

The Business of Migrant Worker Recruitment: Who Has the Responsibility and Leverage to Protect Rights?

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ABSTRACT

Recruitment of low-wage migrant workers has become a vast global commercial enterprise, particularly in Asia. As the industry becomes increasingly associated with systemic human-rights abuses, calls for wholesale transformation are emerging. This Article establishes that states and businesses share human rights responsibilities to ensure migrant worker protection and access to remedy. It then addresses the next obvious question: Who are the relevant actors to drive recruitment industry reform and what roles should they play? The authors contend that systemic change requires establishing a global market that commercially incentivizes fair recruiters and the suppliers that engage them, along with a transnational governance framework that identifies and sanctions those that do not. The Article identifies the unique forms of leverage that state, business, and civil society actors can exert to realize this change and explains why these stakeholders must act in concert to overcome commercial, political, and practical barriers to reform.

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INTRODUCTION

Governance of temporary labor migration is emerging as one of the most significant social, economic, and human rights challenges of this century. This is especially the case in Asia, where the temporary migration of men and women for low-wage jobs abroad has increased exponentially over the past two decades and is a central pillar of the development strategy of many countries in the region.¹ In 2013, of the estimated 231.5 million migrants in the world, over 95 million came from the Asia

1. ASIA-PACIFIC RCM THEMATIC WORKING GRP. ON INT'L MIGRATION, ASIA-PACIFIC MIGRATION REPORT 2015: MIGRANTS' CONTRIBUTIONS TO DEVELOPMENT 9 (2015) [hereinafter RCM WORKING GROUP].

Pacific region, an almost 50 percent increase compared to 1990.² By far, the predominant flows are of temporary labor migrants.³

Labor migration has the potential to improve the lives of migrant workers and their families, and to bring increased prosperity to their communities and countries of origin through remittances and development of new skills. However, for many migrant workers, this promise has not been realized. Low-wage migrant workers are routinely underpaid and made to work long hours under unsafe conditions; their precarious immigration and economic status in their country of employment often acts as a powerful barrier to protesting against and obtaining remedies for mistreatment.⁴ In recent years, media and scholars have shone a particular spotlight on the systemic exploitation of Asian migrants working in construction, manufacturing, fishing, and domestic work, in the Middle East, as well as elsewhere in Asia.⁵

For many low-wage migrant workers, abuses connected with their migration for work do not begin in their country of employment, but during recruitment in their country of origin. In many countries, particularly in Asia, myriad private “merchants of labour” now operate formally and informally across national and international borders, shepherding workers (for a fee) from their villages and towns to their eventual workplaces abroad.⁶ Migrant worker recruitment has evolved into a vast global commercial enterprise⁷ that intersects with a product or service chain that often has a transnational brand at the top.⁸ Indeed, in the Asia Pacific region, the role of recruitment agencies “has grown to such an extent that they may go beyond facilitation [of temporary migration] to even driving migration themselves.”⁹

2. *Id.*

3. *Id.*

4. See, e.g., Ian Urbina, *Sea Slaves: The Human Misery that Feeds Pets and Livestock*, N.Y. TIMES (July 7, 2015), <http://www.nytimes.com/2015/07/27/world/outlaw-ocean-thailand-fishing-sea-slaves-pets.html>, [<http://perma.cc/9BYH-RK8E>] (discussing the conditions of sea workers in Thailand).

5. See *id.*; see also VERITÉ, FORCED LABOR IN THE PRODUCTION OF ELECTRONIC GOODS IN MALAYSIA (2014), <http://www.verite.org/sites/default/files/images/VeriteForcedLaborMalaysianElectronics2014.pdf> [<http://perma.cc/NFU5-35BL>] (discussing the poor conditions of migrant workers in the Malaysian electronics industry); AMNESTY INT’L, THE DARK SIDE OF MIGRATION: SPOTLIGHT ON QATAR’S CONSTRUCTION SECTOR AHEAD OF THE WORLD CUP (2013), <https://www.amnestyusa.org/sites/default/files/mde220102013eng.pdf> [<https://perma.cc/E63K-PDM8>] [hereinafter THE DARK SIDE OF MIGRATION] (discussing the conditions of migrant workers building Qatar’s World Cup stadiums); HUMAN RIGHTS WATCH, WALLS AT EVERY TURN: ABUSE OF MIGRANT DOMESTIC WORKERS THROUGH KUWAIT’S SPONSORSHIP SYSTEM (2010), <http://www.hrw.org/sites/default/files/reports/kuwait1010webcover.pdf> [<http://perma.cc/XV5W-6SDL>] [hereinafter HRW] (discussing abuse of migrant domestic workers in Kuwait).

6. See generally INT’L LABOUR ORG. (INT’L INST. FOR LABOUR STUDIES), *MERCHANTS OF LABOUR* (Christiane Kuptsch ed., 2006).

7. INT’L ORG. FOR MIGRATION, *RECRUITMENT MONITORING & MIGRANT WELFARE ASSISTANCE: WHAT WORKS?* 17, 48–49 (2015), <http://apmigration.ilo.org/resources/recruitment-monitoring-and-migrant-welfare-assistance-what-works/> [<https://perma.cc/PP8Q-8HYB>] [hereinafter IOM] (tabulating approximate number of licensed recruitment agencies in select Asian countries of origin in 2014).

8. JENNIFER GORDON, INT’L LABOUR ORG., *GLOBAL LABOUR RECRUITMENT IN A SUPPLY CHAIN CONTEXT* 13 (2015), http://un-act.org/wp-content/uploads/2016/02/wcms_377805.pdf [<https://perma.cc/4JG4-4LT7>].

9. RCM WORKING GROUP, *supra* note 1, at 10.

Systemic “abuses and fraudulent practices”¹⁰ within the recruitment industry have been documented by a number of scholars in recent years.¹¹ They include the charging of inflated fees that sometimes require workers to go into significant debt; deception of workers concerning the salary and conditions of work they can expect; and the failure to provide workers with appropriate training and essential pre-departure information, including their contract.¹² These abuses commonly give rise to situations of forced labor and human trafficking.¹³

As calls for transformation of the industry emerge,¹⁴ the next question for states, businesses, international organizations, advocacy organizations, donors, and others becomes: Who are the relevant actors to drive change and what roles should they play? To answer this question, this Article considers the human rights responsibilities of state and non-state actors globally to ensure fair recruitment of migrant workers, and the leverage that each stakeholder has to transform the industry and ensure accountability and access to remedy where abuses persist. In doing so, we seek to illustrate why exertion of leverage by these stakeholder groups *in concert* is essential to shifting the economic drivers of recruitment abuses, ensuring accountability for misconduct, and to overcome current economic disincentives to action by states and businesses.

Each stakeholder group has a unique and indispensable role to play in the transformation of the migrant recruitment industry.¹⁵ For example, state regulation of migrant worker recruitment has improved markedly in recent years; however, governments have struggled to curb abusive recruitment practices at a systemic level.¹⁶ There remain critical un-tapped opportunities for countries of migrant worker origin and migrant worker employment to enable and incentivize businesses to adopt fair recruitment practices, and to better identify and sanction those that do not. At the same time, the recent yet steady evolution of a global social expectation that companies

10. Private Employment Agencies Convention arts. 8(2) & 10, *adopted on* June 19, 1997, 2115 U.N.T.S. 249 [hereinafter Private Employment Convention]. The International Labour Organization Convention (ILO) uses this term in the convention, and this term will be used in this Article to refer to the range of harmful recruitment practices set out in the current section.

11. See generally IOM, *supra* note 7; GORDON, *supra* note 8; Patricia Pittman, *Alternative Approaches to the Governance of Transnational Labor Recruitment*, 50 INT’L MIGRATION REV. 269 (2015); Dovelyn Rannveig Agunias, *Regulating Private Recruitment in the Asia-Middle East Labour Migration Corridor*, Issue in Brief (Int’l Org. Migration, Geneva, Switzerland & Migration Pol’y Inst., Washington, D.C.), Aug. 2012.

12. See *infra* Parts I.A, I.B, I.C.

13. *Id.*

14. See, e.g., *About*, OPEN WORKING GRP. ON LABOUR MIGRATION & RECRUITMENT, <http://recruitmentreform.org/about> [<https://perma.cc/W3U7-S9H4>] (last visited Sept. 26, 2016) (showing that there are organizations attempting to change industry standards on foreign labor); FAIR MIGRATION: SETTING AN ILO AGENDA, REPORT OF THE ILO DIRECTOR GENERAL TO THE INTERNATIONAL LABOUR CONFERENCE (2014), http://www.ilo.org/wcmsp5/groups/public/-ed_norm/-relconf/documents/meetingdocument/wcms_242879.pdf [<https://perma.cc/Z7JE-BY7E>] (calling for an ILO agenda for fair migration and emphasizing the growing concern about abusive and fraudulent recruitment practices affecting migrant workers).

15. See Janie A. Chuang, *Giving as Governance? Philanthrocapitalism and Modern-Day Slavery Abolitionism*, 62 UCLA L. REV. 1516, 1520–21 (2015) (discussing the influence of private and state actors in preventing forced labor and human trafficking, including abusive recruitment practices).

16. See GORDON, *supra* note 8, at 3 (observing that the migrant worker recruitment process appears at times to be not only “ungoverned but ungovernable”).

should respect international human rights¹⁷ incentivizes businesses to play a greater regulatory role in protecting human rights and providing redress for harms. States globally can also play far more proactive regulatory roles as procurers of goods and services involving migrant labor. Similarly, civil society, trade unions, and migrant workers can influence businesses to improve their practices. These initiatives can complement regulatory efforts by states to institute a fairer approach to transnational labor recruitment.

The notion of networked governance or, put more simply, shared responsibility, is a useful framework in regard to these various stakeholders. It recognizes both the importance and limitations of government in enforcing rights and seeks to supplement those regulatory gaps by directly involving other crucial stakeholders in preventing and redressing rights violations. As the United Nations (U.N.) Special Rapporteur on the Human Rights of Migrants has observed:

Creating this wholesale shift [to a fair recruitment system] cannot be achieved by tackling separate elements of the problem, or working exclusively with limited stakeholder groups. It requires a comprehensive range of initiatives that tackle the root causes and structural elements of current practices over the short, medium and long term. It must include the perspectives of all stakeholders: migrants, civil society, private sector, governments, and international organizations.¹⁸

The central aim of this Article is to diagnose and recommend what each of these actors can do in practice and how they can act in concert to fulfill the human rights of migrant workers. We begin in Part I by outlining the pervasive multilayered business model that dominates global recruitment of low-wage migrant workers and the systemic abusive practices that have evolved within it. Part II highlights the human rights obligations and responsibilities that attach to states and businesses in relation to migrant recruitment. Part III examines the leverage that business, states, and civil society have to prevent abuses and to drive fair recruitment practices. It considers opportunities for reform and emerging good practices, illustrating the interdependent nature of these sources of leverage and the ways their integration can overcome economic and practical barriers to implementation by individual stakeholder groups. Part IV addresses the roles of businesses, states, and civil society in ensuring migrant workers' access to remedy in the event that abuses persist, recognizing the critical gaps that currently exist. The Article concludes by identifying the leverage that stakeholders can exert to create a market that commercially incentivizes fair recruiters and the suppliers that engage them, and that identifies and sanctions those that do not—the essential conditions for a “wholesale shift” to a fair recruitment model.

17. *See id.* at iii (stating that the principles and rights of migrant workers enshrined in the 1998 ILO declaration on Fundamental Principles and Rights at Work are recognized as fundamental human rights).

18. François Crépeau (Special Rapporteur on the Human Rights of Migrants), *Report on the Human Rights of Migrants*, para. 47, U.N. Doc. A/70/310 (Aug. 11, 2015).

I. THE BUSINESS OF MIGRANT WORKER RECRUITMENT

The majority of temporary low-wage labor migration from Asia is facilitated by private recruitment agencies (also known as manpower agencies) and individual recruitment agents (also known as brokers or subagents).¹⁹ Some migrant workers also use informal social networks for part or all of the recruitment process.²⁰ A small number of countries have government-to-government recruitment schemes²¹ or direct employer recruitment, though these are not common along the Asia-Middle East migration corridor.²²

The private recruitment industry is highly fragmented. There are now hundreds or thousands of relatively small licensed recruitment agencies located in the capital or major cities of most Asian origin countries,²³ and hundreds, or potentially thousands, of additional unlicensed agencies.²⁴ There are few, if any, large transnational corporations (TNCs) or brand-name agencies substantially involved in the recruitment of low-wage migrant workers.²⁵ While some agencies have registered subagents or staff operating at the local level, it is far more common for a migrant's first point of contact to be an independent, individual agent—generally someone known to the worker or introduced through friends, family, or a local figure of authority.²⁶ Most recruitment agencies use a number of individual brokers who identify workers and deliver them to the agency in the capital, generally on commission.²⁷

Once a worker is connected with a recruitment agency in a country of origin, that agency then facilitates a relationship between the worker and a third party abroad (unless a worker's social contact directly connects him or her with the destination country third party). That third party is generally an employer, another recruitment

19. See IOM, *supra* note 7, at 1 (“By the 2000s, the majority of [Columbo Process Member States] migrants were paying for the services of a recruiter in order to migrate.”).

20. See Md Mizanur Rahman, *Bangladeshi Labour Migration to the Gulf States: Patterns of Recruitment and Processes*, 33 CAN. J. DEV. STUD. 214, 215–16 (2012) (referencing literature analyzing the social networks that facilitate and sustain migration across international borders).

21. See IOM, *supra* note 7, at 59–60 (citing examples of government-to-government recruitment schemes in Asia).

22. Rahman, *supra* note 20, at 215.

23. See IOM, *supra* note 7, at 17, 48–49 (listing and tabulating the approximate numbers of licensed recruitment agencies in select Asian countries of origin in 2014).

24. SARAH PAOLETTI, ELEANOR TAYLOR-NICHOLSON, BANDITA SIJAPATI, & BASSINA FARBENBLUM, *MIGRANT WORKERS’ ACCESS TO JUSTICE AT HOME: NEPAL* 128 (2014); BASSINA FARBENBLUM, ELEANOR TAYLOR-NICHOLSON, & SARAH PAOLETTI, *MIGRANT WORKERS’ ACCESS TO JUSTICE AT HOME: INDONESIA* 124 (2013); Tasneem Siddiqui, *Protection of Bangladeshi Migrants Through Good Governance*, in *MERCHANTS OF LABOUR*, 63, 78 (Christiane Kuptsch ed., 2006).

25. See Johan Lindquist, *Labour Recruitment, Circuits of Capital and Gendered Mobility: Reconceptualizing the Indonesian Migration Industry*, 83 PAC. AFF. 115, 125 (2010) (finding that the individual subagent industry, which finds suitable worker for recruitment agencies, has flourished).

26. *Id.*

27. See, e.g., PAOLETTI ET AL., *supra* note 24, at 54 (discussing how recruitment agencies in Nepal have between twenty and fifty individual agents at any one time); RAY JUREIDINI, *MIGRANT LABOUR RECRUITMENT TO QATAR: REPORT FOR QATAR FOUNDATION MIGRANT WORKER WELFARE INITIATIVE* 58 (2014), http://www.qscience.com/userimages/ContentEditor/1404811243939/Migrant_Labour_Recruitment_to_Qatar_Web_Final.pdf [<https://perma.cc/K4BU-Q4D5>] (discussing sub-agents’ compensation in remote communities).

agency in the destination country (often called a “placement agency”) that then places the worker with an employer, or a labor supply agency that employs the migrant and leases him or her out to various companies on a temporary basis.²⁸ Labor supply companies are becoming increasingly prevalent in the Gulf.²⁹ They have come under criticism for shielding companies from responsibility for the treatment of migrant workers by removing the direct relationship between companies and workers in the recruitment process.³⁰

Recruitment agencies and subagents serve important functions. They enable millions of aspiring low-wage workers to access employment opportunities abroad. They provide aspiring workers with information about foreign employment, help them obtain documentation, and navigate government requirements for working abroad.³¹ Nevertheless, systemic misconduct within the recruitment industry often creates the conditions for, or directly causes, many of the abuses that migrant workers suffer.³²

At the core of the problem lies a set of powerful structural forces that combine to make migrant workers especially vulnerable to deceptive and extortionate conduct by recruiters. These forces include: A combination of poverty and unemployment at home and the promise of higher wages in countries of employment; the oversupply of migrant labor across countries of origin compared with the demand in low-wage industries in destination countries;³³ large numbers of recruitment intermediaries competing for opportunities to place workers within a limited supply of overseas jobs; and a business culture in which TNCs, employers, and their suppliers do not expect to bear the costs of recruiting low-wage migrant workers within their supply chain.³⁴

In a context of limited government oversight, three core categories of harmful recruitment practices have germinated in response to these forces³⁵ and are described

28. See, e.g., JUREIDINI, *supra* note 27, at 62 (discussing the recruitment of migrant workers through “labor supply agencies”).

29. See, e.g., *id.* (discussing labor supply companies in Qatar).

30. *Id.*

31. Bassina Farbenblum, *Governance of Migrant Worker Recruitment: A Rights-Based Framework for Countries of Origin*, 7 *ASIAN J. INT'L. L.* 152, 157 (2017).

32. Crépeau, *supra* note 18, paras. 18, 26–30.

33. Nilim Baruah, *The Regulation of Recruitment Agencies: Experience and Good Practices in Countries of Origin in Asia*, in *MERCHANTS OF LABOUR* 37, 42 (Christiane Kuptch ed., 2007).

34. Farbenblum, *supra* note 31, at 176–77.

35. Human rights violations that occur during the recruitment process may be primarily attributable to the recruitment agency, but attribution may also be shared by a number of actors, including governments and businesses further up the supply chain, for either failing to provide or enforce regulatory oversight. Recruitment agencies may also bear a degree of responsibility for abuses that occur during employment. For example, the agency’s staff may know harm is likely to occur because they are aware of previous worker mistreatment, or they are aware that the work conditions are unsafe. The same would be true if the recruiter knowingly sends a worker to a job for which he or she does not possess the necessary skills, which readily results in abuse or dismissal of the worker by the employer. The extent to which recruiters are expected to, and can in practice, undertake due diligence regarding prospective employers remains unclear and merits further consideration.

briefly below. These practices are common to countries of origin across South and Southeast Asia,³⁶ and indeed globally.³⁷

A. Fees

Recruitment agencies and individual subagents routinely charge migrant workers non-transparent fees and costs well beyond regulated limits.³⁸ Migrant workers often sell personal property and take out loans from local moneylenders to cover the inflated recruitment fees and costs.³⁹ Such loans commonly attract usurious interest rates.⁴⁰ As a result, many workers leave home with high, and mounting, debts. Those debts often compel workers to acquiesce to poorer work conditions or lower wages than those promised by the subagent or recruitment agency at home, for fear of deportation and debt-laden unemployment.⁴¹ Such circumstances readily give rise to forced labor conditions.⁴² There is considerable debate regarding the point at which these and other routine abuses in recruitment, such as deceptive conduct (discussed in the next section), constitute forced labor or human trafficking,⁴³ in light of international law definitions

36. Farbenblum, *supra* note 31, at 157 nn.13–22 (citing relevant studies and reports).

37. See, e.g., THE INT’L LABOUR RECRUITMENT WORKING GRP., THE AMERICAN DREAM UP FOR SALE: A BLUEPRINT FOR ENDING INTERNATIONAL LABOUR RECRUITMENT ABUSE 5 (2013), <http://fairlaborrecruitment.files.wordpress.com/2013/01/final-e-version-ilrwg-report.pdf> [<https://perma.cc/K5P4-A5K5>] (describing the “disturbingly common patterns of recruitment abuse” faced by internationally recruited migrant workers in the United States); JUREIDINI, *supra* note 27, at 2, 7.

38. See JUREIDINI, *supra* note 27, at 35–49 (discussing overcharging in recruitment fees in India, Nepal, Bangladesh, and Sri Lanka). Although most states continue to allow agencies to charge fees up to a specified limit, ILO instruments and many policy institutions and human rights groups have now adopted the position that recruitment fees should always be borne by employers, and the charging of any fees to migrant workers should be prohibited. See Farbenblum, *supra* note 33, at 5 n.14 (discussing ILO instruments that address recruitment fees).

39. JUREIDINI, *supra* note 27, at 8.

40. See AMNESTY INT’L, FALSE PROMISES: EXPLOITATION AND FORCED LABOUR OF NEPALESE MIGRANT WORKERS 7 (2011), <http://www.amnesty.org/en/documents/ASA31/007/2011/en/> [<https://perma.cc/U32Y-2NYU>] [hereinafter FALSE PROMISES] (discussing that, in Nepal, migrants pay anywhere from 15 to 60 percent in interest to moneylenders as compared to the maximum acceptable interest charge of fourteen percent stipulated by the Government).

41. See INT’L LABOUR ORG., A GLOBAL ALLIANCE AGAINST FORCED LABOUR: GLOBAL REPORT UNDER THE FOLLOW UP TO THE ILO DECLARATION ON THE FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK 2 (2005), http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_081882.pdf [<https://perma.cc/QYV4-WHVZ>] (discussing “induced indebtedness” as a “key instrument of coercion,” and further detailing that workers must often choose between “highly exploitative conditions” and “running the risk of deportation”).

42. See, e.g., Julia O’Connell Davidson, *Troubling Freedom: Migration, Debt and Modern Slavery*, 1 MIGRATION STUD. 176, 176 (2013) (stating circumstances that give rise to forced labor conditions); see HÉLÈNE HARROFF-TAVEL & ALIX NASRI, TRICKED AND TRAPPED: HUMAN TRAFFICKING IN THE MIDDLE EAST 13 (2013), http://www.ilo.org/wcmsp5/groups/public/-arabstates/-ro-beirut/documents/publication/wcms_211214.pdf [<https://perma.cc/25VJ-6S9M>] (stating that the ILO estimates there are 600,000 individuals subjected to forced labor in the Middle East).

43. See Marja Paavilainen, *Towards a Cohesive and Contextualised Response: When is it Necessary to Distinguish Between Forced Labour, Trafficking in Persons and Slavery?*, 5 ANTI-TRAFFICKING REVIEW 158, 158 (2015) (discussing key perspectives in determining when abuses constitute forced labor); see also Janie A. Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, 108 AM. J. INT’L L. 609, 609–613 (2014) (discussing different ways that forced labor has been defined, and how this has led to legal

contained in article 2 of the International Labour Organization (ILO) Forced Labour Convention⁴⁴ and article 3 of the U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol).⁴⁵

B. Deception

A second category of recruiter misconduct concerns active deception and omissions that result in workers migrating for employment without their voluntary informed consent. This occurs in a number of ways. First, subagents routinely misinform workers about salary, working conditions, and living conditions associated with prospective employment.⁴⁶ In a study of Nepalese migrant workers returning from the Gulf, Amnesty International found that almost 93 percent of workers reported that they had been deceived pre-departure regarding their salary, the nature of the job, their hours of work, overtime pay, and/or rest days.⁴⁷ Misrepresentations of this sort are the basis upon which recruiters justify their inflated fees and charges; workers, believing what they are told, decide that the promised financial reward will outweigh the up-front financial investment, debt, and profound social costs of the decision to migrate.⁴⁸

Recruitment agencies often shift blame to subagents for migrant worker misinformation, but few agencies provide migrant workers with contracts that adequately set out the employment terms in a language that the worker understands; moreover, terms are often not explained to workers and contracts are not provided prior to payment of significant fees, nor at a time when the migrant worker is still able to refuse the position offered.⁴⁹ Recruitment agencies generally do not ask workers what they have been told by their subagents, or what they expect of the position. Nor do these agencies seek to clarify any misinformation. Recruitment agency misconduct is not limited to these omissions, and may include active deception. For example, in the Gulf there is a widely reported practice of workers being told by employers and placement agencies to sign a “substituted” contract on arrival, with less favorable wages

uncertainties).

44. Convention Concerning Forced or Compulsory Labour, art. 2, May 1, 1932, 39 U.N.T.S. 55 [hereinafter Forced Labour Convention].

45. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, art. 3, Dec. 12, 2000, 2237 U.N.T.S. 319 [hereinafter Palermo Protocol]; see also U.N. OFFICE ON DRUGS AND CRIME, THE ROLE OF RECRUITMENT FEES AND ABUSIVE AND FRAUDULENT PRACTICES OF RECRUITMENT AGENCIES IN TRAFFICKING IN PERSONS, at 6 (2015) (discussing the relationship between abusive recruitment practices and trafficking in persons).

46. JUREIDINI, *supra* note 27, at 137; Mohammad A. Auwal, *Ending the Exploitation of Migrant Workers In The Gulf*, 34 FLETCHER FORUM WORLD AFF. 87, 92 (2010). This intentional deception may, under certain conditions, give rise to human trafficking as defined in art. 3 of the Palermo Protocol, *supra* note 45.

47. FALSE PROMISES, *supra* note 40, at 6 n.9.

48. See *id.* at 28, 53; Michael Clemens & Timothy Ogen, *Migration as a Strategy for Household Finance: A Research Agenda on Remittances, Payments, and Development* 3 (Ctr. of Glob. Dev., Working Paper No. 354, 2014) <http://www.cgdev.org/sites/default/files/migration-strategy-household-finance-research-agenda.pdf> [https://perma.cc/XKV6-CR84].

49. PAOLETTI ET AL., *supra* note 24, at 66, 133; FARBENBLUM ET AL., *supra* note 26, at 65.

and conditions than those agreed before departure.⁵⁰ Interviews with Nepalese recruitment agencies suggest that they are aware that the contract presented to workers and the Department of Labour and Employment differs from the “real” contract that workers sign upon arrival in Qatar.⁵¹

Relatedly, document falsification and outright fraud are not uncommon among subagents and recruitment agencies, with prospective workers commonly recruited (and paying fees) for positions that do not exist, or migrating based on falsified documentation.⁵² Travel on falsified documents places the worker at risk of detention and deportation and/or being classified as an irregular migrant by both the country of origin and the country of employment. Migrants in an irregular status are often excluded from accessing protection and services offered by both countries, and are especially vulnerable to exploitation by employers.⁵³

C. Non-Compliance with Pre-Departure Protection Responsibilities, Including Information and Training

A third category of misconduct concerns recruitment agencies’ non-compliance with their key pre-departure and post-return migrant worker protection responsibilities. This includes recruitment agencies’ failure to provide migrant workers with required job training and information, as well as non-provision or deliberate retention of workers’ key documents such as their recruitment and/or employment contract and insurance policy.⁵⁴ In some cases this is done as a means of controlling the worker or in order to extract bribes for the documents at a later stage.⁵⁵ In addition to the direct harm that they cause to migrant workers in their home country, these acts and omissions create conditions that render workers more vulnerable to abuse and less able to access protection and remedies while abroad. Further harms within this category include physical and other abuses perpetrated against migrant workers in training centers and housing compounds managed by recruitment agencies pre-departure,⁵⁶ such as indefinite confinement or restricted movement of women migrant workers.⁵⁷ Recruiters may also subject prospective migrant workers to threats and

50. JUREIDINI, *supra* note 27, at 87–89; *see also* Andrew Gardner et al., *A Portrait of Low-Income Migrants in Contemporary Qatar*, 3 J. ARAB. STUD. 1, 8 (2013) (“The data presented here . . . more generally reinforce the role that misinformation, deception, and unrealistic expectations continue to play in the migration conduit which shuttles migrants to Qatar and other countries.”).

51. JUREIDINI, *supra* note 27, at 88.

52. PAOLETTI ET AL., *supra* note 24, at 64–65; *see* FARBENBLUM ET AL., *supra* note 26, at 47, 104 (describing procedures migrants go through after being defrauded by brokers).

53. *See* JUREIDINI, *supra* note 27, at 66, 87 (giving examples of migrants in an irregular status being detained, or stuck in the black market for labor, because they cannot afford to return home).

54. *See, e.g.*, HRW, *supra* note 5, at 23–24; FALSE PROMISES, *supra* note 42, at 52–60 (each describing recruitment agents’ responsibilities in contrast to what recruiting agencies actually provide to migrants).

55. *See Rights Group: Migrant Workers Abused in UAE*, USA TODAY (Oct. 22, 2014, 11:07 PM) <http://www.usatoday.com/story/news/world/2014/10/22/migrant-workers-united-arab-emirates/17754831/> [<https://perma.cc/6K8V-A44L>].

56. *Help Wanted: Abuses against Female Migrant Domestic Workers in Indonesia and Malaysia*, HUMAN RIGHTS WATCH 30–35 (July 22, 2004), <http://www.hrw.org/sites/default/files/reports/indonesia0704full.pdf> [<https://perma.cc/EK4L-MC9G>].

57. *Id.* at 32.

intimidation, including verbal and psychological abuse, in order to coerce them into making decisions regarding their migration that they would not otherwise make.

II. HUMAN RIGHTS RESPONSIBILITIES OF STATES AND BUSINESS TO PREVENT, DETECT, AND REMEDY ABUSES IN RECRUITMENT

A. *State Obligations*

A range of international instruments impose obligations on states in relation to the governance of migrant worker recruitment.⁵⁸ These instruments include labor rights, human rights, and anti-trafficking conventions, as well as numerous non-binding U.N. and ILO instruments and key non-binding sub-regional instruments.⁵⁹ For example, the Migrant Workers' Convention⁶⁰ requires states to effectively supervise and monitor recruitment agencies, subagents, and other intermediaries to ensure they respect the rights of migrant workers.⁶¹ The widely ratified Convention on the Elimination of All Forms of Discrimination Against Women has also been interpreted by its supervising treaty body as requiring states to regulate and monitor recruitment in order to realize the fundamental human rights of female migrant workers.⁶² The 2014 ILO Protocol to the Forced Labor Convention similarly requires states to prevent

58. These instruments have been considered in detail by scholars elsewhere and will therefore only be described briefly in this section. For discussion of states' obligations under human rights treaties and other international instruments regarding migrant worker recruitment, see Farbenblum, *supra* note 31, at Part. III.A.4. For a detailed discussion of the historical evolution, content, and application of ILO conventions and standards related to migrant worker recruitment, see BEATE ANDREES, ALIX NASRI, & PETER SWINIARSKI, INT'L LABOUR ORG., REGULATING LABOUR RECRUITMENT TO PREVENT HUMAN TRAFFICKING AND TO FOSTER FAIR MIGRATION: MODELS, CHALLENGES AND OPPORTUNITIES 15–31 (2015).

59. Recruitment has been a focus of several regional dialogues within Asia. The only formal agreement that has emerged to date is the non-binding Association of South East Asian Nations Declaration on the Protection and Promotion of the Rights of Migrant Workers, which requires origin country member states to "[e]stablish and promote legal practices to regulate recruitment of migrant workers and adopt mechanisms to eliminate recruitment malpractices through legal and valid contracts, regulation and accreditation of recruitment agencies and employers, and blacklisting of negligent/unlawful agencies." Ass'n of S. E. Asian Nations Declaration on the Protection and Promotion of the Rights of Migrant Workers, art. 14, Jan. 30, 2007; see also Farbenblum, *supra* note 33, at 25 n.131 (providing further context for ASEAN declaration).

60. Int'l Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990, 2220 U.N.T.S. 3 [hereinafter Migrant Workers Convention]. Four key Asian countries of origin have ratified the Migrant Workers Convention: Bangladesh, Indonesia, Philippines and Sri Lanka. Comm. on Migrant Workers, Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, UNITED NATIONS HUMAN RIGHTS, <http://www.ohchr.org/Documents/HRBodies/CMW/StatRatCMW.pdf> [https://perma.cc/TQQ7-6GFU] (last visited Sept. 30, 2016). Cambodia has signed but not ratified the Convention. *Id.*

61. U.N. Comm. on the Protection of the Rights of all Migrant Workers and Members of Their Families, General Comment No. 1 on Migrant Domestic Workers, para. 33, U.N. Doc. CMW/C/GC/1 (2011) [hereinafter General Comment No. 1 on Migrant Domestic Workers].

62. Comm. on the Elimination of Discrimination against Women, General Recommendation No. 26 on Women Migrant Workers, para. 24, U.N. Doc. CEDAW/C/2009/WP.1/R (2008) [hereinafter General Recommendation No. 26 on Women Migrant Workers].

abusive practices in recruitment and to ensure migrant workers' access to appropriate and effective remedies, including compensation.⁶³ Though the 2014 Protocol has not yet been ratified by countries in Asia, the Protocol's provisions on recruitment inform states' obligations to prevent forced labor under the Forced Labor Convention, which has been widely ratified across Asia and globally.⁶⁴ The 2014 ILO Forced Labour Recommendation provides additional guidance on governance measures necessary to prevent forced labor, such as requiring that workers receive detailed transparent contracts during recruitment to prevent deception or misinformation.⁶⁵ Addressing deception in migrant worker recruitment is also key to states' compliance with their obligations under the Palermo Protocol, in which trafficking is defined as, among other things, recruitment through deceptive means for the purpose of exploitation.⁶⁶

In its first General Comment on the Migrant Workers Convention, the U.N. Committee on Migrant Workers made clear that recruitment regulation is not the sole responsibility of origin countries.⁶⁷ According to the Committee, "[s]tates of employment share the responsibility for regulating and monitoring recruitment and placement processes,"⁶⁸ which includes ensuring that all recruitment agencies in the country of employment are subject to authorization, approval, and supervision by public authorities.⁶⁹ Recruitment governance obligations under a number of ILO instruments similarly extend to countries of employment.⁷⁰

63. Protocol of 2014 to the Forced Labour Convention, 1930, arts. 2(d), 4(1) June 11, 2014, INT'L LABOUR ORG. Protocol P029; *see generally* Private Employment Agencies Convention, *supra* note 10; Private Employment Agencies Recommendation, June 19, 1997, INT'L LABOUR ORG. R. 188 (describing state obligations regarding supervision of private recruitment agencies).

64. Forced Labour Convention, *supra* note 44; *see also* *Ratifications of C029 - Forced Labour Convention*, 1930, INT'L LABOUR ORG. (NO. 29), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312174 [<https://perma.cc/2XA8-8V57>] (last visited May 1, 2016) [hereinafter *Ratifications of the Forced Labour Convention*] (showing date of ratification of the Forced Labour Convention by each country).

65. Forced Labour (Supplementary Measures) Recommendation, 2014, art. 8 June 11, 2014, INT'L LABOUR ORG. R. 203; *see* Workers Convention, *supra* note 62, arts. 33, 37 (States' obligations extend further to ensure that all prospective, current, and returned migrant workers not only receive and understand their employment contract, but also receive a range of further key information related to safe migration); *see also* The Convention on the Elimination of All Forms of Discrimination Against Women, art. 14 Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW] (requiring states parties to provide training and other protective measures in order to fulfill women migrant workers' fundamental human rights); General Recommendation No. 26 on Women Migrant Workers, *supra* note 62, para. 24 (requiring countries of origin to provide training and other services to fulfill obligations to women in rural areas).

66. The Palermo Protocol, *supra* note 45, art. 3(a), defines trafficking as "the recruitment . . . of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation."

67. General Comment No. 1 on Migrant Domestic Workers, *supra* note 61, para. 31.

68. *Id.*

69. *Id.* para. 34.

70. *See supra* Part II.A (explaining that ILO's Forced Labor Recommendation sets out state governance measures to prevent forced labor and that ILO's Protocol to the Forced Labor Convention requires states to prevent abusive recruitment practices).

Many obligations, particularly those related to the prevention of forced labor⁷¹ and human trafficking,⁷² are not confined to migrant worker countries of origin and employment, but apply to states globally. These responsibilities are directly enlivened when states operate as procurers of goods and services, and regulators of TNCs operating within their jurisdiction.⁷³ Responsibilities regarding the promotion of fair recruitment may also be incidental to states' commitments to promoting sustainable development.⁷⁴

B. The Responsibility of Business to Respect Human Rights

The responsibility for protecting human rights has long been assumed to be the duty of the state.⁷⁵ More recently, though, discussion has shifted to focus on the human rights responsibilities of corporations and how such duties and/or responsibilities might be allocated between state and non-state actors. The private sector is a key actor in the field of transnational migrant worker recruitment. The recruitment industry has proven stubbornly resistant to traditional state-centric "command control" regulatory techniques⁷⁶ and, despite attempts by a number of governments to take measures such as limiting or prohibiting recruitment fees or licensing recruitment agencies, effective enforcement has been lacking.⁷⁷

The adoption by the U.N. Human Rights Council in 2011 of the Guiding Principles on Business and Human Rights⁷⁸ signaled acceptance of the notion of a corporate

71. To date, 178 countries have ratified the Forced Labour Convention. *Ratifications of the Forced Labour Convention*, *supra* note 64.

72. To date, there are 169 state parties to the Palermo Protocol. *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-b&chapter=18&clang=_en [<https://perma.cc/JVX9-RVW4>] (last updated January 8, 2016, 7:31 AM).

73. *See infra* Part IV.

74. *See* Farbenblum, *supra* note 31, at 182 (discussing the economic impact of abusive recruitment practices); *see also* U.N. GAOR, 70th Sess., Transforming Our World: The 2030 Agenda for Sustainable Development [at 8.7, 8.8, 12.7, 17.16], U.N. Doc. A/RES/70/1 (Sept. 25, 2015) (focusing on the shared responsibility of states and companies to work together to develop sustainable practices that will amongst other things, protect migrant workers, eradicate forced labor, and promote sustainable public procurement policies).

75. Justine Nolan, *From Principles to Practice: Implementing Corporate Responsibility for Human Rights*, in *THE BUSINESS AND HUMAN RIGHTS LANDSCAPE* 387, 387 (J Martin & K Bravo eds., 2015).

76. Command and control regulation might be loosely defined as direct regulation of a company/industry activity by legislation that directs what is, and is not, permitted; its reach is commonly territorially limited. CHARLES H. KOCH, JR. ET AL., *ADMINISTRATIVE LAW: CASES AND MATERIALS* 22–24 (6d ed. 2010).

77. *See infra* text accompanying note 180–81 (observing that monitoring and enforcement mechanisms for recruitment regulations are lacking globally).

78. John G. Ruggie (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: Implementing the United Nations "Protect, Respect and Remedy" Framework: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter *Guiding Principles*] (operationalizing the 2008 "Protect, Respect and Remedy" Framework for Business and Human Rights, also developed by the Special Representative); *see also* John G. Ruggie (Special Representative of the Secretary-

responsibility to respect human rights that exists independently of, and as a complement to, states' duties to protect human rights.⁷⁹ While primarily a negative responsibility—to refrain from harm—the duty to respect also includes proactive, positive responsibilities. The Guiding Principles, for example, asks companies to conduct due diligence concerning “adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships.”⁸⁰ The opaque nature of the migrant worker recruitment chain means that the parameters of such due diligence are not clearly defined; the transnational employer at the top of the supply chain may argue that it is not “directly linked” to a recruitment process that involves layers of agents and subagents, even though these agents recruit workers for its business operations. There is no legal obligation in the Guiding Principles for any company to either conduct such due diligence or to publish its results.⁸¹

The OECD Guidelines for Multinational Enterprises are another “soft law” initiative that enlists the cooperation of governments in encouraging businesses to develop rights-respecting policies and practices.⁸² The OECD Guidelines are “recommendations addressed by governments to multinational enterprises operating in or from adhering countries.”⁸³ First launched in 1976 with only a passing reference to human rights, they were updated in 2011 to incorporate the tenets of the Guiding Principles.⁸⁴ The OECD Guidelines are voluntary in their application, and multinational enterprises are invited to adopt the guidelines in their management systems and incorporate them into their corporate operations.⁸⁵

While both the U.N. and OECD initiatives are broad ranging and potentially applicable to all types of business operations, there has also been some recent interest in developing sector specific guidelines that set forth minimum requirements with respect to recruitment, living and working conditions, and general treatment of migrant workers—The Dhaka Principles for Migration with Dignity is one such initiative.⁸⁶ It

General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. A/HRC/8/5 (April 7, 2008).

79. See JOHN G. RUGGIE, THE UN “PROTECT, RESPECT AND REMEDY” FRAMEWORK FOR BUSINESS AND HUMAN RIGHTS (Sept. 2010), <https://business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-protect-respect-remedy-framework.pdf> [<https://perma.cc/DK9Z-6WCJ>] (commenting that the corporate responsibility to respect rights is a notion that has been gradually emerging and is “acknowledged in virtually every voluntary and soft-law instrument related to corporate responsibility, and now affirmed by the Human Rights Council itself”).

80. *Guiding Principles*, *supra* note 78, at 17.

81. *Id.* at 5.

82. ORG. FOR ECONOMIC COOPERATION AND DEV., GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011), <http://www.oecd.org/daf/inv/mne/48004323.pdf> [<https://perma.cc/FVT4-FYJ7>] [hereinafter OECD GUIDELINES].

83. *Id.* at 3. OECD counts among its members the European Union, the United States of America, the U.A.E., Indonesia, and Qatar. *Id.* at 91.

84. See *id.* at 3–4 (discussing the May 2011 amendments to the OECD Guidelines).

85. *Id.* at 13.

86. Inst. for Human Rights and Bus., *The Dhaka Principles for Migration with Dignity* (Dec. 18, 2012), <http://www.dhaka-principles.org/pdf/2012-12-18-Dhaka-Principles-Long-Version-English.pdf> [<https://perma.cc/5AZJ-UBY8>] [hereinafter *Dhaka Principles*].

acknowledges the necessity of a multi-stakeholder approach to temporary labor migration that involves businesses, governments, civil society, and inter-governmental organizations coming together to address responsibilities towards migrant workers.⁸⁷

The Dhaka Principles are based on international human rights standards, the Guiding Principles, and core ILO standards.⁸⁸ They are a set of human-rights-based principles intended to enhance respect for the rights of migrant workers from the moment of recruitment, during employment, and through to further employment or safe return to home countries.⁸⁹ They are intended for voluntary use by all industry sectors and in any country where workers migrate either inwards or outwards.⁹⁰ While the Dhaka Principles were launched in 2012,⁹¹ it is difficult to assess their uptake and impact due in part to the limited transparency and reporting from companies involved in recruitment. As a sector-specific guideline, it is potentially useful in highlighting the particular rights that are most relevant to migrant workers and on the role businesses can play in securing such rights. However, the Dhaka Principles are necessarily broad and lack specificity around implementation. Principle 9, for example, stipulates that “[m]igrant workers should have access to judicial remedy and to credible grievance mechanisms, without fear of recrimination or dismissal.”⁹² However, no further guidance is given as to what these grievance mechanisms might look like, or how workers’ rights would be enforced and monitored. Although the Dhaka Principles are a useful guide and highlight the need for special measures to be adopted toward the often-vulnerable migrant worker population, they need a corollary system of monitoring, enforcement, and transparency to ensure compliance on the part of recruiters and businesses.

III. LEVERAGE TO EFFECT CHANGE: THE ROLES OF BUSINESS, STATES, AND CIVIL SOCIETY IN DRIVING FAIR RECRUITMENT

Responsibilities for protecting the rights of migrant workers and curbing abusive recruitment practices are distributed across states—including migrant worker countries of origin and destination, and states, globally—and businesses, including recruitment agencies, employers, suppliers, and TNCs at the top of supply chains. In reality, though, the complexity of transnational migrant worker recruitment makes it difficult for any single business or state actor to fulfill its human rights responsibilities and transform migrant worker recruitment practices. It is becoming increasingly clear that

87. *See id.* (“The Dhaka Principles have been developed over the past two years in consultation with a range of stakeholders including the International Trade Union Confederation, the ILO, global companies including recruitment agencies, grassroots and international NGOs and a number of governments.”).

88. *Id.*

89. *Id.*

90. *See id.* at 3 (“The Dhaka Principles were developed by the Institute for Human Rights in consultation with a range of stakeholders from business, government, trade unions and civil society and are intended to be a reference point for all actors involved in the worker migration process.”).

91. *Id.*

92. *Dhaka Principles, supra* note 86, at 1, Principle 9.

recruitment practices cannot be systemically altered absent a multi-stakeholder approach.

This section addresses the question of transformative steps that each actor can take to create the “wholesale shift” to the fair recruitment system⁹³ demanded by human rights responsibilities. It does so through the concept of “leverage.” This concept is drawn in part from the use of the term in the Guiding Principles, in which it denotes an “ability to effect change in the wrongful practices of an entity that causes harm.”⁹⁴ Leverage is distinct from control and need not be demonstrated by explicit coordination of other supply chain actors (for example, via a legal relationship); rather, in this case, it refers to the ability of one stakeholder to affect another’s practices via its strategic position in the chain.⁹⁵ Though leverage is a loose concept, its benefit lies in its applicability to all actors involved in the migrant worker recruitment process, including states and businesses (from the TNC at the top to the smaller recruitment agencies or labor brokers at the bottom).

A. *The Role of Business*

There are a number of ways in which businesses can exert leverage to transform recruitment practices, as illustrated by a range of initiatives recently instituted across the private sector. This section of the Article considers initiatives by individual TNCs, quasi-government procurers of goods and services, and business and recruitment industry peak bodies and coalitions. The development and implementation of these private guidelines and regulatory methods that do not rely on the role of the state as the sole “human rights protector” aim to encourage corporate compliance with international human rights standards; such compliance also serves to protect the brand reputation of compliant companies.⁹⁶ Such initiatives can drive a change in corporate culture to recognize that workers, wherever they are located, must be treated with dignity and respect.

93. Crépeau, *supra* note 18, para. 47.

94. *Guiding Principles*, *supra* note 78, para. 19.

95. *Id.*

96. The rise of private voluntary initiatives aimed at regulating corporate adherence to human rights has a rich but relatively brief history. It is well-documented and includes prominent examples such as the Sullivan Principles that regulated business conduct in South Africa during the apartheid era, and more recent initiatives such as the Fair Labor Association and the Forestry Stewardship Council. *See, e.g.*, Dara O’Rourke, *Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring*, 31 POL’Y STUD. J. 1, 10–11 (2003) (describing the purpose of the Fair Labor Association); ELLIOT J. SCHRAGE, PROMOTING INTERNATIONAL WORKER RIGHTS THROUGH PRIVATE VOLUNTARY INITIATIVES: PUBLIC RELATIONS OR PUBLIC POLICY? 9 (2004) (discussing Starbucks’ use of fair trade coffee to boost its brand reputation); David Vogel, *Private Global Business Regulation*, 11 ANN. REV. POL. SCI. 261, 269 (2008) (noting that many business managers believe “there are business benefits associated with improving their social and environmental practices and in agreeing to voluntary regulatory standards”).

1. Individual TNCs

In our view, one of the primary focuses of reform should be persuading powerful TNCs at the top of product or service supply chains to use their leverage to drive compliance by recruiters lower in the chain.⁹⁷ As argued by Gordon:

It is the firm at the top of the chain that makes the decision to structure its enterprise through subcontracting relationships, usually because such a structure allows the firm to lower its costs and risks. These savings are largely the result of the firm's transfer of risk and legal liability for employment to its subcontractors, the lower wages and costs it achieves by putting jobs out to bid, and its release from obligations to pay benefits.⁹⁸

The leverage of TNCs to shift the recruitment market is exemplified by two recent examples whereby powerful companies in the technology sector sought to regulate and redress wrongs in their migrant worker recruitment process. Each of these initiatives seeks to address some of the abusive practices identified earlier—the improper payment of fees, deception in the recruitment process, and non-compliance with pre-departure responsibilities.

In November 2014, Hewlett Packard (HP) launched its Foreign Migrant Worker Standard (the Standard).⁹⁹ The Standard recognizes that layers of agents and subagents tend to increase the risk of abusive practices. Accordingly, the Standard requires employment contracts for foreign migrant workers to be signed directly with HP's supplier, and not with a recruitment agent.¹⁰⁰ While the Standard does not prohibit the use of recruitment agents, it notes that suppliers "should seek, where possible, to minimize the use of recruitment agents."¹⁰¹ The Standard also prohibits the confiscation of passports, the payment of any "recruitment fee," and requires suppliers to pay workers directly.¹⁰² HP has an extensive international supply chain, and such changes have the potential to have a ripple effect throughout the technology sector.¹⁰³ By encouraging, if not requiring, "direct hire" of migrant workers within the Standard, HP is attempting to thwart some of the harms that emanate from the multi-layered recruitment process.¹⁰⁴ The Standard also recognizes that preventing deception in recruitment is central to the prevention of human trafficking and forced labor.¹⁰⁵

97. See GORDON, *supra* note 8, at 3 (discussing incentive initiatives of countries of employment that focus on encouraging TNCs to regulate within their supply chain).

98. *Id.* at 19.

99. See generally *HP Supply Chain Foreign Migrant Worker Standard*, HEWLETT PACKARD, (Sept. 1, 2015), <http://h20195.www2.hp.com/V2/getpdf.aspx/c04484646.pdf> [<https://perma.cc/29ZC-GY5Z>] [hereinafter *The Standard*].

100. *Id.* at 3.

101. *Id.*

102. *Id.* at 4.

103. HEWLETT PACKARD, *HP 2011 Global Citizenship Report 91* (2001) http://www.hp.com/hpinfo/globalcitizenship/media/files/hp_fy11_gcr_supply_chain_responsibility.pdf [<https://perma.cc/5SMT-N6MV>].

104. *The Standard*, *supra* note 99, at 3 (inferring implicitly the harm of recruitment agents).

105. See *id.* at 2 ("[T]here shall be no deception, fraud, or coercion in the recruitment, placement,

Apple's stand against recruitment fees is another example of the extent to which commercial leverage can be used to create change. It is widely accepted that migrant worker recruitment fees are substantially driven by employers failing to pay for the costs of recruitment, and by further fees and bribes exacted by employers and placement agents in destination countries.¹⁰⁶ The imposition of recruitment fees and the involvement of multiple layers of actors in the recruitment process create obstacles to establishing fair recruitment practices and must be addressed in part by restructuring supply chain business models so that employers and TNCs at the top of the chain expect to bear the legitimate costs of migrant worker recruitment. This concern ultimately needs to be addressed by changing TNC and supplier business practices such that the costs of recruitment are borne by the end user and not the migrant worker.¹⁰⁷

Apple's Supplier Responsibility 2009 Progress Report (the Report) highlighted that the recruitment of migrant workers by its suppliers posed a serious challenge to the maintenance of the company's labor standards.¹⁰⁸ The Report noted that Apple's suppliers used multiple third-party labor agencies to source workers from other countries and that it was common practice to charge workers a recruitment fee.¹⁰⁹ In response, Apple updated its Supplier Code of Conduct and issued a standard for Prevention of Involuntary Labor and Human Trafficking.¹¹⁰ This standard initially limited recruitment fees to the equivalent of one month's net wages.¹¹¹ However, in 2014 Apple announced that, starting in 2015, no worker employed on an Apple line could be charged any recruitment fees.¹¹² Since 2008, Apple has required its suppliers to reimburse what it regards as excess recruitment fees.¹¹³ In 2014, this requirement resulted in Apple's suppliers reimbursing US\$3.96 million in excess fees to over 4,500 foreign contractors.¹¹⁴ This brought US\$20.96 million of total reimbursements to over 30,000 foreign contract workers between 2008 and 2014.¹¹⁵

These two examples illustrate the potential for a TNC to use its leverage to regulate the conduct of its suppliers and redress harms already suffered by migrant workers during the recruitment process. However, in each of these examples, the financial burden of improving the recruitment process principally fell on the TNC's

transportation or management of foreign migrant workers.”).

106. See, e.g., Urbina, *supra* note 4 (discussing how ships recruit migrant labor in Southeast Asia).

107. At the same time, there is much to be gained from transnational collaboration among origin countries to ban recruitment fees and create a level playing field in relation to recruitment costs to employers. See *infra* Part III.B.2 (explaining that countries of origin have particular leverage to enable the operationalization of state and industry governance of recruitment practices).

108. SUPPLIER RESPONSIBILITY: 2009 PROGRESS REPORT, APPLE INC. 6 (2009), http://images.apple.com/supplier-responsibility/pdf/Apple_SR_2009_Progress_Report.pdf [<https://perma.cc/FWH4-PWTM>] [hereinafter APPLE PROGRESS REPORT].

109. *Id.* at 6–7.

110. APPLE INC., SUPPLIER CODE OF CONDUCT 2 (2016), http://images.apple.com/supplier-responsibility/pdf/supplier_code_of_conduct.pdf [<https://perma.cc/5TP6-PMCG>].

111. APPLE PROGRESS REPORT, *supra* note 108, at 7.

112. SUPPLIER RESPONSIBILITY: 2014 PROGRESS REPORT, APPLE INC. 15 (2014), http://www.apple.com/my/supplier-responsibility/pdf/Apple_SR_2014_Progress_Report.pdf [<https://perma.cc/YG8V-UJKU>].

113. *Id.*

114. SUPPLIER RESPONSIBILITY 2015 PROGRESS REPORT, APPLE INC. 18 (2015), https://www.apple.com/my/supplier-responsibility/pdf/Apple_SR_2015_Progress_Report.pdf [<https://perma.cc/YYL7-3ZT5>].

115. *Id.*

suppliers, and it is not clear if the TNCs provided additional funding for their suppliers. The “carrot” to comply is the promise of continued business with the multinational, and the “stick” is that of being cast aside and losing a lucrative contract. For these practices to be sustainable, TNCs must take into account the costs of compliance by providing financial incentives to their suppliers. The same is true of government procurers of goods and services that prohibit fee payments by migrant workers in their supply chains, but do not necessarily incorporate into the tendering process the costs of compliance with this requirement and the auditing and other measures it entails, making compliant suppliers less financially competitive.¹¹⁶ As a result, businesses (and states) at the top of a supply chain will likely need to offer suppliers a longer-term commitment to using their goods and services if they expect suppliers to invest resources in complying with fair recruitment standards.

Employers can also be more transparent about absorbing recruitment costs themselves. The Leadership Group for Responsible Recruitment, a new initiative launched in May 2016 by five companies—The Coca-Cola Company, HP Inc., Hewlett Packard Enterprise, IKEA, and Unilever—declares commitment to the “‘Employer Pays Principle,’ which states that the costs of recruitment should be borne not by the worker but by the employer.”¹¹⁷ As the details of the new initiative are not yet fully formulated, it is not clear whether the “Employer Pays Principle” applies directly to the transnational brand or falls onto its suppliers, but the general principle stands—workers should not have to pay for a job. This initiative is also supported by other stakeholders such as the Institute for Human Rights and Business, the Interfaith Center on Corporate Responsibility, the International Organization for Migration, and Verité, and broadly aims to champion the “Employer Pays Principle” within a diversity of industries, calling for similar commitments from other companies to drive positive change across all sectors.¹¹⁸

2. Quasi-Government Procurers

A different model to standards imposed by individual TNCs is the establishment of self-regulating regional organizations and standards, such as the Qatar Foundation’s Mandatory Standards of Migrant Workers’ Welfare for Contractors and Subcontractors.¹¹⁹ The Qatar Foundation is a quasi-governmental organization, and the

116. See Farbenblum, *supra* note 31, at 177–78 n.152 (explaining imperatives for state and TNC procurers to incorporate recruitment costs into tendering processes).

117. *Introducing the Leadership Group for Responsible Recruitment*, INST. FOR HUMAN RIGHTS AND BUS. (May 04, 2016), <http://www.ihrb.org/news-events/news-events/the-leadership-group-responsible-recruitment/> [https://perma.cc/J867-3DDV].

118. *Id.*

119. QATAR FOUNDATION FOR EDUCATION, SCIENCE AND COMMUNITY DEVELOPMENT, MANDATORY STANDARDS OF MIGRANT WORKERS’ WELFARE FOR CONTRACTORS AND SUBCONTRACTORS 10 (2013), <http://www.qf.org.qa/app/media/2379> [https://perma.cc/78EL-9GJT] [hereinafter MANDATORY STANDARDS]. The Qatar Foundation is a semi-private chartered non-profit organization that is supported by a significant government endowment. See QATAR FOUNDATION, ABOUT QATAR FOUNDATION, <http://www.qf.org.qa/about/about> [https://perma.cc/5CE3-QC9B] (last visited Aug. 14, 2016). Since 2006, the Qatar Foundation has launched more than \$20bn worth of construction projects. Elizabeth Bains, *Qatar Foundation*, MEED MIDDLE EAST BUSINESS INTELLIGENCE (Feb. 12, 2012), <http://www.meed.com/>

Mandatory Standards are in part a response to the increased public scrutiny that has been placed on Qatar's labor practices as it continues its rapid building and development expansion plans in preparation for the FIFA World Cup in 2022.¹²⁰ The QF Mandatory Standards are not designed as general reference guidelines but are narrowly focused so as to be applicable only to "[w]orkers of [Qatar Foundation] Contractors and Sub-Contractors."¹²¹ Compliance with the Mandatory Standards is expected of all contractors and subcontractors with the Qatar Foundation. Provisions regarding recruitment stipulate that "[w]orkers shall not be charged any Recruitment and Processing Fees or Placement Fees."¹²² Further, the Mandatory Standards require that Qatar Foundation contractors and subcontractors can only utilize the service of recruitment agencies that are registered and licensed in the jurisdiction in which they operate¹²³ and that there is a due diligence obligation on the contractor to ensure that those recruitment agencies will not charge workers fees.¹²⁴

In 2013, another Qatari quasi-governmental organization known as the Supreme Committee for Delivery and Legacy launched its Workers' Charter.¹²⁵ The Charter requires all potential contractors and subcontractors to comply with its principles, as well as relevant Qatari laws for projects related to the World Cup.¹²⁶ These standards, if enforced, can lead to improved conditions for workers on certain projects. However, they are no substitute for accompanying state-led regulation and enforcement to ensure the protection of migrant workers' rights both during recruitment and employment.

The Mandatory Standards, like the examples above concerning HP and Apple, largely place the responsibility for establishing and enforcing ethical recruitment practices on contractors and subcontractors. Here, the Qatar Foundation is using its leverage to influence the behavior of its labor suppliers. In all three cases some responsibility remains with the entity at the top of the supply chain to conduct adequate due diligence to ensure its mandate is followed.

3. Industry Peak Bodies

Industry-led initiatives, such as the Global Business Coalition Against Trafficking (GBCAT),¹²⁷ the code adopted by the International Confederation of Private Employment Agencies (CIETT),¹²⁸ and the International Organization for Migration's

countries/qatar/qatar-foundation/3123845.article [https://perma.cc/AJB5-8ZHX].

120. THE DARK SIDE OF MIGRATION, *supra* note 5, at 82.

121. MANDATORY STANDARDS, *supra* note 119, para. 5.3.

122. *Id.* para. 11.1.1.

123. *Id.* para. 11.2.1.

124. *Id.* para. 11.2.3.

125. SUPREME COMM. FOR DELIVERY AND LEGACY, SC WORKERS' WELFARE STANDARDS 2 (1st ed. 2013), <http://www.sportingintelligence.com/wp-content/uploads/2013/11/SC-WORKERS-WELFARE-STANDARDS-EDITION-1-2.pdf> [https://perma.cc/F8B9-F6LC].

126. *Id.*

127. GLOBAL BUSINESS COALITION AGAINST TRAFFICKING, <http://www.gbcat.org> [https://perma.cc/NR7L-T28D] (last visited May 1, 2016).

128. INT'L CONFEDERATION OF PRIVATE EMP'T SERVICES, CIETT CODE OF CONDUCT 1, http://www.ciett.org/uploads/media/CiETT_Code_of_Conduct.pdf [https://perma.cc/V4ZN-84UR] (last visited May 1, 2016) [hereinafter CIETT CODE].

(IOM) International Recruitment Integrity System (IRIS) framework,¹²⁹ are each attempts to mobilize businesses to focus on the particular vulnerabilities of migrant workers and the potential harms that can result from harmful recruitment and employment practices. The IOM, for example, is developing and promoting IRIS as an “international voluntary ‘ethical recruitment’ framework.”¹³⁰ According to the IOM, the framework aims to create a public-private alliance of governments, employers, recruiters and other partners committed to ethical recruitment. IRIS aims to “assist employers in identifying recruitment intermediaries who share their commitment to fair recruitment and be based on international labor standards and industry best practices.”¹³¹ IOM developed an IRIS Code of Conduct with broadly framed principles including respect for laws and rights at work and prohibition of recruitment fees;¹³² however, progress toward operationalizing these general principles has been slow. The lack of detail in the standards combined with a lack of clarity about how they would be enforced makes it difficult to assess the potential of this initiative at this stage.

Within the recruitment industry itself, CIETT adopted a new code¹³³ in 2015 that includes a provision that “[p]rivate employment services shall take all appropriate measures to ensure that workers have access to remedy, as provided by law, and to credible grievance mechanisms, without fear of recrimination or discrimination.”¹³⁴ As the trade association representing recruitment agencies and other private employment services at the global level, CIETT is playing a self-regulatory role in guiding its members—national associations of private employment services or international employment and recruitment companies—to improve recruitment practices that would ideally complement statutory regulation. CIETT has developed a complaints procedure that would allow it to hear and investigate complaints against any of its members, and the penalty imposed may result in suspension from the organization.¹³⁵ For the most part, however, CIETT members are larger firms that focus on recruitment of higher-wage migrants and have limited involvement in the recruitment of low-wage migrant workers.

129. INT’L ORG. FOR MIGRATION, INT’L RECRUITMENT INTEGRITY SYSTEM, <http://iris.iom.int/about-iris> [<https://perma.cc/SC5S-FK4D>] (last visited May 1, 2016) [hereinafter IRIS].

130. *Id.*

131. INT’L RECRUITMENT INTEGRITY SYSTEM, EXPERT MEETING REPORT 1 (2014), [http://iris.iom.int/sites/default/files/document/IRIS Expert Meeting Report-F.pdf](http://iris.iom.int/sites/default/files/document/IRIS%20Expert%20Meeting%20Report-F.pdf) [<https://perma.cc/M3CF-PESP>].

132. INT’L RECRUITMENT INTEGRITY SYSTEM, *IRIS Stands For . . .*, <https://iris.iom.int/iris-stands-...> [<https://perma.cc/LLS5-7SZF>] (last visited Oct. 10, 2016).

133. CIETT CODE, *supra* note 128.

134. *Id.* at Principle 10.

135. *See id.* at 4–5 (“Complaints must relate to a Ciett direct member’s activities related to employment and recruitment policy and/or practices. . . . Complaints may relate to perceived violation of the Ciett Code of Conduct; any formally documented policies, guidelines or initiatives developed by a Ciett member; any applicable human rights, labour laws and regulations; and/or perceived contravention of generally accepted recruiting and placement practices If the Quality Standards and Compliance Officer determines that there has been a violation of the Ciett Code of Conduct, and that such a violation is sufficiently grave to warrant suspension of membership or expulsion, it shall refer the matter, after having consulted the Ciett Board, to the Ciett General Assembly with a recommendation as to an appropriate sanction.”).

The end goal here is a paradigm shift that affects the way companies, governments, and society view this issue, with state regulatory efforts being viewed as part of the solution, but not the only solution. Companies, in particular global transnational companies, are being asked to play a significant role in responding to human rights challenges. Although 30 to 40 years ago very few companies acknowledged any affirmative obligation to address human rights standards, this concept is no longer anathema to many companies.¹³⁶ For many (but not all) companies, the question is no longer whether it should address human rights issues but rather how it should do so, at what cost, and with whom it should collaborate in addressing the problems that exist. These questions enable a company to then use its leverage to ensure greater respect for workers' rights in its supply chain, beginning at the point of worker recruitment.

B. The Role of States

1. States as Influencers of Supply Chains

States will always have a critical role to play in compelling or incentivizing businesses at the top and middle of a goods or services supply chain to ensure fair recruitment by all entities within the chain. This is because any recruitment transformation by TNCs will take time and will be imperfect, and because many other businesses that benefit from migrant labor lack intrinsic motivation to demand fair recruitment practices within their supply chain.¹³⁷ This may be the case, for example, if they are not part of a transnational supply chain or are part of an industry that is not subject to public scrutiny.

One way in which countries of migrant worker employment can influence supply chains is through the establishment of recruitment restrictions and liabilities imposed on employers, in addition to directly regulating recruitment/placement agencies based in the country of employment (discussed below in Part (IV)(2)(B)). Some countries of employment have imposed recruitment restrictions on employers in bilateral memoranda of understanding with migrant worker countries of origin.¹³⁸ However, without dedicated enforcement by the country of employment these agreements have limited practical impact.¹³⁹ In contrast, other countries of employment have introduced laws which establish joint liability regimes, making employers and other beneficiaries of migrant labor legally responsible for misconduct in recruitment within their supply

136. See, e.g., RICHARD M. LOCKE, *THE PROMISE AND LIMITS OF PRIVATE POWER* 4–10 (2013) (profiling companies that have embraced human rights); see also U.N. GLOBAL COMPACT, <https://unglobalcompact.org> [<https://perma.cc/44RZ-N7EZ>] (last visited Oct. 10, 2016) (demonstrating that a vast number of companies have, in theory, embraced the concept of human rights via their involvement with the compact).

137. See GORDAN, *supra* note 8, at 15 (explaining that actors at the top of the chain are excused from liability for abuses that occur lower down the chain).

138. See, e.g., IOM, *supra* note 7, at 60 (describing and citing agreements that Saudi Arabia has concluded with Indonesia (2014), Sri Lanka (2014) and the Philippines (2013)).

139. E.g., Piyasiri Wickramasekara, *Something Is Better than Nothing: Enhancing the Protection of Indian Migrant Workers Through Bilateral Agreements and Memoranda of Understanding* 25 (2012) (“In general, there is little evidence to show that the Indian Government has made any tangible measures following the signing of the MOUs [T]here is hardly any information to show that the MOU has made any difference in the country of destination.”).

chain.¹⁴⁰ The Canadian province of Manitoba has, for example, enacted a law that prohibits recruiters from charging fees to workers and prohibits employers from passing along any recruitment costs to their migrant worker employees.¹⁴¹ The Manitoba law also requires employers to use only government-registered recruitment agencies, and employers can be compelled to reimburse workers for recruitment charges levied by any of their suppliers, including labor hire companies.¹⁴² Similar laws have since been enacted by a range of other Canadian provinces.¹⁴³

The Netherlands has adopted a somewhat different public-private hybrid approach to establishing employer accountability for the conduct of recruiters and other subagents.¹⁴⁴ Under Dutch law, all entities higher in the supply chain are responsible for a staffing agency or subcontractor's failure to pay minimum wages and other benefits.¹⁴⁵ Alongside the law, the non-government organization (NGO) Stichting Normering Arbeid (SNA) (Foundation for Employment Standards) offers a voluntary certification program for employment agencies based on regular audits for compliance with standard worker protections.¹⁴⁶ In a manner that bridges the public and private, a firm that contracts with a certified labor provider (and the firms above it in the subcontracting chain) is protected against worker claims under Dutch law, and is eligible for mitigated penalties from the government.¹⁴⁷ Despite the voluntary nature of SNA certification, firms have begun to demand certification of all agencies in their subcontracting chains.¹⁴⁸

Some countries in the Middle East have also begun to directly regulate recruitment agencies within their countries, mostly by implementing licensing schemes for agencies sourcing foreign workers. For example, specific laws on the licensing of private employment agencies (e.g., Jordan and Lebanon), references in labor codes to private employment agencies supplemented by ministerial resolutions or decrees establishing licensing requirements (e.g., Qatar and the United Arab Emirates (U.A.E.)), and in some countries, further sector-specific labor laws particularly with regard to sectors that are heavily reliant on foreign labor such as domestic work and the garment industry (e.g., Jordan).¹⁴⁹ In 2016, the Government of Dubai launched the Taqdeer Award in an attempt to incentivize companies to improve employment practices.¹⁵⁰ The Award Program targets Dubai-based companies in the construction sector; and the government ranks the companies based on their labor policies, health

140. See GORDON, *supra* note 8, at 22–32 (providing an overview of a number of these schemes).

141. Worker Recruitment and Protection Act, S.M. 2008, c 23 (Can.).

142. *Id.*

143. FAY FARADAY, PROFITING FROM THE PRECARIOUS: HOW RECRUITMENT PRACTICES EXPLOIT MIGRANT WORKERS 75 (Metcalf Foundation, 2014).

144. See GORDON, *supra* note 8, at 26–28 (discussing the Dutch framework).

145. *Id.* at 27.

146. *Id.* at 27–28; see also *Labour Standards Register*, STICHTING NORMERING ARBEID, <http://www.normeringarbeid.nl/en/default.aspx> [<https://perma.cc/6WBR-L4HJ>] (last visited May 1, 2016).

147. GORDON, *supra* note 8, at 28.

148. *Id.*

149. See generally ANDREES ET AL., *supra* note 58, at 63–65.

150. *Award Aims and Objectives*, GOV'T OF DUBAI: TAQDEER AWARD, http://www.taqdeeraward.ae/theaward/Aims_Objectives [<https://perma.cc/J29E-XMUF>] (last visited May 3, 2016).

and safety, recruitment, wages, and facilities.¹⁵¹ Companies receiving a high rating will then be awarded priority in government projects.¹⁵²

State initiatives to influence supply chains have not been confined to migrant worker countries of employment. At a global level, states are beginning to exert leverage over the recruitment process in countries of origin via their regulation of TNCs within their own jurisdiction, for example, by imposing increased transparency and reporting standards on corporate supply chains.¹⁵³ Some states are also utilizing their economic leverage to impose recruitment standards in the supply chains of goods and services that the state itself procures.¹⁵⁴

To date, states' regulation of TNCs with respect to recruitment practices has largely focused on imposing increased reporting requirements and disclosure on TNCs regarding the labor practices in their supply chains. In 2015, the United Kingdom passed the Modern Slavery Act, which mandates transparency in supply chains.¹⁵⁵ The Act requires companies¹⁵⁶ to prepare an annual statement describing steps that they have taken to ensure that slavery and human trafficking is not present in their operations or in any of their supply chains, and to publish this information on the company's website.¹⁵⁷ The statement may include information about the company's policies, due diligence processes, risks, performance indicators, and training relating to slavery and human trafficking.¹⁵⁸ If the company has not taken any such steps, it must issue a statement to that effect.¹⁵⁹ The scope of the disclosure obligation is opaque because the Act does not define "supply chain."¹⁶⁰ Furthermore, there are no financial or other penalties attached to non-compliance with the disclosure obligation; instead, the Act aims to harness the power of the consumer to demand and use information to help prevent slavery and exploitation.¹⁶¹ Early analysis of the first 75 statements published pursuant to the Act showed that only 29 percent complied with the Act's basic procedural requirements—that the statement is approved by the Board, signed by

151. *Id.*

152. *Id.*

153. *See, e.g.*, Modern Slavery Act 2015, c. 30, § 54 (UK) (U.K. regulation requiring TNCs to comply with certain reporting standards).

154. *See infra* text accompanying notes 167–69 (discussing U.S. regulations on supply chains).

155. Modern Slavery Act 2015, c.30, § 54 (UK).

156. *Id.* § 54(4),(2),(12) (stating that the disclosure obligation in § 54 applies to "commercial organisation[s]" which in turn are defined as bodies corporate (wherever incorporated) or partnerships (wherever formed) and which "carr[y] on business, or part of a business" in the United Kingdom (U.K.), and that the entity must supply goods or services (although there is no requirement that they be supplied in the U.K.) and have a total turnover greater than a prescribed amount (which at the time of writing has not yet been set)).

157. *See id.* § 54(4), (7) (requiring a statement of steps to reduce human trafficking, as well as posting requirements if an organization has a website). The Act applies to companies with total turnover above an amount to be determined by the Secretary of State. *Id.* § 54(2)(b). Regulations have set the turnover, or group turnover—that is, the total turnover of a company and its subsidiaries—to £36 million or more. Modern Slavery Act 2015 Regulations 2015 No. 1833 (UK).

158. Modern Slavery Act 2015, c.30, § 54(5) (UK).

159. *Id.* § 54(4)(b). The Act also provides for enforcement through injunction or specific performance. *Id.* § 54(11).

160. *See generally* Modern Slavery Act 2015, c. 30.

161. 28 Feb 2012, 541 Parl. Deb., H.C. (2012) 172 (U.K.), <http://www.publications.parliament.uk/pa/cm201212/cmhansrd/cm120228/debtext/120228-0002.htm#12022857000002> [<https://perma.cc/37KP-RQP4>].

a company director (or equivalent), and made available on the homepage of the company's website.¹⁶² Further, the analysis also disclosed that only nine statements covered the six content areas on which information may be included, such as organizational structure, company policies, and due diligence.¹⁶³ While it is still early, the analysis of the Act's impact thus far suggests that broadly framed reporting requirements that do not couple transparency with any penalty for non-compliance may not be the most effective mechanism for achieving transparency and accountability.

The Modern Slavery Act was modeled on, but is potentially broader than, California's Transparency in Supply Chains Act.¹⁶⁴ Since 2012, large retailers and manufacturers doing business in California have been required to disclose on their websites the extent to which the company engages in verification of product supply chains to address risks of slavery, forced labor, and human trafficking. Disclosures must describe steps taken, such as verifying product supply chains, auditing suppliers, and requiring direct suppliers to certify that materials comply with local laws regarding slavery and human trafficking.¹⁶⁵ There is no penalty for failing to take steps, only for failing to disclose whether or not a company engages in supply chain due diligence.¹⁶⁶ The Supply Chains Act does not address what constitutes appropriate due diligence.¹⁶⁷ The sanction for non-compliance is potential injunctive relief by the California State Attorney General,¹⁶⁸ meaning that companies will not face a monetary penalty for failure to disclose, but that they will receive an order from the Attorney General to take specific action.

While these legislative examples demonstrate how states can indirectly "regulate" or at least monitor abusive recruitment practices that may be indicative of forced labor or trafficking of migrant workers, such regulation also aims to harness the power of consumers to demand that businesses use their leverage to ensure greater respect for workers' rights. In August 2015, two separate lawsuits, one filed against Costco¹⁶⁹ and

162. *Register of Slavery and Human Trafficking Corporate Statements Released to Date to Comply with the UK Modern Slavery Act*, BUS. & HUMAN RIGHTS RESOURCE CENTRE AND CORE, https://business-humanrights.org/sites/default/files/documents/CORE%20BHRRC%20Analysis%20of%20Modern%20Slavery%20Statements%20FINAL_March2016.pdf [<https://perma.cc/9K82-TY6W>] (last visited May 1, 2016) [hereinafter *Corporate Statement Analysis*]; see also *UK Modern Slavery Act & Registry*, BUS. & HUMAN RIGHTS RES. CTR., <https://business-humanrights.org/en/uk-modern-slavery-act-registry> [<https://perma.cc/BH3A-MLND>] (last visited May 1, 2016) [hereinafter *Registry of Corporate Compliance Statements*] (listing and providing sources to company statements in compliance with the Modern Slavery Act).

163. *Corporate Statement Analysis*, *supra* note 162.

164. *Compare* Modern Slavery Act 2015, c. 30, with California Transparency in Supply Chains Act, CAL. CIV. CODE § 1714.43 (West, Westlaw through CH. 893 of 2016 Reg. Session) [hereinafter *Supply Chains Act*] (showing the extent of the Supply Chains Act). The scope of the Supply Chains Act is potentially limited by its reference to the "direct supply chain for tangible goods offered for sale." CAL. CIV. CODE § 1714.43(a)(1). In addition, the Supply Chains Act only applies to retail sellers or manufacturers *operating in California* with more than US\$100 million in worldwide gross receipts. *Id.*

165. Supply Chains Act, *supra* note 147, § 1714.43(c).

166. See *id.* § 1714.43 (explaining the requirements retail manufacturers and sellers must comply with while operating in California).

167. *Id.*

168. *Id.* § 1715.43(d).

169. See generally *Class Action Complaint, Sud v. Costco Wholesale Corp.*, No. 3:15-cv-03783 (N.D. Cal. Aug. 19, 2015), ECF No. 1.

the other against Nestlé,¹⁷⁰ alleged the use of slave labor in each company's supply chain. Both lawsuits were filed in California by consumers and separately accuse the companies of knowingly supporting a system of slave labor in their supply chain to import seafood products into the U.S. The lawsuit against Nestlé was dismissed in December 2015,¹⁷¹ and the Costco case was dismissed in January 2016.¹⁷² The lawsuits stemmed in part from the disclosure expectations set by the Supply Chains Act and the plaintiffs argued that the companies' uses of forced labor are inconsistent with their mandated disclosures.¹⁷³ Neither Costco nor Nestlé was accused of directly engaging in such practices; rather, the accusations concern supplier relationships with companies that are sourcing seafood from suppliers that do allegedly engage in such practices.¹⁷⁴ The reporting regulations established by California potentially enable public monitoring of abusive recruitment practices in supply chains and provide a mechanism for holding companies accountable both for what they say and what they do in their supply chains, including how their suppliers recruit their workers.¹⁷⁵

Another example from the United States highlights how states can use their leverage via public procurement regulations to require companies to probe their supply chains to investigate recruitment practices and working conditions.¹⁷⁶ Under U.S. procurement regulations, federal contractors who supply products on a list published by the Department of Labor must certify that they have made a good faith effort to determine whether forced or indentured child labor was used to produce the items listed.¹⁷⁷ Federal contractors providing supplies acquired or services to be performed outside of the United States with a value greater than US\$500,000 must provide a compliance plan and certification after completing due diligence that no contractor or subcontractor is engaged in human trafficking.¹⁷⁸

170. See generally Complaint for Violation of California Consumer Protection Laws, *Barber v. Nestlé USA Inc.*, No. 8:15-cv-1364 (C.D. Cal. filed Aug. 27, 2015).

171. Order Granting Defendants' Motion to Dismiss, *Barber v. Nestlé USA Inc.*, No. 8:15-cv-01364 (C.D. Cal. Dec. 9, 2015), ECF No. 39. The plaintiffs' allegation was not that Nestlé failed to comply with the Supply Chains Act; rather, they argued that Nestlé was obligated to make additional disclosures at the point of sale regarding the likelihood that a given can of its Fancy Feast product contained seafood sourced by forced labor. *Id.* at 2. Nestlé successfully argued that the claim was barred by the "safe harbor doctrine" because the California legislature had already considered the requisite disclosures that large companies with potential forced labor in their supply chains would need to make to consumers and elected not to require any further disclosures. *Id.* at 4.

172. Order on Motions to Dismiss, *Sud v. Costco Wholesale Corp.*, No. 15-cv-03783-JSW (N.D. Cal. Jan. 15, 2016), ECF No. 76.

173. *Sud v. Costco Wholesale Corp.*, No. 15-cv-03783-JSW, 2016 WL 192569, at *1 (N.D. Cal. Jan. 15, 2016); *Barber v. Nestlé USA, Inc.*, 154 F. Supp.3d 954, 956–57 (C.D. Cal. 2015).

174. *Costco*, 2016 WL 192569, at *1; Nestlé, 154 F. Supp.3d at 956–57.

175. See *Barber*, 154 F. Supp.3d at 962 (discussing the level of disclosure required by the California Legislature to adequately inform consumers).

176. U.S. DEP'T OF STATE, U.S. GOVERNMENT APPROACH ON BUSINESS AND HUMAN RIGHTS 14 (2013), <http://www.humanrights.gov/wp-content/uploads/2013/06/usg-approach-on-business-and-human-rights-updatedjune2013.pdf> [<https://perma.cc/C5N8-2PMG>].

177. *Id.*

178. Combating Trafficking in Persons, 48 C.F.R. § 52.222-50(h) (2015); see also Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, § 910, 130 Stat. 122, 239 (2016) (eliminating the "consumptive demand exception," a long-standing loophole in the prohibition against the importation into the United States of goods made with forced labor). Pursuant to the consumptive demand exception, companies have been able to import goods produced with forced labor if the "consumptive demand" for those

The exploitation of workers in global supply chains is one of the most significant reputational issues facing companies today. Each of these laws aim to incentivize companies (by exposing them to greater scrutiny and potential financial liability) to conduct due diligence into the conditions in which workers in their supply chain are both recruited and employed. Reporting by itself does not guarantee accountability. Rather, reporting is a tool that has the power to advance accountability by increasing transparency around corporate operations, which may then trigger pressure to improve corporate human rights performance. The examples discussed above illustrate how states, which may be countries of origin and/or destination, can still influence the recruitment process.

2. Countries of Origin as Direct Regulators of Recruitment Practices

Countries of origin have particular leverage to enable state regulation and private sector standards governing recruitment agencies in ways that could not be achieved by overseas actors alone. They can do this by establishing systems that further encourage compliance, and by detecting, preventing, or deterring non-compliance. This section focuses primarily on the five key forms of leverage that countries of origin can exert through direct regulation of migrant recruitment and the structural barriers to exercising that leverage in practice. Though not a primary focus of this section, countries of employment also have significant leverage to drive fair recruitment through direct regulation of the recruitment agencies (sometimes called placement agencies) based in those countries. Many of the functions discussed below in relation to countries of origin may similarly apply to countries of employment in this respect.

a. Detection of Non-Compliance

Countries of origin have unique potential to detect misconduct in recruitment within their borders and to alert concerned states, TNCs, and employers abroad to its occurrence.¹⁷⁹ Countries of origin also have a unique role in detecting misconduct by recruiters that do not have compliance pressures from counterparts abroad. Such pressures may not exist either because the recruiter or employer is not part of a supply chain that is subject to public scrutiny and/or the country of employment does not have, or does not enforce, recruitment restrictions. In all cases, detection of non-compliance is critical to the imposition of accountability measures against non-compliant agencies, and the provision of remedies for workers, both by countries of origin and actors abroad. It is also essential to the gatekeeping functions of states and businesses in

goods in the United States exceeds the capacity of domestic production. Sarah A. Altshuler, *U.S. Congress Finally Eliminates the Consumptive Demand Exception*, CORPORATE SOCIAL RESPONSIBILITY AND THE LAW (Feb. 16, 2016), <http://www.csrandthelaw.com/2016/02/16/u-s-congress-finally-eliminates-the-consumptive-demand-exception/> [<https://perma.cc/85MY-PZN2>]. With the elimination of the exception, civil society organizations are likely to petition U.S. customs authorities to halt the import of a range of products. *Id.*

179. See generally Farbenblum, *supra* note 31 (discussing the full range of ways in which origin countries can improve their detection of misconduct).

determining which entities may be involved in the recruitment of migrant workers in the future.

Systematic detection of abuses has proven particularly challenging to origin countries.¹⁸⁰ A recent global study of national laws governing private recruitment agencies found that they rarely introduced comprehensive monitoring or enforcement mechanisms.¹⁸¹ Though countries of origin are making significant efforts to improve oversight of migrant worker recruitment agencies, systematic detection of abusive recruitment practices will not be possible until those countries develop and resource institutional infrastructure capable of conducting routine monitoring as well as investigations in response to complaints.¹⁸² These are highly resource-intensive functions that could potentially be supported in part by states or private actors abroad that are committed to ensuring fair recruitment in supply chains.¹⁸³ Detection of abuses is also perennially undermined by corruption and collusion at various levels of government and the recruitment industry,¹⁸⁴ often compounded by the absence of robust judiciaries, government transparency, and entrenched rule of law principles.¹⁸⁵

Technology may be able to assist countries of origin to prevent and detect non-compliance with relevant laws and standards and reduce opportunities for corruption. For example, countries of origin can better oversee fees paid by migrant workers by prohibiting cash payments and requiring that any fees or costs for recruitment services be paid electronically, a requirement recently introduced in Indonesia.¹⁸⁶ But technology can be manipulated and cannot entirely replace origin countries' investigative functions. To comprehensively address the problem of improper fee-charging, for example, countries of origin must find methods for establishing what migrant workers actually paid and create a realistic expectation among recruiters that improper charges will be detected. States could require recruitment agency attestation regarding charges actually paid by the worker to the recruitment agency *and* subagent, potentially as a condition of licensing, in addition to developing accessible mechanisms through which workers can report impermissible charging by either party. These mechanisms may include, for example, a hotline to which workers could report anonymously or routine questioning of prospective migrant workers at the point of departure in the airport regarding their fee payment. Findings of repeated impermissible charging should result in license suspension or cancellation and should act as an impediment to license renewal. This feedback loop can operate in concert with, and be supported by, due diligence efforts by businesses and states abroad to

180. See ANDREES ET AL., *supra* note 58, at 82–83 (calling for further research to identify innovative monitoring and enforcement mechanisms to prevent recruitment abuses).

181. *Id.* at 82.

182. *Id.*

183. See *id.* at 83–84 (discussing measures to improve fair recruitment laws, policies, and enforcement).

184. See VERITÉ, AN EXPLORATORY STUDY ON THE ROLE OF CORRUPTION IN INTERNATIONAL LABOR MIGRATION 2–3 (2016), https://www.verite.org/sites/default/files/images/Verite-Report-Intl-Labour-Recruitment_0.pdf [<https://perma.cc/T8QL-HMVF>] (examining three illustrative transnational migrant worker recruitment corridors to identify the points where corruption and collusion exists); Farbenblum, *supra* note 31, at nn.167–68 and accompanying text.

185. While the pervasive role of corruption in migrant recruitment warrants careful consideration and further study, a detailed discussion of the issue is beyond the scope of the present Article.

186. PELAKSANAAN PENEMPATAN DAN PERLINDUNGAN TENAGA KERJA INDONESIA DI LUAR NEGERI [Placement and Protection of Indonesian Workers Abroad] 22/2014, art. 46 (Indon.).

detect impermissible fee charging, and to deny business to recruitment agencies that charge impermissible fees or engage subagents who do so. To tackle corruption by government officials, use of innovative technologies must also sit alongside general national anti-corruption programs and specific regulatory measures such as laws prohibiting government officials and their relatives from holding financial interests in recruitment agencies and ancillary businesses, as has been done in the Philippines.¹⁸⁷

b. Deploying Intelligence on Non-Compliance: Licensing and Information-Sharing Among Stakeholders

Countries of origin can share the intelligence they obtain on non-compliance to exert leverage over the conduct of recruiters in several ways. For example, they can use information on general trends to support reform of their own laws and policies, and those of private and state actors abroad, in a manner that is evidence-driven and responds to evolving business practices that adapt to circumvent regulatory reforms.¹⁸⁸ They can also disseminate information online regarding worker complaints and non-compliance by individual recruitment agencies as a basis for decision-making by prospective workers and state and business partners abroad concerning their choice of recruiter.

The greatest leverage that countries of origin could wield in this area would be to link together the granting and periodic renewal of recruitment agency licenses and agencies' compliance with their worker protection responsibilities, including fulfillment of contractual responsibilities to remedy worker losses.¹⁸⁹ Across Asia and other regions, the predominant approach to recruitment regulation is the establishment of licensing schemes.¹⁹⁰ However, these schemes are primarily directed towards establishing agencies' commercial stability¹⁹¹ and not to compliance with worker protection obligations.¹⁹² Countries of origin could make their licensing process far

187. Philippine Overseas Employment Administration, POEA Rules and Regulations Governing the Recruitment and Employment of Land-based Overseas Workers, Pt. II, r. I § 2(e) (2002) [hereinafter POEA Rules and Regulations]; Migrant Workers and Overseas Filipinos Act of 1995, Rep. Act No. 8042, § 6(j) (1995) (Phil.).

188. See IOM, *supra* note 7, at 4, 110 (stating that for detection of misconduct to feed into policy formulation, origin countries also need to engage in more effective data collection and analysis); Farbenblum, *supra* note 31, at 171–72 (discussing data collection on recruitment by countries of origin and related obligations under international law); FARBENBLUM ET AL., *supra* note 24, at 85, 91, 157 (regarding data collection on recruitment-related harms and access to justice in practice).

189. See General Comment No. 1 on Migrant Domestic Workers, *supra* note 61, para. 35 (“States parties should establish, in consultations with migrant workers’ organizations, NGOs and workers’ and employers’ organizations, specific criteria relating to migrant domestic workers’ rights and ensure only agencies observing these criteria and codes can continue to operate.”); General Recommendation No. 26 on Women Migrant Workers, *supra* note 62, para. 24(c)(ii) (recommending that countries of origin implement accreditation programs to ensure good practices among recruitment agencies).

190. ANDREES ET AL., *supra* note 58, at 81.

191. For example, the schemes generally require agencies to demonstrate their financial solvency, facilities and corporate governance, and to pay fees and in some countries, a deposit. See, e.g., Nepal’s Foreign Employment Act, (Act. No 18/2007) (Nepal) (requiring an institution to pay fees and a deposit to acquire a license).

192. See *id.* (listing fees and deposits as requirements to obtaining licenses but neglecting to include

more useful to businesses and states that require fair recruitment by linking licensing with migrant worker complaints made through diplomatic missions and through domestic mediation and insurance claims processes. They can also establish mechanisms through which workers and their advocates, and indeed employers, can inform licensing decision-makers about an agency's non-compliance with its protection obligations—a process which rarely occurs in countries of origin.¹⁹³ Using information gathered through investigations and migrant worker input, general corporate regulators could also play a greater role in preventing de-registered agencies and their officers and directors from involvement in a reconstituted “phoenix” agency under a different name—a common practice that is very difficult for states and businesses abroad to detect.

Collaboration among countries of origin, and the sharing of information among their diplomatic missions, is also crucial to better identify exploitative recruitment agencies and employers in a particular destination country and to refuse approval for the recruitment of migrant workers for particular job orders. Countries of origin would also be assisted by structured intelligence sharing on the part of destination countries concerning recruitment agency partners in those countries. Synchronization of this sort will work most effectively if countries of employment and origin integrate aspects their labor migration regulatory frameworks, particularly in areas such as recruitment fees and standardized employment contracts.¹⁹⁴ In regard to fees, compliance and detection of misconduct can be significantly enhanced by joint efforts between countries of origin, countries of employment, and other stakeholders abroad to clarify the limited services for which recruitment agencies may charge reasonable costs (e.g., costs of obtaining personal identification documents such as a passport) as distinct from costs that should be borne by the employer, and by setting clear and reasonable limits on the amount that may be charged for these and other ancillary services that recruiters organize, such as money-lending and transportation.¹⁹⁵

c. Incentivizing Compliance

Countries of origin can adopt measures that incentivize fair practices by recruitment agencies to prevent compliance requirements from becoming too onerous, particularly for less well-resourced recruitment agencies. Such incentives can be achieved through regulation, in tandem with industry self-regulation initiatives of the type discussed above, or independent monitoring efforts that incorporate input from workers and their advocates. For example, agencies that are found to comply with industry codes, independent monitoring standards or regulatory protections can be

worker protection obligations).

193. Farbenblum, *supra* note 31, Part II.A.1.

194. For example, a number of key destination countries in the Middle East including Jordan, Qatar, Saudi Arabia, and the U.A.E. have enacted laws banning recruitment fees for migrant workers. ANDREES ET AL., *supra* note 58, at 64. However, these laws are in conflict with the laws in key countries of origin, including Bangladesh, Indonesia, and the Philippines, which allow agencies to charge recruitment fees and other costs to workers, with actual costs often exceeding the prescribed limits. *Id.*

195. A new recruitment regulation introduced in December 2014 in Indonesia prohibits recruitment agencies from charging any fees other than those associated with an itemized list of expenses with maximum caps. Placement and Protection of Indonesian Workers Abroad 22/2014, art. 42 (Indon.).

offered rewards such as streamlined “license extensions, the waiving of certain [compliance] requirements, tax incentives, expedited processing of employment contracts, public listing as a recommended agency, reduced monitoring supervision [after a period, and] offers to fill the quotas for bilateral agreements.”¹⁹⁶ Compliant agencies can also be rewarded financially, for example, by paying lower bank deposits, as is now the case under a new Jordanian rating system for private employment agencies.¹⁹⁷

d. Oversight and Regulation of Subagents

One of the greatest impediments to detecting misconduct and enforcing recruitment regulations is the pervasive role that individual subagents play in the deception and overcharging of migrant workers during recruitment. These practices are especially difficult for employers, TNCs, foreign states, and other beneficiaries of migrant labor to detect. In the absence of effective governance by countries of origin, subagents may operate with impunity.¹⁹⁸ In most Asian countries subagents are not independently regulated, and recruitment agencies are rarely held accountable for subagents’ abuses through any formal or other relationship.¹⁹⁹ Indeed, a 2013 study found that nearly half of returned Nepali migrant workers did not even know whether the individual subagent who sent them abroad worked for a recruitment agency.²⁰⁰

In its General Comment on migrant domestic workers, the U.N. Migrant Workers’ Committee explicitly underscores that states’ regulatory responsibilities regarding recruitment agencies²⁰¹ extend to the effective regulation and monitoring of subagents, to ensure that they respect workers’ rights.²⁰² Some states such as Indonesia have sought to address abuses by subagents by banning them and/or criminalizing their operation.²⁰³

196. INT’L LABOUR ORG., REGULATING RECRUITMENT OF MIGRANT WORKERS: AN ASSESSMENT OF COMPLAINT MECHANISMS IN THAILAND 16 (2013), <http://apmigration.ilo.org/resources/regulating-recruitment-of-migrant-workers-an-assessment-of-complaint-mechanisms-in-thailand> [https://perma.cc/RL6D-UR86].

197. See ANDREES ET AL., *supra* note 58, at 65 n.248 (discussing Jordan’s recently enacted framework for a three-tiered rating system for private employment agencies in which higher ratings will translate into lower bank deposit requirements).

198. *Id.* at 71.

199. See *id.* (“[T]he actions of sub-agents or other intermediaries may fall outside of government’s regulatory authority.”).

200. THE ASIA FOUNDATION, LABOUR MIGRATION TRENDS AND PATTERNS: BANGLADESH, INDIA, AND NEPAL 18 (2013), <https://asiafoundation.org/resources/pdfs/LabourMigrationTrendsandPatternsBangladeshIndiaandNepal2013.pdf> [https://perma.cc/8CQU-FTTX].

201. See Migrant Workers Convention, *supra* note 60, art. 66(2) (allowing recruitment to be performed by “agencies, prospective employers or persons acting on their behalf” only if those actors are subject to authorization, approval and supervision by the relevant state).

202. General Comment No. 1 on Migrant Domestic Workers, *supra* note 61, para. 33.

203. See Placement and Protection of Indonesian Workers Abroad 39/2004, art. 4 (Indon.) (forbidding the placement of workers abroad by individuals); see also ANDREES ET AL., *supra* note 58, at 71. A December 2014 Indonesian recruitment regulation goes further and requires that local-level recruitment be undertaken only by a verified employee of the recruitment agency in conjunction with government officials at the city or district level. Placement and Protection of Indonesian Workers Abroad 22/2014, art. 13 (Indon.). It is not yet clear how this provision will be implemented and enforced or whether it will have an impact on the

This has met with little success as misconduct by individual subagents is difficult for authorities to detect and, to the limited extent that workers might be able to pursue claims against subagents directly, communal relationships between workers and subagents commonly deter them from enforcing their rights or reporting fraud or other unlawful conduct to authorities.²⁰⁴ As a result, subagents are rarely, if ever, prosecuted.²⁰⁵

Abuses by subagents could be more effectively addressed by establishing conditions under which recruitment agencies are accountable for the conduct of subagents they use. As the gatekeepers to business opportunities for subagents, recruitment agencies have significant capacity and leverage to influence the conduct of subagents, which has not yet been systematically engaged as a locus of power for addressing misconduct. One view is that the best way to do this is via legislation requiring recruitment agencies to establish formal business arrangements with subagents and other subcontractors that articulate a clear structure of accountability and liability for business practices.²⁰⁶ Given that implementation of these requirements will be challenging, it may be more effective for recruitment agencies to be held legally responsible for the conduct and representations of subagents if certain agency relationship criteria are met—regardless of whether or not a formal business arrangement has been established. Nepal, for example, introduced a regulatory requirement for recruitment agencies to register subagents they use.²⁰⁷ The promise of this ground-breaking law has failed to materialize because agencies are not subject to any penalty for using unregistered subagents. As of June 2013, only 290 of Nepal’s estimated 80,000 subagents had been registered.²⁰⁸

As with recruitment agencies, fairer practices on the part of subagents can be promoted by creating financial incentives at the state level and within the supply chain for subagents who comply with relevant laws and standards. For example, an independent accreditation system for individual agents could be established by states, industry bodies, and/or other respected entities that could serve a range of functions.²⁰⁹ In its simplest form, it could be a “preferred supplier” scheme under which recruitment agencies would be driven to use only preferred subagents by the demands of employers, TNCs, and states seeking to eliminate fee charging and abusive recruitment practices from their supply chain. Such a scheme could go some way to addressing challenges that these entities encounter in attempting to conduct robust due diligence on recruitment businesses in migrant workers’ home countries, down to the village level.²¹⁰

e. Preventing Deception and Ensuring Migrants Make Informed

widespread and entrenched use of independent brokers.

204. PAOLETTI ET AL., *supra* note 24, at 155.

205. FARBENBLUM ET AL., *supra* note 24, at 104–05.

206. Crépeau, *supra* note 18, at 19.

207. Foreign Employment Act, 2064 (2007), § 74 (1) (Nepal).

208. PAOLETTI ET AL., *supra* note 24, at 55. It is possible, however, that if diligently enforced with penalties for using unregistered agents, Nepal’s registration requirement could be a more effective model.

209. Farbenblum, *supra* note 31, at 180 n.166.

210. Such a scheme, if overseen by government, could also serve a legal function. If states were to implement laws under which recruitment agencies are automatically liable for subagents’ misconduct, agencies that use licensed subagents could receive immunity from liability under certain conditions and the subagent could lose its accredited status. *Id.*

Decision to Migrate

Much of the scholarly and industry discussions on abusive recruitment and forced labor prevention reasonably center on recruitment fees. However, it is often the deception perpetrated by recruiters regarding salary and other conditions of employment that makes the payment of recruitment fees so problematic, for reasons discussed in Part (II)(B) above. When employers, TNCs, state procurers, and other end users seek to eliminate forced labor and trafficking from their supply chain, it is therefore essential that they consider not only whether fees were paid, but also whether the worker received her contract of employment in a timely manner, whether the contracts reflected the true and complete conditions of employment, and whether she had its terms explained to her before she paid fees and committed to migrating. This is a difficult form of due diligence to undertake, and would benefit substantially from efforts by country of origin governments. Such due diligence should be a key condition of maintaining a recruitment agency license, and one that origin country governments could audit through interviews with current or returned migrant workers, and through complaints made by migrant workers to embassies or hotlines. It can similarly be audited by TNCs, suppliers and employers through the same auditing processes used to detect fee payment (though these currently need improvement).

As in the case of fees, technology could play an important interventionist function between workers and employers by enabling migrant workers to access job information and services directly online, alongside investigation and enforcement initiatives such as those described above.²¹¹ Migrant workers' access to technology may also reduce fraud and corruption issues related to the withholding or falsification of migrant workers' contracts and identity documents. For example, if origin country governments were to maintain copies of workers' key identity documents and contracts in an electronic form that is accessible to the worker and her family, recruiters would no longer be able to retain workers' documents as a means of control or in order to extract bribes for access to the documents. It also reduces opportunities for the common practice of contract substitution upon the worker's arrival in the country of employment, particularly if the electronic documentation system is accessible to relevant government agencies in both countries of origin and employment.²¹²

There are a number of examples of emerging good practice in this respect. For example, some states are beginning to transnationally address overcharging, deception, and disempowerment of workers through the use of technology and "e-government" initiatives to limit or better oversee the intermediating role played by the private recruitment industry.²¹³ India's eMigrate system, for example, requires employers, including those hiring domestic workers, to register with the Indian Mission and upload all details of the relevant position in order to receive a job code required for

211. See *Planet of the Phones*, ECONOMIST (Feb. 28, 2015), <http://www.economist.com/news/leaders/21645180-smartphone-ubiquitous-addictive-and-transformative-planet-phones> [https://perma.cc/H7D4-4EQZ] (estimating that by 2020, 80 percent of the adult population in the world will own a smartphone).

212. Farbenblum, *supra* note 31, at 181–82.

213. See, e.g., *About eMigrate Project*, EMIGRATE, <https://emigrate.gov.in/ext/about.action> (last visited July 25, 2016) ("The ministry has undertaken this transformational e-governance program with a vision to transform emigration into a simple, transparent, orderly and humane process.").

recruitment.²¹⁴ Workers can apply online for emigration clearance after receiving the attested visa and employment contract signed by the employer,²¹⁵ reducing opportunities for deception during recruitment.

Similar initiatives have been instigated by countries of employment. For example, reforms that took effect in the U.A.E. in January 2016 directly tackle the issue of predeparture misinformation by requiring prospective workers to sign a standard employment offer in their home country that must be filed with the U.A.E. Labor Ministry before a work permit is issued.²¹⁶ The binding contract cannot be varied within the country of employment unless the new terms are beneficial to and agreed by the worker.²¹⁷

f. Barriers to Action by Countries of Origin

While countries of origin have a critical role to play in preventing unfair recruitment practices, there are significant barriers to the exercise of their leverage. Alongside the pervasive impact of corruption,²¹⁸ a lack of political will to address recruitment problems within origin countries may also reflect the expense of establishing and resourcing recruitment governance institutions for a developing country with limited government resources and competing domestic demands.²¹⁹ It may also result from states' concerns that they will undermine their competitiveness as a worker-source country if they shift the costs of recruitment from migrant workers to employers or businesses and make recruitment from their country more expensive in the global marketplace for migrant labor. The reality of this concern was clearly demonstrated in the case of Nepal, which introduced new measures to significantly reduce recruitment fee caps and require all employers to cover airfare and visa costs of

214. *Instructions for Employers – Applying for Registration*, EMIGRATE, <https://emigrate.gov.in/ext/forms/InstructionsEmp-Regn.pdf> [<https://perma.cc/N4LW-7QUG>] (last visited July 23, 2016).

215. *Guidelines for Emigration Clearance System*, MINISTRY OF EXTERNAL AFFAIRS, <http://www.mea.gov.in/emigration-clearance-system.htm> [<https://perma.cc/46KA-4C3V>] (last visited July 24, 2016).

216. SAQR GHOBASH, MINISTRY OF LABOUR, U.A.E., MINISTERIAL OF LABOUR, MINISTERIAL DECREE NO. 764 of 2015 (Sept. 27, 2015); Derek Baldwin, *New UAE Labour Rules Kick in on January 1, 2016*, GULFNEWS (Sept. 28, 2015), <http://gulfnews.com/news/uae/government/new-uae-labour-rules-kick-in-january-1-2016-1.1591368> [<https://perma.cc/9X2B-UEPA>].

217. GHOBASH, *supra* note 216, art. 4.

218. *See* IOM, *supra* note 7, at 79 (detailing the effect corruption has on recruitment).

219. *See* Farbenblum, *supra* note 31, at 179–82 (discussing the countervailing macroeconomic incentives for preventing abusive recruitment practices and ensuring migrant workers' access to remedies and drawing attention to “the long-term economic costs to migrant workers, their families, communities and indeed the national economy of inflated fees paid to private recruiters and related high-interest debt, of receiving wages (and remittances) lower than those promised to the worker when she decided to migrate at significant cost, and of having no accessible means for seeking compensation for those losses,” in addition to “the social and economic burden of un-remedied physical and psychological injuries sustained abroad as a result of abusive recruitment practices or inadequate preparation for migration, often with long-term consequences for the worker’s future earning capacity and social relationships”).

migrant workers going to the Gulf²²⁰ and Malaysia.²²¹ In the four months following the introduction of the measures, job demand from Malaysia dropped almost 80 percent.²²² Recruitment agencies observed that Malaysian employers, mostly small companies, had simply gone elsewhere for their migrant workers and started hiring from Bangladesh, Vietnam, Cambodia, and Indonesia, which provide “cheaper workers” and pay large commissions to destination country agents for providing job quotas.²²³

Ultimately, this brings us full circle to the need for cooperation among TNCs, countries of employment, and states to level the playing field among countries of origin and to establish a market for fair recruiters that economically incentivizes countries of origin to invest resources in enforcing their recruitment regulations.

3. The Role of Civil Society, Unions, and Migrant Workers

Another crucial set of stakeholders with indirect leverage to improve recruitment practices is civil society, trade unions, and migrant workers. Techniques such as naming and shaming, public advocacy campaigns, or litigation, that have long been used by civil society to influence governments, are now commonly directed against businesses to advocate for workers’ rights more generally.²²⁴ The role of civil society to “affect change in indirect ways, that is influencing other actors, such as government”²²⁵ and businesses should not be underestimated. In 2015, Human Rights Watch released a set of guidelines²²⁶ to protect migrant construction workers working in the Gulf Cooperation Council countries.²²⁷ The guidelines are aimed at TNCs and domestic companies to

220. See Roshan Sedhai, *Govt Decision to Waive Visa Fee, Airfare gets Vote of Confidence from Workers*, KATHMANDU POST (July 10, 2015), <http://kathmandupost.ekantipur.com/news/2015-07-10/govt-decision-to-waive-visa-fee-airfare-gets-vote-of-confidence-from-workers.html> [https://perma.cc/HP9Y-MZ2M] (stating that the measures cover workers going to Qatar, Saudi Arabia, the U.A.E., Bahrain, Oman, and Kuwait).

221. See *id.* (reporting the claim by Bimal Dhakal, chairman of Nepal Association of Foreign Employment Agencies, that the decision is an attempt to put the agencies out of business). See also Om Astha Rai, *Who is Against Zero-cost Migration and Why?*, NEPALI TIMES (July 12, 2015), <http://nepalitimes.com/article/nation/manpower-agencies-of-Nepal-are-the-ones-against-zero-cost-migration-policy,2402> [https://perma.cc/433R-ZFPN] (reporting Nepali recruitment agencies’ claim that the measures would only be practical when all employers in the Gulf and Malaysia agree to bear the cost of visas and airfares, which is currently the case only for large employers).

222. Roshan Sedhai, *Steep Decline in Nepali Migrants Going to Malaysia*, KATHMANDU POST (Nov. 29, 2015), <http://kathmandupost.ekantipur.com/news/2015-11-29/steep-decline-in-nepali-migrants-going-to-malaysia.html> [https://perma.cc/TK7D-LJ4K].

223. See *id.* (quoting Bal Bahadur Tamang, former chairperson of Nepal Association of Foreign Employment Agencies). This has not been the experience in the Gulf states, though it may be too early to know whether in fact the employers are absorbing the extra recruitment costs and, if so, the reasons for this absorption.

224. Pittman, *supra* note 11, at 286–89.

225. *Id.* at 288

226. See generally HUMAN RIGHTS WATCH, GUIDELINES FOR A BETTER CONSTRUCTION INDUSTRY IN THE GCC: A CODE OF CONDUCT FOR CONSTRUCTION COMPANIES (Dec. 2015), https://www.hrw.org/sites/default/files/supporting_resources/2015.12.21.gcc_brochure_dec_2015.pdf [https://perma.cc/H979-XTZ4] [hereinafter HUMAN RIGHTS WATCH].

227. The Gulf Cooperation Council states are Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the U.A.E. SECRETARIAT GENERAL OF THE GULF COOPERATION COUNCIL, <http://www.gcc-sg.org/en-us/Pages/default.aspx> [https://perma.cc/L9J4-KZ4X] (last visited July 25, 2016).

ensure that they, and their contractors and subcontractors, respect the rights of migrant workers on their projects and protect workers from serious abuses, including trafficking and forced labor.²²⁸ The challenge for NGO initiatives such as this is enforcement, and Human Rights Watch will likely need to rely on its “watch dog” and reporting functions to keep track of corporate behavior.

Civil society organizations and trade unions are enlisting the participation of migrant workers to establish innovative recruitment data collection and online dissemination programs in relation to particular recruitment agencies. Partnerships between these organizations and states are likely to be fruitful.²²⁹ For example, in 2014 the Centro de los Derechos del Migrante (CDM) (the Center for Migrant Rights), which focuses on Mexico-US migrant worker flows, launched “Contratados,” which allows migrant workers to rate their experience of recruiters or employers online, by voicemail or by text message.²³⁰ In essence, this service operates as a “TripAdvisor” for migrant workers and its strength will depend in part on its uptake and dissemination by the workers themselves.²³¹ States are also enlisting the participation of migrant workers in accountability efforts through the use of social media. For example, since early 2015, the Philippines has required all recruiters of domestic workers to maintain an active Facebook page as a condition of government approval of worker placement.²³² The agency must provide details of the page to the worker and accept friend requests from the worker, her family, and the Philippines Overseas Employment Administration (POEA).²³³ The agency is required to regularly monitor the account and respond to requests for information and assistance by migrant domestic workers and their families, and the POEA can refer cases to the agency through its Facebook page.²³⁴

Worker organization and consumer campaigns, such as the fifteen-year Fair Food campaign initiated by the Coalition of Imokalee Workers (CIW) in the U.S., also illustrate the potential of organized migrant workers and civil society organizations to impact business practices.²³⁵ The CIW is a membership-based human rights organization of farmworkers that emerged to address the recruitment and employment challenges facing tomato pickers (predominantly migrant workers) in Florida.²³⁶ The campaign, driven by farmworkers themselves, relied on strong alliance building with consumer groups and human rights activists to persuade major brands to take steps to end farmworker exploitation.²³⁷ Through an initial boycott of the fast-food company Taco Bell, publicity campaigns, and protests, the campaign was ultimately successful in

228. HUMAN RIGHTS WATCH, *supra* note 226, at 5.

229. *See* GORDON, *supra* note 8, at 47–49 (showing a range of examples); *see also* Pittman, *supra* note 11, at 292–93.

230. CONTRATADOS, <http://www.contratados.org/> [<https://perma.cc/KU9F-BJMH>] (last visited April 30, 2016).

231. *Id.*

232. Memorandum Circular No. 01 from Phil. Overseas Employment Admin. (Feb. 24, 2015), <http://www.poea.gov.ph/memorandumcirculars/2015/1.pdf> [<https://perma.cc/362Q-URTJ>].

233. Memorandum Circular No. 03 from Phil. Overseas Employment Admin. § II.c (Mar. 14, 2015), <http://poea.gov.ph/memorandumcirculars/2015/3.pdf> [<https://perma.cc/97QD-SZTF>].

234. *Id.*

235. *See* Pittman, *supra* note 11, at 286–93 (discussing non-governmental organization, union, and multi-stakeholder initiatives on migrant worker rights).

236. GORDON, *supra* note 8, at 39–42.

237. *Id.*

gaining the participation of several large companies including McDonalds, Sodexo, Whole Foods, and WalMart in its Fair Food Code of Conduct (Food Code).²³⁸ The Food Code addresses recruitment abuses by prohibiting labor intermediaries and mandates that growers hire all field workers directly.²³⁹ The Food Code is backed by binding agreements between the CIW and the buyer companies that obligate the buyers to suspend purchases from growers who have failed to comply with the Food Code.²⁴⁰ This places a strong market incentive on growers to comply with the Food Code.

Civil society campaigns tend to focus narrowly on a specific thematic issue, company, or geographic location. Such a targeted approach can be effective, and when combined with binding commitments, like those developed by the CIW, can result in stringent enforcement. A multi-pronged approach that involves workers, incorporates strong civil society campaign techniques, and is underpinned by innovative complaint and monitoring mechanisms, when combined with the oversight of the state, perhaps stands the best chance of instituting fair recruitment practices.

While this section highlights the potential of many individual strategies to impact particular issues, countries, or companies, each of these operating in isolation will only have limited reach. As noted at the outset, what is required is not only a range of initiatives from a multiplicity of stakeholders, but also that they operate with some level of coordination to increase their impact. State regulation, whether emanating from their role as countries of origin, employers, or procurers, can establish a framework for both regulating recruiters and reporting recruitment practices. Businesses and civil society initiatives that design and implement improved supply chain practices can plug the gap between regulatory frameworks and reality regarding improper fee-charging, pre-departure deception, and recruiters' failures to provide migrant workers with the information and documents they need before they leave home.

For example, inroads can be made towards rights protection in relation to fee payment if, at the same time, TNCs demand that recruitment fees are paid by employers and not by migrant workers as a condition for supply chain participation; states regulate fee limitation and detect and systematically penalize non-compliance by recruitment agencies, while making available to employers an industry of licensed non-fee charging fair recruiters; migrant workers provide information to states and businesses on improper recruitment agency fee-charging that informs licensing and supply-chain participation decisions; and by civil society monitoring fee payment and facilitating consumer support for TNCs that prevent migrant worker fee-charging. It is the mutually reinforcing nature of these strategies that will have a greater impact on rights protection than the sum of their individual efforts.

238. *See id.* (detailing the origins and activities of the CIW); *see also Participating Buyers*, FAIR FOOD STANDARDS COUNCIL, <http://www.fairfoodstandards.org/resources/participating-buyers/> [<https://perma.cc/MH56-5F6P>] (last visited April 30, 2016).

239. *Fair Food Code of Conduct* § I.5 (2016), <http://www.fairfoodstandards.org/resources/fair-food-code-of-conduct/> [<https://perma.cc/PV93-836T>]; GORDON, *supra* note 8, at 40.

240. *About the Fair Food Program, Market Enforcement*, FAIR FOOD PROGRAM, <http://www.fairfoodprogram.org/about-the-fair-food-program/> [<https://perma.cc/A7LL-FUMH>] (last visited May 1, 2016).

IV. ENSURING MIGRANT WORKERS' ACCESS TO REMEDY FOR ABUSIVE RECRUITMENT PRACTICES: THE ROLES OF STATES AND BUSINESS

Ensuring access to remedy is a necessary adjunct in efforts to prevent unfair and exploitative recruitment practices. It is a fundamental state obligation under a range of human rights treaties, including the Migrant Workers Convention.²⁴¹ It is also the responsibility of businesses under the Guiding Principles.²⁴² Through the establishment and resourcing of effective redress mechanisms, states and businesses can limit the economic harm that abusive recruitment practices cause to migrant workers and their families by ensuring, at a minimum, compensation to workers for their resulting financial losses. As with prevention responsibilities, responsibility for ensuring that a worker is compensated for recruitment-related harms rests with a number of actors, including: Recruitment agencies (and subagents); employers, TNCs, and other businesses within a supply chain; countries of origin; and countries of employment and states globally.

The responsibility to remedy recruitment-related harms rests first and foremost with the recruitment agency. Indeed, it is often mandated under the contract that the migrant worker enters into with the recruitment agency.²⁴³ Countries of origin have significant leverage to ensure recruiter accountability for misconduct through consistent imposition of penalties (ranging from fines to deregistration). This ought to go beyond accountability for improper fee-charging to also include accountability for deception, non-provision of contracts and other key documents and information, as well as for other forms of misconduct such as intimidation, violence, confinement pre-departure, and deliberate retention of a worker's identity or other documents. In addition to punishing the recruitment agency, countries of origin can use their institutional leverage to ensure migrant workers' access to remedies by establishing accessible mechanisms through which workers can obtain compensation for losses that they suffer as a result of recruiter misconduct. In order to prevent workers from feeling compelled to remain in exploitative employment due to mounting high-interest debt or the risk of falling into poverty upon their return home, remedial processes must be swift, straightforward, and accessible by a worker or a worker's family.

Recent studies have found that although remedies against recruitment agencies might in theory be available to migrant workers in their countries of origin, they are rarely accessible in practice; when they are accessible, the outcomes are generally unjust because the processes through which they are obtained are not grounded in migrant workers' legal rights or recruitment agencies' contractual and statutory obligations.²⁴⁴ The studies found that current redress mechanisms are generally inaccessible due to

241. Migrant Workers Convention, *supra* note 60, art. 83; *see also* Farbenblum, *supra* note 33, Part III.A.2 (discussing access to remedy and related international obligations).

242. John Ruggie (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: Implementing the United Nations "Protect, Respect and Remedy" Framework*, para. 22, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

243. *See* Farbenblum, *supra* note 31, Part II.B (discussing the contractual relationship between recruitment agencies and migrant workers).

244. *See generally* PAOLETTI ET AL., *supra* note 24; FARBENBLUM ET AL., *supra* note 24.

factors such as cost, geography (centralization of institutions in capital cities), and lack of legal assistance.²⁴⁵ For the most part, existing mechanisms do not enable workers to obtain timely payment from recruitment agencies or insurers, typically due to skewed power relationships between workers and recruitment agencies, poor institutional processes, inadequate resourcing, lack of decision-maker expertise, and a lack of government enforcement capacity, among other factors.²⁴⁶ Moreover, migrant workers commonly lack awareness and understanding of procedures for accessing remedies.²⁴⁷ This lacuna could be addressed through government dissemination of information to workers before departure, as well as when workers make complaints to diplomatic missions abroad, regarding their legal rights and procedures for invoking formal and informal redress mechanisms in their country of origin.²⁴⁸

Access to remedy is another area that may benefit from innovative use of technology. For example, in February 2016, Pakistan's Ministry of Overseas Pakistanis and Human Resource Development announced the establishment of an online complaint management system that allows migrant workers to submit legal complaints about issues they faced in recruitment or employment.²⁴⁹ The system will increase the ability of migrant workers to at least lodge and track the status of their complaints while abroad and at home, hopefully increasing the efficiency of the current complaints modality and introducing a measure of transparency in order to safeguard the interests of migrant workers.²⁵⁰

Though the obligation to remedy recruitment-related losses is primarily the responsibility of the recruitment agency, it is clear that TNCs and other businesses that benefit from migrant labor also bear responsibility for ensuring migrant workers have access to remedy—whether this involves ensuring that compensation is paid by the recruitment agency, or by the business itself. The need for provision of remedies for wrongs suffered by migrant workers is noted in the Dhaka Principles, but no detail is provided as to their potential implementation.²⁵¹ A specific provision concerning remedy is made in the Qatar Foundation's Mandatory Standards, which provides that “[t]he Employer shall have an effective and efficient grievance procedure that Workers may utilize to lodge complaints against Recruitment Agencies Local or Recruitment Agencies Abroad,” but no further details as to the content or operation of such a

245. PAOLETTI ET AL., *supra* note 24, at 145–48; FARBENBLUM ET AL., *supra* note 24, at 123–33.

246. PAOLETTI ET AL., *supra* note 24, at 119–26; FARBENBLUM ET AL., *supra* note 24, at 92–99.

247. *See* PAOLETTI ET AL., *supra* note 24, at 145 (explaining that Nepali migrant workers commonly complain of knowing neither their rights under Nepali law nor the mechanisms established and services available to enforce their rights); FARBENBLUM ET AL., *supra* note 24, at 127 (explaining that Indonesian migrant workers had little understanding of their rights under Indonesian law, and little awareness of redress mechanisms available to them).

248. *See* PAOLETTI ET AL., *supra* note 24, at 178 (recommending that the DoFE and FEPB should cooperate to increase access to pre-arrival orientation programs and information regarding legal rights and seeking redress); FARBENBLUM ET AL., *supra* note 24, at 155–57 (recommending strengthened embassy oversight and consular assistance, and improved access to information on migrant worker rights and redress).

249. *Online Complaint System for Overseas Pakistanis*, SAMAA (Feb. 8, 2016), <http://www.samaa.tv/pakistan/2016/02/online-complaint-system-for-overseas-pakistanis/> [https://perma.cc/XD79-F8JJ].

250. *Id.*

251. *Dhaka Principles*, *supra* note 89, at 5–9.

process are provided.²⁵² With respect to remedying the payment of a recruitment fee by workers, the Mandatory Standards note that contractors and subcontractors are liable for reimbursement to the worker.²⁵³ However, there is no guidance around implementation and enforcement.

Joint responsibility on the part of an employer and a supplier to provide redress for recruitment violations is one possibility for improving access to remedy. It is a strategy that has been adopted by states ranging from the Philippines²⁵⁴ to several Canadian provinces.²⁵⁵ However, in many countries, particularly in the Middle East, the enforcement of such joint-liability schemes is difficult, if not impossible, for the average low-wage migrant worker to achieve in practice.²⁵⁶ This is due to the general barriers to accessing remedies described earlier, including a need for significant legal advice and representation and coordination between origin and destination countries.

The transnational nature of labor migration also raises a host of jurisdictional and practical impediments to the enforcement of contracts concluded between recruitment agencies in countries of origin and their counterparts (placement agencies or employers) in destination countries, which are now required in origin countries such as Indonesia.²⁵⁷ Regulation and oversight of this transnational business relationship has received very limited attention by researchers and policymakers to date, despite the fact that inflated recruitment fees paid by migrant workers are partially the result of fees, bribes, and kickbacks that destination country recruiters and employers demand from origin country recruitment agencies, which are then passed down to workers.²⁵⁸ Transnational enforcement of labor migration contracts is an area that would particularly benefit from further study and pilot projects, possibly drawing on lessons learned from other areas of the law that operate transnationally.

The Guiding Principles provide that both states and corporations should offer access to judicial and non-judicial grievance mechanisms for those harmed by corporate conduct.²⁵⁹ Ideally, non-judicial grievance mechanisms supplement judicial

252. See MANDATORY STANDARDS, *supra* note 119, paras. 11.4.5, 11.4.8 (detailing that employers must reimburse workers for recruitment, processing, or placement fees and must have an effective and efficient grievance procedure for workers to lodge complaints against recruitment agencies).

253. *Id.* para. 11.4.5.

254. In the Philippines, migrant workers enter into a single multi-party contract with origin and destination country recruiters as well as the employer, under which all of the parties are jointly and severally liable for contractual breaches by any of the parties. Migrant Workers and Overseas Filipinos Act of 1995, Rep. Act No. 8042, § 10, 91:32 O.G. 4994 (June 7, 1995); POEA Rules and Regulations, *supra* note 187, Part II, r. 2, § 1(f)(3).

255. FARADAY, *supra* note 143, at 61; GORDON, *supra* note 8, at 22–25; ANDREES ET AL., *supra* note 60, at 46–50.

256. See GORDON, *supra* note 8, at 29, 31–32 (explaining that the negative effects of joint-liability schemes include increased recruitment fees, slow government enforcement processes, and increased necessity of legal assistance).

257. See Placement and Protection of Indonesian Workers Abroad 22/2014, art. 3, (Indon.) (requiring recruitment agencies to present to the relevant diplomatic mission and the Indonesian migrant protection agency a copy of the contract between the Indonesian recruitment agency and its counterpart in the destination country related to the position).

258. See, e.g., JUREIDINI, *supra* note 29, at 44–45 (explaining that large differences in recruitment charges are due to kickback payments to personnel of employment companies in Qatar).

259. *Guiding Principles*, *supra* note 78, at 22–23.

mechanisms. However, in many jurisdictions judicial remedies are inaccessible, ineffective, or non-existent, meaning that non-judicial grievance mechanisms may, in theory, offer greater promise for those affected by business-related human rights abuse.²⁶⁰ However, although a few non-judicial grievance mechanisms are beginning to show potential in providing remedies for worker rights violations, they are generally not yet up to the task of providing victims with remedy. As the Guiding Principles note, the concept of access to remedy is multi-pronged and ideally includes both state and non-state based mechanisms, but as one commentator observed back in 1999, “only a selected few among private corporations are likely to willingly submit to new responsibilities without being legally compelled to do so.”²⁶¹ An under-explored issue is the question of how companies might be incentivized (through consumer or market pressure or perhaps the threat of regulation) to provide access to non-judicial remedies for human rights violations in their supply chain.

Finally, although the OECD Guidelines have been criticized (for example, for their lack of “hard” enforcement power and the inconsistent manner in which they have been applied), they do contain a potential mechanism for “remedying” corporate rights violations.²⁶² OECD members and adhering states are obliged to set up a National Contact Point (NCP) to promote the OECD Guidelines, and this can be used by individuals and communities to make a complaint regarding the global activities of any company as long as that company is domiciled in an OECD member or adhering country.²⁶³ The mandate of these NCPs is to “further the effectiveness of the *Guidelines* by undertaking promotional activities, handling enquiries and contributing to the resolution of issues that arise relating to the implementation of the *Guidelines* in specific instances.”²⁶⁴

For example, in May 2015 the Swiss NCP accepted a complaint from Building and Wood Workers’ International (BWI) regarding human rights violations of migrant workers related to the construction of facilities for the FIFA 2022 World Cup in Qatar.²⁶⁵ The complaint related to: The confiscation of passports; discrimination and unequal remuneration; non-payment of wages; charging of recruitment fees; occupational health and safety issues; restrictions on the freedom of association; alteration of employment contracts; detention of migrant workers; a lack of safe and decent accommodation; and issues related to access to remedy.²⁶⁶ The initial assessment

260. GWYNNE SKINNER ET AL., *THE THIRD PILLAR: ACCESS TO JUDICIAL REMEDIES FOR HUMAN RIGHTS VIOLATIONS BY TRANSNATIONAL BUSINESS* 66–67 (2013).

261. M.K. Addo, *Human Rights and Transnational Corporations – An Introduction*, in *HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS* 11 (M.K. Addo ed., 2001).

262. JORIS OLDENZIEL ET AL., *10 YEARS ON: ASSESSING THE CONTRIBUTION OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES TO RESPONSIBLE BUSINESS CONDUCT* 6 (2010).

263. *Eligibility of a Complaint*, OECD WATCH, <http://www.oecdwatch.org/filing-complaints/Eligibility%20of%20a%20complaint> [<https://perma.cc/U29A-BCYL>] (last visited Oct. 17, 2016).

264. OECD GUIDELINES, *supra* note 82, at 68.

265. NATIONAL CONTACT POINT OF SWITZERLAND, *INITIAL ASSESSMENT: SPECIFIC INSTANCE REGARDING THE FÉDÉRATION INTERNATIONALE DE FOOTBALL ASSOCIATION (FIFA) SUBMITTED BY THE BUILDING AND WOOD WORKERS’ INTERNATIONAL (BWI) 1–2* (2015), <https://www.wiltonpark.org.uk/wp-content/uploads/WP1428-Swiss-National-Contact-Point-Initial-Assessment-FIFA.pdf> [<https://perma.cc/HU2Z-XSX2>].

266. *Id.* at 2.

of the Swiss NCP in December 2015 concluded that the issues raised merit further consideration, and the Swiss NCP accepted the complaint and the investigation is ongoing.²⁶⁷ The next step would first require the Swiss NCP to obtain the assent of all relevant parties to meet and mediate the issue and then possibly, if warranted, draw up recommendations for implementation of the OECD Guidelines by FIFA in Qatar.²⁶⁸ While this complaint serves to highlight the plight of migrant workers in Qatar, it is unclear whether it will lead to real improvements on the ground. Following 15 years of operation, a review of the NCP system was conducted by the OECD Watch, an NGO, which highlighted significant limitations with the NCP system.²⁶⁹ It documented that significant barriers exist to bring a complaint to the mechanism and, for those cases that are filed, only one percent of the 250 NCP complaints resulted in an outcome that directly improved conditions for the victims.²⁷⁰ This track record does not bear much promise for the plight of migrant workers.

It appears that the best prospects for ensuring access to remedy for recruitment related harms are through the operation of multiple channels with multiple actors. These include origin countries' establishment of effective and accessible mechanisms through which migrant workers can obtain compensation directly from recruitment agencies, with licensing consequences and other penalties for recruitment agency non-compliance. Also important is the absorption of responsibility (ideally contractual) by TNCs and other supply chain businesses for ensuring migrant workers are compensated (either directly or by exercising their leverage down their supply chain to require compensation by recruitment agencies), along with easily accessible judicial and non-judicial processes that enable migrant workers to realize their rights in this respect. To these measures, initiatives may be added by NGOs and international organizations to support migrant workers in filing claims, such as the IOM's indication that its recruitment accreditation framework, IRIS, will in the future administer complaints and a referral mechanism to assist victims of unethical or illegal recruiters in filing grievances with the appropriate authorities.²⁷¹

CONCLUSION

The business of recruiting low-wage migrant workers requires a revolutionary transformation of current social, political, commercial, and legal practices to reduce the ongoing harms to low-wage migrant workers. Media reports concerning, for instance, enslaved Thai fisherman,²⁷² or the abusive conditions encountered by migrant workers building stadiums for mega sporting events,²⁷³ have placed, and will continue to place, pressure on states and businesses to accept their human rights responsibilities concerning these workers. Such transformation can be best achieved if states, businesses, and civil society exert their particular leverage in concert.

267. *Id.* at 5–8.

268. *Id.* at 8.

269. CAITLIN DANIEL ET AL., REMEDY REMAINS RARE 19 (2015).

270. *Id.*

271. IRIS, *supra* note 129.

272. Associated Press, *Indonesia Jails 5 Thai Captains for Enslaving Fishermen*, BANGKOK POST (Mar. 11, 2016, 10:43 AM), <http://www.bangkokpost.com/news/asean/894492/indonesia-jails-5-thai-captains-for-enslaving-fishermen> [<https://perma.cc/SS3K-NHRD>].

273. *See, e.g.*, THE DARK SIDE OF MIGRATION, *supra* note 5.

For this transformation to be realized, the economic drivers of abusive recruitment practices and barriers to reformative action for each stakeholder must be addressed. Some of these drivers arise from the complex transnational web of actors involved in recruitment and employment of migrant workers, in which opportunistic deception and overcharging by middlemen is routine and goes undetected and unpunished by states. Other drivers are structural, such as TNCs and other entities at the top of global goods and service supply chains that demand cheap workers with low recruitment-related costs.

At its core, transformation of the migrant recruitment business requires TNCs, state procurers, and other businesses to exert their economic leverage to create a market that commercially incentivizes fair recruiters and suppliers that engage them. At the same time, it requires countries of migrant worker origin and employment to further enable and incentivize businesses to adopt fair recruitment practices, and to identify and sanction those that do not. The devil of this approach will lie in the detail, and in the willingness of states and businesses to address the economic implications of their demands for fair recruitment.

For a start, TNCs, state procurers, and other businesses that are willing to demand fair recruitment of migrant workers must directly confront the allocation of costs involved in establishing and maintaining fair recruitment practices. If migrant workers are to pay no recruitment fees under a fair recruitment system, those costs must be allocated elsewhere. Recruitment agencies are, after all, businesses that charge for their services. The obvious response is to allocate those costs to the employer, which is standard practice for recruitment of higher-waged workers.²⁷⁴ Alternately, the employer could directly recruit workers, though this would involve similar costs to that employer.

In any event, simply allocating costs to employers will not in itself result in broad reforms unless entities at the top of goods and services supply chains recognize and address these costs. Most employers will be unwilling to absorb recruitment costs if it means accepting significantly reduced profits or becoming uncompetitive in relation to other supplier businesses that are not absorbing recruitment costs. Accepting these recruitment costs means TNCs will pay for more expensive goods or services from suppliers, and that TNCs and state procurers will require suppliers to itemize recruitment-related costs as part of any tendering process. It must also be recognized that the costs of fair recruitment go beyond simply absorbing recruitment fees. This includes allocating resources to continuous monitoring of a recruitment agency and remedying breaches, such as paying compensation to migrant workers for abusive recruitment practices. As noted earlier, businesses (and states) will likely need to offer suppliers a longer-term commitment to using their goods and services if they expect suppliers to invest resources in compliance with fair recruitment standards.

Similarly, countries of origin and employment can play significant roles in detecting and penalizing misconduct by all private actors involved in recruitment and in establishing an industry of fair recruiters. However, a transformed recruitment system will need to address the significant economic implications for origin and

274. JUREIDINI, *supra* note 27, at 36 (stating that three contractors in Qatar confirmed that whether or not they pay recruitment fees for a migrant worker depends on the worker's skills level).

destination countries of strengthening recruitment regulation in the ways proposed in this Article. For instance, countries of employment, and in turn, the businesses at the top of the supply chain that rely on suppliers in those countries, will need to address the legitimate concerns of countries of origin that competitiveness as a worker source country will be undermined if they shift the costs of recruitment from migrant workers to employers or suppliers and make recruitment from their country more expensive in the global marketplace for migrant labor.

Indeed, countries of employment also have legitimate concerns that requiring employers to bear the costs of recruitment will make those suppliers less competitive in the global marketplace. One way to address this is by levelling the playing field among countries of origin through multilateral agreements that establish common fair recruitment standards. In the meantime, states, employers, and businesses at the top of supply chains can address these concerns by rewarding countries of origin that reliably supply them with workers sourced by fair recruiters, and by investing in effective enforcement institutions by providing those countries with increased recruitment opportunities. The disintermediating potential of technology can also be powerfully engaged to reduce opportunities for abusive recruitment practices and reduce oversight and compliance costs, as demonstrated by the various examples discussed in this Article.²⁷⁵

Finally, civil society can play a critical role in monitoring, supplementing, and extending traditional governance models to both highlight abusive recruitment practices and propose alternatives. Civil society can also harness the power of consumers to pressure businesses to monitor and report on their supply chains to improve transparency, creating increased accountability. Some of the initiatives discussed in this Article have been driven in part by campaigns involving unions, NGOs, consumers, and workers pushing from the ground up; and these campaigns have caught the attention of some legislators who have developed legal frameworks to impose varied responsibilities on businesses regarding their supply chains. In a manner analogous to the way in which states and businesses might reward their supply chain procurer with contract longevity, consumers can reward companies by increased patronage, recognizing not only the quality of the product but also the treatment of its workforce.

Achieving a wholesale shift to a fair recruitment system is challenging, and it is apparent that such a shift cannot be achieved by any single actor or initiative. States and corporate actors bear responsibility for ensuring that migrant workers' human rights are protected within recruitment, and that rights violations are addressed. States, corporations, civil society, and migrant workers each have unique forms of leverage to prevent abuses and drive fair recruitment. The best chance for progress towards fair recruitment practices for migrant workers lies in simultaneously harnessing the leverage of this multiplicity of stakeholders and combining public and private regulatory techniques to address the root causes and economic drivers underlying current practices.

275. See, e.g., *supra* Part III.A.1.