

Deploying Disclosure Laws to Eliminate Forced Labour: Supply chain transparency efforts of Brazil and the United States of America

Ashley Feasley

Abstract

States are increasingly addressing forced labour in supply chains by implementing transparency or disclosure measures that aim to make companies disclose the existence of forced labour in their supply chains. Examining the recent approaches of Brazil and the United States of America shows some promising practices to best inform governmental policy going forward.

Keywords: forced labour, supply chain, legislation, transparency, Brazil, United States of America

Please cite this article as: A Feasley, 'Deploying Disclosure Laws to Eliminate Forced Labour: Supply chain transparency efforts of Brazil and the United States of America', *Anti-Trafficking Review*, issue 5, 2015, pp. 30–49, www.antitraffickingreview.org

Implementación de las leyes de divulgación para eliminar el trabajo forzoso: los esfuerzos de transparencia de la cadena de suministro del Brasil y los Estados Unidos de América.

Ashley Feasley

Resumen

Los Estados están abordando cada vez más el trabajo forzoso en las cadenas de suministro mediante la implementación de medidas de transparencia o de divulgación, que tienen como objetivo hacer que las empresas revelen la existencia de trabajo forzoso en sus cadenas de suministro. Examinar los enfoques recientes de Brasil y de los Estados Unidos de América muestra algunas prácticas prometedoras para informar mejor a las políticas gubernamentales en el futuro.

Palabras clave: trabajo forzado, cadena de suministro, legislación, transparencia, Brasil, Estados Unidos de América

Introduction

In response to growing awareness about the pervasiveness of forced labour in global supply chains, governments have engaged in efforts to regulate companies' and governments' supply chains. Forced labour¹ enslaves women, men, and children globally into manual labour, sexual servitude and debt bondage. According to the International Labour Organization (ILO), forced labour in the global private economy generates profits of USD 150 billion a year.² Some of these profits derive from production and consumption of goods that have forced labour in product supply chains.

This article aims to evaluate the efforts of the Brazilian and United States of America (US) governments to create and implement supply chain transparency disclosure laws. Brazil and the US are engaged in legislative and administrative action to implement disclosure and transparency measures to eliminate forced labour from supply chains. The approaches of the US and Brazil take disparate forms. Brazil has worked to combat forced labour through internal and domestic operations with a focus on products and production carried out within Brazil. In contrast, the US approaches the elimination of forced labour with a focus on goods and services produced abroad and domestically. Brazil utilises the publication of a national *lista suja* or 'Dirty List' of companies which have been found to have forced labour in their supply chains. The Brazilian government reinforces the viability of the Dirty List through investigations, sanctions such as bank-lending penalties, and business adherence through a voluntary pact that some businesses have joined. The US has federal disclosure requirements on conflict minerals, an executive order overseeing the federal government's supply chain, and a state-level supply chain disclosure law, but has yet to enact a federal disclosure law specifically targeting forced labour in supply chains. The level of government ownership and enforcement of supply chain disclosure regulation, and business community acceptance of regulation are key indicators of successful engagement.

Section I discusses the evolving human rights and corporate social responsibility movements that aim to regulate business conduct, including forced labour in supply chains. Section II reviews the Brazilian government's approach to eradicate forced labour from supply chains, centered around the Dirty List, and comprising engagement with business community, financial penalties and law enforcement work to investigate non-complying companies, and includes updates on the recent suspension of the Dirty List. Section III examines the US government's approach to utilising supply chain legislation to eliminate forced labour. The US effort, in comparison to Brazil's efforts since the early 2000s, has not had as much engagement with the business community, but has been progressive in issuing regulations regarding the supply chains and procurement practices of the US federal government and is showing signs of progress with other initiatives. Combating forced labour through supply chain transparency regulation is still a new concept for governments to embrace. A review of both countries' efforts is useful as it highlights best practices and approaches to compel companies to eliminate forced labour from supply chains.

I. Corporate Responsibility to Address Forced Labour

Increasingly companies found to produce, source and sell products that utilise forced labour are facing international pressure in the form of negative publicity and boycotting to clean up their supply chains. These actions among others have created an opening for evaluating the responsibilities of businesses to honour human rights. International human rights instruments have traditionally addressed the conduct of governments. When the international system did address transnational corporations, it was in the context of restrictive or corrupt business practices, and largely ignored the obligations a corporation might have to protect human rights.³ Recently, transnational corporations have begun to face legal consequences for human rights abuses as the international human rights community increasingly turns its attention

¹ Forced labour is defined in: ILO, *C029—Forced Labour Convention, 1930 (No. 29), Convention concerning Forced or Compulsory Labour*, 28 June 1930, and ILO, *C105—Abolition of Forced Labour Convention, 1957 (No. 105), Convention concerning the Abolition of Forced Labour*, 25 June 1957. Article 1(1) of the former states forced labour is 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.' The ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) provided guidance on the definitional scope of forced labour, stating forced labour encompasses trafficking in persons for the purpose of labour and sexual exploitation, as defined by the United Nations (UN) Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children. CEACR, 'Eradication of forced labour: General survey concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105)', Report III (Part 1B), International Labour Office, 2007, para. 77.

² ILO, 'Profits and Poverty: The economics of forced labour', International Labour Office, 2014, retrieved 2 August 2015, http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_243391/lang-en/index.htm

³ R Steinhardt, 'Corporate Responsibility and the International Law of Human Rights: The new lex mercatoria' in P Alston (ed.), *Non-State Actors and Human Rights*, Oxford University Press, 2005, pp. 177–227.

to multinational corporations' role and responsibility in respecting human rights.⁴ Part of the new focus on accountability for non-governmental actors, including corporations, can be attributed to the shifting purview of human rights bodies and growing recognition of the global power and reach of corporations. To this end, the principle that businesses have a responsibility to respect human rights such as addressing forced labour in supply chains has gained unprecedented acceptance over the past decade: by the international legal community—through the creation of the United Nations (UN) Global Compact⁵ and adoption of the Guiding Principles on Business and Human Rights,⁶ by governments⁷ and corporations.⁸ Yet differences regarding how, by whom, and to what degree corporations are to be regulated in order to ensure that global supply chains are free of forced labour remain. Corporations are making efforts to address forced labour in supply chains through the implementation of voluntary codes of conduct, transparent sourcing programmes, and other corporate social responsibility (CSR) initiatives.⁹ States are attempting to address forced labour in supply chains through transparency and disclosure regulations.

II. Brazil's Supply Chain Disclosure Approach

With extensive agricultural, construction and garment industries in urban and rural areas, forced labour has long been prevalent in Brazil. Human-rights-focused activism of the 1990s, building on the anti-military government civil society movement of the 1970s, catapulted the issue of forced labour onto the international stage. In 1994, a Brazilian person in forced labour lodged a criminal complaint with the Inter-American Commission on Human Rights of the Organization of American States and the Brazil eventually accepted responsibility for the incident.¹⁰ The case, coupled with media and awareness advocacy campaigns and the electoral success of Partido dos Trabalhadores in the 2002 presidential victory of Luiz Inácio Lula da Silva, helped to contribute to changes in the Brazilian government's response to forced labour. Although, as discussed in the following section, efforts to address labour exploitation began to be addressed in the mid-1990s.

A. Investigative and Civil Society Coordinating Capability: Mobile Inspection Groups and the National Commission to Eradicate Slave Labour

In 1995, the Brazilian government created Special Mobile Inspection Groups (GEFM) operating out of the Ministry of Labour and Employment (MTE) to investigate incidences of forced labour throughout Brazil.¹¹ GEFM, the implementation vehicle behind the Brazilian government's effort to eradicate forced labour, has a primary responsibility to monitor forced and child labour cases through investigation, unscheduled visits and civil society cooperation.¹² As a result of GEFM's work, the Brazilian government reports approximately 44,000 workers were rescued from forced labour or slavery-like work between 1995 and 2012.¹³ In July 2015, GEFM announced it will begin using drones

⁴ See for example: *Doe v. Unocal*, 395 F.3d 932 (9th Cir. 2002), reh'g en banc, 395 F.3d 978 (9th Cir. 2003).

⁵ The UN Global Compact is an initiative to encourage corporations to commit to human rights principles. The effective abolition of forced labour is Principle 4 among ten principles to be upheld by businesses. UN Global Compact, 'The Ten Principles of the UN Global Compact', UN Global Compact, retrieved 2 August 2015, <https://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>

⁶ The UN Secretary-General's Special Representative for Business and Human Rights, John Ruggie, produced the Guiding Principles on Business and Human Rights, which were endorsed by the UN Human Rights Council in 2011. The Guiding Principles provide an authoritative global standard for business conduct related to human rights.

⁷ For example, Finland, Germany, The Netherlands and the United Kingdom have national action plans on business and human rights.

⁸ Over 8,000 businesses from approximately 145 countries have signed the UN Global Compact.

⁹ Kimberley-Clarke, 'UNGC Index', retrieved 2 August 2015, <http://www.sustainabilityreport2010.kimberly-clark.com/gri-ungc-index/ungc-index.asp> ; SAB Miller, 'Reporting in accordance with the GRI and progress in implementing the UN Global Compact Principles', retrieved 2 August 2015, <http://www.sabmiller.com/docs/default-source/sustainability-documents/gri-ungc-table-2014.pdf?sfvrsn=2> ; Total, 'Global Compact', retrieved 2 August 2015, <http://csr-analysts.total.com/reporting-standards/global-compact>

¹⁰ Inter-American Commission on Human Rights, 'Report on Amicable Solution No. 95/03', Case 11,289, José Pereira-Brasil, 2003 (unpublished).

¹¹ P Costa, 'Fighting Forced Labour: The example of Brazil', International Labour Office, 2009, pp.4-8.

¹² US Department of State, '2011 Human Rights Reports: Brazil', retrieved 2 August 2015, <http://www.state.gov/j/drl/rls/hrrpt/2011/wha/186495.htm>

¹³ F Ortiz, 'Face of Slave Labour Changing in Brazil', Inter Press Service News Agency, 30 April 2014, retrieved 21 August 2015, <http://www.ipsnews.net/2014/04/face-slave-labour-changing-brazil/>

equipped with cameras to monitor hard-to-reach areas. The drone pilot programme will start in Rio de Janeiro state and will be expanded to other states.¹⁴

In addition to designating GEFM to investigate, the government created the National Commission to Eradicate Slave Labour (CONATRAE) to coordinate government efforts to combat forced labour in 2003. CONATRAE also provides a forum for civil society input. The first National Plan for the Eradication of Forced Labour was initiated in 2003, and codified policies on labour inspection. It contains short and long-term objectives to guide governmental and civil society action.¹⁵ The National Plan was updated in 2007 and continues to provide long and short-term objectives for government, business, and civil society to jointly work on to eradicate forced labour.

B. *Lista Suja*: The Dirty List

In 2004, Brazil introduced legislation that would effectively ‘name and shame’ companies who used forced labour in their supply chains. MTE Decree No. 540/2004 created a register of names of employers caught by GEFM exploiting workers in conditions analogous to slavery. The names are published on a national Dirty List, which is searchable and updated every six months.¹⁶ Further information on the list includes the owner of the offending company, the location of the offense, the product cultivated, and the number of workers subjected to forced labour.¹⁷ The last published recent Dirty List included 609 corporations and individuals.¹⁸

The process for assessing whether a company should be on the list is largely a reactive one. Once a complaint is initiated, GEFM investigates the workplace. If the business creates obstacles to GEFM’s work, the MTE has the power to request to freeze company bank accounts as well as arrest those impeding the investigation. During the investigation the name of the business is kept confidential to increase the chances of an effective inspection. Maintaining the confidentiality of the company’s identity until and unless a company is proven guilty incentivises corporate compliance as the list is seen as more than symbolic ‘naming and shaming’—instead it represents a real investigation. If it is determined that workers are subjected to forced labour conditions, the business is prosecuted by GEFM labour inspectors. The charges are sent to MTE for administrative review. A guilty verdict may require the offending business to pay fines. Only businesses found guilty will have their names included on the Dirty List.¹⁹

When a company is placed on the list, it is monitored for two years and cannot have its name removed until it has paid its fines and restitution and has not committed recent instances of forced labour. If these criteria are met, the offending company’s name is taken off the list. The process of identifying companies to be included in the Dirty List has been considered thorough and legitimate by all parties (corporations and consumers), which lent credibility to the list from its inception, though as discussed below this credibility has suffered in recent times.

C. Penalties Related to Inclusion on the Dirty List

Adherence to the Dirty List has been reinforced by both business and international human rights communities. The National Pact for the Eradication of Slave Labour (Pact) has assisted in solidifying business support, but there was initial business opposition to the Pact. In 2004, the ILO and Ethos Institute for Business and Corporate Social Responsibility began conducting meetings with identified companies to convince business leaders that the Pact would be good for business because it would give Brazil global recognition for effectively combating forced labour and would increase the value of the national product in the international market.²⁰ In 2005, the Pact was created as a voluntary multi-stakeholder initiative²¹ and engages national and international signatory companies to maintain slavery-free supply chains. Organisations that sign the Pact commit themselves to not collaborating with companies named on the Dirty List. When

¹⁴ A Brasileiro, ‘Brazil will use drones to fight slave labor in rural areas’, *Reuters*, 28 July 2015, retrieved 2 August 2015, <http://www.reuters.com/article/2015/07/28/us-brazil-slavery-drones-idUSKCN0Q226F20150728>

¹⁵ Presidency of the Republic of Brazil, ‘National Plan for Eradication of Forced Labor’, 2003, retrieved 2 August 2015, <http://portal.mte.gov.br/data/files/FF8080812B21345B012B2ABFC6A000ED/7338.pdf>

¹⁶ Repórter Brasil, retrieved 2 August 2015, <http://reporterbrasil.org.br/lista-suja/>

¹⁷ Repórter Brasil, ‘Lista Suja do Trabalho Escravo’, retrieved 2 August 2015, <http://reporterbrasil.org.br/listasuja/resultado.php>

¹⁸ N Bertrand, ‘Brazil Has A Brilliant Approach To Ending Modern-Day Slavery’, *Business Insider*, 17 November 2014, retrieved 21 August 2015, <http://www.businessinsider.com/how-brazil-shames-companies-that-enslave-people-2014-11#ixzz3jIibIVH>

¹⁹ Costa, p. 89.

²⁰ Instituto Pacto Nacional History pela Eradacao de Trabalho Escravo, ‘Histórico’, retrieved 2 August 2015, <http://www.inpacto.org.br/inpacto-2/historia/>; S Aaronson and J Zimmerman, *Trade Imbalance: The struggle to weigh human rights concerns in trade policymaking*, Cambridge Press, New York, 2007.

²¹ ILO, ‘Slave Labour: It’s time to end this shame once and for all’, ILO, 2005, retrieved 2 August 2015, http://www.ilo.org/wcmsp5/groups/public/---dgreports/---ilo-washington/documents/genericdocument/wcms_189835.pdf

companies who have signed the Pact are confronted with concrete evidence of other businesses involvement with forced labour via the Dirty List they must either end business dealings with the offending corporation or risk negative publicity.²² In this way, the Pact is innovative in its vision of shared responsibilities for labour rights violations, going beyond companies to supplier and outsourcing networks. As a result, the Pact functions as a transnational instrument that can cripple a company's key asset, its public image.²³ In 2013, 380 corporations, accounting for 30% of Brazil's gross national product, had signed onto the Pact.²⁴

When the threat of bad publicity from non-compliance with the Pact does not spur responsible sourcing, the business community's use of a company's presence on the Dirty List as a reason to deny them funding has increasingly proven to be the most effective weapon to ensure forced-labour-free supply chains. Public and private financial institutions, including the Banco do Brasil, the Banco da Amazônia, the Banco do Nordeste and the Brazilian Development Bank (BNDES), have all refused credit to companies included on the Dirty List. Brazilian government officials have noted that for businesses this is the biggest penalty.²⁵ Bank actions denying credit reflect the unwillingness of financial institutions to associate publicly with forced labour violators.

Complementing the Brazilian business communities' actions, the government has utilised additional measures targeting blacklisted companies. For example, a governmental decree from the Ministry of National Integration Decree No. 1.150 recommends that financial bodies refrain from granting financial assistance companies who appear on the Dirty List. While no sanctions exist for those banks that offer credit to blacklisted companies, Decree No. 1.150 nonetheless gives guidance to lending institutions and is a good example of the complementary regulation enacted to bolster the impact of the Dirty List and incentivise business community adherence.²⁶ Businesses included on the Dirty List are also excluded from competing for new projects within public programmes like the housing programme *Minha Casa Minha Vida*.²⁷ Lastly, in June 2014, Brazil adopted a constitutional amendment to allowing the government to confiscate property, without compensation, when forced labour is found to have been used.²⁸

D. Recent Resistance to the Dirty List

Despite the progress in eradicating forced labour the Brazilian government has recently encountered obstacles in maintaining the integrity of the Dirty List, particularly in the form of business backlash and legal action.²⁹ The controversies surrounding OAS SA and MRV Engenharia, both companies placed on the Dirty List, illustrate the government's struggle with business on a micro-level, and the suspension of the Dirty List by the Brazilian Chief Justice demonstrates businesses' increasingly advanced strategies to stymie the mechanism.

1. OAS SA and MRV Engenharia

OAS SA helped build two stadiums for the 2014 World Cup. From June-October 2013, GEFM agents and prosecutors monitored OAS SA construction sites and found evidence of forced labour in Minas Gerais.³⁰ OAS SA was placed on the Dirty List in July 2014. This was notable given Brazil's participation in the Commitment for Decent Work for the

²² Instituto Pacto Nacional History pela Eradacao de Trabalho Escravo.

²³ L Carstensen and S McGrath, 'The National Pact to Eradicate Slave Labour in Brazil: A useful tool for unions?' *Global Labour Column*, 2012, retrieved 2 August 2015, <http://column.global-labour-university.org/2012/12/the-national-pact-to-eradicate-slave.html>

²⁴ Walk Free, 'Brazil: Global Slavery Index 2014', retrieved 2 August 2015, <http://www.globalslaveryindex.org/country/brazil/> ; ILO, Slave Labour.

²⁵ Associated Press, 'More employers in Brazil accused of slave-like conditions', *USA Today*, 3 January 2012, retrieved 2 August 2015, <http://usatoday30.usatoday.com/news/world/story/2012-01-03/brazil-slave-labor-employers/52363518/1>

²⁶ Costa, pp. 89–93.

²⁷ W Zocchio, 'Banco do Brasil é processado por trabalho escravo em obras do Minha Casa, Minha Vida', *Repórter Brasil*, 17 September 2013, retrieved 22 August 2015, <http://reporterbrasil.org.br/2013/09/banco-do-brasil-e-processado-por-trabalho-escravo-em-obras-do-minha-casa-minha-vida/>

²⁸ Emenda Constitucional # 81 at http://www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc81.htm ; Senate Bill 432 of 2013 at http://www.senado.gov.br/atividade/materia/detalhes.asp?p_cod_mate=114895

²⁹ For example, in 2012 there was an unsuccessful constitutional legal challenge to the validity of the Dirty List brought by the National Confederation of Brazilian Agriculture. 'Case questioning constitutionality of Slave Labor Blacklist is dropped by STF', 11 April 2012, <http://conectas.org/en/actions/justice/news/case-questioning-constitutionality-of-slave-labor-blacklist-is-dropped-by-stf>

³⁰ A Brasileiro, 'World Cup stadium builder added to Brazil's slave labour "Dirty List"', *Thomson Reuters Foundation*, 4 July 2014, retrieved 21 August 2015, <http://www.trust.org/item/20140704074731-3ih6d/>

World Cup and the fact that OAS SA was one of the official builders for the event.³¹ Shortly thereafter, OAS SA obtained a court order to have its name removed from the Dirty List. The removal of OAS SA from the list is a sign of the its ineffectiveness in the face of business opposition and legal challenge, however, the incident also illustrates the business community's recognition that appearing on the Dirty List has negative consequences. These negative consequences, namely the bad publicity, fines and loss of lending opportunities, have driven businesses to try to close the Dirty List. Ironically, it is these enforcement mechanisms and governmental support that made the Dirty List an international model. Businesses which have been negatively affected have spoken of the power and the crippling financial consequences of the Dirty List. 'There are undeniable impacts on a company's image,' stated Rubens Menin Teixeira de Souza, founder and president of MRV Engenharia, a large real estate development company that has appeared on the Dirty List four times.³² Like OAS SA, MRV Engenharia has obtained injunctions to have its name removed. In 2013, the company's financing contracts were suspended by Caixa Econômica Federal for appearing on the list and it had to pay USD 6.7 million in fines.

2. Suspension of the Dirty List

Likely in response to continued financial penalties, certain industries have recently made a concerted effort to end the Dirty List. In December 2014, Brazilian President of the Supreme Court, Ricardo Lewandowski, granted an injunction suspending the publication of the Dirty List. The ruling stemmed from a constitutionality claim brought by the Brazilian Association of Real Estate Developers (Associação Brasileira de Incorporadoras Imobiliárias) on grounds that the Dirty List should be codified under law instead of inter-ministerial ordinance and that administrative appeals procedures for challenges to the labour inspections did not ensure the right to a fair hearing.³³ The decision was issued during the holiday recess by the Chief Justice only and garnered negative press internationally.³⁴

After a three-month suspension, a new Dirty List was promulgated on 31 March 2015, through an inter-ministerial ordinance signed by MTE and the Secretariat of Human Rights. The new Dirty List was slated to be released in April, but this has not yet happened. The Brazilian government has stated that the new Dirty List is being finalised and is waiting for Supreme Court authorisation to release the list.³⁵ There are claims that the new list is complete, but that there is internal pressure within the government and from businesses to delay publication of the list.³⁶

Whilst the Brazilian government publically displayed resolve in the face of business opposition and continued to support the Dirty List, the delay in publically releasing the list has resulted in less meaningful enforcement and signals more tentative government support compared to earlier years. Importantly for businesses, the financial threats of restricted lending due to presence on the Dirty List have softened. Since the Dirty List is no longer available, BNDES and Caixa Econômica Federal (another Brazilian bank) guided their employees to stop using it as a consideration when examining loan applications. Instead, the two banks claim to be using other criteria to ensure that companies applying for capital are not using forced labour, though they have not disclosed those mechanisms.³⁷ The longer the government delays in issuing the new list, the more incentivised businesses are to oppose it, as they benefit from more lenient financing criteria. The situation with the Dirty List is still unfolding, but much has been done to eviscerate the effectiveness of the Brazilian model in the past year. The mounting pressure and legal attacks by business interests have sidelined the Dirty List, a key part of an international model of a programme against forced labour. For the Brazilian model to successfully continue, the government must publicise and robustly defend the Dirty List and reinstate financial penalties for non-complaint companies.

³¹ 'World Cup 2014: Pact for decent work launched in Sao Paulo', Building and Wood Worker's International, <http://www.bwint.org/default.asp?index=5140> The Pact requires all signatories respect the labour rights established by the ILO Conventions, including prevention of forced labour.

³² C Costa, 'Government 'dribbles' STF and creates new list of slave labour', BBC Brazil, 6 April 2015, retrieved 21 August 2015, www.bbc.co.uk/portuguese/noticias/2015/04/150331_lista_trabalho_escravo_cc

³³ M Silva and C Báfero, 'Brazil: Blacklist of slave labour in Brazil—Renewal of labour regulation', Mondaq, 11 May 2015, retrieved 2 August 2015, <http://www.mondaq.com/x/396372/employee+rights+labour+relations/Blacklist+of+Slave+Labor+in+Brazil+Renewal+of+Labor+Regulation> ; <http://reporterbrasil.org.br/2015/03/confira-a-nova-lista-suja-do-trabalho-escravo/>

³⁴ Office of the High Commissioner for Human Rights (OHCHR), 'Human Rights Council concludes general debate on the promotion and protection of all human rights', OHCHR, 2015, retrieved 2 August 2015, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15698&LangID=E#sthash.vla6nwoZ.dpuf>, http://www.conectas.org/arquivos/editor/files/Conectas_RB_Statement%20Lista%20Suja%20-%202013_03.pdf

³⁵ Email with C Costa, BBC Reporter, 3 August 2015, on file with the author.

³⁶ Interview with C Costa, BBC Reporter, 22 May 2015.

³⁷ Interview with C Costa, BBC Reporter, 22 May 2015.

In contrast to Brazil, disclosure regulation to combat forced labour in supply chains is a newer regulatory concept in the US. I will now evaluate the US regulatory framework in order to evaluate the benefits and pitfalls of the US model.

III. Supply Chain Transparency in the US

While there have been legislative measures to combat child labour,³⁸ and efforts to monitor products made by child or forced labour,³⁹ disclosure legislation specifically aimed at companies' supply chains did not become law in the US until 2010. In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act [hereinafter Dodd-Frank]⁴⁰ and California enacted the California Transparency in Supply Chains Act (CTSCA).⁴¹ Dodd-Frank is a federal law that applies to all US states. The CTSCA only applies to companies doing business in California. In addition to Dodd-Frank and CTSCA, there are two recent federal forced labour supply chain transparency efforts that bear note: the Business Supply Chain Transparency on Trafficking and Slavery Act of 2014 (HR 4842) and Executive Order 13627 Strengthening Protections Against Trafficking in Persons in Federal Contracts (EO 13627). HR 4842 was proposed federal legislation in the 113th Congress. EO 13627 is an executive order that applies to the US federal government by presidential decree.

A. Conflict Minerals Disclosure Legislation: Section 1502 of the Dodd-Frank Act

Dodd-Frank focuses on financial service reforms. However Section 1502 mandates publically-traded companies to annually report to the Securities and Exchange Commission (SEC) and disclose use of 'conflict minerals' from the Democratic Republic of Congo (DRC) in their supply chains.⁴² Section 1502 does not explicitly address forced labour, however, it is a federal law that utilises supply chains disclosure, and as such it is important to evaluate it as a first step in the US regulatory regime.

The issues encountered in implementing Section 1502 are useful to examine as they reflect some of the existing impediments to supply chain transparency legislation eliminating forced labour. The response to Section 1502 from two key stakeholders, the business community and the implementing government agency, has been mixed.⁴³ The business community has resisted and continues to do so through a legal battle that has resulted in delays to full implementation of Section 1502. The US Securities and Exchange Commission (SEC), the government agency tasked with implementation, has at times seemed uncertain in its support of the regulation.

SEC officials initially struggled to translate Section 1502's accompanying rules into regulations. The SEC first issued proposed regulations in December 2010 and received over 13,000 comment letters.⁴⁴ In response, the SEC altered early drafts of the rules and pushed back deadlines. The delay signaled to opposition groups that procedural tactics could be effective in undermining implementation. In August 2012, the SEC issued the final rule accompanying Section 1502. In protest, business groups filed a lawsuit requesting a modification or set-aside of the rule. In July 2013, a federal district

³⁸ The Sanders Amendment of 1997, offered to the Tariff Act of 1930 prohibited the importation of goods created by forced labour. The Tariff Act was amended again in 2000 to specifically include prohibitions against goods created by forced or indentured child labour. H. Amdt. 368 to 19 U.S.C. 1307—105th Congress (1997–1998) agreed to by voice vote, 7 September 1997; Trade and Development Act of 2000, 19 U.S.C. § 1307 (2006).

³⁹ Trafficking Victims Protection Reauthorization Act of 2005, Public Law 109–164 (2006), mandated the Department of Labour develop and make available to the public a list of goods from countries that it has reason to believe are produced by forced labour or child labour in violation of international standards.

⁴⁰ Dodd-Frank Wall Street Reform and Consumer Protection Act Pub. L. No. 111–203, 124 Stat. 1376 (2010).

⁴¹ California Transparency in Supply Chains Act of 2010, ch. 556, 2010 Cal. Stat. 2641 (codified at CAL. CIV. CODE § 1714.43).

⁴² Dodd-Frank § 1502, 124 Stat. at 2213 (codified at 15 U.S.C. § 78m(p)) (Supp. V 2011) "Conflict minerals" is defined as (A) columbite-tantalite (coltan), cassiterite, gold, wolframite, or their derivatives; or (B) any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the [DRC] or an adjoining country.' § 1502(e)(4)(A)–(B). See also: International Conference on the Great Lakes Region and Organisation for Economic Co-operation and Development, 'Regional Certification Mechanism Certification Manual, Mineral Certification Scheme of the International Conference on the Great Lakes Region (ICGLR)', retrieved 2 August 2015, <http://www.oecd.org/investment/mne/49111368.pdf>

⁴³ M Seitzinger and K Ruane, 'Conflict Minerals and Resource Extraction: Dodd-Frank, SEC regulations, and legal challenges', Congressional Research Service, 2015, retrieved 2 August 2015, <http://fas.org/sgp/crs/misc/R43639.pdf>

⁴⁴ Proposed Rule: Conflict minerals, SEC, <http://www.sec.gov/comments/s7-40-10/s74010.shtml>

court found the final rule viable.⁴⁵ The business plaintiffs appealed the decision and achieved a partially successful result with parts of the rule deemed to be violative of the First Amendment. While large portions of Section 1502 are now in effect, part of the rule is still not finalised as the SEC requested and received a rehearing. Four years after enacting Dodd-Frank, corporate opposition to Section 1502 has prevented consistent implementation. On August 18, 2015, the US Court of Appeals for District of Columbia upheld the First Amendment violation. The ruling still largely upholds Section 1502, making companies conduct due diligence and file reports to SEC, but companies are not required to say whether the products are conflict free. The delays illustrate the power of organised corporate resistance to supply chain disclosure regulations in the US.⁴⁶ The decision marks the second time that the three-judge panel has reviewed the regulator's conflict minerals rule. In this way, the US and Brazil now share a common obstacle: pushback from corporate interests through litigation. While US business interests did not succeed in preventing Section 1502 from becoming law, they have delayed implementation. This tactic seems to have also taken hold in Brazil.

In addition to opposition from the business community, the SEC has seemed hesitant to use its mandatory disclosure powers to monitor supply chains. Many within the organisation were concerned as to whether the SEC had the expertise or the actual ability to undertake such a task. Mary Schapiro, former SEC Chairperson, has acknowledged that the SEC lacked expertise in the area.⁴⁷ SEC Chair Mary Jo White questioned the use of SEC disclosure powers to exert pressure on companies to change behaviour, stating:

Seeking to improve safety in mines for workers or to end horrible human rights atrocities in the Democratic Republic of the Congo are compelling objectives, which, as a citizen, I wholeheartedly share. But, as the Chair of the SEC, I must question, as a policy matter, using the federal securities laws and the SEC's powers of mandatory disclosure to accomplish these goals.⁴⁸

Such comments call into question the SEC's willingness to enforce supply chain regulations and contrast the Brazilian MTE's investigative and administrative work related to the Dirty List. The SEC's resistance to lead on this issue could result in a lack of meaningful implementation—negating the impact and purpose of supply chain disclosure legislation. Recent negative media reports about what is happening in the DRC as a result of Section 1502 bolster that idea.⁴⁹ Many advocates argue that the SEC has disclosure expertise and is best situated to take on this role if the US does decide to expand disclosure regulation to combating forced labour through supply chains. However, the current fight over Section 1502 demonstrates the need for both governmental agency and business community buy-in for successful federal supply chain legislation in the US.

In addition to the above-mentioned obstacles, reports on Section 1502's actual impact upon the DRC have been divergent and controversial. In 2010, in an effort to comply with Section 1502, DRC's government shut down the mining industry for six months and initiated a conflict mineral certification process. As of October 2014, eleven mines of approximately 900 in South Kivu, DRC, contained minerals classified as conflict-free.⁵⁰ Critics claim that Section 1502 incentivised international buyers to abandon the region and source minerals elsewhere.⁵¹ Proponents note that Section 1502 created a strong market incentive for change, resulting in major impact upon DRC conflict mines by

⁴⁵ National Association of Manufacturers et. al. v. SEC, Civil Action No. 13-cv-635

(Opinion), 2013, retrieved 2 August 2015, <https://www.sec.gov/rules/final/2014/34-67716-opinion.pdf>

⁴⁶ S Lynch, 'US court backs companies' free speech over conflict minerals', *Reuters*, 18 August 2015, retrieved 21 August 2015, <http://www.reuters.com/article/2015/08/18/sec-court-conflictminerals-idUSL1N10T14920150818>

⁴⁷ C Taylor, 'Conflict Minerals and SEC Disclosure Regulation', *Harvard Business Law Review Online*, vol. 2, 2012, retrieved 2 August 2015, <http://www.hblr.org/?p=1820>

⁴⁸ M J White, 'The Importance of Independence', speech at the 14th Annual A A Sommer, Jr. Corporate Securities and Financial Law Lecture, Fordham Law School, New York, 3 October 2013, retrieved 2 August 2015, http://www.sec.gov/News/Speech/Detail/Speech/1370539864016#.VH1Q6_ldW-G

⁴⁹ L Wolfe, 'How Dodd-Frank is Failing Congo', *Foreign Policy*, 2 February 2015, retrieved 2 August 2015, <http://foreignpolicy.com/2015/02/02/how-dodd-frank-is-failing-congo-mining-conflict-minerals/>; C Vogel and B Radley, 'In Eastern Congo, economic colonialism in the guise of ethical consumption?' *Washington Post*, 10 September 2014, retrieved 2 August 2015, <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/09/10/in-eastern-congo-economic-colonialism-in-the-guise-of-ethical-consumption/>

⁵⁰ S Raghavan, 'Obama's conflict minerals law has destroyed everything, say Congo miners', *The Guardian*, 2 December 2014, retrieved 2 August 2015, <http://www.theguardian.com/world/2014/dec/02/conflict-minerals-law-congo-poverty>

⁵¹ Various, 'An Open Letter', *Christoph Vogel*, 2014, retrieved 2 August 2015, <https://ethuin.files.wordpress.com/2014/09/09092014-open-letter-final-and-list.pdf>

interrupting long-standing industry practices of opacity in supply chains.⁵² Further debate about the success of Section 1502 seems to be intensifying⁵³ and threatens the political viability of future federal supply chain transparency measures in the US as politicians may find supply chain legislation politically unpalatable.

B. State-led Efforts: California Transparency in Supply Chains Act

The CTSCA was a positive state-level supply chain disclosure development. CTSCA applies to retailers or manufacturers doing business in California but it does not forbid the sale of goods produced through forced labour. Instead, the CTSCA requires that companies with annual gross receipts of USD 100 million doing business in California disclose their efforts to eradicate trafficking and forced labour in their direct supply chains.⁵⁴ Disclosure must be posted on the company's website homepage with an obvious and easily understood link. Covered companies must, at a minimum, disclose to what extent, if any, the retailer, seller, or manufacturer: (1) verifies company product supply chains to evaluate and address risks of human trafficking and forced labour and whether the verification was conducted by a third party; (2) conducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and forced labour in supply chains; (3) requires direct suppliers to certify that materials incorporated into the product comply with the laws regarding human trafficking and forced labour of the country or countries in which they are doing business; (4) maintains internal accountability standards and procedures for employees or contractors failing to meet company standards regarding trafficking and forced labour; and (5) provides company employees and management, who have direct responsibility for supply chain management, particularly with respect to mitigating risks within the supply chains of products.⁵⁵

As the CTSCA does not criminalise the existence of forced labour within a company's supply chain, its primary benefit is that it mandates the disclosure of information about forced labour and human trafficking to consumers.⁵⁶ Despite mandating disclosure of information, the CTSCA does not contain details as to what constitutes adequate compliance for eliminating forced labour from a supply chain. As a result, some corporations interpreted the CTSCA facially and reported that their companies were not taking any measures to eradicate or monitor human trafficking and forced labour in their supply chains. The remedy for a company's inaction or violation of CTSCA is injunctive relief to compel compliance filed by the California Attorney General. Whilst an injunction can be a useful contractual remedy, it is a mild deterrent for non-disclosure of the existence of forced labour in a company's supply chain. The lack of legal ramifications, regulatory incentives or penalties weakens the CTSCA's power and purpose and disincentivises companies from investigating their supply chains and implementing strategies to eradicate forced labour. Recently, the Attorney General's (AG) office issued letters to over 1,700 eligible companies requiring them to notify the office whether they are CTSCA-compliant.⁵⁷ Additionally the AG created a resource guide for prospective CTSCA filers to provide compliance guidance.⁵⁸ The AG's recent actions demonstrate that there will likely be more enforcement-minded efforts to ensure CTSCA compliance in the future.

C. Recent Federal Legislative and Administrative Supply Chain Efforts

Despite the successful passage of the CTSCA, recent efforts at the federal level to enact supply chain disclosure legislation have failed. HR 4842, a federal bill that aimed to eliminate modern slavery, human trafficking, forced and child labour through supply chain disclosures, was introduced with bipartisan support in June 2014 by Representatives Carolyn Maloney (D-NY) and Chris Smith (R-NJ). Like Section 1502 of Dodd-Frank, HR 4842 relied on companies reporting to the SEC and consumer policing. HR 4842 required companies with annual worldwide global receipts greater than USD 100 million to report to the SEC and make publicly available on their websites information describing any measures taken to identify and address conditions of forced labour, slavery, human trafficking and child labour within their supply chains. The disclosures would have also required companies to describe: risks identified within the supply chain and measures taken towards eliminating risks; whether audits of supply chains were conducted by third parties; whether outside labour organisations and non-governmental organisations (NGOs) were consulted in the audit process;

⁵² Various, 'Open Letter Conflict Minerals: A broader push for reform is essential', *Enough Project*, 2014, retrieved 2 August 2015, http://www.enoughproject.org/files/OpenLetterConflictMinerals_October_2014.pdf

⁵³ For example, countries that are economically impacted by Dodd-Frank are considering bringing a suit against the US through the World Trade Organization on the grounds that Section 1502 violates rules of trade. L Wolf.

⁵⁴ CTSCA, ch. 556, 2010 Cal. Stat. 2641 (codified at CAL. CIV. CODE § 1714.43).

⁵⁵ CTSCA at §1714.43(3)(a)(1)-(3)(c)(1-5).

⁵⁶ *Ibid.*, §1743.43.

⁵⁷ C Navarro, 'California Enforces Supply Chain Disclosure Law', *Hogan and Lovells: Focus on regulation*, 2015, retrieved 2 August 2015, <http://www.hlregulation.com/2015/05/06/california-enforces-supply-chain-disclosure-law/>

⁵⁸ K D Harris, 'The California Transparency in Supply Chains Act: A resource guide', California Department of Justice, 2015, retrieved 2 August 2015, <http://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf>

and whether working conditions and labour practices of upstream suppliers were examined to verify whether such suppliers have appropriate systems to identify risks within their own supply chains. In contrast to Section 1502, HR 4842 did not rely on the SEC to determine compliance criteria, instead it required the SEC and the US State Department to develop regulations together and share subject matter expertise on forced and child labour, human trafficking and modern slavery. The inclusion of the State Department reflects a positive advancement of the development of US supply chain legislation policy, as it reflects an attempt to utilise the State Department's expertise.

HR 4842 faced similar but less publicised obstacles to becoming federal law that Section 1502 of Dodd-Frank has faced in final rule issuance. Most notably there was concern about having the SEC as the implementing government agency. Earlier drafts of HR 4842 had the Department of Labour, not the SEC, as the implementing agency. However in the final version the SEC was the designated government agency. Additionally, there was not much support for HR 4842. Even with a broad coalition of faith-based groups, NGOs and labour and worker rights groups supporting the introduction of the bill, HR 4842 only gained a total of four sponsors out of a possible 435 sponsors.

Despite the limited Congressional support for HR 4842 during the 113th Congressional session, US legislators have plans to reintroduce a new version of the bill in the 114th Congressional session on 27 July 2015, HR 3226. The bill again assigns the SEC as the implementing governmental agency. Positively, for the 114th Congressional session, the legislation has been introduced in both the Senate (a companion bill to HR 3226, S. 1968 was introduced on August 5, 2015) and the House of Representatives, whereas HR 4842 was only introduced in the House of Representatives. Additionally, the new House version of the bills was introduced earlier in the legislative session, which creates more opportunity to gather legislative sponsors. The increased interest in supply chain transparency legislation by Congress illustrates a hopeful forward path on federal US legislative efforts, and could signal that the SEC may be more willing to take on supply chain transparency regulatory efforts in the future.

In addition to supply chain disclosure legislation, there are new federal administrative supply chain transparency efforts related to government procurement implemented by the government. The recent Presidential Executive Order 13627: Strengthening Protections Against Trafficking in Persons in Federal Contracts applies supply chain transparency disclosure principles to US government procurement and represents a best practice in regards to governmental self-regulation. As EO 13627 is focused on government procurement, it centres on the purchase of goods and services but also focuses on efforts to ensure suppliers monitor their own supply chains in which goods and services are purchased as production inputs.

EO 13627, signed by President Barack Obama in September 2012, aims to curb human trafficking and forced labour in all US federal contracting. As the US federal government is the largest single purchaser in the global economy, the scope of EO 13627 is extensive. EO 13627 requires federal contractors and sub-contractors to take specific preventative measures to address and eliminate modern slavery in their supply chains. Certain aspects of EO 13627 are improvements upon existing US government supply chain and procurement policy. For example, the existence of a recruitment and wage plan that forbids recruitment fees being charged is a welcome protection that reflects growing knowledge about points along the federal procurement supply chain that have traditionally been the weakest. Lastly, EO 13627 requires the creation of a taskforce of relevant stakeholders in order to identify, adopt and publish appropriate safeguards guidance and compliance assistance to prevent trafficking and forced labour in federal contracting in identified areas. EO 13627 is a stellar example of the innovative transparency policy that can be undertaken in the US context when there is strong government support and a robust implementation mechanism.

IV. Conclusion

Analysis of Brazil and US governmental approaches in implementing supply chain disclosure regulations to eliminate forced labour maps the progress and setbacks that have occurred with states' regulatory efforts to clean up supply chains. Given recent developments, it is clear the viability and effectiveness of supply chain disclosure regulations to eliminate forced labour are still in-flux. As such, it is imperative that governments robustly support regulatory efforts. The early successes seen in Brazil illustrate the remarkable progress that can be achieved when government is invested in political support and enforcement. The delays and controversies surrounding implementation of Section 1502 of Dodd-Frank show the result when government is not aggressively engaged. With business opposition to supply chain disclosure likely to occur, it is necessary that governments and civil society work with businesses to create as much buy-in and positive incentives for cooperation as possible, but also employ true financial penalties for non-compliance. In Brazil, the Dirty List's power to impede financing opportunities for non-compliant businesses was critical; in the US there are no comparable penalties. In addition to having penalties, they must be meaningfully implemented. The recent

setbacks in Brazil show the power of business opposition and the need for government support when business attacks such efforts. Without the Dirty List, businesses have not been required to address forced labour as in previous years and are also not penalised for failing to do so. Evaluating the Brazilian and the US approaches we still see much is in transition, but that government support and enforcement along with the engagement of businesses are necessary elements in supply chain disclosure laws working to eliminate forced labour.

Ashley Feasley is the Director of Advocacy at the Catholic Legal Immigration Network and an Adjunct Lecturer of Law at the Washington School of Law at the Catholic University of America. Ashley previously worked at ECPAT International and Fordham University School of Law, United States of America, and is a consultant for Human Trafficking Search. Email: ashleykfeasley@gmail.com. Twitter: [@ashleyfeasley](https://twitter.com/ashleyfeasley)