HOLDING TRANSNATIONAL CORPORATIONS TO ACCOUNT IN NEW ZEALAND FOR HUMAN RIGHTS ABUSES COMMITTED OVERSEAS

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Abstract

Transnational corporations (TNCs) are usurping the power that has traditionally belonged to states. TNCs operate across multiple jurisdictions with complex supply chains in the pursuit of low production and manufacturing costs and high profit margins. International law has historically avoided application to non-state actors, which has allowed TNCs to wield significant power while facing few obligations to respect human rights.

Dole New Zealand and its sister corporation Dole-Stanfilco are used as a case study. Despite substantial allegations of human rights abuses throughout Dole's banana plantations in Mindanao, the Philippines, New Zealand is one of the largest importers of their bananas. The alleged abuse of workers there would not be tolerated in New Zealand but, by buying their bananas, New Zealand consumers are indirectly tolerating and encouraging those abuses.

Exploration of the potential remedies available to individual New Zealanders to hold TNCs to account for their actions overseas demonstrates that the current system is inadequate. Legislative changes are necessary to bring about behavioural change in corporate supply chains. It is no longer an excuse that the abuses are not occurring within our own territory, especially where our own purchasing decisions not only contribute to but encourage those abuses.

I. Introduction

In an increasingly globalised world transnational corporations (TNCs) are usurping the power that has traditionally belonged to states.[1] Rapid advances in communication and transportation throughout the last century allowed enterprises to venture beyond domestic borders and expand their

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1 Jilles LJ Hazenbourg "Transnational Corporations and Human Rights Duties: Perfect and Imperfect" (2016) 17(4) Human Rights Rev 479 at 479.

influence across the globe.[2] It is now estimated that TNCs make up between one third and one half of the world's 100 largest economic entities.[3] TNCs can be a transformative force for good, and the globalised economy has generated millions of jobs over a few decades, lifting hundreds of millions out of extreme poverty.[4] However, it has become clear that, like many states, TNCs are able to commit and escape responsibility for human rights abuses.[5] While states may be held accountable for committing abuses through the international community and international organisations such as the United Nations (UN), international law has historically avoided application to non-state actors. Until recently, states were considered "the primary, if not exclusive, actors within the international order".[6] This has allowed TNCs to wield significant power while facing few obligations to respect human rights within the states they operate in. The depth and complexity of their supply chains has further impeded the ability to hold these entities to account, especially where they operate in developing countries with relaxed labour and trade laws and poor enforcement mechanisms.

An increasingly socially conscious global society has therefore embarked on a quest to produce an international framework intended to address corporate human rights abuse.[7] The UN adopted the "Protect, Respect and Remedy Framework" in 2008 and, later, the Guiding Principles on Business and Human Rights ("Guiding Principles") in 2011 as part of the movement towards greater corporate responsibility. These mechanisms, designed by Special Representative John Ruggie, set out voluntary duties and obligations which consolidate the law in relation to business and human rights and provide guidelines for the improvement of protection of individuals affected by TNCs' activities. States have a duty to protect against human rights abuses by third parties including businesses and there is a corporate responsibility to respect human rights. This article is interested in the third principle which concerns the provision of effective access to remedies for human rights violations by TNCs.

Dole New Zealand ("Dole NZ") and its sister corporation Dole-Stanfilco ("Stanfilco") will be used as a case study. Dole NZ is a Bermuda-registered company and Stanfilco is based in the Philippines. Both are subsidiaries of ITOCHU Corporation, headquartered in Japan. There are substantial allegations of human rights abuses throughout Dole's banana plantations in Mindanao, the Philippines, yet New Zealand is one of the largest importers

2 Robert C Blitt "Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance" (2012) 48(1) Tex Intl LJ 33 at 36.

3 At 37.

4 Dorothée Baumann-Pauly and Justine Nolan *Business and Human Rights: from Principles to Practice* (Routledge, Abingdon, Oxon, New York, 2016) at 22.

5 Blitt, above n 2, at 37.

6 At 36.

7 At 35.

of their bananas. The alleged abuse of workers there would never be tolerated in New Zealand, but by buying their bananas (and in such large quantities), New Zealand consumers are indirectly tolerating and encouraging those abuses. Just because human rights abuses are not being committed in New Zealand does not mean that they should be ignored, particularly where the purchase of those products in New Zealand is supporting those abuses. New Zealanders deserve assurance that the products they purchase in supermarkets are not harming people on the other side of the world.[8] However, there are many challenges when it comes to holding TNCs to account for human rights violations. This article focuses on the ability to remedy such human rights abuses. While consumers can take a stand against such corporations by "voting with their dollar" or speaking out on social media, this research will assess potential legal avenues available to individual New Zealanders which could force corporations to take direct responsibility for their activities. How can the average New Zealander seek remediation of human rights abuses committed overseas in relation to the creation and distribution of products and services in New Zealand? It should be noted that, on 26 October 2017, Dole NZ issued a notice of intention to cease to carry on business in New Zealand. However, this will not affect the relevance and application of this article which has used Dole NZ as a case study within the broader context of TNC accountability in New Zealand for actions committed overseas.

Part II of this article will outline the alleged human rights abuses that are being committed on Dole's banana plantations in Mindanao. Part III will discuss how business and human rights fit within the current international human rights law framework. Part IV will assess a number of remedial mechanisms that are available to the average New Zealander and whether these would provide an adequate remedy for the alleged abuses overseas and New Zealand's contribution to them. Finally, having concluded that there is little that the average New Zealander can do to hold TNCs to account, part V will consider the potential for legislative change.

II. Case Study: New Zealand and Dole Banana Plantations in Mindanao, Philippines

New Zealand imports more bananas per capita than any other developed country and is the second largest importer globally.[9] Each New Zealander eats an average of 18 kg of bananas annually.[10] Dole NZ, through Stanfilco, is one of the largest suppliers of bananas to New Zealand, which supplies 70 per cent of its bananas from Mindanao, the Philippines. Stanfilco plantations

8 Oxfam New Zealand "Are Dole Bananas really the 'ethical choice'?" 27 May 2013 <www.oxfam.org.nz>.

9 Tess McClure "Banana Republic: the ugly story behind New Zealand's most popular fruit" 19 July 2016 Radio NZ <www.radionz.co.nz>.

10 Ibid.

in the Philippines cover approximately 10,000 ha and generate an average of 29,000 direct and indirect jobs.[11] The banana industry has faced many allegations of major human rights abuses, particularly in relation to labour rights violations. The issues can, to a large extent, be attributed to the practices of international enterprises which manage the Mindanao banana industry.[12] This section will outline how Stanfilco's banana production is structured, as well as various allegations of human rights abuses in relation to health and safety, remuneration, hours of work, union association, and child labour.

Stanfilco's banana production involves a highly-varied web of actors, employees, and workers. Rank and file workers are directly employed by Stanfilco. Workers employed under a labour cooperative to work on Stanfilco-managed farms or production plants tend to have less benefits than regular workers. Other workers are employed by either middlemen or private growers, who are contracted to sell their produce exclusively to Stanfilco for a certain period of time.[13] These workers make up 65 per cent of Stanfilco's workforce.[14] Under Philippines Department Order 18-A, subcontractors are treated as agents of the principal, and the principal and subcontractor are solidarily treated as the employer.[15] The principal is thereby responsible for all workers' entitlements and benefits under applicable labour laws. Stanfilco is consequently solidarily liable for the full implementation of legislated labour standards in all its operations.[16] Unfortunately, the Philippines government is either unwilling or unable to effectively enforce these obligations. A report conducted by the Center for Trade Unions and Human Rights (CTUHR) and released by Oxfam New Zealand concluded that Stanfilco is nominally compliant with prescribed standards for its rank and file workers, which comprise a minority of its workforce.[17] Workers of middlemen and private growers, however, face serious human rights abuses, including poor pay and working conditions, insecurity of tenure, and harassment and intimidation for union involvement. The use of multi-level and multi-dimensional employment relationships gives Stanfilco numerous advantages, allowing it to cut costs while optimising in gains and profits of production expansion at the expense of its workers.[18]

11 Center for Trade Unions and Human Rights "The Labour and Environmental Situation in Philippine Banana Plantations Exporting to New Zealand" 2013 Oxfam New Zealand at 17 <www.oxfamnz.org.nz>.

12 At 5.

13 Center for Trade Unions and Human Rights, above n 11, at 19.

14 At 32.

15 Department of Labor and Employment Department Order (Republic of the Philippines) 18-A, s 2011 at 2; "solidary liability" at para (k) refers to the liability of the principal as direct employer together with the contractor for any violation of any provision of the Labor Code.

16 Center for Trade Unions and Human Rights, above n 11, at 68.

17 At 69.

18 At 68.

A. Health and Safety

Book IV of the Philippines Labor Code requires that employers provide a minimum amount of health and safety equipment which includes, among other things, protective gear such as masks, helmets, safety boots, coats and first aid kits.[19] CTUHR found that Stanfilco workers were provided with gloves and boots, but that they were only replaced once yearly.[20] Workers of middlemen and growers must either purchase their own protective gear or go without.

Pesticide is often sprayed over workers while they are working. Stanfilco plantations spray chemicals such as Paraquat, which has been banned across the European Union since 2007; Lorsban, which has been banned in United States homes since 2001; and Furadan, which is banned throughout the European Union and on food crops in the US.[21] Exposure to such chemicals can cause headaches, sore throats, difficulty breathing and skin irritations.[22] Long term exposure can cause multi-organ failure, Parkinson's disease, cancer and lung disease, and can also affect the mental development of unborn foetuses.[23] The plantations surround villages, which means many workers and their children live among the fine mist of chemicals.[24] For example, the son of one worker developed a cough caused by the pesticide at the age of 5 months, and by the age of 6 years his cough had still not subsided.[25] Despite warnings from a doctor to take her son away from the oversprays, the worker could not afford to leave her job on the plantation.

B. Remuneration

Stanfilco's direct employees receive wages that are close or equivalent to those prescribed by regional wage boards.[26] That minimum wage, however, represents only a fraction of the amount required to support an adequate standard of living.[27] All minimum wage workers interviewed in the CTUHR report expressed that their income cannot support an adequate standard of living for their families.[28] This is considered to include three decent meals a day for their family, school expenses for their children to support graduation from college, other household expenses such as energy, water and rent, and a small amount of saving for times of emergency.[29] The workers of middlemen

19 At 34.
20 At 34.
21 At 34.
22 At 35.
23 McClure, above n 9.
24 Ibid.
25 Ibid.
26 Center for Trade Unions and Human Rights, above n 11, at 28.
27 At 29.
28 At 29.
29 At 29.

and private growers that sell exclusively to Stanfilco receive wages that violate both the minimum wage and the living wage.[30] Their salaries amount to only 12.7–31 per cent of the mandated minimum wage,[31] and are sometimes based on a by-piece-rate instead of a daily wage.[32] Some are forced to work up to 18 hour days for as little as 30 cents per hour.[33]

Banana companies and exporters report billions of dollars in revenue.[34] While Stanfilco or its related enterprises do not publicly publish profit figures, Radio NZ reports that its 2015 financial year revenue was more than NZD 6.9 billion. An 8 kg box of bananas is sold for around 27 cents/kg in the Philippines, but by the time it reaches New Zealand, its retail value has increased by around 1,100 per cent, to NZD 3–4 per kg.[35] Workers are estimated to receive just one to three per cent of a banana's retail value.[36]

A Radio NZ reporter recounted this conversation with a Stanfilco worker:[37]

> Does he think it's fair, I ask, that his colleagues are paid for a day's work the same amount as a single banana bunch is sold in New Zealand?
>
> "…I don't know the price in New Zealand."
>
> I tell him the bananas he picks go for up to NZD 3 a bunch.
>
> "What?" he breaks into a half-smile, looks up in disbelief, shakes his head. "No, it's too much," he says. "That would not be fair".

C. Hours of Work

Stanfilco has a Social Accountability 8000 (SA 8000) certification, which requires that employers comply with laws and industry standards. This includes assigning workers a "normal workweek" that does not exceed 48 hours as well as entitling workers to one day off following every six consecutive work days.[38] The International Labour Organization Convention 106 (Weekly Rest Convention), as well as the Philippines Labor Code, reinforce these requirements.[39] The CTUHR investigation suggests that Stanfilco mostly complies with these requirements, but workers of middlemen and growers who supply exclusively to Stanfilco do not enjoy many of these rights. These

30 At 30.
31 At 30.
32 At 28.
33 McClure, above n 9.
34 Ibid.
35 Ibid.
36 Food Empowerment Project "Peeling Back the Truth on Bananas" <www.foodispower.org>.
37 McClure, above n 9.
38 Center for Trade Unions and Human Rights, above n 11, at 31.
39 At 32.

workers are often forced to work overtime in order to meet a production quota, sometimes working seven days a week,[40] and may be suspended if they do not meet their quota.[41] The report indicated that workers sometimes work up to 14 hours a day without overtime pay.[42] For example, Janet Gorgio, a worker in one of the packing plants, claimed that she is often paid by the box rather than by the hour. She and others must therefore work between 15 and 18 hours per day in order to meet packing targets of 800 boxes.[43] This is a clear breach of the industry and certification standards outlined above.

D. Trade Unions and the Freedom of Association

The right to freedom of association, which includes the right to voluntarily join or not to join a trade union, is protected by Article 211 of the Philippines Labor Code. The Federation of Integrated Labor Union (FILU) is the only union recognised by Stanfilco in almost all the regions that it operates in. In the Philippines, only one union is allowed to represent the entire workforce in a company or enterprise.[44] The elected union may represent the workforce for a period of five years, following which a freedom period comes into place. This period of 90 days allows new unions to challenge the union and allows workers to vote for the union that will represent them over the following five years.[45] However, FILU has reportedly hidden or obscured the freedom period date on several occasions.[46] Many workers interviewed by CTUHR claimed that there had never been an election.[47] FILU is considered by many of the workers to be management organised,[48] and there is a general perception that it will not uphold worker rights.[49] Further, membership of FILU does not appear to be consensual; workers automatically become members once they become employees.[50] Rank and file workers in Panabo City noted that workers were forced to vote for FILU in 2006 or else face dismissal, and others noted that they were "obliged" to become members.[51] Middlemen and growers' contracts explicitly prohibit union membership.[52]

Affiliation with any union other than FILU appears to result in harassment and abuse, not necessarily through Stanfilco directly, but through

40 At 32.
41 At 33.
42 At 32.
43 McClure, above n 9.
44 Center for Trade Unions and Human Rights, above n 11, at 43.
45 At 44.
46 At 45.
47 At 46.
48 At 44.
49 At 54.
50 At 45.
51 At 46.
52 At 54.

anti-communist groups and the military.[53] Some union activists have been murdered. Radio NZ spoke to Vincente Barrios, who was ambushed in 2005 when he started a union. While he escaped with bullet wounds, his friend was killed. Four bystanders were injured. Barrios noted that no investigation was ever launched and the perpetrators were never caught. Unfortunately, such attacks on labour rights activists are common in the Philippines.[54] The CTUHR found that cases of harassment and intimidation against trade unionists and labour activists soured in 2015, with an increase by 200 per cent of extrajudicial killings, physical assaults, destruction of property and death threats.[55] Local human rights groups note that underreporting means the real numbers are likely much higher.[56] Human Rights Watch found in 2011 that only seven extrajudicial killing cases had been successfully prosecuted in the previous decade, meaning that there is only a small chance that the perpetrators will be brought to justice.[57]

E. Child Labour

Under ILO Minimum Age Convention (C138), child labour refers to any work performed by children under the age of 12, non-light work done by children aged 12–14, and hazardous work done by children aged 15–17. This was ratified by the Philippines on 4 June 1998. The Philippines specified a minimum age for labour of 15 years, the minimum possible age under the Convention. While the Philippines government made significant efforts in 2016 to eliminate the worst forms of child labour, significant enforcement challenges remain due to a lack of resources.[58] Stanfilco is alleged to have limited funding for transportation, fuel and other necessities to carry out inspections.[59] In 2015, Stanfilco identified 102 establishments with deficiencies in child labour law compliance, including employment of children under the minimum age for work as well as in hazardous work.[60] The CTUHR report noted that private growers continue to hire workers who are younger than 15 years.[61] One of the interviewees was a 14 year old harvester working for a middleman. His wage was based on piece rate, and he was required to work from eight to 12 hours a day to meet production quotas. Of the 51 workers

53 At 52.
54 McClure, above n 9.
55 Ibid.
56 Ibid.
57 Ibid.
58 United States Department of Labor, Bureau of International Labor Affairs "2016: Findings on the Worst Forms of Child Labor: Philippines Significant Advancement" (2016) <www.dol.gov>.
59 McClure, above n 9.
60 Ibid.
61 Center for Trade Unions and Human Rights, above n 11, at 41.

interviewed by CTUHR, eight knew of farms employing child labourers that sell exclusively to Stanfilco.[62]

F. Dole Explanation and Responses

The rising interest in the role of TNCs in the international realm and their potential to commit human rights abuses without consequence has led to increased scrutiny of corporations such as Dole. Dole has made no public acknowledgement of these issues. Its New Zealand website states that it is "extremely proud of the relationship" with its employees. It has three main themes of investing in people and communities, protecting workers and protecting the environment.[63] Dole has avoided these allegations through claims on their website that they do not *knowingly* purchase products from commercial producers employing minors. Dole also attempted to prevent a 2009 film *Bananas!**, which exposed shocking working conditions on Dole's banana plantations, from being shown by unsuccessfully suing the filmmaker for defamation.[64] It has become increasingly unacceptable for TNCs such as Dole to hide behind claims that they are unaware of human rights abuses within their supply chain. The following section will outline why this is no longer acceptable and what duties Dole has in the business and human rights context.

III. International Human Rights Law and Business and Human Rights

A key aim of the international human rights framework is to protect individuals against the abuse of power by the monarch, the tyrant or the state.[65] Under the various international treaties that New Zealand is a party to, our government has certain obligations and may be held accountable by New Zealand society, treaty bodies and the international community. However, private actors are not recognised by international human rights law as obligation holders.[66] This has become increasingly concerning through the rise of globalisation, which has resulted in non-state actors, such as TNCs, amassing significant power and influence. The power and resources of many governments has begun to erode at the same time that TNCs have experienced exponential growth.[67] Many of the top Fortune 500 companies have revenues equivalent to, and often significantly larger than,

62 At 41.

63 Dole New Zealand "Corporate Responsibility" <www.dolenz.co.nz>.

64 Bananas the Movie "Bananas!* is getting sued by Dole" <www.bananasthemovie.com >.

65 Azizur Rahman Chowdhury and Jahid Hossain Bhuiyan "An Introduction to International Human Rights Law" (1st ed, Brill - Nijhoff, Boston, 2010) at 28.

66 At 107.

67 Baumann-Pauly and Nolan, above n 4, at 21.

the gross domestic product (GDP) of many states.[68] TNCs often operate in jurisdictions where governments are either unable or unwilling to uphold even the basic human rights of their citizens.[69] Many of those operating in developing countries are guilty of treating workers poorly through pay and working conditions, discrimination against certain ethnic groups or genders, and some work with governments that commit gross human rights abuses.[70] Developing countries, which may have more lenient labour and trade laws or poor enforcement mechanisms, allow corporations to grow, manufacture or produce goods more cheaply than they could in developed countries. These goods can then be sold in countries such as New Zealand for a much higher profit. As a result, the activities of TNCs in developing countries can be highly detrimental to human rights, yield high profits, and not attract immediate responsibility or accountability.[71] The increasing power of TNCs and their influence over political, social and economic factors suggests the need for a reappraisal of the appropriate role for businesses in an increasingly globalised world.[72]

A number of incidents in recent years have received worldwide attention and prompted increasing discussion on the role of businesses in the human rights context. The Bhopal disaster in India, which occurred in 1984, resulted in over 200,000 people being exposed to highly toxic gases and chemicals due to the leak from a pesticide plant.[73] The total death toll reached around 20,000. The plant was run by an Indian organisation, Union Carbide India Limited (UCIL), which was majority owned by a parent company in the United States, the Union Carbide Corporation (UCC). The disaster depicts the typical environment in which TNCs violate human rights; a corporation based in a developed country passed on the risks of its profit-maximising activities to the poor people of a developing country.[74] The complex litigation which followed in an attempt to hold the parties to account highlighted the immense difficulties faced by victims from a developing country. These include the unclear allocation of corporate human rights obligations, the impenetrability of the corporate veil, lack of legal aid for victims, insufficiency of civil and criminal sanctions against corporations, and the involvement of corrupt state agencies.[75] Around 34 years later, most Bhopal victims are yet to receive a remedy. The 2013 collapse of the Rana Plaza building in Bangladesh also illustrated the difficulties in regulating global supply chains, particularly where companies only maintain relationships with "known" contractors and

68 At 21.
69 Chowdhury and Bhuiyan, above n 65, at 2.
70 Baumann-Pauly and Nolan, above n 4, at 22.
71 Chowdhury and Bhuiyan, above n 65, at 107.
72 Baumann-Pauly and Nolan, above n 4, at 21.
73 Roli Varma and Daya R Varma "The Bhopal Disaster of 1984" (2005) 25(1) Bulletin of Science, Technology and Society 37 at 38.
74 Baumann-Pauly and Nolan, above n 4, at 25.
75 At 26.

those known contractors then subcontract work to a much wider group of "unknown" workers to complete production.[76] The acknowledgement that dangers present within non-transparent subcontracting practices require the involvement of a range of government and non-state actors in order to be resolved has led to a series of international efforts to redefine the role of businesses in a human rights context.[77]

A. Developments in the Approach to Business and Human Rights

A series of UN efforts to redefine the international approach to the protection of human rights recognised that the traditional state-centric approach to international law could not provide the requisite protection in the modern world. Models of shared responsibility and accountability were acknowledged as a necessary foundation for the development of a new international approach to business and human rights.[78]

The Commission on Transnational Corporations was created in 1973 by the UN to develop a code of conduct for TNCs. The Commission was ultimately unable to come to agreement and the project was abandoned. A Working Group on Transnational Corporations was established by the UN High Commissioner on Human Rights in 1998 with a similar goal and the result was the creation of the Norms on Transnational Corporations and Other Business Enterprises. This initiative sought to impose on companies, directly under international law, the same range of human rights obligations that states have accepted for themselves under treaties they have ratified.[79] However, the proposal was highly controversial in the business community and received little support from governments.[80] It was ultimately rejected by the Commission. The failure of these norms has since been attributed to a lack of communication with non-state actors.[81] In response, a new approach aimed to place consultation with non-state actors at the centre of a new inquiry.

In 2005, John Ruggie was appointed as the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.[82] The mandate was initially only to last two years and was intended to identify and clarify existing standards and practices. On that basis, Ruggie began by conducting an extensive

76 At 31.

77 At 31.

78 At 19.

79 John Ruggie "Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises: Guiding Principles on Business and Human Rights" (2011) 29(2) NQHR 224 at 224.

80 At 225.

81 Michael K Addo "The Reality of the United Nations Guiding Principles on Business and Human Rights" (2014) 14 HRL Rev 133 at 145.

82 Ruggie, above n 79, at 225.

programme of systematic research.[83] The Council renewed Ruggie's mandate for another year in 2007, allowing him to submit recommendations. In June 2008, Ruggie made a single recommendation that the Council support the Protect, Respect and Remedy Framework (the Framework) which he had developed during his mandate. It was unanimously endorsed by the Council and Ruggie's mandate was extended yet again, this time with the purpose of "operationalising" the Framework.[84] The resulting Guiding Principles on Business and Human Rights (Guiding Principles) were created through six years of extensive discussions with all stakeholder groups, including governments, business enterprises, individuals and communities directly affected, and experts in the many relevant areas of law and policy. [85]

B. The Protect, Respect and Remedy Framework

The Framework is based on three pillars and comprises 31 total principles. The first duty to protect places an obligation on the State to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication. This duty provides an opportunity for states to set out their expectations to all business enterprises domiciled within their jurisdiction to respect human rights in their operations.[86] The second duty to respect places a responsibility on business enterprises to act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved. The third pillar addresses the need for greater access for victims to effective remedies.[87] Each pillar is an essential component in this interconnected system of preventative and remedial measures.[88]

The remedy pillar emphasises the need for access to remedies where duties under the first two pillars have been breached.[89] Without the availability of effective remedies, the state duty to protect is rendered weak or even meaningless.[90] States are obliged to investigate, punish and redress business-related human rights abuses and provide a remedy through judicial, administrative, legislative and non-judicial processes.[91] Potential remedies outlined in the Guiding Principles are apologies, restitution, rehabilitation, financial or non-financial compensation, and punitive sanctions.[92] Crucially, procedures should be put in place to prevent the reoccurrence of such abuses.

83 At 225.
84 *Report of the Human Rights Council* GA Res 63, A/63/53 (2008).
85 Ruggie, above n 79, at 226.
86 Addo, above n 81, at 134.
87 Ruggie, above n 79, at 226.
88 At 226.
89 Addo, above n 81, at 135.
90 Ruggie, above n 79, at 247.
91 At 246.
92 At 247.

The success of the Framework and its corresponding Guiding Principles has mainly been accredited to the large number and inclusive nature of stakeholder consultations.[93] The Framework has been endorsed by individual governments, business enterprises and associations, civil society and workers' organisations, national human rights institutions, and investors.[94] By the beginning of 2011, 47 international consultations on all continents had been held and Ruggie had made site visits to business operations and their local stakeholders in more than 20 countries. A full draft of the Guiding Principles was sent to all Member States on 22 November 2010 and posted online for public comment until 31 January 2011.[95] This has resulted in a sense of inclusiveness and ownership of the Guiding Principles by all interested parties, leading to a firm endorsement and growing uptake by stakeholders.[96] Success may also be attributed to the fact that 10 companies tested the workability of the human rights due diligence provisions, which were discussed in detail by corporate law professionals from more than 20 countries with expertise in over 40 jurisdictions.[97] Their value lies in not only providing practical guidance, but also in that it is informed by actual practice.[98]

The Guiding Principles are not legally binding nor have they created new international law obligations.[99] Instead they have elaborated the implications of existing standards and practices for States and businesses.[100] They have identified where the current regime falls short and how it should be improved. The Guiding Principles were created to be universally applicable, reflecting the fact that there are 193 United Nations Member States, 80,000 transnational enterprises, and thousands more subsidiaries and countless millions of national firms.[101] This means that, when it comes to implementation, one size does not fit all. The Guiding Principles are therefore broad so as to apply as widely as possible.

Ruggie's mandate ended in 2011 and he was replaced by a Working Group on the issue of human rights and transnational corporations and other business enterprises. This Working Group aims to promote the dissemination and implementation of the Guiding Principles.[102] It is made up of five independent experts who identify, exchange and promote good practices and lessons learned from the implementation of the Guiding Principles. The

93 At 226.
94 At 226.
95 At 227.
96 Addo, above n 81, at 136.
97 Ruggie, above n 79, at 227.
98 At 227.
99 Karin Dryhurst "Liability up the Supply Chain: Corporation Accountability for Labor Trafficking" (2013) 45(2) NYU J Intl Law & Pol 641 at 651.
100 Ruggie, above n 79, at 227.
101 At 228.
102 United Nations Human Rights Office of the High Commissioner "Working Group on the issue of human rights and transnational corporations and other business enterprises" <www.ohchr.org>.

Working Group also guides an annual forum, which has become the largest global gathering on business and human rights, whereby stakeholders discuss challenges in the implementation of the Guiding Principles. Its mandate was renewed in 2017.[103]

C. Criticism of the Framework

The Guiding Principles are a significant contributor to the debate about the role of non-state actors in the international arena.[104] Despite this, many non-governmental organisations have criticised the Guiding Principles for not going far enough to regulate the impact of corporate actors.[105] Human Rights Watch has criticised the UN for simply endorsing the status quo, as companies are encouraged but not obliged to respect human rights.[106] The voluntary nature of the Guiding Principles undercuts their effectiveness and normative power.[107] Further, the Guiding Principles do not specifically address the common scenario where a corporation breaks down into a myriad of legal entities, incorporated in various countries, with the effect that it is able to evade the regulations of developed countries.[108] This is common practice for TNCs such as Dole NZ, which is registered in the Bahamas, yet operates in New Zealand, its parent company, ITOCHU Corporation, based in Japan and its sister company, Stanfilco, based in the Philippines. The duty to protect is primarily focused on the obligations of host states; while home states should encourage businesses to respect human rights in their activities overseas their duty to protect does not generally extend extraterritorially.[109] This "governance gap" provides one of the largest challenges in business and human rights. Home states have strongly resisted a duty to regulate the extraterritorial activities of corporations operating within their jurisdiction,[110] but host states, especially in developing countries, are often either unwilling or unable to regulate corporations' activities in their own jurisdictions. Davitti argues that the obligation of a home state to regulate extraterritorially has support in international law.[111] A state is required, as a minimum, "not to

103 *Business and human rights: mandate of the Working Group on the issue of human rights and transnational corporations and other business enterprises* A/HRC/35/L.11 (2017).

104 Addo, above n 81, at 145.

105 Blitt, above n 2, at 52.

106 Human Rights Watch "UN Human Rights Council: Weak Stance on Business Standards" (16 June 2011) <www.hrw.org>.

107 Ryan J Turner "Transnational supply chain regulation: Extraterritorial regulation as corporate law's new frontier" (2016) 17(1) Melb Jl Int Law188 at 199.

108 Daria Davitti "Refining the *Protect, Respect and Remedy* Framework for Business and Human Rights and its Guiding Principles" (2016) 16 HRL Rev 55 at 66.

109 United Nations Human Rights Office of the High Commissioner "Guiding Principles on Business and Human Rights" (United Nations, New York and Geneva, 2011) at 3.

110 *Human Rights and Corporate Law: Trends and Observations from a Cross-National Study Conducted by the Special Representative,* A/HRC/17/31/Add2 (2011) in Davitti, above n 108, at 67.

111 At 67.

allow knowingly its territory to be used for acts contrary to the rights of other states".[112] Brownlie confirms that a home state is under a duty to "control the activities of private persons within its territory" and argues that "the duty is no less applicable where the harm is caused to persons or other legal interests within the territory of another state".[113] Davitti argues that home states are required to act under international law whenever the nullification or impairment of the enjoyment of human rights is a foreseeable result of their conduct.[114] Based on these arguments, a home state would be required to act where a corporation operating in their jurisdiction is directly contributing to the abuse of human rights in a host state, motivated by the demand for their product in the home state. However, the reluctance of states to accept this duty and its lack of endorsement by the Guiding Principles has resulted in a governance gap, whereby states do not feel obliged to take action and TNCs are able to continue profit-maximising activities to the detriment of the human rights of their workers. New Zealand has traditionally been reluctant to regulate the extraterritorial activities of those carrying out business within its territory. In the absence of an explicit duty to do so, New Zealand individuals must rely on other non-judicial mechanisms in order to hold private actors to account. The following section will discuss the potential remedies available through such soft law mechanisms and address their limited potential to provide adequate redress when the state itself is unwilling to hold TNCs to account for human rights abuses overseas.

IV. Remedies

This section will discuss the various remedies that the average New Zealander could access to hold TNCS, and Dole NZ in particular, to account for activities outside New Zealand territory. Potential remedial outlets could include contacting the company itself, certification system complaints mechanisms, the courts, labour tribunals, National Human Rights Institutions, and the National Contact Point under the OECD Guidelines.

A. Dole Complaint Process

Dole NZ's website provides information about the company, products, sustainability efforts and its relationship with workers. The website provides a "Contact Us" option,[115] which allows anyone to send a message. This is one way that an average, socially-minded New Zealander could seek a remedy for the allegations against Dole NZ. The author sent a message on 29 August

112 *Corfu Channel Case (United Kingdom v Albania)* Merits [1949] ICJ Rep 4 at 22.

113 Ian Brownlie "System of the Law of Nations: State Responsibility" (1983) at 165, cited in Davitti, above n 108, at 65.

114 Davitti, above n 108, at 66.

115 Dole New Zealand "Contact Us" <www.dolenz.co.nz>.

2017 outlining concerns in relation to the various allegations of human rights abuse.[116]

A reply was received from Kamilla Camilo, a Senior Marketing Manager for Dole NZ, within the same day.[117] This provided information about the various certifications that Dole NZ possesses, including the SA 8000 certification and the Rainforest Alliance certification, the requirements of which are outlined in the following section. Camilo also emphasised that Stanfilco and its third-party growers pay their workers at least the minimum wage legally required in the particular region. The author was also provided with assurance that Dole NZ is committed to providing a safe and healthy work environment. In contrast to allegations made, Stanfilco claims to provide appropriate protective equipment and additionally requires all workers to undergo an annual physical examination, with access to company nurses for any health issues. It was also noted that Stanfilco follows all applicable occupational health and safety laws and regulations as well as manufacturer's protocols.

In regards to the freedom to unionise, it was noted that Stanfilco's daily paid employees have been unionised for more than 20 years. It is claimed that the unions engage in peaceful and speedy collective bargaining. Further, regular Labour Management Council meetings take place between representatives of the union and management for the purpose of reviewing the implementation, application and interpretation of agreements made between the parties.

The speed of the reply from Dole NZ suggests that this mechanism can be a useful way for New Zealand consumers to gain more information about Dole NZ's products and to hold it accountable. While the email contained a lot of information which was already available on their website, the response was tailored to the author's particular concerns and was clearly not a generic reply. However, while this mechanism allows consumers to gain more information from Dole NZ, it does not necessarily clear up the allegations made against them. It seems unlikely that a such a large TNC would do anything other than justify their current practices in response to individual concerns. The email claimed that the Radio New Zealand article, based on CTUHR's report, did not mention Dole NZ specifically, but that is not the case. The article interviewed "labourers… [that] worked on plantations supplying bananas to Sumifru and Dole". The testimonies of these workers should not be easily discounted. Further, Radio New Zealand's article noted that "Dole did not provide comment after repeated requests for interviews and information on their practices in the Philippines". Contrastingly, Dole claimed that they had not been given a chance to tell their own side of the

116 Email from Courtney Ormiston to Dole New Zealand regarding the allegations of human rights abuse on Dole-Stanfilco's banana plantations in Mindanao (29 August 2017), reproduced in Appendix 1.

117 Email from Kamilla Camilo (Dole New Zealand Senior Marketing Manager) to Courtney Ormiston in response to an inquiry about the working conditions on Dole-Stanfilco's banana plantations in Mindanao (29 August 2017).

story in regards to this particular article. It can also be noted that Dole made no public challenge to the article after its publication. While this mechanism provided me with more information, it was not useful in providing a remedy for the banana plantation workers.

B. Certification Systems and Their Complaint Mechanisms

Stanfilco is Rainforest Alliance certified, which indicates that it has been audited to meet standards that require environmental, social and economic sustainability. Farms must meet criteria set by the Sustainable Agriculture Network (SAN) in order to become certified.[118] SAN's website has an inquiry and complaints system which allows an inquiry, complaint or issue to be made via email. Rainforest Alliance allows complaints to be submitted on its website but does not appear to allow consumers to make complaints. Stanfilco also holds a SA 8000 certification. This includes requirements that no minors will be used as workers, there will be provision of a safe and healthy working environment, respect for collective bargaining rights, an absence of excessive overtime, and the payment of wages sufficient to secure an adequate standard of living for the workers and their families. Concerns regarding an organisation's implementation of the SA 8000 Standard can be reported to the Social Accountability Accreditation Services (SAAS) using an online form.[119] These complaints are directed to the closest agent to the source of the complaint, to either Certified Organisations, Certification Bodies or SAAS.[120] These certification processes do not explicitly consider the practices of suppliers and subcontractors as part of certification. This means that Stanfilco may be minimally compliant with the Rainforest Alliance and SA 8000 standards, and thereby receive certification, but may continue to source produce from middlemen and private growers whose practices do not meet those standards. While these complaints processes may be helpful in relation to any breaches by Stanfilco to their direct employees, it is unlikely to be helpful in resolving breaches further down the supply chain.

C. OECD Guidelines for Multinational Enterprises

The Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises (Guidelines) are recommendations made by governments to multinational enterprises operating in or from adhering countries.[121] The Guidelines comprise non-binding principles and

118 Rainforest Alliance "What Does Rainforest Alliance CertifiedTM Mean?" (25 October 2016) Rainforest Alliance <www.rainforest-alliance.org>.

119 Social Accountability International "Feedback" <www.sa-intl.org>.

120 Social Accountability Accreditation Services "Complaints and Appeals" <www.saasaccreditation.org>.

121 OECD 2011 *OECD Guidelines for Multinational Enterprises* (OECD Publishing, Paris, 2011) at 3.

standards that promote responsible business conduct in a global context, organised into 11 different chapters. These Guidelines play an important role in operationalising the third pillar of the Guiding Principles; provision of a remedy.[122] The Guidelines apply to all entities within the multinational enterprise, including parent companies and local entities, and to multinational enterprises either operating in or based in an adhering country.[123] New Zealand, being the country in which Dole NZ is operating in, is a member of the OECD, meaning that the Guidelines may apply.[124] The Philippines is not currently a member.

The Guidelines are complemented by National Contact Points (NCPs) which are set up in each adhering state to assist in the implementation of the Guidelines in a national context. NCPs are empowered to handle individual complaints regarding all matters of the Guidelines. This includes complaints related to the overseas actions of TNCs from adhering countries, as well as all entities within them.[125] NCPs provide a mediation and conciliation platform for resolving issues that arise during this process.[126] The establishment of the NCPs are crucial to the use of the Guidelines as a remedy function for victims of human rights abuses.

The New Zealand NCP, located in the Ministry of Business, Innovation and Employment, provides a useful format to raise issues about the activities of a TNC such as Dole NZ. This section will consider whether the issues raised in Part II of this article could provide sufficient ground for a complaint to the New Zealand NCP under Chapter IV, Human Rights, and Chapter V, Employment and Industrial Relations, of the Guidelines. It will then assess how effective the process would likely be.

i. Chapter IV: Human Rights

Chapter IV of the Guidelines recommends that, based on the Guiding Principles, enterprises should, within the framework of internationally recognised human rights, respect the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations.[127]

Paragraph 1 states that enterprises should avoid infringing on the human rights of others and should address adverse human rights impacts with which

122 Samantha Balaton-Chrimes and Fiona Haines "Redress and Corporate Human Rights Harms: An Analysis of New Governance and the POSCO Odisha Project" (2017) 14(4) Globalisations 596 at 596.

123 OECD, above n 121, at 17.

124 New Zealand ratified the Convention of the OECD on 29 May 1973.

125 Juan Carlos Ochoa Sanchez "The Roles and Powers of the OECD National Contacts Points Regarding Complaints on an Alleged Breach of the OECD Guidelines for Multinational Enterprises by a Transnational Corporation" (2015) 84 Nord J Intl L 89 at 91.

126 OECD, above n 121, at 3.

127 OECD, above n 121, at 31.

they are involved. Under paragraph 2, they should also avoid causing or contributing to adverse human rights impacts through their own activities and address such impacts when they occur. The International Covenant on Economic, Social and Cultural Rights (ICESCR)[128] entitles workers to just and favourable conditions of work,[129] including a right to fair wages,[130] the right to a decent living for themselves and their families,[131] the right to safe and healthy working conditions,[132] the right to rest, leisure and reasonable limitation of working hours and periodic holidays with pay, and the right to remuneration for public holidays.[133] Article 8 gives workers the right to join trade unions. The allegations of unsafe labour and poor working conditions, such as long working hours and low pay outlined in Part II, if true, certainly constitute infringement of these human rights and would constitute non-compliance with paragraphs 1 and 2.

Paragraph 3 requires that enterprises should seek ways to prevent or mitigate human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts. While Stanfilco seems to meet minimum requirements most of the time, subcontractors and growers allegedly commit serious abuse. As outlined in Part II, rank and file workers receive a minimum wage most of the time but workers employed by private growers or middlemen receive much lower rates.[134] While Stanfilco may not commit these abuses itself, it can be argued that these abuses are directly linked to their business operations. As a large TNC, Stanfilco has significant leverage over its growers and suppliers. Stanfilco should use this leverage to influence the entities beneath it to prevent or mitigate these human rights impacts.[135] In considering what action would be appropriate, the NCP would consider how crucial the relationship is to the enterprise, the severity of the impact, and whether terminating the relationship with the entity would itself have adverse human rights impacts.[136] Stanfilco's obligations extend beyond their own practices down the supply chain, so this guideline has, in all likelihood, been breached.

128 International Covenant on Economic, Social and Cultural Rights (opened for signature 16 November 1966, entered into force 3 January 1976). NZ has been a signatory since 28 December 1978, the Bahamas since 23 December 2008, Japan since 21 June 1979 and the Philippines since 19 December 1966.

129 Article 7.

130 Article 7(a)(i).

131 Article 7(a)(ii).

132 Article 7(b).

133 Article 7(d).

134 Centre for Trade Union and Human Rights, above n 11, at 28.

135 OECD, above n 121, at 33.

136 At 33.

ii. Chapter V: Employment and Industrial Relations

Chapter V outlines recommendations for employment and industrial relations. The Guidelines assist in the implementation of the standards and principles set by the ILO,[137] of which the Philippines, the Bahamas, Japan and New Zealand are all members.

Paragraphs 1(a) and (b) of Chapter V emphasises the importance of freedom of choice in relation to union membership and is affirmed by Article 211 of the Philippines Labor Code. As discussed in Part II, the freedom of association is barely respected within Stanfilco's web of suppliers. FILU, perceived by many to be management-operated, has a monopoly on union representation for rank and file workers. Workers of growers and middlemen are not given the opportunity to join any union. Affiliation with the wrong union, or in some cases any union, results in intimidation, harassment, and sometimes assassination. The obligation under paragraph 3 in Chapter IV continues to apply here. While in some circumstances Stanfilco itself may not be in breach of these requirements, it appears to be either in support of or turning a blind eye to the abuses that go on in relation to union membership. Stanfilco could apply significant pressure on FILU, as well as its suppliers and growers, to ensure that the freedom of association is respected. This is a clear breach of this guideline.

Many of the workers interviewed by the CTUHR investigation did not have sufficient knowledge of their rights under the union or of the union re-election process. This may be a breach of paragraph 2, which requires that the enterprise provide information to workers' representatives that is necessary for meaningful negotiations on conditions of employment[138] and to provide information to workers and their representatives which enables them to obtain a true and fair view of the performance of the entity or of the enterprise as a whole.[139]

When operating in developing countries, enterprises should provide the best possible wages, benefits and conditions of work within the national framework.[140] These should be at least adequate to satisfy the basic needs of the workers and their families.[141] The SA 8000 Certification also prescribes that certified companies "respect [the workers'] right to living wages".[142] Article 106 of the Philippines Labor Code, relating to contractors and sub-contractors' employees, makes Stanfilco solidarily liable for the wages, which are well below the prescribed minimum, that its growers pay their workers.[143] Discussion in Part II further suggests that the minimum wage prescribed

137 At 37.
138 Paragraph 2(b).
139 Paragraph 2(c).
140 Paragraph 4(b).
141 Paragraph 4(b).
142 Social Accountability International "Social Accountability 8000 International Standard" (SAI, New York, 2014) at 8.1.
143 Center for Trade Unions and Human Rights, above n 11, at 30.

in each region does not often meet the basic needs of workers and their families. This indicates that Stanfilco's practices do not comply with Chapter V's paragraph 4(b) and may also be in breach of their obligations under the Philippines' Labor Code and the SA 8000 Certification.

Enterprises should also ensure occupational health and safety in their operations[144] and are encouraged to do so even where it is not formally required by the laws and regulations of the country in which they are operating.[145] Even if Stanfilco can be argued to comply with the minimum requirements set by Philippines law for their direct employees, once again they continue to be liable for the poor conditions endured by the workers of their suppliers.

Paragraph 1(c) recommends contribution to the effective abolition of child labour as a matter of urgency. This can be done through labour management practices, the creation of high-quality, well-paid jobs and through contribution to economic growth.[146] While the Philippines government made significant efforts in 2016 to eliminate the worst forms of child labour, there remains significant enforcement challenges due to a lack of resources.[147] The CTUHR noted that private growers continue to hire workers who are younger than 15 years.[148]

iii. Effectiveness of the OECD Complaint Mechanism

New Zealanders can raise an issue with the NCP through the website.[149] Once a complaint is submitted, the NCP will assess if the issue merits further examination. This initial assessment is generally completed within three months. The enterprise complained about will have the opportunity to submit a response, and the complainant may in turn provide their own response. The initial assessment comprises an analysis of whether the complaint is material and substantiated, whether there is a link between the enterprise and the complaint, and how similar issues have been dealt with elsewhere. NCPs of countries represented in the complaint will also be contacted. The NCP will draft the initial assessment and release it to the parties for comment. If the complaint is rejected, the NCP will release a statement describing the reasons for their decision. If the complaint is accepted as warranting further examination, the "good offices" phase will be initiated. This aims to help the parties resolve the issues through mediation and consultation. Lastly, a final statement will be released. The entire process, including the good offices phase, takes between 13–15 months.

The Guidelines, complemented by the NCP function, are claimed to provide a more cost-effective and faster access to remedy than judicial

144 Paragraph 4(c).
145 OECD, above n 121, at 40.
146 At 38.
147 United States Department of Labor, above n 58.
148 Center for Trade Unions and Human Rights, above n 11, at 41.
149 Ministry of Business, Innovation and Employment "Raising an issue about a multinational enterprise" <www.mbie.govt.nz>.

mechanisms.[150] The focus is on problem solving with a view to delivering both individual justice and systemic change.[151] However, tools such as the Guidelines and their NCPs also face criticism for being inattentive to the imbalance of power between parties,[152] and for being dependent on unrealistic circumstances whereby stakeholders have healthy relationships with each other, agree on the nature of the problem and are willing to participate in the problem-solving process regardless of cost.[153]

Whether this mechanism will be effective in the Stanfilco scenario will depend on the approach of the New Zealand NCP. NCPs around the world have fundamentally different perceptions of their roles and powers.[154] Some of the main issues encountered by NCPs are whether they have the power to conduct a thorough examination of the facts in order to issue a final statement and whether they have the authority to include a conclusion describing whether or not the concerned enterprise has breached the Guidelines.[155] The NCPs in Australia, Mexico and the US have taken the view that their power to offer good offices is the main principle informing their role,[156] and they do not have the power to conduct a fact-finding mission.[157] This means that, if no agreement can be reached between the parties, or if a party is unwilling to participate in procedures aimed at reaching a consensual solution, the NCP will merely issue a final statement closing the case.[158] Contrastingly, the UK and Norway NCPs will both engage in a thorough examination of the facts where necessary. Norway's NCP may conduct field visits and interviews or make technical assessments.[159] Both UK and Norway NCPs will also issue a clear final statement indicating whether or not the enterprise is in breach of the Guidelines.[160]

It is not clear what approach the New Zealand NCP will take, as it appears to be a little used function. So far, the New Zealand NCP will request additional information, a response from the enterprise concerned and an additional response by the complainant. There does not appear to have been any instances where the NCP has engaged in a further examination of the facts, nor has there been a situation where either a mutual agreement was not reached or a party has refused to engage in the good offices process. It, therefore, remains to be seen how the New Zealand NCP would approach the issues that other NCPs around the world have faced.

150 Balaton-Chrimes and Haines, above n 122, at 596.
151 At 596.
152 At 598.
153 At 598.
154 Sanchez, above n 125, at 106–107.
155 At 102.
156 At 102.
157 At 103.
158 At 107.
159 At 105.
160 At 105.

If the NCP was to accept a complaint such as this as meriting further examination, then the good offices phase would be initiated with Dole NZ. However, mediation and discussion may not be useful in this scenario. A complaint such as this would not be submitted in order to seek redress for the author or even other individual New Zealanders, but to hold Dole NZ to account for their activities in the Philippines. Similarly, complainants to Canada's NCP in *Fredemi Coalition v Goldcorp*,[161] noted that "dialogue is not always an appropriate mechanism for resolving disputes".[162] In this scenario, given Dole NZ's insistence that their current certifications signify a lack of human rights abuse, dialogue with Dole NZ may be futile.

The true power of the NCP mechanism lies in the fact that the Guidelines and NCPs are government backed instruments, which provide authority for its procedures and findings.[163] The public nature of a final statement, and the inclusion of recommendations, can be a powerful tool. A factual finding and conclusion that an enterprise is in breach of the Guidelines can lead to public shaming which may affect business reputation.[164] Research by Italy's Bocconi University indicates that the current operation of the Guidelines are "unlikely to fundamentally alter corporate behaviour".[165] Rather, a focus on providing reliable information about a company, as well as providing a clear distinction between "good and bad performers", could significantly impact consumer preference and thereby influence corporate behaviour. Further, a factual inquiry would logically be necessary if the NCP is to provide meaningful recommendations to the enterprise on how to better comply with the Guidelines.[166]

A public statement by the New Zealand NCP on factual findings of the Mindanao circumstances and a conclusion as to whether or not Dole NZ has breached the Guidelines, having conducted a thorough examination of the facts, would provide accountability.[167] Public acknowledgement of the difficulties faced by Mindanao workers and Dole NZ's role in the creation of that kind of working environment would be a good start to providing a remedy.[168] If Dole NZ either refuses to take part in the NCP's good offices services or where a mutual agreement cannot be agreed upon, no remedy would be provided to the victims. A thorough investigation of the facts is necessary in most cases for any victim to pursue an effective remedy.[169] Not

161 OECD Watch "*Fredemi Coalition v Goldcorp*" (9 December 2009) <www.oecdwatch.org>.

162 Sanchez, above n 125, at 117.

163 At 110.

164 At 110.

165 Lucio Baccaro and Valentina Mele "For Lack of Anything Better? International Organizations and Global Corporate Codes" (2011) 89 Public Administration 451 at 464 in Sanchez, above n 125, at 111.

166 At 112.

167 At 118.

168 At 117.

169 At 117.

only does setting the facts straight clear up any denials and lies that often exist at the heart of human rights abuses, but it can also help to prevent any future abuses.[170]

The good offices procedure may not be useful in this context given the wide scope of abuses occurring and the varying degrees of abuse that different workers face. As outlined previously, Stanfilco's workforce in Mindanao varies greatly. Rank and file workers, for example, may have less grounds for complaint than workers of private growers and middlemen. Workers for private growers in one region may have different claims compared to those in another region, or even another plantation. It is therefore unclear who would take part in the good offices function. It would likely be necessary to begin by choosing and representing one group of workers whose rights are being abused. However, it would be more helpful for the New Zealand NCP to conduct a thorough fact-finding examination with a view to assessing Dole NZ's compliance with the Guidelines and to making recommendations that can benefit every type of worker. This mechanism may therefore be of limited use in providing a remedy.

D. Un Working Group on the Issue of Human Rights and Transnational Corporations

The UN Working Group on the issue of human rights and transnational corporations (Working Group) has a mandate to promote the effective and comprehensive dissemination and implementation of the Guiding Principles. This involves identifying and promoting good practices and lessons learned on the implementation of the Guiding Principles, as well as making recommendations to, and seeking information from, governments, TNCs, national human rights institutions and rights holders. The Working Group conducts country visits by invitation and makes recommendations for enhancing access to effective remedies to those whose human rights are affected by corporate activities. It reports annually to the Human Rights Council and the General Assembly.[171] During a recent visit to Canada, the Working Group made several recommendations, including that the federal government implement mandatory due diligence and non-financial disclosure from companies to prevent human rights abuses within their global supply chains. It was also suggested that the Canadian NCP become more independent and should include information about breaches of the OECD Guidelines in final statements. If the Working Group were invited to New Zealand to conduct such a visit, it is likely that similar recommendations would be made. This could be useful in provoking government action to demand accountability from TNCs. It would, however, depend on an invitation by the New Zealand government.

170 At 118.

171 United Nations Human Rights Office of the High Commissioner, above n 102.

The Working Group can also receive communications on alleged human rights violations and, where appropriate, will intervene directly with the State and business enterprise involved.[172] This process begins with an allegation letter to the State and business enterprises drawing their attention to the claims made and the applicable international human rights norms and standards, including the Guiding Principles. This dialogue aims to encourage the parties involved to investigate all aspects of the situation and take necessary steps to provide redress.[173] A communication may be submitted by any person claiming to be a victim or to have reliable knowledge of the situation. This mechanism could be useful in prompting either the Philippines or New Zealand governments to act. However, it should be noted that, while the Human Rights Council encourages all states and businesses to cooperate with the Working Group by responding to all communications,[174] there is no penalty for ignoring such communications. One hundred and twenty-four communications were sent between 1 March 2017 and 31 May 2017, and only 13 replies have been received.[175] Whether this procedure would have a real impact on the banana plantation workers would remain to be seen.

E. New Zealand Human Rights Commission

A potential remedy could be sought through the Human Rights Commission (the Commission),[176] which was set up to promote and protect the human rights of all people in New Zealand.[177] Enquiries and complaints can be made through the Commission's website. However, this complaints mechanism may not be appropriate for this issue. The Commission is focussed on discrimination based on, among other things, sex, marital status, ethical belief and political opinion. None of these grounds would apply to the alleged abuses suffered by Mindanao workers. Further, the complaints mechanism requires the individual complaining to have personally suffered the alleged discrimination which, again, does not apply here.

F. Crimes Act 1961

Another avenue that could be explored is the slave labour provisions in the Crimes Act 1961, ss 98-98AA. These offences cover acts committed within and outside of New Zealand by any person. Section 98 prohibits

172 United Nations Human Rights Office of the High Commissioner "Communications Procedure" <www.ohchr.org>.

173 Ibid.

174 *Human rights and transnational corporations and other business enterprises* A/HRC/RES/26/22 (2014).

175 United Nations Human Rights Office of the High Commissioner "Communication Report and Search" <spcommreports.ohchr.org>.

176 Human Rights Commission "What the Commission does" <www.hrc.co.nz>.

177 Human Rights Commission "About the Commission" <www.hrc.co.nz>.

any kind of slave dealing, which covers a wide range of actions, including selling, purchasing, transferring, employing, using, or permitting a slave to be employed. Section 98(2) defines "slave" as any person who is subject to debt-bondage or serfdom, and it has also been defined as a person held as property.[178] It is an offence under s 98AA to engage any person under 18 years in forced labour. A body corporate, or corporation sole, incorporated under the laws of New Zealand, may be brought for an offence under s 98AA even if the acts or omission were committed outside of New Zealand.[179] However, the acts and omissions in concern here were directly committed by Stanfilco or by subcontractors to Stanfilco. While both companies are subsidiaries of ITOCHU Corporation, it is uncertain whether Dole NZ could be tried under these provisions. Further, the issues that this article is concerned with may not fit within the definition of "slave dealing", as the issues lie in their working conditions rather than in their lack of legal freedom. While the workers may be unable to quit because of financial reasons and lack of other employment opportunities, this does not constitute slavery under the Act.

G. Fair Trading Act 1986

If the allegations made in Part II are true, then a claim could be made under the Fair Trading Act 1986 (FTA) about the statements on Dole NZ's website. The FTA prohibits engagement in conduct that is misleading or deceptive generally or is likely to mislead or deceive.[180] An unsubstantiated representation must not be made in respect of goods, specifically relating to the supply of those goods.[181] A representation is unsubstantiated if the person making the representation does not have reasonable grounds for the representation.[182]

Dole NZ's website claims to "offer employees competitive wages, ample benefits and a safe work environment" and to "honour our employees' rights".[183] Working conditions are "designed to protect the health, safety, and well-being of all our employees". Dole NZ claims to provide a "stable" source of employment with wages "in line with or exceeding legal requirements". Dole NZ also claims to have long-term contracts with farmers which provide a guaranteed market for their produce at fair, stable, and competitive prices.[184]

The FTA provisions will not protect workers who are not direct employees of Dole NZ. Dole NZ's website uses the term "employees", under which workers of middlemen and private growers would not fit. While this avenue

178 *R v Decha-Iamsakun* [1993] 1 NZLR 141 (CA).
179 Section 7A(1)(a)(iv).
180 Section 9.
181 Section 12A.
182 Section 12A(2).
183 Dole New Zealand, above n 63.
184 Ibid.

could be useful for direct employees, it does not provide a remedy for the workers who comprise 65 per cent of Stanfilco's workforce in Mindanao.

H. Conclusion

The potential but mostly futile remedial mechanisms discussed in this section illustrate the difficulty in holding TNCs to account. The average socially minded New Zealander would need to explore multiple avenues in the search for a remedy, none of which seem particularly likely to secure an effective outcome. The OECD complaint mechanism appears to be the most promising and accessible option but, even so, it is unlikely to result in a visible change for Mindanao workers and is highly dependent on the approach of the New Zealand NCP. Current applicable legislation is unlikely to provide a remedy and would require significant time and resources on the part of the individual. It therefore becomes apparent that, in order to hold TNCs to account to prevent New Zealanders contributing to human rights abuses across the world, more fundamental changes must be made.

V. The Need for Supply Chain Legislation

There are limited options available for the average socially-minded New Zealand consumer to access a remedy for human rights abuses which occur overseas. It is therefore suggested that more must be done in the legislative realm to effectively prevent and punish extraterritorial human rights abuses.[185] The state duty to protect should be strengthened through the creation of a legislative environment that promotes transparency and accountability for TNCs. This could be achieved through the implementation of supply chain legislation, which has been adopted by a growing number of states around the world. Examples include the California Transparency in Supply Chains Act, the Modern Slavery Act, the Indonesian Ministerial Regulation and the French Corporate Duty of Vigilance law.[186] Australia is also in the process of considering whether to implement such legislation. This section will consider the approaches taken in California and the United Kingdom, whether New Zealand should consider a similar model and, if so, what form it should take.

185 Blitt, above n 2, at 53.

186 Letter from Michael K Addo (Chair-Rapporteur of the Working Group on the issue of human rights and transnational corporations and other business enterprises) to Australia (15 May 2017); Transparency in Supply Chains Act 2010 (California); Modern Slavery Act 2015 (UK); Ministerial Regulation 2017 (Indonesia); Duty of corporate Vigilence Law 2017 (France) .

A. California Transparency in Supply Chains Act of 2010

The primary purpose of the California Transparency in Supply Chains Act (the California Act) is to ensure that companies provide their consumers with information which enables them to understand which ones manage their supply chains responsibly.[187] It applies to retail sellers and manufacturers doing business in California who have annual worldwide gross receipts exceeding USD 100,000,000.[188] Certain companies are required to report on their specific actions to eradicate slavery and human trafficking in their supply chains. This involves reporting on the extent that the company: engages in verification of product supply chains to evaluate and address risks of human trafficking and slavery; conducts audits of suppliers; requires direct supplies to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the countries in which they are doing business; maintains accountability standards and procedures for employees or contractors that fail to meet company standards regarding slavery and human trafficking; and provides employees and management with training on slavery and human trafficking and, in particular, in relation to mitigating risks within the supply chains of products.[189] These disclosures must be made on the company's website.[190] If a consumer believes that a company has not posted the required disclosure, an alert may be sent to a dedicated email account of the Attorney General. The Department of Justice issued an informational Resource Guide which contains optional recommendations on how to comply with the Act.

B. The Modern Slavery Act 2015 (UK)

The UK Modern Slavery Act 2015 (the United Kingdom Act) was broadly modelled on the California Act. Under the United Kingdom Act, a commercial organisation must prepare a slavery and human trafficking statement for each financial year of the organisation.[191] These disclosure obligations supplement other obligations under the Companies Act 2006 (UK).[192] Companies must satisfy four criteria, which involve an analysis of the type, geographical location, activities and turnover of the entity. The Act applies to "commercial organisations" which are defined as being, first, either bodies corporate (wherever incorporated) or partnerships (wherever formed) that, second, "carr[y] on a business, or part of a business" in the United Kingdom."[193] The focus on business activity, rather than where they are domiciled, allows the

187 Transparency in Supply Chains Act 2010 (California), s2(j).
188 Section 3(a)(1).
189 Section 3(c)(1)–(5).
190 Section 3(b).
191 Section 54(1).
192 Section 414C(7).
193 Turner, above n 107, at 192.

Act to have extraterritorial application. The legislation applies to business entities incorporated in foreign jurisdictions which carry on business in the United Kingdom.[194] The commercial organisation must supply goods or services, in comparison to the California Civil Code, which only requires retail sellers and manufacturers to disclose. The threshold turnover amount is also lower under the United Kingdom Act than in California; the former has a threshold of GBP 36 million while the latter has a threshold of USD 100 million in annual worldwide gross receipts.[195] These factors suggest that the United Kingdom Act has a much broader reach.

While these Acts have a focus on slavery and human trafficking, their principles could be applied to other human rights abuses, including poor pay, hours of work, health and safety in the workplace, child labour, and freedom of association.

C. A New Zealand Approach

Any potential New Zealand legislation should take note of and learn from the shortcomings in the United Kingdom and Californian legislation. It is also essential that it be aligned with international standards, including the Guiding Principles and relevant ILO conventions.[196] The issue cannot be solved solely through supply chain disclosure. Measures must be put in place to incentivise compliance with supply chain best practice and penalise business entities with supply chains that include unlawful labour practices.[197]

Turner argues that the focus of the UK legislation on individual entities rather than the group or enterprise means that the disclosure obligation could be circumvented or have its effect limited through careful business restructuring.[198] It is suggested that the disclosure obligation should instead be extended to the enterprise as a whole, so that each entity that is owned or controlled by the entity satisfying the statutory definition must give disclosure in respect of its supply chain.[199] The United Kingdom Act does not contain a penalty regime, which reflects the reluctance of states to impose strict social responsibility standards backed by sanctions.[200] The only penalty for non-compliance with the disclosure obligation is potential reputational consequences. This type of approach ultimately erodes the success of transnational supply chain regulation.[201] It is commonly accepted that a balance between punishment and persuasion is necessary for successful

194 At 193.
195 At 193.
196 Letter from Michael K Addo, above n 186.
197 Turner, above n 107, at 209.
198 At 194.
199 At 194.
200 At 195.
201 At 195.

regulation.[202] If New Zealand were to implement similar legislation, its success would depend on the extent to which corporations are deterred from breaching it. Reputational consequences, while persuasive, are not enough to fundamentally change corporate behaviour.

The United Kingdom Act arguably places too high a burden on the administrative branch of government.[203] Regulatory authorities have the burden of investigating and prosecuting those who do not comply with the standards. Turner argues that there should be a combination of public monitoring and enforcement and the creation of incentive structures within the law to promote self-regulation.[204] In the absence of a penalty regime, there is no incentive for self-regulation or the creation of an internal culture that promotes respect of human rights. Even after the regulatory authority has used resources to monitor and enforce compliance with the Act, the corporation may still simply report that it has taken no steps in relation to the prevention of slavery in its supply chain.[205] A similar New Zealand Act should therefore include a penalty regime. If substantial penalties for breaches are readily enforceable then corporations will need to change their behaviour to avoid such an outcome.

The United Kingdom and California Acts rely on the concept that, if consumers are given clear information as to a company's involvement in slavery or forced labour, then they will be less likely to purchase goods or services from that company. However, Turner warns against placing too much reliance on expecting fully informed consumers to make rational purchasing decisions.[206] There is little empirical evidence to suggest that consumers would not purchase products if they knew about the conditions they were manufactured or produced in. Factors such as price and quality may continue to outweigh concerns about human rights abuses. Similarly, too much reliance should not be placed on other private actors to hold TNCs to account through a complaints procedure or litigation. Such regulation depends on private actors such as investigative journalists, non-governmental organisations and private individuals to enforce the obligations and fails to consider that such actors may not have an incentive or the resources to proactively monitor or enforce through litigation human rights compliance.[207]

Inspiration for a New Zealand approach could be taken from the Australian Illegal Logging Prohibition Act, which is a model of transnational supply chain regulation in the timber industry.[208] While the purpose of the Act was not explicitly to protect human rights, it has allowed human rights violations

202 At 195.
203 At 196.
204 At 197.
205 At 197.
206 At 196.
207 At 198.
208 At 205.

under the Act to be classed as statutory wrongs.[209] Importation of illegally logged timber that does not comply with the Act's due diligence requirements is punishable by 300 penalty units,[210] a term used to determine the amount payable for fines, and the processing of illegally logged raw logs is punishable by either up to five years imprisonment and 500 penalty units, or both.[211] The Explanatory Memorandum acknowledges that consumer countries must take action to address the illegal logging problem, especially where there is no or an ineffective regulatory regime in a developing country.[212] The importance of this legislation is that it does not criminalise the wrongdoer in a foreign jurisdiction, over whom the Australian courts may not have jurisdiction. Rather, it provides a mechanism for the prosecution of downstream activities ancillary to the illegal act.[213] To avoid liability, companies must negotiate appropriate warranties and indemnities in their contracts for supply in order to limit their exposure and to obtain independent certification of the legality of the products.[214] The foreign wrongdoer may therefore be subject to liability in contract if the Australian company suffers loss. Despite this, Australian actors cannot contract out of criminal liability. This Act demonstrates that a downstream regulatory scheme in developed countries can indirectly strengthen compliance with the law in developing states.[215]

This article suggests that a New Zealand approach should therefore include the following features:

(a) Disclosure obligations for corporations about their actions taken to eradicate human rights abuses within their supply chains and analysis of the remaining potential for abuse. This requirement, similar to the United Kingdom and California legislation, would promote transparency and accountability for TNCs operating in New Zealand. A complaints mechanism should be established to allow private actors to hold corporations to account where disclosure obligations are not complied with.

(b) Human rights abuses within the scope of the potential legislation should be broadly defined to include not only slavery and forced labour but also abuses in relation to employment rights, child labour, and union affiliation.

(c) An extraterritorial penalty regime. A similar approach could be taken to the Illegal Logging Act, whereby the importation of goods into New Zealand through supply chains that contain human rights abuse is criminalised or highly penalised. The worst forms of human rights abuse, such as slavery and child labour, could attract higher

209 At 205.
210 Illegal Logging Prohibition Act 2012 (Australia), s 12(c).
211 Section 15.
212 Turner, above n 107, at 207.
213 At 207.
214 At 207.
215 At 207.

> penalties than others. It may be necessary to allow a grace period before such an Act came into force to allow corporations to change their practices. The imposition of serious penalties would force TNCs in New Zealand to fundamentally change their internal practices, indirectly forcing the entities in their supply chains to comply with local laws and regulations.

Despite the importance of international standards such as the Guiding Principles and OECD Guidelines, binding instruments must be put in place to prevent and limit corporate human rights abuse. As more countries begin to adopt legislation similar to the United Kingdom and California regimes, New Zealand must consider what approach it will take. A synthesis of disclosure obligations, binding regulations that specifically address abuses within the supply chain, complaint mechanisms accessible by private actors, and penalty regimes must be utilised. This article recommends that the New Zealand government explore the possibilities of implementing binding regulations on TNCs with inspiration from the aforementioned recommendations.

VI. Conclusion

The potential remedies available to individual New Zealanders to hold TNCs to account for their actions overseas are limited. Contacting TNCs directly may allow the individual to obtain more information and a formal response to allegations of abuse, but such an approach is unlikely to provoke any significant change in business practices. As in Dole NZ's case, TNCs are likely to reproduce information already available on their websites as well as reference to certifications. Further, relevant legislative provisions do not provide a clear remedy. The extraterritorial provision in the Crimes Act is limited to slavery and forced labour and the applicable Fair Trading Act provisions may be useful for abuses committed against Stanfilco's direct employees but will not provide a remedy for the remaining 65 per cent of the workforce who face the most human rights violations. The complaint procedure of the UN Working Group could be useful through encouraging the New Zealand government to implement legislative protection. The OECD complaint mechanism is the most promising remedial avenue. While it is unlikely that the New Zealand NCP would do anything other than provide good offices, individuals could use avenues such as this to apply pressure to Dole NZ generally to change its internal practices. The OECD mechanism would be extremely useful in this context if it followed the approaches of the United Kingdom and Norway NCPs by carrying out a thorough examination of the facts and issuing a concluding statement indicating compliance with the Guidelines.

Exploration of these remedies demonstrates that the current system is inadequate in the face of the abuses caused by TNCs in the world today.

Guidelines such as those prescribed by the Guiding Principles and the OECD Guidelines are important aspects of the movement to address human rights abuses caused by TNCs but do not provide adequate protection. Disclosure obligations such as those in United Kingdom and Californian legislation could bring about behavioural change in corporate supply chains.[216] While these Acts are focused on slavery and forced labour, their principles could be applied to other forms of human rights abuse in the supply chain, including those that are allegedly part of Dole NZ's supply chain. Any similar New Zealand legislation should account for the weaknesses of the United Kingdom and Californian Acts. These include the limited information required to be disclosed, the absence of an obligation to report which jurisdiction the alleged abuse is occurring, and the weak enforcement structure and absence of pecuniary penalties for inadequate or non-compliance.[217] Disclosure, in and of itself, is not sufficient to change corporate behaviour. Further regulatory action is required in order to effect real change.

TNCs operate across multiple jurisdictions with complex supply chains in the pursuit of low production and manufacturing costs and high profit margins. TNCs can no longer be viewed as mere profit generating bodies, but must be considered in light of their ability to contribute to the welfare of society.[218] Corporate engagement with human rights goes beyond acting upon a moral obligation, and human rights must be embedded within core business practices[219] and must be linked to a long term vision of sustainable business.[220] Given the power they wield and the enormous impact they have on everyday lives, New Zealand must put mechanisms in place to protect the human rights of those associated with them. In our increasingly globalised world, it is no longer an excuse that the abuses are not occurring within our own territory, especially where our own purchasing decisions and consumer culture are not only contributing to but encouraging those abuses.

216 Turner, above n 107, at 209.

217 Turner, above n 107, at 209.

218 Addo, above n 81, at 147.

219 Lisa McConnell "Assessing the Feasibility of a Business and Human Rights Treaty" (2017) 66(1) ICLQ 143 at 23.

220 Baumann-Pauly and Nolan, above n 4, at 20.

APPENDIX 1: Email from Courtney Ormiston to Dole New Zealand regarding the allegations of human rights abuse on Dole-Stanfilco's banana plantations in Mindanao (29 August 2017)

On 29/08/17, 1:13 PM, "courtney.ormiston@live.com" <courtney.ormiston@live.com> wrote:

> Name : Courtney Ormiston
> Email : courtney.ormiston@live.com
> Subject : Fresh Products
> Message : To whom it may concern:

I have bought bananas from Dole every week for the last few years. However, information about Dole's practices in Mandanao, Philippines and the treatment of its workers recently came to my attention. As a result, I no longer purchase Dole bananas. According to research undertaken by Radio NZ, workers on Dole banana plantations in Mindanao work up to 18 hours a day for as little as 30 cents per hour. Workers have no access to goggles, masks, boots or gloves. Further, there is evidence that union workers who campaign for better working conditions have faced intimidation, harassment and assassination. In contrast, Dole claims on its New Zealand website that it is "extremely proud of the relationship" it has with its employees. As transnational corporations such as Dole become increasingly powerful, I believe that it is imperative that such corporations take measures to protect human rights above and beyond what they are expected or legally required to do in the country in which they are operating. This is especially so when the country in question is either unwilling or incapable of protecting the human rights of its people.

Could you provide information in response to these allegations and what Dole is doing to ensure that their workers' human rights are protected?

Kind regards
Courtney Ormiston