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The story of human rights corporate accountability is not a story of a move towards stringent international and transnational regulations. One discussion nowadays is whether the UN Guiding Principles on business and human rights (UNGPs) should be hardened into law. Regulations on human rights due diligence (HRDD) would increase access to remedies for victims, hold lead firms legally liable for their involvement in harm, and incentivize responsible business conduct. The UN has taken up the hard law question in 2014 and is pondering now the options for a treaty on corporate accountability.

This brief is about using legal coercion directed at the top of global value chains (GVCs) as a way forward. It addresses two questions: when and why should coercive regulations be promoted or not? How can the business and human rights governance regime become stronger even in the absence of such regulations aimed at lead firms in GVCs? The brief puts forward a regulatory framework and narrative to valorize less coercive legal strategies and non-legal strategies through 'regulatory mixes'. Less coercive instruments could be transparency laws, public procurement regulations, soft law instruments, and various policies inside and outside GVCs to enable responsible business conduct.

At times the narratives about regulating GVCs reveal an attraction for oversimplification: there is a choice between human rights and profit, between voluntarism and law, and the task is simply about making a now uncontroversial responsibility – HRDD – mandatory. When the complexity of regulating transnational business operations becomes overwhelming, the regulatory narratives tend to default, sooner or later, on two elements: on the *entity at the top of GVCs*, that is, the lead firm seen as resourceful and contributing in some sense to GVCs abuses, and on *legal coercion*, that is, strong laws adopted in home states to counteract the profit motive and competitive market pressures.

This there is a tendency to default on lead firms and legal coercion (Brief 1/2017). Further, such proposals often draw analogies and point to precedents where due diligence obliga-tions were adopted. Such analogous reasoning is not necessarily enlightening to the extent it obscures the particularities of regulating GVC (Brief 2/2017).

This brief seeks to alleviate these two dangers of *premature defaulting* and *misleading analogies.* The default is not unavoidable if an alternative to strengthened governance is identified, and misleading analogous argumentation can be resisted if some distinctions are observed. This analysis cautions against the appeal and false straightforwardness of sweeping calls to "just legalize the HRDD".

Note: This brief draws on R. Mares, 'De-centring human rights from the international order of states - The alignment and interaction of transnational policy channels', Indiana Journal of Global Legal Studies, Vol. 23:1 (Winter 2016) pp. 171-199, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2920756 and on R. Mares, 'Legalizing human rights due diligence and the separation of entities principle', in Surya Deva and David Bilchitz (eds.), Building a Treaty on Business and Human Rights: Context and Contours (CUP, 2017) pp. 266-296 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3054492

The result is the two-track, multi-channel regulatory model outlined herein. It is two-track because it keeps separate a company's direct or indirect involvement with the harm. It is multi-channel because it accounts for six transnational policy channels that have a bearing on GVCs (Brief 3/2017). The model speaks of regulation in a way that valorizes less coercive legalization forms as well as non-legal forces. It clarifies the regulatory task so that obstacles and opportunities present in transnational business operations are better accounted for and systemic thinking is encouraged.

REFERENCE POINTS

This brief impresses that in the struggle to legalize corporate responsibilities we should not lose sight of a number of distinctions and considerations. Conflations and blind spots might be useful for rhetorical purposes but diminish clarity on the way forward.

Two root causes of abuses: top and bottom of GVCs. The UNGPs drew attention to a distinction between direct and indirect involvement in human rights infringements. Thus the responsibility to respect refers to involvement by causation, contribution or mere linkages with harmful operations. This points to two different root causes of abuse: root causes at the top of the chain (own decisions of lead firms) (Type 1), and root causes at the bottom (conduct of business partners and the inadequate laws in the host state) (Type 2).

Takeaway: *The UNGPs assign a responsibility to act on lead firms regarding both such root causes and that corporate responsibility to respect extends deep into the GVC.*

Two ways to discharge responsibility to act: cease and leverage. The UNGPs specify appropriate conduct: cease own conduct, exercise leverage, terminate a relationship. Depending on the root cause, the responsibility to respect becomes *a responsibility to cease harmful conduct* in the context of Type 1 root causes (the causation and contribution scenarios).

Or it becomes a *responsibility to exercise leverage* over the third party in the context of Type 2 causes (the linkages and contribution scenarios) before termination of the relationship is contemplated. It becomes easier to grasp whether the same or different regulatory tools are appropriate in the two regimes – the cessation regime and the leverage regime – once they are analytically separated.

Takeaway: *By specifying what the responsibility to act entails, the UNGPs separated the cessation and leverage regime. All GVC infringements should not be conflated as being ultimately traceable to one root cause (top of GVC).*

Legalizing the responsibility to act in the two regimes: coercive or less coercive. The UNGPs have not gone as far as discussing regulatory designs and implications of turning HRDD into law. Instead the UNGPs offered the 'polycentric governance' model on which further legalization actions could be built upon in the future (Brief 1/2017). This brief maintains that there are major differences between the cessation and leverage in terms of legalization tasks and options.

In the cessation regime, law would institute a *prohibition* of harmful conduct which could be in the form of *coercion.* That would not be conceptually problematic and would draw on classic principles of civil and criminal liability; by contrast, less coercive regulations appear inadequate to the task of ensuring the company is ceasing its harmful conduct.

In the leverage regime, the task of regulation is not one of *prohibition,* but of *mobilizing* and *guiding leverage.* Could coercive legal strategies hitting at the top of the GVC (lead firm) — as in the cessation regime — achieve this leverage objective? Possibly but the risk lies in creating incentives for lead firm to prematurely disengage from business partners. Thus, applying legal coercion on the lead firm has to be assessed against the danger of actually destroying the leverage rather than securing it. Therefore less coercive legal strategies and non-legal strategies might acquire special value in the leverage regime.

Takeaway: *Regulating leverage in a coercive manner is more complicated than prohibiting harmful conduct.*

Legalization in transnational and domestic settings: three foundational principles. Both domestic laws (host state) and transnational laws (home state) are at the heart of the project of holding MNEs accountable. The two sets of laws – domestic and transnational – are essential for closing the jurisdictional and regulatory gaps that MNEs sometime exploit. Domestic laws should evolve coercive forms to protect human rights as in other developed countries; then suppliers and subsidiaries would be held liable under stringent host state laws. However, transnational laws targeting the top of GVCs raise special challenges that should not be ignored.

The complication regarding transnational laws has to do with how lead firms could comply with coercive laws holding them liable for abuses down the GVC. Compliance could result either in strengthened protections for rightholders or in the redirection of value chains away from high risk zones so the lead firm does not have to shoulder the administrative burdens and liability risks.

This is the specter of redirection of GVCs, should legal coercion be exercised at the top of GVC. In other words, the regulatory issue is not as simple as lawmakers deciding that the lead firm should bear the risks (insure) for human rights infringements down the GVC, and use coercive law to that end. Instead three first order principles define the transnational context and shape legalization options: the legal separation of entities (business law), national sovereignty (international law), and rightholders' interest in maximum leverage being mobilized (human rights law). (Brief 2/2017)

Takeaway: *Domestic and transnational settings are different due to the specter of relocation that triggers three foundational principles. The difficulty should not be reduced to a clash between human rights and the 'pro-business' principle of legal separation of entities.*

The space for legal coercion in the cessation and leverage regimes. In the cessation regime, coercion hitting at the top of GVC through transnational law has a decisive role. It can properly cover causation and contribution to harm and ensure due liability for wrongdoing. Separately from that, domestic laws in host countries should evolve to be as coercive and effective as their counterparts in developed countries. Affiliates infringing

human rights should be liable – this is not the place to argue for less coercive and soft law solutions.

The same coercion in the leverage regime can backfire due to the specter of redirection of GVCs. However, it might also have a role even in this leverage regime. On the one hand, home states can decide on stringent *measures based on public policy* (e.g. bans on products tainted by slavery). On the other hand, *host states might consent* to take the risk of redirection (e.g. through a treaty). Significantly though, both these options restrict trade in a global climate that has pursued the further liberalization of trade and investment. So these options will appear as exceptions and inherently be of narrow application; advocating for them has limitations due to frictions with the three foundational principles. The consent of the host state has to be ascertained on a case by case basis and not presumed.
In sum, in the leverage regime, transnational law has to secure that the lead firm remains engaged and exercises influence over business partners with termination being a last resort, according to the UNGPs. The rule is maximizing leverage; redirection of GVC is the exception.

Takeaway: *Legal coercion through transnational laws is warranted primarily in the cessation regime and even in the leverage regime (but only in two situations).*

The value of less coercive laws in transnational setting: stepping stone or end of the line. In the cessation regime, less coercive strategies are inherently unable to deal satisfactory with the prohibition task. They can however be valuable as a stepping stone on the ladder to ultimate destination, coercive laws. Many NGOs value less coercive regulations (e.g. transparency laws) as a precedent and an opening of the path towards more stringent legalization measures. However, the same laws could equally well be seen as lack of political will from home states to hold lead firms accountable and offer remedies to victims.

In the leverage regime, the situation is different. Such less coercive laws have an indispensable role in managing frictions with the three first order principles active in transnational setting. Also such regulations are meant to mobilize some leverage from the top of GVCs.

The essential question is: do less coercive strategies matter? We need explanations of transnational law that are able to valorize less coercive laws in a systemic way. Importantly, seeing such laws as valuable cannot be in the stepping-stone mode: start soft but aim for coercive at the top of GVC. Valorization has to contemplate an end-of-the-line mode: stronger protection of human rights is to be achieved but not through legal coercion at the top of the GVC. The puzzle is: how can less coercive mechanisms increase in strength without evolving into legal coercive forms targeting the top of GVCs?

Takeaway: *There are situations where less coercive laws are not a stepping stone, but end of the line. That happens in the leverage regime. To achieve stronger protection of human rights requires a different way of explaining the value of less coercive laws.*

Expanded field of vision: developments in six transnational policy channels. The governance of GVCs is impacted by new developments in six transnational channels: international trade law, international investment law, international human rights law, development cooperation, corporate social responsibility (CSR), and home state laws with extraterritorial

effects. (Brief 3/2017) They are of high relevance for the leverage regime.

However most of these developments are not coercive in nature, neither on states nor on businesses. Nor do they target primarily the top of the GVC by emphasizing the responsibilities of lead firms and home states to prevent and redress infringements in GVCs. But these channels mobilize some leverage and they refer to internationally recognized human rights. The question still is: how do these developments really matter?

Takeaway: *When expanding analysis beyond the top of GVCs and legally coercive tools, there are actually a multitude of policy developments. They should not be ignored or quickly downplayed as they offer new opportunities and pathways to strengthen the protection of human rights appear.*

Assessing less coercive developments in the six transnational channels: three indicators. While these developments reveal hard law measures, they are less coercive in nature. It would be shortsighted to dismiss them out of hand as inherently flawed, likely inconsequential, and proof of lacking political will to constrain markets and profit-maximizing corporations. Less coercive as they are, such developments reveal an increased orientation towards root causes of infringements in GVC as well as increased *alignment, complementarity and interaction.* Therefore to assess more fully these developments requires tracking three indicators: strength (coerciveness), depth (root causes) and tightness (interaction). (Brief 3/2017) Then the leverage amassed by these developments can be better grasped.

Takeway: *Evaluations should not be reduced to tracking only the coerciveness indicator.*

Achieving strength: a rope from weak threads. Once the multitude of transnational policy channels is accounted for and the three indicators are used, a regulatory and sys-temic perspective can be outlined. As witnessed by myriads of cross-references and joint programs, these channels increasingly align and interact, creating opportunities to harvest and direct their combined leverage towards the root causes of human rights infringements.

The task is to capitalize on openings in multiple policy channels and devise a regulatory strategy of knitting harder and softer institutionalization strategies into a protective network for rightholders. Strength can be achieved by creating a “rope” from weaker strands.

This is a picture of a regulatory regime coming to terms with the multiple, though limited, tools in its arsenal and therefore seeking to gather strength by bundling together weak strands (less coercive legal strategies) into a rope that targets root causes of problems rather than their symptoms. Economic integration and GVCs created the possibility for combinations of public regulation, private regulation, standardization and capacity-building measures involving a multitude of policy channels.

The relevance of the state-centered human rights law system is not diminishing, but there are new sources of leverage to be captured and new pathways toward human rights pro-tection that emerging transnational regulatory regimes mobilize and institutionalize. Such rope thinking is aligned with the “policy mixes” rhetoric in CSR and the “policy coherence” ambitions of the European Union and the UN.

The rope of weak threads is a way to achieve strength without being coercive against lead firms (top of GVC). It is an alternative to the recurrent default in corporate accountability advocacy and literature on the coercive and the top of the GVC. This suggests that less coercive laws on lead firms are valuable not as a stepping stone but end of the line (at least regarding the top of the GVC). The multitude of developments in the six channels are not evidence of lack of political will to hold MNEs accountable, but valuable tools to navigate the three foundational principles in a transnational context. They are not inherently weak and therefore worthless, but important ingredients in a package of measures and channels bracketing GVCs.

A net of transnational channels makes it more difficult for lead firms and entities in the GVC as well as states and other actors with a bearing on GVCs to justify their inaction or harmful decisions. This rope model positions the GVC as a transnational governance regime amassing leverage for human rights and directing it to root causes of harm. It accounts and explains the jungle of recent developments of the less coercive kind while being clear when, where and why coercive laws are necessary.

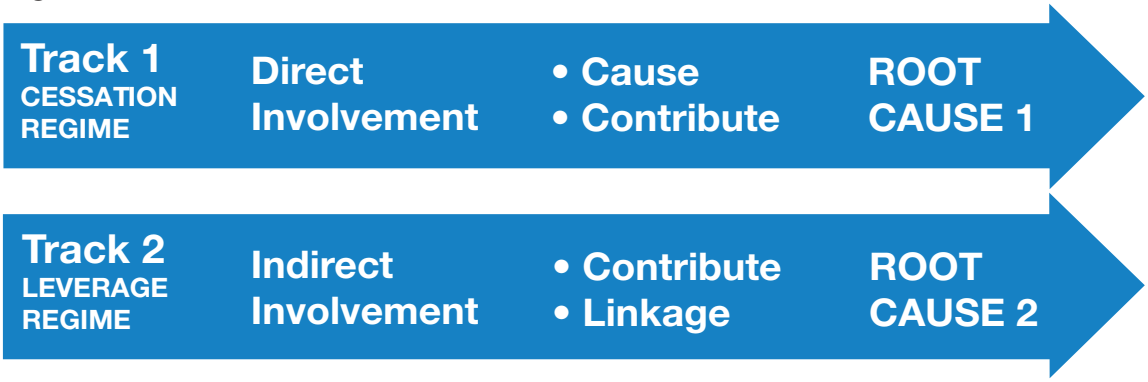
Takeway: *The rope out of weak threads is a way to begin valorizing less coercive developments in transnational channels.*

A TWO-TRACK, MULTI-CHANNEL REGULATORY MODEL

A 'two-track model' to guard against reductionism. The two-track approach to corporate responsibility indicates that the cessation regime and the leverage regime are separated, and clarify where coercive regulations are either inherently unproblematic or of exceptional application. The model shows the limits of proposals advocating legal coercion at the top of GVCs. It also reveals the vast territory in the leverage regime populated by three foundational principles and the multitude of relevant policy channels exhibiting less coercive and non-legal strategies.

The distinctions and considerations introduced so far helps guard against unwarranted analogies that tend to be used in sweeping calls to hold multinationals accountable and legalize HRDD. This prevents uncritical and premature default on the coercive and the top of GVC.

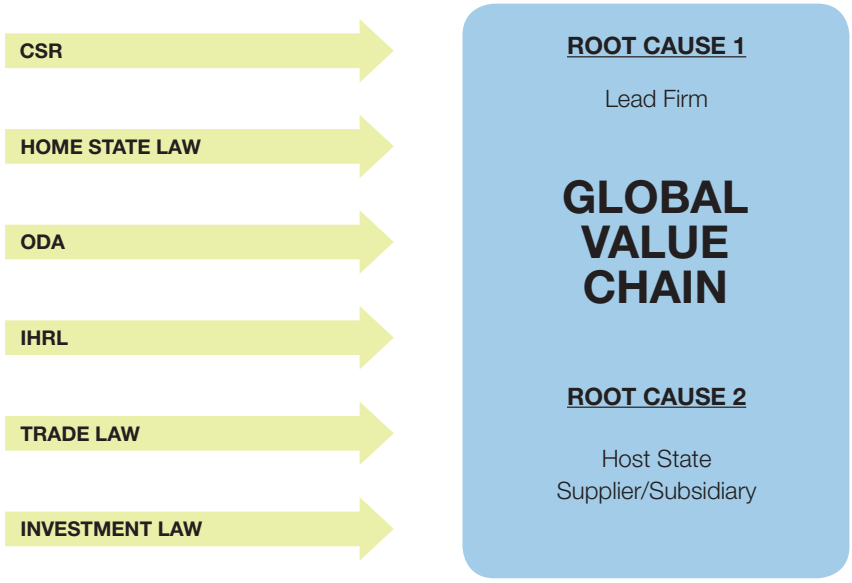
Figure 1: Two-track model



A ‘multi-channel model’ for regulating GVCs. There is an alternative to strengthen the protection of human rights that does not single-mindedly aim to direct coercion at the top of the GVC. The ‘rope out of weak threads’ harvests leverage from transnational policy channels and directs it toward root causes. This rope view replaces the ‘stepping stone’ view on less legally coercive and non-legal strategies. It explains the value of these strategies differently.

The way forward in strengthening the transnational governance net is by increasing alignment, interactions and complementarities among transnational channels. Using the three indicators allows assessing policy channels not in isolation but in their GVC context. Importantly, this rope model operates only in the leverage regime.

Figure 2: Multi-channel model (Brief 3/2017)



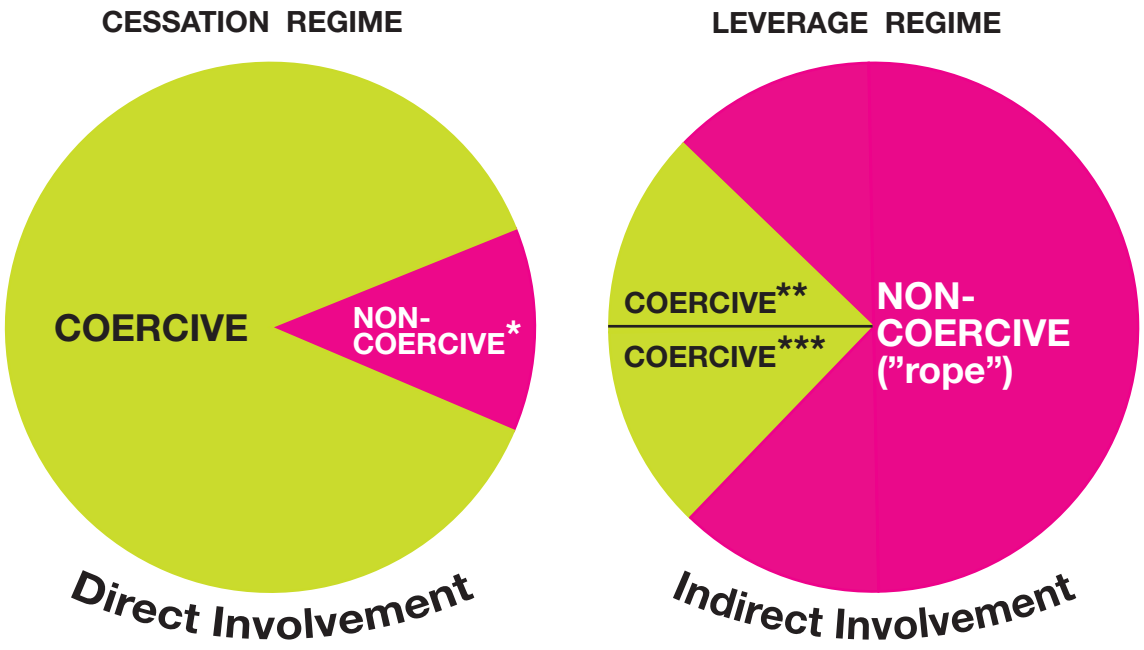
CHOICE OF LEGALIZATION MODELS: narrow scope and coercive methods versus broader scope and regulatory mixes. Saying that HRDD should be legalized to escape voluntarism tells nothing about the dangers of redirection of GVCs, about what first order principles are at play in the transnational context, and about the genuine need for a carefully balanced policy mix needed to summon leverage for human rights protection and direct it toward root causes.

Undertones of a unified, coercive strategy of holding MNEs accountable merely sell an illusion that by advocacy, a stringent approach can be expanded further and further to cover indirect involvement situations, and to gradually progress from less coercive to coercive methods against the lead firm as the way of ridding GVCs of abuses. Instead, such undertones might backfire by giving ammunition to opponents to box in human rights advocacy as a fringe perspective, ideological, and not mindful enough of first principles of corporate and state organization.

The model advanced herein helps to guard against the risk of premature default on legal coercion. Ignoring key distinctions through analogous reasoning and the seeming lack of alternatives on how to strengthen the regulatory regime further compound that risk. The two track approach presents the necessary distinctions that should not be overlooked; the multichannel offers that alternative way forward.

The choice for the legally inclined becomes clearer: either limited legalization in the coercive mode or comprehensive legalization in the 'polycentric mode' through less coercive tools. On the one hand, one endeavor is to devise specific, legally coercive regimes to ensure direct involvement does not remain unsanctioned. This can also explore the (limited) space for coercion in the leverage regime (two situations) while remaining mindful of the three foundational principles. On the other hand, a very different endeavor is needed in the indirect involvement cases. The leverage regime is characterized by multiple moving parts and scarcity of coercive tools, and requires complex regulatory mixes.

Figure 3: Regulation of lead firms



*** Buyer company's decision → Downward pressure on suppliers**
**** Exceptions based on public policy (home state)**
***** Consent on host state**

Hard law itself is not synonymous with legal coercion; there is a continuum between voluntary and coercive. The rope model takes this continuum seriously and discourages black-and-white and decontextualized assessments – 'weak' versus 'strong' – of regulating lead firms. Importantly however, the continuum is not a license for slippery slope argumentation based on conflations and reductionism. Rather it is an invitation to forge regulatory mixes that carefully set the needle on the continuum without losing sight of first principles and analytical distinctions. Transnational laws might well be less coercive and will have to be valorized in complex regulatory packages.

In sum, there is a choice: regulatory proposals could be either *limited* in scope and rely on coercive means or *broad* in scope and be prepared to employ less coercive means. Thus one can seek hard, coercive legalization in limited contexts where it is appropriate and creates minimum frictions with first order principles. Or – if one is inclined to leave the comfort of coercive legal solutions and hierarchical ordering – seek a more complex legalization perspective of maximizing leverage for human rights in a way that builds on Ruggie's polycentrism.

Ruggie on parameters and perimeters

– 'I wanted at all cost to avoid having my mandate become entrapped in or sidetracked by lengthy intergovernmental negotiations over a legal text, which I judged would be inconclusive at best and possibly even counterproductive. It was too important to get the parameters and perimeters of business and human rights locked down in authoritative policy terms, which could be acted on immediately and on which future progress could be built.' (Ruggie, *Just Business: Multinational Corporations and Human Rights*, 2013, pp. xlv)

Implication 1. Do not conflate the cessation regime and leverage regime. That would encourage contamination by wrongly importing solutions, or difficulties, from another regime. Using the two-track model prevents the double default – on lead firms at the top of GVC and on coercive regulations – as THE regulatory way forward to protect human rights in GVCs. Regulating to cease harmful conduct is different from regulating leverage and different regulatory tools – one involving legal coercion and the other using policy mixes – should be employed.

Implication 2: Do not ignore or downplay three foundational principles of international law, human rights law, and business law. They come into play only for cases of indirect involvement in harm (the leverage regime). Downplaying the principles builds on the illusion that the expansion of corporate responsibilities happens in "virgin territory" ready to be conquered by legal interpretive maneuvers, rather than in territory densely populated by first order principles. Invoking a mere turn from soft law to hard law to make it mandatory for lead firms to employ HRDD cannot disguise the frictions with these three principles.

Implication 3: Find ways to valorize less coercive legalization. Such "weaker" instruments (e.g. transparency laws) have often been valued as a mere step towards a coercive regulatory solution. Instead they should be seen as essential instruments for managing frictions with the three principles and harvesting leverage in GVCs. Without finding a conceptual way to valorize less coercive strategies, one is prone to default – sooner or later – on the coercive and the top of the GVC. The 'rope model' – strong rope out of weak threads – is such an attempt.

Implication 4. Against summary dismissal of recent developments. Some appear 'weak'. Some other happen in transnational economic channels (e.g. trade, investment, corporate self-regulation through CSR) that themselves have inherently been part of the problem, not of the solution, for the antiglobalization critique. However neither of these developments should be dismissed in a hurry from further analysis. Coerciveness is not the

only relevant dimension for measuring a policy channel. Instead measuring also the depth (root causes) and tightness (interactions) allows for a fuller assessment of channels that impact on GVCs.

Implication 5: There is a choice between pursuing comprehensive and limited legalization. Choosing to pursue a comprehensive legal framework requires us to get clear about the limits of coercive legalization when applied to lead firms (get rid of an illusion) and then to get down to a very laborious task of creating a less centralized regulatory regime with multiple moving parts (weave weaker threads into a strong rope).

This brief outlined a two-track, multi-channel model on regulating GVCs. It is two-track because it keeps separate the direct or indirect involvement in harmful operations. It is multi-channel because it accounts for six transnational policy channels that have a bearing on GVCs. The model explains the value of less coercive legalization forms as well as non-legal forces through the 'rope model 'of weaving weak threads into a stronger rope. It shows why and when coercive regulation are problematic through three foundational principles active in the leverage regime. Current developments in multiple policy channels should not be ignored but be assessed by using three indicators (coerciveness, depth, and tightness). The model cautions against the appeal and false straightforwardness of sweeping calls to "just legalize the HRDD" and turn the UNGPs into hard law. Less coercive regulations and non-legal factors have an essential role in a transnational regulatory model to protect human rights in GVCs.