

Kevin Kolben and The Consumer Imaginary: Labor Rights, Human Rights, and Citizen-Consumers in the Global Supply Chain: Commentary and Analysis

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By: Pearl Eliadis, Visiting Scholar, with commentary from Alyssa King, Assistant Professor and Sabine Tsuruda, Assistant Professor (Queen's Law)

Globalization has always been a vexing topic, especially where labour and human rights law intersect with international trade. The global supply chain economy offers opportunities to businesses and

consumers to access lower prices, innovative products, and essential raw materials. Increasingly, firms are outsourcing their manufacturing and production, especially to East Asia, BRICs and developing countries, prompted by lower trade tariffs and more powerful information technology and communications. Lead firms like Apple and Nike may not make much of anything themselves anymore, but they do rely on massive, disaggregated production chains and “fissured” workplaces in other countries where labour and health standards may be considerably lower and where employees have little or no relationship with lead firms.

Kevin Kolben, Associate Professor of Rutgers Business School, a lawyer with a background in labour law, examines these phenomena in his recent article, “The Consumer Imaginary: Labor Rights, Human Rights, and Citizen-Consumers in the Global Supply Chain.” (Kolben 2019). Kolben presented his work at Queens Law on January 13 at the Douglas Cunningham Lecture, convened by Queen’s Law’s Kevin Banks.

The unbundling and scattering of supply chains across the globe increases the social distance between consumers and workers. Consumers are less likely to know about workers in distant countries or the conditions in which they work, while workers are vulnerable to precarious employment, dangerous conditions and poor labour protections. In the worst cases, workers experience slavery, forced labour, abuse and cruel treatment.

For a wide range of reasons, state-based legal systems have not been well-equipped to address corporate malfeasance or negligence that occurs in other jurisdictions. In Canada, victims of corporate malfeasance or negligence overseas have worked with transnational labour and human rights activist networks for years. Working alongside Canadian activists and lawyers, they have supported foreign plaintiffs seeking redress before Canadian courts. The results in cases like *Choc v. Hudbay Minerals* Inc.; *Araya v. Nevsun Resources*, *Garcia v. Tahoe Resources*; *Chevron Corp. v. Yaiguaje* and *Das v. George Weston Ltd.* (Loblaws) have been mixed; attempts to drag Canadian corporations to account before the courts may have had some success, but such cases have also taken years of litigation just to clear preliminary procedural hurdles.

All of which begs a basic question.

ARE THERE OTHER EFFECTIVE SOLUTIONS?

This article provides an overview of Kolben’s research into other ways in which consumers as ‘citizen-consumers’ can offer market-based alternatives and effectively mobilize to apply pressure to lead firms to improve compliance with human rights and labour standards. The article also discusses some parallel developments in Canada, and looks at current major CSR standards to situate the discussion. It then discusses two critiques. First, concerns about introducing more ‘voluntary’ and market-based initiatives aimed at spurring consumers to pressure corporate behaviour have not proved successful to date. It is not clear why more of them are needed. Second, if the solution is additional legislation to increase and strengthen labour, trade, and transparency laws, this would be the product of state

action (perhaps encouraged by its citizens, with ‘citizenship’ understood in the traditional sense) and not the citizen-consumer as the regulatory agent. All this leads us to ask what an expanded concept of social citizenship brings to the endeavour.

Queen’s Law’s **Sabine Tsuruda** commentary takes on some of these questions and answers them from a different perspective: what are the implications of a policy reorientation away from a primarily rights-based approach to one that also relies on consumers to choose products produced under fair and humane conditions?

Next, Queen’s Law’s **Alyssa King** encourages us to examine underdeveloped areas of law that hold promise as avenues to engage with both states and corporate actors using international private law tools that could be brought to bear in shaping and being shaped by the consumer imaginary.

The Citizen-consumer Reimagined

In the US, academics have been looking closely at the role of the consumers as activists, regulators and even disruptors of global chains of production in an effort to promote social justice at home and abroad. Citizen-consumers thus reimagined transcend their status as mere purchasers of goods and services to become non-state ‘regulatory agents’. Kolben argues that the “consumer imaginary” is about conceptualizing (or re-conceptualizing) the processes and the people who produce goods.

The use of ‘citizenship’ is a central concept in the Article and is grounded in consumers’ social engagement with global communities of like-minded consumer activists, rather than the more traditional meaning of citizenship that connotes political attachment to a defined nation-state. Kolben is especially interested in mechanisms that can operate in the framework of consumer citizenship and that can narrow the social distance between consumers and the people who make the products they purchase:

“[T]he term ‘consumer citizenship’ is chosen because consumers who make purchasing choices informed by a political ideal and desire to connect with producers are engaging in a form of activity that is consonant with cosmopolitan ideas of citizenship… In consumer citizenship, political activity occurs at the site of consumption and through market transactions (Kolben, 861, 865).”

Kolben acknowledges that neither “consumer citizenship” nor political consumerism (the European variant) are new ideas and that both iterations have been subject to criticism. But Kolben argues that citizen-consumers’ potential as r*egulatory agents* is under-explored in terms of how they can influence the global supply chain.

The 2013 collapse of the Rana Plaza in a Dhaka garment factory in Bangladesh provides a practical starting place. The collapse caused death, injury and disability to thousands of workers. Avaaz, a US-based activist group (founded by a Canadian), uses crowd sourcing and petitions to fund its work and mobilize its base. Avaaz became involved immediately, launching an influential petition seeking justice and accountability for the victims, their families, and workers in Bangladesh.

As a result of the international and critical scrutiny, pressure was placed on local factories to raise their labour, health, and safety standards through two multi-stakeholder initiatives, the Accord for Fire and Building Safety (the 'Accord') and the Alliance for Bangladesh Workers' Safety (the 'Alliance'). The Accord and the Alliance aimed to monitor and improve health and safety standards in the garment industry.

Meanwhile, in Canada, attempts to bring Canadian firms sourcing products from companies in the Rana Plaza to account for the collapse of the Rana Plaza have failed. The Ontario Court of Appeal dismissed on a preliminary basis an attempt to bring a class action against, inter alia, Loblaws and Joe Fresh for their alleged role in the disaster. In Das v. George Weston Ltd. (Loblaws), the Ontario Court of Appeal found that the matter was properly subject to Bangladeshi law and was, in any event, time-barred.

Kolben does not discuss at any length whether occupational health and safety or labour conditions in Bangladesh have improved materially as a direct result of consumer activism. There were changes in national labour laws to ensure structural safety and new requirements to establish safety committees following the disaster. (See the discussion in Naila Kabeer, Lopita Haq and Munshi Sulaima, Multi–stakeholder initiatives in Bangladesh after Rana Plaza: global norms and workers' perspectives (BRAC University, 2019). However, it is not clear that these results can be attributed to the citizen-consumer as distinct from other vocal actors such as social justice/transnational activists, the international labour movement, foreign governments, or even the extensive corporate membership of the Accord and the Alliance, for that matter, who knew that they had be seen to be responding publicly to the outrage.

Decreasing the Social Distance between Workers and Consumers

What is clear is that consumers can make a difference to the reputations of businesses, and that consumer behaviour can be influenced by transparent and easily-understood information about what they are buying. Kolben analyzes several studies showing that consumers can be driven to make purchases or to refrain from doing so on ethical and principled grounds. Their purchasing behaviour will be influenced by perceptions of social responsibility and the ethical production of goods attached by the seller. Some studies show that socially-conscious consumers may alter their behaviour if they are made to feel closer to or at least aware of the working conditions of those who produce consumer goods.

In one such study, consumers were shown to be less likely to buy products, even at a discount, if they knew that the product was made under poor conditions (although the research also demonstrates price sensitivity: even if the consumer is aware that the product was made in good conditions, they are less likely to buy as prices rise: see Kimberly Ann Elliott and Richard B. Freeman, "Can Labor Standards Improve under Globalization?" 34-35 (Peterson Inst. for Int'l Econ. 2003). Conversely, consumers are willing to pay more for ethical and fair trade products like clothing and coffee, for example (see C. Patrick Heidkamp et al., "Human Rights and Public Opinion: From Attitudes to

Action", (2009) 124 Pol. Sci. Q. 443).

Social labels like 'fair trade' initiatives are important non-state strategies discussed by Kolben that can reduce the social distance between consumers and workers, even if the geographic distance between them is actually unaffected (Kolben, 886). Primary social labels, which mainly target the consumer, are widely used to promote awareness of social and environmental issues and standards. Their effectiveness is contested because the initiatives are not local as a rule and do not reflect local priorities, and because they are not able to address human rights violations related to freedom of association and collective bargaining rights (Kolber 885). Kolben argues, however, that they foster a form of 'relationship' with actual producers and, critically, that consumers will be spurred to action as a result.

In response to problematic or unethical corporate behaviour, boycotting and 'buycotting' are widely used to punish and to reward, respectively, unethical corporate behaviour. 'Buycotting' is the practice of consciously seeking out and purchasing goods as a positive reinforcement to companies that engage in ethical and socially responsible behaviour.

Experimental results from researchers Mark Pigors and Bettina Rockenbach, also discussed by Kolben, shows that consumers are sensitive to both price and to the conditions of workers (wage levels in this study). Information about wages that is directed at consumers about workers creates a virtuous circle: firms are incentivized to pay higher wages to their workers, which encourages consumers to buy goods made by workers who they know are paid higher wages (Mark Pigors and Bettina Rockenbach, "Consumer Social Responsibility" (2016) 62 Management Science 3123). Again, Kolben argues that this kind of information serves an important function by decreasing the social distance between the workers and the consumer and promoting awareness and even empathy (Kolben describes social distance in the sociological and social theory literature as "the degree to which people are willing and able to accept and include those who belong to other social groups based on race, social class, and nationality to name or few differentiators", at 876).

Trade and Transparency: Consumer Power or State Tools?

For lawyers, it is the last section of Kolben's article that is of particular interest. CSR, as a form of corporate philanthropy, is heavily criticized, not only by activists and unions, but also by academics who see the entire exercise as a way to shielding business from any real responsibility through soft norms and voluntary standards that are not directly enforceable. But the question of what meaningful options exist remains a live question.

Academics have suggested the introduction of new or more stringent requirements so that corporate disclosure and public reporting about labour and human rights are provided in ways that are more easily understood by the consumer (see Adam S. Chilton and Galit A. Sarfaty, "The Limitations of Supply Chain Disclosure Regimes" (2017) 53 Stan. J. Int'l L. 1. But consumers have to be willing to support strategies to put pressure on companies to change their behaviour. But, Kolben observes,

trade and labour provisions as well as transparency laws are not actually designed to “trigger the consumer imaginary.” Kolben elaborates two ways in which policy can intervene to regulate labour conditions in supply chains: the first is through trade law and the second is domestic transparency laws.

1. Trade Law

US legislators have become more responsive to labour and human rights standards in recent years, Kolben asserts, pointing to legislation passed by Congress providing that goods produced by “convict labor or/and forced labor or/and indentured labor under penal sanctions shall not be entitled to entry at any of the ports of the United States” (Amendments to 19 U.S. Code §?1307 were introduced in 2000 and in 2016 to ban the importation of products made with forced labour and/or indentured labour, and to remove a loophole that would have permitted exceptions based on consumer demand, respectively).

Pressure to improve conditions for workers has generated other trade-related mechanisms such as unilateral labour standards and labour rights conditionality. These are not new developments, as Kolben points out: conditionality was introduced in 1983, as part of the Caribbean Basin Initiative and then incorporated the following year into a generalized system of preferences (Kolben, 890). In Europe, similar standards have been introduced through conditionality provisions such as the GSP+ that include human rights standards and form part of the EU’s 2012 Strategic Framework on Human Rights and Democracy.

Significant global increases in the use of trade agreements containing labour provisions have supporters, but detractors as well, with the latter camp criticizing such provisions as a form of protectionism. Kolben nonetheless views labour provisions as a way of ensuring that trade liberalization is moderated by basic conditions attached to labour standards (Kolben, 892).

2. Domestic Transparency Laws

The second area is domestic transparency laws, which are relatively new compared to trade law. They include mandatory disclosure requirements that “generate accurate information for consumers to make purchasing decisions and to provide information to stakeholders to better enable them to pressure companies to change their supply chain practices” (Kolben, 892).

Among the best-known American examples discussed in the Article is the Dodd-Frank Wall Street Reform and Consumer Protection Act that provides for mandatory disclosure by public companies on the sources of their minerals from the Great Lakes Region in Sub-Saharan Africa. Human rights and humanitarian concerns, particularly in the Democratic Republic of the Congo, were major considerations in the development of Dodd-Frank.

Kolben’s second example is the California Transparency and Supply Chains Act which also requires reporting, in this case, by retailers or firms doing business in California (Cal. Civ Code §1714.43

(2012). Businesses are required to disclose how they monitor their processes for slavery and human trafficking in supply chains. The Act aims to provide “consumers with critical information about the efforts that companies are undertaking to prevent and root out human trafficking and slavery in their product supply chains – whether here or overseas.” (See Kamala D. Harris, *The California Transparency and Supply Chains Act: A Resource Guide* (California Department of Justice, 2015.) A key requirement of the disclosure is that information be posted on the web sites both the retailer and the manufacturer, and must be conspicuous and easy to understand.

Kolben notes that the literature on CSR reporting and mandatory disclosure initiatives points to an important drawback, namely that technical reporting requirements are not always easily accessible to consumers and, even if they are, consumers would have difficulty assessing and comparing the disclosures, making them inappropriate for assessing, for example, human rights standards (although the California initiative appears to be specifically aimed at ensuring ease of both access and comprehension) (Kolben, 895).

DISCUSSION

Kolben’s article provides a textured, thoughtful analysis of how domestic and regional trade laws and domestic disclosure laws emerged in the US as tools to improve corporate behaviour and trigger the ‘consumer imaginary’. It certainly is tempting to think that alternatives to rights-based approaches and traditional legal mechanisms are needed. These pathways to justice have had only marginal success, at best, in requiring companies to respect labour and human rights standards. Activists and academics have spent much energy looking for feasible alternatives to make transnational and domestic mechanisms more effective as ‘triggers” to the consumer imaginary. Kolben’s survey of the literature is wide-ranging, covering both the theoretical underpinnings of his central ideas and the practical and empirical bases for the analysis.

His central idea of consumer citizenship operates as the framework within which trade, labour and transparency mechanisms are grounded and, to some extent, are dependent for their success.

It is not entirely clear, however, why ‘citizenship’ (even as reconceptualised and re-purposed), is needed to illustrate or build imagined relationships and real empathy. Lynn Hunt’s 2008 book, Inventing *Human Rights, A History* provides important insights into the emergence of human rights in western countries during the early modern period.

Hunt points to technological developments such as the printing press and wider distribution of printed material, along with changing social patterns and interactions among an emerging literate and leisure class. These consumers of culture and of news created an unprecedented pool of people who shared ideas, experiences and emotions that affected others. They had a newfound capacity to more easily experience empathy for other people with whom they would not otherwise have come into contact. The role of empathy is central to Hunt, as is an ’imaginary’ and shared community of interest by people who were responding not only to the arts but also to calls for political change. The additional

framing of such communities as ‘citizenship’ does not appear necessary or perhaps even advisable to achieve the objective creating such communities, a point made by Sabine Tsuruda later in this article, because of the implications for rights-based approaches.

In a consumer citizenship framework, which is underpinned by a shared imagination and solidarity, one would expect some reciprocity or mutual obligations and duties that would elevate the conceptual framework from a mere community to a form of citizenship. This reciprocity would exist between the corporate sector and the consumer, or between the consumer and the worker, or both, and would generate benefits, duties or powers that accrue to the citizen-consumer by virtue of the status of ‘citizenship’. But Kolben’s framework invites us to ask whether the citizen-consumer is owed anything by anyone, including, say, the corporate sector? Does the ecosystem of imagined relationships contain any form of legal reciprocity? And if the answer to this question is no, what does the idea of citizenship in Kolben’s model bring to the table?

Certainly, corporations have rejected soundly the idea that they owe a broader set of duties to consumers, especially formal legal duties, unless they are forced to do so through consumer laws or the narrow examples of trade and transparency laws raised by Kolben.

The global community, for its part, has attempted to rouse the corporate imaginary in parallel with efforts by social justice activists to rouse the consumer imaginary by developing market-based rules and soft standards. But the tangible result has been a confusing maze of CSR guidelines, rules and processes (recently rebranded in Canada as ‘responsible business conduct’), almost all of which are voluntary and none of which are truly effective.

A partial list includes the UN Global Compact (2000); the Voluntary Principles on Security and Human Rights (2000); the Extractive Industries Transparency Initiative (2002); the UN Guiding Principles on Business and Human Rights (endorsed by the UN in 2011); the OECD’s Guidance for Multinational Enterprises (2011), with guidance on disclosure, employee and industrial relations, human rights, the environment, and bribery (2011), and the OECD Due Diligence Guidance for Responsible Business Conduct (2018). There are also sustainable development frameworks of course, not to mention geographically-focused initiatives like the Africa Mining Vision, and processes for conflict minerals, like the Kimberly Process Certification Scheme for diamonds. Canada has two separate (and toothless) mechanisms for conflict resolution and Global Affairs Canada provides a fulsome survey of the applicable standards called the CSR Standards Navigation Tool—which runs a full and daunting 124 pages, citing myriad environmental, human rights, labour standards and on governance (part of this section is drawn from the discussion in: Pearl Eliadis, “All that Glitters: What Corporate Social Responsibility is Not”, Literary Review of Canada (November 2019).

At the national level, governance in developing countries has suffered in the face of CSR projects and neo-liberal investment. Academics like Paula Butler and Nketti Johnston-Taylor have written about these issues in the 2019 publication *Corporate Social Responsibility and Canada’s Role in Africa’s Extractive Sectors*. They observe that the political and policy structures of developing countries have

been weakened and hollowed out by trade agreements and investments that allow large firms to erode national capacity or political will to enforce labour and human rights standards. Firms and transnational businesses assume *de facto* control of how production facilities operate, while corporate social responsibility is deployed to ease the path in other countries and to justify corporate behaviour at home.

A significant governance gap has thus yawned between the rhetoric of market-based initiatives and abundant soft norms and processes on the one hand, and human rights and labour laws on the other. Canadian legal scholars Penelope Simons and Audrey Macklem have pointed to the need to bridge this gap by requiring state intervention grounded in the requirement to respect, protect and fulfill human rights (*The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (Oxon., New York: Routledge, 2014).

It is true that a broad understanding of both legal governance and social engagement models can help to create pathways for more engaged citizens and consumers. However, the history of CSR suggests that new layers of voluntary initiatives and private governance mechanisms will not work unless, as Kolben suggests at the end of his Article, they are developed with a view to creating domestic law in the home states of transnational corporations. As such, we find ourselves squarely back in a traditional citizenship framework where the State, as the primary duty-holder in international law, has obligations under both customary international law and treaty law to ensure that rights are respected, protected and fulfilled. And where citizens, in the traditional political sense, pressure their governments to enact laws that will protect workers, wherever those workers may be.

SHOULD 'CITIZEN-CONSUMERSHIP' DO THE HEAVY POLICY LIFTING?
COMMENTARY FROM SABINE TSURUDA

To better respond to the labour and human rights abuses of global supply chain workers, Kolben argues for a policy reorientation from a primarily rights-based approach to one that also relies on consumers to choose products produced under fair and humane conditions. To support such "citizen-consumership," Kolben argues that we should adopt legal measures that aim to trigger the "consumer imaginary"—people's abilities to, as consumers, imagine the working conditions and lived experiences of the individuals producing consumer goods (Kolben 879–80).

Block #1Kolben's thoughtful proposal is attuned to possible moral risks of adopting a consumer citizenship model, such as the risk that the model would, if implemented, exacerbate wealth-based differences in political power (Kolben 866–67). Even so, Kolben seems largely optimistic that increased reliance on consumer citizenship would be a valuable public policy change. While I agree that people should exercise care with respect to how their market activity impacts labor conditions, I am wary of giving consumer citizenship a major public policy role in preventing labor and human rights abuses.

First, Kolben proposes triggering the consumer imaginary by personalizing workers' experiences, such as by making workers' legal testimonies about the labor abuses they experience public, by making available images of the "faces and hands" of the people who grow food and make clothes, and the like (Kolben 840, 896–97). The purpose of such information is to encourage consumers to empathize towards workers in the global supply chain and, in turn, to make consumer choices based on how producers treat their workers. While empathy is surely a morally valuable capacity to develop and exercise, there is a risk that, in seeking to encourage empathy, the narratives we choose to reveal about workers' lives will tend to present workers in the global supply chain as weak, as victims who require our good will for saving, as docile, and so forth. Such depictions may be effective for triggering empathy, but they may also be disempowering, and even essentializing, for the subjects of our empathy.

In response, Kolben might say that we could adopt measures that let workers decide what they reveal about themselves, rather than putting that narrative power in the hands of their bosses or third parties. While this would be an improvement, workers may still feel rational pressure to self-represent in ways that cater to Whole Foods and Walmart shoppers' ideas of grateful coffee growers and vulnerable garment workers. This is not to say that we should not support consumers in feeling empathy for the people who produce what they buy. Rather, my point is that there may be deep tensions between respecting workers and facilitating consumer empathy, the latter of which may be contingent on morally problematic ideals and stereotypes that consumers have about workers. And, consequently, in seeking to facilitate empathy, we shouldn't just focus instrumentally on how to trigger empathy, but also on sharing information about workers that supports their agency and status.

Block #2Second, for similar reasons, I am concerned about turning to consumer citizenship as a possible rights alternative (as opposed to a mere supplement). Making the quality of people's working conditions contingent on the ethical predilections of private individuals is reminiscent of eras during which people of colour, women, non-citizens, and the like, were denied equal protection of the law, and instead had to depend on the voluntary acts and good will of others for safe working conditions and financial support. Of course, Kolben is not arguing that we should go back to such times. But relying on consumer choices to make up for rights deficiencies has a similar character: such a public policy involves making it a feature of our laws that the quality of workers' labor conditions is to be contingent on how consumers feel about workers. Moving from a rights-based model to a consumer-based model may also be particularly worrisome in the context of global supply chains. The most powerful consumers will often be white, wealthy citizens from colonial powers, and many of the workers with the greatest need may be people of colour in countries that suffered under colonial rule. Consumer citizenship models for reducing labor and human rights abuses abroad may thus reproduce colonial relations of dependency.

To be clear, I do not mean to suggest that any reliance on consumer choice to make up the shortfall in workers' rights is impermissible. It may be that Kolben's model of consumer citizenship is, for better or

for worse, the most effective way we can improve conditions on the ground. But that doesn't mean we have to make reliance on consumer citizenship a central and valued feature of our public policy. We might instead treat public reliance on consumer citizenship as a non-ideal stopgap—as an interim, highly imperfect, and partial response to a set of problems that ultimately require securing a more equal legal status for workers abroad.

OVERLOOKED PRIVATE LAW TOOLS IN TRANSNATIONAL JUSTICE COMMENTARY FROM ALYSSA KING

International private law tools could also be brought to bear in shaping and being shaped by the consumer imaginary. International arbitration has an underappreciated role to play, in two ways. First is the old tried-and-true tactic for litigating against states: embarrassing your opponent. Although international commercial arbitration is typically confidential, investment arbitration is not. Sadie Blanchard has discussed how investors use discovery against states in order to uncover corruption, and force a settlement in cases in which assets would otherwise be protected by sovereign immunity. Two can play the discovery game. States may be able to raise defenses that relate to alleged violations of say, environmental rights, by the investor and get information into the public domain. Here, arbitration would help shape the news consumers receive about corporations, news that might affect their buying decisions.

Most people imagine international commercial arbitration as business to business arbitration, conducted by institutions purpose built for those business customers. Yet one can imagine instances in which it offers the only avenue for rights related redress, particularly if national courts are weak and states are uninterested in rights enforcement. A set of model rules for Business and Human Rights arbitration now exists. These rules might be useful for business that are interested in better supply chain management. They can require suppliers to meet certain human rights standards and arbitrate against them if they don't. One can also imagine a bottom up push from labour rights groups to include arbitration clauses in contracts. If demand for this type of arbitration exists, institutions will adapt, offering model clauses with rules conducive to human rights claims and arbitral lists with lawyers knowledgeable in this area.

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