food Agreements negotiated with each participating buyer is a commitment to require its suppliers to abide by the Fair Food Code of Conduct.<sup>56</sup> Apart from requiring compliance with applicable local, state and federal laws, the code sets forth certain prohibitions that carry immediate consequences if violated: prohibitions against forced labour and child labour of any kind, the use or threat of physical violence, and sexual harassment involving physical contact.<sup>57</sup> The code also includes detailed requirements for accurate timekeeping as well as documentation that must appear on all pay slips.<sup>58</sup>

Importantly, the code establishes a ban on subcontracting of employment: all farm workers are hired by growers as employees.<sup>59</sup> For decades prior to 2010, the Florida tomato-growing industry—like agricultural employment in general—was characterised by multiple complex subcontracting arrangements which often shielded growers from legal responsibility for labour abuses.<sup>60</sup> Under the Code of Conduct, however, all farm workers must be employees of the grower—this includes workers supervised by crew leaders who are themselves contractors rather than being employed by the grower. And all these employees are required to participate in the grower's orientation process—including training on their rights under the FFP.

The Fair Food Code is not a static document; it has developed over time through continuous dialogue among workers, growers and buyers.<sup>61</sup> Many code features are based on farm workers' distinctive knowledge of, or familiarity with, problems in the tomato harvesting fields. These include a

<sup>55</sup> Ibid 40, referencing Appendix A of the Fair Food Code of Conduct Guidance Manual.

<sup>56</sup> Ibid 50–55. The wage premium is included in the Code of Conduct.

<sup>57</sup> Ibid 52.

<sup>58</sup> Ibid 51. On timekeeping, the code specifies that all compensable hours must be recorded, with accurate hours kept by growers through a system (such as time clock punch or card swipe) in which employees control their time registration devices. The code requires that payslips display pay period, hours worked, wages, and the fair food premium as a separate line item.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid 16. See generally *Aimable v Long & Scott Farms* 20 F3d 434 (11th Cir 1994); *Alviso-Medrano v Harloff* 868 FSupp 1367 (MD Fla 1994); *Arredondo v Delano Farms Co* 2012 WL 2358594 (ED Cal 2012).

<sup>61</sup> See Fair Food Standards Council, 'Fair Food Code of Conduct & Selected Guidance', <http://www.fairfoodstandards.org/code.html>.

prohibition against over-filling or ‘cupping’ buckets, complete with a visual standard for bucket filling; elimination of previously unrecorded and unpaid waiting time in the fields; provision of a safe shaded area in the fields (through durable, mobile shade structures) and the ability to access it during rest breaks; and training on sexual harassment and discrimination prevention provided to all workers and supervisors.<sup>62</sup>

Another key element is worker-to-worker education regarding the code that takes place on the farm during paid working time.<sup>63</sup> Growers provide a booklet and video to all workers at the point of hire; these materials, describing the code and its contents, are written and acted by the CIW and its members.<sup>64</sup> During subsequent CIW education sessions at the job site, workers talk to one another about their experiences and the rights generated from those experiences, including the right to make complaints with no retaliation.<sup>65</sup> Workers also are informed that FFSC will visit growers to ask questions, conduct monitoring and enforce the agreement. Health and safety committees must be established at every farm, providing a structured voice for workers on such issues.

Finally, there is a 24-hour hotline to bilingual FFSC auditors who investigate complaints and resolve them, normally in a collaborative fact-finding and resolution process with participating growers.<sup>66</sup> There are other ways to report code violations, including by informing CIW personnel. Since 2011, over 500 worker complaints about participating growers have been received; almost all have been investigated and processed to resolution.<sup>67</sup> Worker education includes an emphasis on workers’ role as monitors of their own rights, both in the workplace and in their interactions with the programme’s designated monitoring organisation.

### *A Comprehensive Auditing Structure*

Perhaps the linchpin to the Fair Food Program model is the FFSC auditing process, conducted by its 11-person staff.<sup>68</sup> In order to ensure transparency and co-operation with the code, FFSC auditing must be at once in-depth and

<sup>62</sup> These provisions are set forth in the code (FFSC, *FFP Annual Report* (n 39) 51–53) and explained in other sections of the report: 19–20 (sexual harassment), 26–27 (bucket-filling standards), 31 (shade in the fields).

<sup>63</sup> FFSC, *FFP Annual Report* (n 39) 9–10.

<sup>64</sup> *Ibid* 22.

<sup>65</sup> *Ibid* 21.

<sup>66</sup> *Ibid* 22–23, 34–35.

<sup>67</sup> *Ibid* 34–35. Almost 50 per cent of complaints received were found to be valid; almost 25 per cent were found not valid and/or not to have alleged a code violation; approximately 20 per cent resulted in some action agreed upon by the participating grower and complaining worker(s) without formal disposition of the complaint; and the remainder were either informational in nature or else workers chose not to proceed.

<sup>68</sup> *Ibid* 7.

nanced in its application. The auditing mandate has resulted in the development of tools to determine what information is reviewed and accessible to the auditors. The process of assessing information obtained from the tools leads to an evaluation of each grower that includes prepared findings and a corrective action plan where necessary improvements have been identified.

The first and possibly most important auditing tool is the interview guidelines, customised for each participating grower. Accessibility to all levels of management and workers ensures there is little opportunity for interference with information collection. Intimidation or coaching of workers during the auditing process is grounds for probation or suspension from the programme.<sup>69</sup>

The FFSC audits every grower every season, and audits extend to multiple locations when they exist. It normally interviews over half a grower company's workers, which is well above traditional auditing sample sizes.<sup>70</sup> For a fairly large operation—over 500 workers—the FFSC will send eight auditors who spend three to four days on site.<sup>71</sup> Interview packets for field workers, crew leaders and management each contain a comprehensive and specific set of questions to ask, and issues on which to comment. Because the interview packets for crew leaders and management pose very similar questions tailored somewhat differently, they provide an opportunity to enhance transparency (and minimise manipulation of facts) through obtaining the same information from both sources.<sup>72</sup> The auditors also spend substantial amounts of time interviewing workers in the fields and in a variety of other settings. They ride the buses with workers, visit workers' housing for follow-up conversations and to check on the housing quality, and provide cards that include the hotline phone number.<sup>73</sup> This intensive, hands-on and time-consuming level of involvement assures that the auditors develop a thorough and fine-grained understanding of labour conditions on the ground.

A second tool utilised is document requests that enable the comprehensive collection of relevant written materials. The document request process begins well in advance of the site visit: the lead auditor typically makes contact with the grower and initiates this process one to one-and-a-half months before the audit team arrives on site.<sup>74</sup> FFSC requests eight distinct categories of documents as part of its management and operations audit.<sup>75</sup>

<sup>69</sup> Ibid 15.

<sup>70</sup> Ibid 10.

<sup>71</sup> Notes of Jennifer Gordon from site visit and interviews with FFSC staff, 12 January 2014.

<sup>72</sup> Examples of interview questions and guidelines are on file with the author.

<sup>73</sup> See Gordon, notes from site visit (n 71).

<sup>74</sup> Ibid.

<sup>75</sup> The categories are general; hiring and registration; training and communication of policies; work environment; complaint procedure; wages, hours and pay practices; health and safety; and housing. Document request samples are on file with author.



In addition to records and policy documents on management systems and personnel procedures, which are obtained prior to the audit or at the management interview, there are payroll document reviews from several pay periods that are used to ensure proper compensation (including distribution of the fair food premium) as well as accurate timekeeping mechanisms and minimum wage compliance.<sup>76</sup> These payroll document reviews are conducted after field operations audits so that financial investigators can verify and utilise in their analyses data that has been provided by workers.

As part of the payroll audit, FFSC randomly selects five personnel files for review, in order to verify proper documentation of registration, training, injuries and disciplinary actions.<sup>77</sup> The auditors also prepare charts keyed to various report sections (eg transparency and co-operation; hiring and registration; worker training; crew leader and supervisor training; health and safety; wages, hours and pay practices) that are used as categories for interviews, field notes or document requests. For each report section, the auditor describes the control objective, preparation and inquiry procedures, and testing procedures. This approach fosters greater uniformity in the auditing process and also guides the auditors by enabling them to collect detailed information on the way each grower operates.<sup>78</sup>

Within ten days following the collection of audit data, the FFSC submits a preliminary evaluation of findings to the participating grower, indicating the likelihood of good standing or probation/suspension from the programme. If certain findings appear to be especially troubling, the preliminary evaluation will be accompanied by an expedited preliminary audit report that provides an overview of the most problematic findings and suggests corrective actions to avoid probation or suspension.<sup>79</sup>

After the expedited preliminary findings, and within eight weeks of FFSC's payroll audit, growers receive a full assessment report for the season that includes an overview of the audit process, a summary of major findings, and an in-depth description of the findings according to key programme areas tailored to sections of the audit tools as mentioned above. At the beginning of each assessment report section is a breakdown of issues addressed from a prior year's corrective action plan (CAP), issues unaddressed from the prior year's CAP, new issues revealed during the audit, and any further corrective action required. Following this assessment, FFSC and the grower agree on a

<sup>76</sup> FFSC, *FFP Annual Report* (n 39) 7. The FFSC also monitors participating buyer payments of the fair food premium to participating growers.

<sup>77</sup> Judge Laura Safer Espinoza, Director of the FFSC, personal communication, March 2014 and July 2015. Given the number of individuals employed by growers, having advance knowledge that five files will be pulled at random is unlikely to result in any manipulation of data.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*; sample documents on file with author.

corrective action plan specifying findings and CAP measures. The CAP then forms the basis for the next season's audit, which assesses the grower's performance related to the agreed-upon CAP as well as addressing the grower's performance in the months since the prior audit, using the same detailed format.

The goal of this comprehensive data collection effort is to ensure compliance in practice with the code. Where deficiencies arise, the objective is to provide the grower with an effective roadmap towards full code implementation. The auditing process is designed to monitor the activity of growers over a period of time, and to foster a working relationship between the FFSC and each growers' organisation.<sup>80</sup> But ultimately, compliance with the code is required if the grower wants to remain in the programme.

In the three seasons between 2011 and 2014, the FFSC conducted 81 management interviews and 98 payroll audits, resulting in 86 corrective action plans.<sup>81</sup> FFSC auditors visited over 100 farm locations, interviewed 7,000 workers on and off-site, and conducted almost 300 on-site interviews with crew leaders to assess knowledge of code requirements and compliance at the field level.<sup>82</sup> In a signal of the value attached to these audits by the growers themselves, some participating growers have begun requesting that FFSC audit their out-of-state operations, that is, farm locations that are not covered by the programme.<sup>83</sup>

As comprehensive and effective as the FFSC's audit protocols are in practice, it is worth repeating that the FFP considers workers themselves to be the essential frontline defenders of their own rights. Workers are empowered by the multiple layers of education as to their rights under the Code of Conduct, and by the efficacy of the protected complaint mechanism. For all 54 complaints in which FFSC found that some form of retaliation had been taken against workers, resolutions were successfully achieved, including the rehiring of all terminated workers, disciplinary actions and retraining for the offending supervisors, and public apologies along with reaffirmations of the right to complain without fear of retaliation from management.<sup>84</sup> The FFSC emphasises that it is able to overcome certain inherent limitations of the traditional audit-only monitoring approach by effectively deputising

<sup>80</sup> See FFSC, *FFP Annual Report* (n 39) 10–11.

<sup>81</sup> *Ibid* 33. There is a higher number of payroll audits because many growers have multiple locations—each farm location within a company is recorded as a separate audit. The higher number of CAPs than management interviews is likely due to the fact that in a few instances the same owner has implemented the same policies and procedures across more than one company—in those cases, there is no need to interview management twice. Laura Safer Espinoza, personal communication, July 2015.

<sup>82</sup> FFSC, *FFP Annual Report* (n 39) 33.

<sup>83</sup> *Ibid*. See also *ibid* 15–16 (reporting statements from growers appreciating the audit process and results).

<sup>84</sup> Greg Asbed and Laura Safer Espinoza, personal communication, July 2015.

30,000 workers as monitors; this also provides a further deterrent to supervisors who might consider violating workers' rights.<sup>85</sup>

### *Enforcement Through Market Consequences*

When—as occurs in the great majority of instances—an audit discloses violations warranting a corrective action plan, remediation is a relatively rapid process. Growers must comply with the code or they will lose the ability to sell their tomatoes to buyers in the FFP. This threat of lost business has been a substantial incentive for compliance even though the FFP encompasses a relatively small percentage of all purchases of Florida tomatoes.<sup>86</sup> Importantly, the FFP's market-based effectiveness has not required that participating brands (McDonald's, Sodexo, Walmart et al) collectively exercise control over a majority of sales from one or more Florida tomato growers. Instead, these brands simply must have control over enough of the market so that a majority of individual suppliers will not want to lose so large a proportion of their business. This in turn suggests that a model relying on market consequences can effect significant change in labour conditions by channelling the efforts of a relatively low number of buyers.

If growers violate the code's zero-tolerance provisions (addressing forced labour of any kind; systemic use of child labour; sexual harassment involving physical contact; use or threat of physical violence), they may be suspended from the programme for varying lengths of time.<sup>87</sup> By August 2014, seven growers had been suspended and nine more had been placed on probation.<sup>88</sup> Brands may not purchase tomatoes from suspended growers for a 90- to 180-day period within the Florida growing season.<sup>89</sup> To uphold these market consequences, auditors review brands' monthly supply chain records to be sure that they only source Florida tomatoes from participating growers in good standing.<sup>90</sup> Supervisors who violate the zero-tolerance provisions must be terminated, and they are ineligible for employment at

<sup>85</sup> Supervisors who were persistent bad actors have been weeded out through suspensions and terminations. Because the FFP makes the participating grower responsible for the conduct of its supervisors under the code, many growers have also engaged in proactive self-policing for the first time. *Ibid.*

<sup>86</sup> Roughly 20 per cent of overall Florida tomato sales fall under the purview of the FFP. Steve Hitov, personal communication, July 2015.

<sup>87</sup> Suspension is automatic for instances of forced labour or systematic child labour. For the other zero tolerance events, the perpetrator must be discharged or the grower is suspended. For all other code violations, growers are prodded to take corrective action, and failure to do so results in probation. A grower placed on probation has 15 days to fix the outstanding problem(s) or it is suspended. See FFSC, *FFP Annual Report* 34; Steve Hitov, personal communication, July 2015.

<sup>88</sup> FFSC, *FFP Annual Report* (n 39) 34.

<sup>89</sup> Laura Safer Espinoza, personal communication, March 2014.

<sup>90</sup> FFSC, *FFP Annual Report* (n 39) 11.

Fair Food Program farms for up to five years, depending on the nature of the offence.<sup>91</sup>

At the same time, the audit and enforcement process includes space for collaboration. Many growers have developed their own systems: this often involves a point person handling complaints from workers about conditions and violations who makes sure that complaints percolate up to management. When FFSC finds a violation for the first time, it tries to provide a remedial roadmap or plan. And while the protections of the code are fixed, there is also a Guidance Manual that provides some assistance on how to interpret and apply various code provisions. The manual is drafted and updated by a working group consisting of CIW plus several growers.<sup>92</sup> Further, some growers now send FFSC their own policies to review and if necessary to make recommendations for achieving compliance. Growers also have invited FFSC on site to train their supervisors.

FFSC monitoring and enforcement are effective because there is a real hammer: loss of market share imposed by the brands through their separate agreements with CIW. The auditing system has now completed its fourth full season (November 2014 to April 2015). Initially, there was a significant amount of angry pushback from growers, and some baseline requirements were not being fulfilled.<sup>93</sup> It also took a certain amount of time for the workers to trust FFSC enough to report complaints.<sup>94</sup> By the middle of the first full season of operations, in winter and spring of 2012, the number of complaints had substantially increased. After three years, there appear to be fewer serious instances of non-compliance, and the complaints with respect to growers that have participated in the FFP for several seasons have become more routine.<sup>95</sup>

The FFP is being extended in 2015 to 10,000 more workers, at Florida bell pepper farms and to tomato suppliers in Georgia, South Carolina and Virginia.<sup>96</sup> Walmart has taken the lead in expanding the FFP to the three new states. As in Florida, the FFSC will monitor for growers' compliance with the Code of Conduct and for payment of the FFP wage premium.<sup>97</sup>

<sup>91</sup> Ibid 19. An offending supervisor must undergo FFSC-approved training before employment eligibility at participating growers can be reinstated. Failure by a participating grower to impose these sanctions on offending supervisors results in suspension from the programme.

<sup>92</sup> Steve Hitov, personal communication, March 2014; see also Guidance Manual.

<sup>93</sup> Laura Safer Espinoza, personal communication, March 2014.

<sup>94</sup> Ibid.

<sup>95</sup> Workers and a growing number of supervisors have expressed relief to FFSC monitors that the industry's worst actors no longer have a place at FFP farms. After three full seasons, FFSC's annual report for 2013–14 confirmed the absence of any cases of forced labour, violence by supervisors against workers or sexual assault. FFSC does continue to receive complaint line calls reporting instances of these abuses from workers on non-FFP farms. Laura Safer Espinoza, personal communication, July 2015.

<sup>96</sup> See Steven Greenhouse, 'Farm Labor Groups Make Progress on Wages and Working Conditions', *New York Times*, 3 July 2015.

<sup>97</sup> Steve Hitov, personal communication, July 2015.

### C. Distinctively Effective Aspects

The Fair Food Program is substantially more successful than other corporate compliance programmes in the labour standards area. A central element is that *workers define the issues to be addressed, notably including a focus on wage increases*. The Code of Conduct addresses worker needs and priorities arising in a particular industry and location. This minimises the risk of compliance becoming a public relations issue. The focus is on resolving workers' perceived problems rather than cleaning up a brand's reputation.

A second, related element is that *workers have multiple ways to report violations and are protected in doing so*. It is hard to overstate the value of a structure where, having identified the priorities, workers also can feel secure in identifying when those priorities are not being met. Audits that are extensive and well-staffed, including off-site worker interviews, buttress the importance of workers' effective ability to report violations. Moreover, the worker education programmes and 24-hour complaint hotlines create considerable risk of violations being exposed outside the audit process. This effectively discourages unwanted conduct by field-level supervisors and encourages growers to disclose fully their relevant conduct and activities as part of the audit. Once again, corporate motivation is centred on programme improvement.

A third important element of the Fair Food Program approach is its *attention to management accountability*. There is an immediate meaningful impact for failure to comply. The FFSC code is framed primarily with reference to market-based consequences rather than legal rights or traditional legal remedies. The code bypasses international labour standards that are unavailable to these workers under the US legal system, notably the right to collective bargaining for agricultural employees.<sup>98</sup> Beyond lack of availability, however, market consequences would seem a more effective deterrent than legal remedies such as fines or cease-and-desist orders, because of their timing and certainty as well as their magnitude.

A final distinct element is that *brands are required to work closely with their product suppliers to co-ordinate responsive compliance efforts*. With respect to the wage premium, brands put funds into the supply chain to support the costs associated with changes they demand from those suppliers.<sup>99</sup> The brands also have a direct interest in their suppliers' audit performance. Payroll audits review and assess growers' monthly reporting of premium distributions to individual workers, including lists of field-level supervisors

<sup>98</sup> See 29 USC § 152(3) (excluding agricultural employees from NLRA coverage).

<sup>99</sup> See FFSC, *FFP Annual Report* (n 39) 40, referencing the 87–13 per cent split discussed above.

who are not eligible to receive the premiums.<sup>100</sup> In addition, the brands' monthly supply chain records are audited to assure that they only source tomatoes from participating growers in good standing.<sup>101</sup> Brands are thus directly and continuously engaged with their suppliers on labour standards priorities, analogously to how they *sua sponte* engage those suppliers on pricing and delivery priorities in the course of their regular market-driven decision making.

#### IV. REPLICATING THE IMMOKALEE WORKERS MODEL: SOME PRELIMINARY THOUGHTS

Success with a universe of 30,000 tomato field workers does not neatly translate to the challenges facing millions of apparel or footwear workers in multiple countries. There are differences in national law and practice across the global supply chain that result in varied approaches to labour standards protection and contract enforcement. These variations, along with differences in national languages and cultures, pose added challenges to brands seeking to negotiate with and monitor performance of multiple suppliers. One obvious example involves implementing the ban on subcontracting of employment given different legal approaches to employee status across different national legal systems.

Further, the relative ease of mobility for suppliers of these other products makes it harder for multinational brands to develop a closed system that captures all or substantially all participants in the supply chain.<sup>102</sup> Growers of tomatoes in the US are essentially constrained by climate from relocating out of south Florida between November and April. Other agricultural products that may become a focus for CIW campaigns, such as bell peppers and strawberries, are similarly limited in geographic terms as a result of climate-driven conditions.

Garment and footwear production do not face the same constraints. They are basically low-capital, labour-intensive operations, allowing factories to relocate to other countries or even to other parts of the same country. The increased use since 2005 of short-term fixed duration employment contracts between garment suppliers and their production workers has facilitated the process of relocating factories by making it easier to terminate workers'

<sup>100</sup> Ibid 29. The wage premium is listed as a separate line item on each worker's pay stub.

<sup>101</sup> Ibid 11.

<sup>102</sup> The Worker Rights Consortium has developed a designated supplier programme (DSP), encouraging major apparel brands to concentrate control over working conditions by sourcing at fewer factories and occupying a larger share of output at those factories. See Worker Rights Consortium, *The Designated Suppliers Program—Revised* (Washington, DC, WRC, 2012). Major brands have not adopted the DSP approach and appear reluctant to do so on their own initiative.

employment while also making it harder for workers to organise and protect their interests. These fixed-duration contracts (FDCs) are probationary and typically valid for three to six months, though they can be extended further if workers and employers agree on specific terms. The FDC problem has become especially acute under Cambodian labour law, although it exists in other countries as well.<sup>103</sup>

Without wanting to minimise such difficulties, I would point to several factors that arguably support prospects for replication of the CIW model.

### A. Vulnerability of Worker Populations

Some may assert that workers toiling in the global garment, footwear or electronics supply chains present an immeasurably more intimidating set of obstacles than what CIW has had to overcome. Yet no-one in the early 1990s would have thought that what CIW and FFSC have accomplished was even conceivable, given centuries of oppressed farm labour in the southern US—including over 200 years of slavery, a century of sharecropper exploitation and decades of abusive conditions for the largely migrant labour that today constitutes the agricultural workforce. CIW and its allies have ended farm labour slavery in the industry (with the help of the Justice Department) and secured basic labour standards protections for tens of thousands of tomato pickers. They have not achieved total success, and their campaigns continue in Florida and other parts of the country. Still, any argument that the challenges involving global supply chain workers are inherently more daunting than those faced by agricultural migrant workers in the southern US states is less than persuasive.

### B. Precariousness of Legal Rights

Although agricultural workers in the US fall outside the scope of the NLRA for organising a trade union or engaging in collective bargaining, they are accorded basic constitutional protection for freedom of association.<sup>104</sup> It may be argued that this legal protection for collective voice relieves some precariousness for CIW members and supporters in their campaign to secure

<sup>103</sup> See Arnold, 'Workers' Agency' 221–22 (Cambodia) (n 25); SwedWatch, *Play Fair* 9 (Indonesia) (n 5). See generally Stephen Sonnenberg and Benjamin Hensler, *Monitoring in the Dark: An Evaluation of the International Labor Organization's Better Factories Cambodia Monitoring and Reporting Program* (Stanford, CA, Stanford Human Rights Clinic and WRC, 2013).

<sup>104</sup> See generally *McLaughlin v Tilendis* 398 F2d 287, 289 (7th Cir 1968); *Atkins v City of Charlotte* 296 FSupp 1068, 1077 (WD NC 1969).

labour standards improvements and protections. However, it is worth reiterating that the CIW success stems from a contractual rather than legislative approach, featuring a privately generated code of conduct enforced through market-based consequences. In this respect, the CIW approach resembles US unions' recent success in negotiating neutrality agreements with individual employers. Those agreements have increased prospects for union recognition and collective bargaining by contracting around the perceived limitations of labour legislation.<sup>105</sup> And while agricultural migrants will not be arrested or murdered for talking about worker protection strategies—as they might be in other countries—these workers, who lack the protection of the NLRA, can be fired for engaging in concerted activities. For desperately poor individuals, this amounts to a not insignificant penalty. Even federal minimum wage, overtime and occupational safety laws that do cover farm workers are notoriously under-enforced in farm labour settings.<sup>106</sup>

Apart from these weaknesses in US law and practice, migrants face the pervasive fear of deportation when responding to exploitive labour conditions. Guest workers' visas are tied to a job with a particular employer. If these workers quit in search of better wages or conditions, they will likely lose their right to work and stay in the US. Should they dare to file complaints challenging workplace conditions or discrimination, they may be fired and again confront the loss of their lawful status as visitors.<sup>107</sup>

### C. Focus on Market Consequences

The precarious legal situation of migrant farm workers presumably influenced the direction of the CIW model away from the judicial system and toward private regulation enforced by major brands through market-based consequences. That such an intrinsically vulnerable population has used worker-driven democratic processes to improve labour standards through negotiation with a powerful corporate chain of command suggests possibilities.

Factory workers in Southeast Asia are comparably vulnerable to migrant farm workers in the US in many respects, given that national laws either do not recognise their basic rights or—more likely—do not protect and enforce those rights. Further, workers in these supply chains are often themselves

<sup>105</sup> See James J Brudney, 'Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms' (2005) 90 *Iowa Law Review* 819.

<sup>106</sup> See Maria Ontiveros, 'Migrant Labour in the United States: Working Beneath the Floor for Free Labour?' in Costello and Freedland (eds), *Migrants at Work* 180, 184–91; Frank Diehl *Farms v Sec'y of Labor* 696 F2d 1325 (11th Cir 1983).

<sup>107</sup> Ontiveros, 'Migrant Labour in the United States' 185–87.



migrants—they may be far from home, far from their families, and not able to understand the predominant language or local culture.<sup>108</sup> These migrants may be especially vulnerable under local labour laws, both because as temporary or irregular workers they face difficult legal status issues similar to their Florida counterparts, and because labour inspectors may inappropriately enforce immigration laws against them.

Accordingly, one might hypothesise that the most effective entity to insist on change in global supply chains is the multinational corporation rather than the national government, local trade union or worker NGO. To be sure, corporate brands will become change agents only in response to pressure brought against them, including pressure in the US and/or Europe. But major retail brands are familiar with such pressures to improve basic working conditions, brought by trade unions, university students, institutional investors and consumers more generally. Representatives from worker organisations in Asian countries, supported by NGOs in those countries, might make strategic appearances in alliance with US or EU consumer and investor groups and unions in order to impose more targeted public pressure on these brands.

Since the 1990s, efforts by consumers and NGOs, and also traditional and social media, have increasingly linked the reputation of lead retail firms to their suppliers when it comes to abusive or harsh labour practices.<sup>109</sup> Notwithstanding the opacity of global supply chains, multinational brands are coming to understand in business terms the reputational advantages of proactive strategies—including improvements beyond those applied under local law—as well as the attendant risks when refusing to accommodate local activism.<sup>110</sup> Absent a pervasive national government presence as a capable monitor and enforcer, corporate motivation may have to come primarily from privately negotiated arrangements, supplemented or complemented by assistance from the ILO and NGOs. To take two examples, ILO audit data from export-oriented garment factories in Cambodia indicate that reputation-conscious global buyers have been driving improved

<sup>108</sup> See, eg Clean Clothes Campaign, *Migrant Workers in Thailand's Garment Factories* (Amsterdam, Clean Clothes Campaign, 2014) 17; Vicki Crinis, 'Sweat or No Sweat: Foreign Workers in the Garment Industry in Malaysia' (2010) 40 *Journal of Contemporary Asia* 589, 599; Arnold, 'Workers' Agency' (n 25) 214; Richard Record, Stephanie Kuttner and Kabmanivanh Phouxay, 'Voting With Their Feet? Explaining High Turnover and Low Productivity in the Lao Garment Sector' in Rossi, Luinstra and Pickles (eds), *Towards Better Work* 149.

<sup>109</sup> See generally Kevin B Sobel-Read, 'Global Value Chains: A Framework for Analysis' [2014] *Transnational Legal Theory* 364, 388–89; Locke, *The Promise and Limits of Private Power* (n 35) 1–3, 12–13.

<sup>110</sup> See, eg Simon Zadek, 'The Path to Corporate Responsibility' *Harvard Business Review*, December 2004, pp 125–32; Debora L Spar and Lane T La Mure, 'The Power of Activism: Assessing the Impact of NGOs on Global Business' (2003) 45 *California Management Review* 79.

compliance with ILO standards.<sup>111</sup> And the tragic 2013 factory collapse at Rana Plaza, which killed over 1,100 workers, has resulted in a major push by many Western retailers and apparel brands to improve safety at Bangladeshi factories.<sup>112</sup>

What CIW essentially concluded with respect to tomato growers may be seen as applicable to garment, footwear or electronics suppliers. Despite only a modest level of control over most production facilities in their supply chains, Nike, Adidas or Apple regularly insist on certain levels of quality, price and timing from their suppliers, and terminate them for failing to meet those levels. Leading brands arguably can add wage premiums and industry-specific labour protections to their negotiated deals on the same basis.

<sup>111</sup> See Locke, *The Promise and Limits of Private Power* 170–71 and sources cited therein (n 35). One added incentive for compliance in Cambodia is factories' interest in securing a licence to export from the Cambodian government. See generally ILO, 'Better Factories Cambodia', [http://www.ilo.org/asia/whatwedo/projects/WCMS\\_099340/lang--en/index.htm](http://www.ilo.org/asia/whatwedo/projects/WCMS_099340/lang--en/index.htm).

<sup>112</sup> See generally Bangladesh Accord for Fire and Building Safety, <http://bangladeshaccord.org/>; Alliance for Bangladesh Worker Safety, <http://www.bangladeshworkersafety.org/>. These two organisations together are responsible for thousands of new factory inspections and corrective plans at hundreds of plants. See generally Steven Greenhouse, 'Two Groups Complete Inspections of 1,700 Garment Factories', *New York Times*, 13 October 2014.