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Hiding in Plain Sight: An ILO Convention on Labor Standards in Global Supply Chains

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Hiding in Plain Sight: An ILO Convention on Labor Standards in Global Supply Chains

James J. Brudney*

Abstract

This Article proposes a solution to the primary challenge currently confronting governments, employers, and workers under international labor law: how to promote and protect decent labor conditions in global supply chains (GSCs).

The Article begins by summarizing why existing public law and private law approaches have failed to meet this challenge over several decades. It describes the shortcomings of law and practice in developing countries as well as the weakness of corporate social responsibility (CSR), including the most ambitious version of CSR, the U.N. Guiding Principles on Business and Human Rights. It then analyzes the problems with recent national laws in developed countries that impose mandates on multinational enterprises (MNEs) at the top of global supply chains—laws requiring disclosure and transparency in labor-protection efforts and laws requiring a due diligence process to identify and monitor against human rights risks.

The centerpiece of the Article is its argument for an international convention, promulgated by the International Labor Organization (ILO), that includes three essential features missing from existing voluntary and mandatory approaches. First, business obligations must include substantive responsibility to avoid involvement in supply chain human rights violations, not just procedural responsibility to adhere to a set of due diligence processes. In this context, the Article explores different approaches to establishing tort liability for violations under both U.S. and European law. Second, workers and their representatives must directly participate in the design, implementation, and enforcement of a due diligence system. Third, all workers engaged in supply chain activities must be protected, regardless of their formal employment or contractual status

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under relevant national law. The Article additionally considers issues of jurisdiction, enforcement, and remedies likely to arise under the convention.

Finally, the Article addresses the appropriateness and feasibility of such a convention. It identifies several factors that support a leadership role for the ILO and discusses the impact of existing ILO conventions on national laws in ways that extend beyond formal ratification. The Article closes with a suggestion to invite newer voices from the worker and employer communities to participate in discussions about labor conditions in GSCs alongside the recognized trade union and employer organizations.

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I. INTRODUCTION

It has been the monstrous curse of the world, of all ages, to degrade labor to the level of a commodity, a material, a chattel, to be bought and sold, and the price of it regulated in the market as any “materials to be worked up.”

Eugene V. Debs, *Labor as a “Commodity”*, LOCOMOTIVE FIREMEN’S MAG., Mar. 1889, at 196, 197.

The labor of a human being is not a commodity or article of commerce.

Clayton Antitrust Act of 1914 § 6, 15 U.S.C. § 17.

[L]abor is not a commodity.

ILO, Declaration of Philadelphia art. 1 (May 10, 1944) (reaffirming fundamental principles of the ILO).

In the twentieth century, nations and the new international order denounced the idea of labor as a commodity to be exploited. Yet, in the twenty-first century, the promises appearing on global corporations’ websites that they will respect workers’ human rights¹ bear little relation to the exploitation and abuse actually experienced by those workers.² Recent estimates indicate that, worldwide, over 150 million children are engaged in child labor and over twenty-seven million children and adults are victims of forced labor.³ In addition, tens of millions of individuals toiling in global supply chains (GSCs) experience some combination of substandard wages, excessive working time, serious safety and health risks, restrictions on freedom of association, and workplace discrimination.⁴

¹ See, e.g., *Human Rights and Labor Issues*, GAP INC. (2022), <https://perma.cc/N5WF-X6KD>; *Human Rights*, WALMART (2022), <https://perma.cc/J5UX-K87N>.

² See, e.g., GLOBAL LABOR JUSTICE ET AL., *GENDER BASED VIOLENCE IN THE GAP SUPPLY CHAIN: A REPORT TO THE ILO* (2018), <https://perma.cc/FEY8-DV3X> (reporting on gender-based violence at twelve supplier factories in India, Indonesia, and Sri Lanka); GLOBAL LABOR JUSTICE ET AL., *PRECARIOUS WORK IN THE WALMART GLOBAL VALUE CHAIN* (2016), <https://perma.cc/QQ2Q-JVY4> (reporting on instances of forced labor, wage-related rights abuses, repression of freedom of association, and unauthorized subcontracting at supplier factories in Bangladesh, Cambodia, and India); see also Noor Ibrahim, *Sexual Assault, Forced Labor, Wage Theft: Garment Workers in Jordan Suffer for U.S. Brands*, THE GUARDIAN (Aug. 29, 2020), <https://perma.cc/U8WV-7WNN> (describing abuses at factories from which GAP, Walmart, and “dozens of American fashion brands” source apparel).

³ ILO ET AL., *ENDING CHILD LABOUR, FORCED LABOUR AND HUMAN TRAFFICKING IN GLOBAL SUPPLY CHAINS* 5 (2019), <https://perma.cc/LD6S-MMUG>; ILO ET AL., *GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOUR AND FORCED MARRIAGE* 2 (2022), <https://perma.cc/45AU-9743>.

⁴ See HUMAN RIGHTS WATCH, *HUMAN RIGHTS IN SUPPLY CHAINS: A CALL FOR A BINDING GLOBAL STANDARD ON DUE DILIGENCE* 5, 11–16 (2016), <https://perma.cc/UD6D-SVDA>. See generally DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2014).

The growth of GSCs for a wide range of products and services⁵ reflects the influence of numerous factors, including government efforts to attract foreign direct investment, the expanded role of international trade, fragmentation of production across borders, and technological developments.⁶ Although there is no single GSC model, multinational enterprises (MNEs) typically occupy the top of a network of subcontractors, suppliers, and outsourced assemblers or producers, including homeworkers.⁷ Over the past several decades, GSCs have at times contributed to economic growth, job creation, and enhanced competitiveness, especially in developing countries.⁸

Progress in achieving decent labor conditions, however, has been disappointing. Public enforcement of labor standards in developing countries and private adherence to regulatory norms through codes of corporate social responsibility (CSR) have largely failed to address grim working conditions in GSCs for apparel, footwear, electronics, agriculture, and other products.⁹ Even the 2011 adoption of the U.N. Guiding Principles on Business and Human Rights, a rigorously developed voluntary compliance framework, has not led to substantial change in supply chain labor conditions.¹⁰

The COVID-19 pandemic has highlighted this failure to achieve decent labor conditions. Millions of workers worldwide were left in desperate straits when brands and retailers cancelled or refused to pay their suppliers for production orders, suppliers laid off workers or closed factories without providing

⁵ GSCs have proliferated for products such as apparel, footwear, automobiles, electronics, agriculture, and seafood, and for services including transportation, tourism, and hospitality. This Article does not address the diversity in structure and operation of GSCs; its primary examples come from apparel, footwear, and agriculture. For descriptive and normative purposes, the Article adopts the paradigmatic model of a brand-driven retail supply chain in which competition among suppliers and control of ordering practices directly and indirectly affect working conditions.

⁶ See OECD, INTERCONNECTED ECONOMIES: BENEFITTING FROM GLOBAL VALUE CHAINS 13 (2013); WORLD BANK GRP., TRADING FOR DEVELOPMENT IN THE AGE OF GLOBAL VALUE CHAINS xiii (2020) [hereinafter WORLD BANK GRP., TRADING FOR DEVELOPMENT]; ILO Governing Body, 340th Sess., *Report of the Director-General, Second Supplementary Report: Report of the Technical Meeting on Achieving Decent Work in Global Supply Chains* ¶ 10 (Oct.–Nov. 2020) [hereinafter ILO Governing Body, 2020 *Second Supplementary Report*]. The terms “Global Supply Chain” and “Global Value Chain” (GVC) are generally viewed as synonymous; this Article uses “Global Supply Chain” except when a publication uses the term GVC.

⁷ See generally Gary Gereffi et al., *The Governance of Global Value Chains*, 12 REV. OF INT’L POL. ECON. 78 (2005) (discussing five types of global value chain governance).

⁸ See Int’l Lab. Conf., 105th Sess., *Resolution Concerning Decent Work in Global Supply Chains* ¶ 1 (July 8, 2016); WORLD BANK GRP., TRADING FOR DEVELOPMENT, *supra* note 6, at 67–86.

⁹ On failure of public law enforcement, see *infra* Part II.A; on inadequacy of CSR, see *infra* Part II.B.

¹⁰ For discussion of the Guiding Principles as a voluntary form of corporate self-regulation, see *infra* Part II.B. For discussion of certain Guiding Principles as foundational in constructing a mandatory approach, see *infra* Part III.A.

severance payments to which the workers were legally entitled, and governments did not enforce their laws prohibiting such wage theft.¹¹

Recognizing a need to close the considerable gap between principle and practice, governments in developed countries have begun enacting legislative mandates for MNEs that are based or do substantial business within their borders. These mandates have taken two separate forms: first, laws requiring disclosure and transparency in labor-protection efforts undertaken by MNEs in their supply chains;¹² and second, laws requiring a level of MNE due diligence in assessing and enforcing against the human rights risks faced by workers in these supply chains.¹³ While statutes aimed explicitly at supply chain conditions are a positive development, they have thus far been less than successful. Disclosure laws lack financial penalties, a civil liability regime, or indeed any serious enforcement mechanism for non-compliance. Due diligence laws face a range of conceptual and design challenges; notably, they do not require consultation with trade unions at each stage of the due diligence process, and they establish liability only for failure to follow certain procedures, not for the outcomes of causing or contributing to human rights abuses.¹⁴

The absence of labor protections in practice coincides, ironically, with widespread international recognition over the past several decades of certain labor standards as fundamental human rights, including the right to be free from forced labor, child labor, and workplace discrimination; the right to enjoy freedom of association and collective bargaining;¹⁵ and, most recently, the right to have a safe

¹¹ See WORKER RTS. CONSORTIUM, *FIRE, THEN ROBBED: FASHION BRANDS' COMPLICITY IN WAGE THEFT DURING COVID-19* (Apr. 2021); BUS. AND HUM. RTS. RES. CTR., *WAGE THEFT AND PANDEMIC PROFITS: THE RIGHT TO A LIVING WAGE FOR GARMENT WORKERS* 3 (Mar. 2021) [hereinafter BHRRC]; Mark Anner, *The Governance Challenges of Social Upgrading in Apparel Global Value Chains in the Context of a Sourcing Squeeze and the COVID-19 Pandemic*, in *ECONOMIC AND SOCIAL UPGRADING IN GLOBAL VALUE CHAINS* 361, 362, 374–76 (C. Tiepen et al. eds., 2022).

¹² See anti-slavery disclosure statutes from California (2010), the U.K. (2015), and Australia (2018), discussed *infra* Part II.C.

¹³ See due diligence statutes from France (2017), the Netherlands (2019), and Germany (2021), discussed *infra* Part II.C.

¹⁴ See *infra* Part II.C for analysis and critiques of both sets of laws.

¹⁵ These rights are set forth in eight conventions deemed fundamental under the ILO structure: two dealing with forced labor, two addressing child labor, two covering non-discrimination, and two dealing with freedom of association and collective bargaining. These eight fundamental conventions are also enshrined in Int'l Lab. Conf., 86th Sess., *Declaration on Fundamental Principles and Rights at Work* (June 1998).

and healthy workplace.¹⁶ The International Labor Organization (ILO)¹⁷ has led the drive to identify and elevate such fundamental labor norms in the global context, a role respected and deferred to by international trade and finance organizations.¹⁸ These norms have also become widely embedded in national statutes and constitutions.

Although there is no magic solution for what may seem an intractable challenge, this Article argues for a new international law approach: imposing liability and related obligations on transnational business enterprises as well as governments to reduce human rights abuses in GSCs. Specifically, the ILO should take the lead in formulating a global supply chain convention that sets out three central requirements for business enterprises. First, business responsibility must include both a process component and an outcomes component. Business enterprises must comply with a detailed set of due diligence procedures *and also* avoid involvement in human rights violations and provide remedies for causing, contributing to, or failing to mitigate such violations. Second, workers and their representatives must be provided the ability to engage directly and meaningfully with other interested parties in the formulation and implementation of the multi-stage due diligence process. And third, there must be protection for all workers engaged in supply chain activities, regardless of their formal employment or contractual status under relevant national law.

Application of an ILO convention to private entities as well as governments differs from the ILO's traditional focus of formulating binding obligations (through Conventions) or non-binding guidelines (through Recommendations)

¹⁶ In June 2022, delegates to the International Labour Conference of the ILO adopted a resolution adding to the existing fundamental principles the right to a safe and healthy working environment. *See International Labour Conference Adds Safety and Health to Fundamental Principles and Rights at Work*, ILO (June 10, 2022), <https://perma.cc/NHZ5-2YCZ>; *see also* Lejo Sibbel, *ILO Conventions and the Covenant on Economic, Social and Cultural Rights: One Goal, Two Systems*, 1 DIALOGUE & COOPERATION 51, 53–54 (2001) (discussing close linkage of ILO Conventions to the Universal Declaration of Human Rights regarding forced labor convention, as well as to the International Covenant on Economic, Social and Cultural Rights (ICESCR) regarding freedom of association convention).

¹⁷ The ILO, a U.N. agency established in 1919 by the Treaty of Versailles, includes 187 member states. Since its founding, it has promulgated 190 Conventions (deemed binding on states that ratify them) and over 200 non-binding Recommendations. *See* ILO Constitution art. 19 (describing procedures for promulgation and ratification of conventions and recommendations). The eight conventions identified as fundamental, *see supra* note 15, have collectively been ratified by over 90% of member states, and in one instance by 100%.

¹⁸ On trade, see Lawrence R. Helfer, *Understanding Change in International Organizations: Globalization and Innovation in the ILO*, 59 VAND. L. REV. 649, 707–10 (2006); Lee Swepston, *How the ILO Embraced Human Rights*, in RESEARCH HANDBOOK ON LABOUR, BUSINESS, AND HUMAN RIGHTS LAW 295, 305–06 (Janice Bellace & Beryl ter Haar eds., 2019). On finance, see *World Bank-ILO Cooperation*, ILO (June 2019), <https://perma.cc/44Z8-89UA> (identifying joint work and coordinated efforts responding to global supply chains); *The Programme*, BETTER WORK, <https://perma.cc/UBE9-RAUH> (describing collaboration between ILO and International Finance Corporation (IFC), a member of the World Bank Group).

for national governments only. This Article maintains, however, that the ILO is well positioned to undertake this modification for a number of reasons. While governments ratify ILO Conventions mainly to apply within national borders, a number of Conventions recognize and even require a role for cross-border cooperation.¹⁹ Further, the ILO recently has adopted innovative approaches to regulating work that is home-based, ambulatory across borders, or involves the informal economy.²⁰ In addition, the ILO very recently acted to regulate workplace violence and harassment through a comprehensive implementation and prevention strategy that could serve as a model for a convention regulating GSCs.²¹ Finally, the ILO's unique tripartite governance structure is well suited to generating and justifying expectations applicable to employers and their organizations as well as governments,²² as illustrated by its Tripartite Declaration of Principles that encourages MNEs to "take immediate and effective measures" to remedy violations of fundamental labor standards in their operations.²³

Since the late 1990s, the ILO has focused on the challenges that GSCs present, but it has struggled to agree on a comprehensive international approach to resolving them.²⁴ A convention that achieves the three objectives identified above could successfully break this impasse. At the same time, the impasse is more likely to be overcome if the preparations and negotiations include entities in addition to the traditional employer and worker organizations formally represented within the ILO's tripartite structure. On the employer side, MNEs in particular should be included, and they should participate directly and separately

¹⁹ See *infra* Part IV.B, discussing various examples.

²⁰ See *id.*

²¹ See ILO Convention 190 on Violence and Harassment, discussed *infra* Parts III.C–D.

²² Each of the ILO's 187 member states is represented not only by governments but also by organizations of employers and workers. A member state's right of participation as a representative includes the right to vote; the standard ratio of representation is 2:1:1, or two government, one employer, one worker. This ratio applies both in the International Labor Conference (a parliamentary-type organ that typically meets once a year) and in the Governing Body (a smaller, executive-type organ that meets more often during the year). See ILO Const. arts. 2, 3, 7.

²³ ILO, TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY 8 (5th ed. 2017).

²⁴ See, e.g., Int'l Lab. Conf., 105th Sess., Report IV: Decent Work in Global Supply Chains 1 (Apr. 8, 2016) (noting 2013 decision by Governing Body to initiate discussion on the issue); ILO Evaluation Off., *ILO Decent Work Interventions in Global Supply Chains: A Synthesis Review on Lessons Learned; What Works and Why, 2010-2019* (Sept. 2019); Guillaume Delautre, *Decent Work in Global Supply Chains: An Internal Research Review* (ILO Rsch. Dept., Working Paper No. 47, Oct. 2019); ILO Governing Body, 2020 Second Supplementary Report, *supra* note 6, at 25–28; ILO Tripartite Working Grp. on Options to Ensure Decent Work in Supply Chains, *Building Blocks for a Comprehensive Strategy on Achieving Decent Work in Supply Chains* (July 5, 2022). See generally Huw Thomas & Mark Anner, *Dissensus and Deadlock in the Evolution of Labour Governance: Global Supply Chains and the International Labour Organization (ILO)*, J. BUS. ETHICS (2022) (contending that ILO gridlock on this issue is due primarily to shifting power asymmetries between the tripartite constituents of governments, employers, and workers).

from the International Organization of Employers (IOE), whose members are for the most part national employer organizations rather than actual businesses.²⁵ On the worker side, organizations representing informal economy workers in the supply chain and other NGOs focused on a worker-driven approach to social responsibility should be included, as their voices would add value distinct from that of national trade union organizations.²⁶

This Article endorses the U.N. Guiding Principles on Business and Human Rights (UNGPs) as a baseline structure, while maintaining that pursuant to this structure, business obligations must be tied to substantive outcomes and adequate procedures, and also subject to actionable redress. With this in mind, the ILO should specifically address five major issues when drafting a global supply chain convention: (i) the nature of MNE duties at the top of the chain, some involving vicarious liability and some fault-based; (ii) the importance of continuous engagement with workers and their representatives in the design, implementation, and enforcement of a due diligence system; (iii) the scope of coverage for workers engaged in supply chain activities; (iv) the role of governments as a public enforcement presence, primarily in developed countries where MNEs are based or do extensive business; and (v) the need for meaningful remedies, including injunctions to compel compliance, access to monetary relief for victims of human rights abuses, and other sanctions imposed directly by the government. In this regard, arbitration becomes relevant as an additional means of resolving disputes that transcend national borders.

Part II of the Article examines the challenge of assuring decent labor standards in GSCs. It summarizes the basic shortcomings of efforts by governments in countries where global supply chain workers are located, by MNEs through the CSR approach, and by governments in countries where MNEs are domiciled or do substantial business. Part III then describes and justifies the key components of a proposed international convention to address the GSC decent work deficit, as well as discussing issues of jurisdiction, enforcement, and remedies that are likely to arise. Part IV examines the appropriateness of ILO leadership on the GSC issue, and the feasibility of the convention being proposed. It also identifies anticipated gaps in participation by certain employer and worker entities that could be addressed in order to enhance prospects for productive resolution.

²⁵ See *infra* Part IV.C.

²⁶ One such organization is Women in Informal Employment Globalizing and Organizing (WIEGO), which runs the Home-Based Workers Organizing for Economic Empowerment Project. See *Homeworkers Organizing for Economic Empowerment*, WIEGO (2022), <https://perma.cc/Q3BF-BHSH>. For discussion of worker initiatives operating outside the traditional trade union structure, see Sean Sellers, *Assessing Feasibility for Worker-Driven Social Responsibility Programs*, in *POWER, PARTICIPATION AND PRIVATE REGULATORY INITIATIVES* 139, 139–48 (David Brinks et al. eds., 2021) [hereinafter *POWER AND PARTICIPATION*]. Other examples of such organizations are discussed *infra* Part IV.C.

II. FAILURE OF EXISTING PUBLIC LAW AND PRIVATE LAW APPROACHES

This Part critiques the main approaches to achieving decent labor conditions in GSCs, presenting them as they have developed, in chronological terms. National law and practice in the developing countries where GSCs operate on the ground have long been deficient. Since the 1990s, MNEs have offered CSR as an alternative or supplement, but that approach, too, has disappointed. Now, national governments in countries where GSCs are domiciled (mainly, though not exclusively, in Europe) are enacting statutes that establish mandatory versions of CSR-type proposals, applicable to corporations. While a step forward, these statutes are inadequate in important respects.

A. Shortcomings of National Law and Practice in Developing Countries

Despite the growing influence of fundamental ILO standards on national legal systems across the globe, a wide gap remains between those standards and national law and practice in many countries. This is especially the case in developing countries where robust GSC operations are located and the informal economy is widespread. In some developing countries, scholars have observed a “walking back” of the rigor of enacted or ratified labor standards over time.²⁷ Several factors account for why the implementation of ILO labor standards by developing countries is so often disappointing: (i) governments may have economic motivations to minimize enforcement; (ii) national labor laws may have doctrinal limitations that allow for worker exploitation; and (iii) strategic and practical restrictions may be imposed on labor inspection.²⁸

1. Government economic motivations

Governments in developing countries are often reluctant to monitor or enforce labor protections as part of a larger economic strategy. Their reticence may be linked to a desire to attract new foreign direct investment, an effort to make domestic companies more attractive to foreign buyers, or an attempt to remain competitive with working conditions in other countries. It is common

²⁷ Lucas Ronconi, *Globalization, Domestic Institutions, and Enforcement of Labor Law: Evidence from Latin America*, 51 *INDUS. REL.* 89, 96 (2012). See Colin Fenwick, *The ILO and National Labour Law Reform: Six Case Studies*, in *LABOUR REGULATION AND DEVELOPMENT: SOCIO-LEGAL PERSPECTIVES* 235–287 (Shelley Marshall & Colin Fenwick eds., 2016).

²⁸ On failure of public laws, see Daniel Vaughan-Whitehead, *How “Fair” Are Wage Practices Along the Supply Chain?: A Global Assessment*, in *TOWARDS BETTER WORK: UNDERSTANDING LABOUR IN APPAREL GLOBAL VALUE CHAINS* 68, 72–100 (Arianna Rossi et al. eds., 2014) [hereinafter *TOWARDS BETTER WORK*]; ILO, *Wages and Working Hours in the Textiles, Clothing, Leather and Footwear Industries* (ILO Sectoral Activities Dept., Working Paper GDFTCLI/2014, Sept. 2014); Michele Ford et al., *Authoritarian Innovations in Labor Governance: The Case of Cambodia*, 34 *GOVERNANCE* 1255, 1258, 1267 (2021).

wisdom, propagated even by the International Finance Corporation (IFC), the private sector arm of the World Bank Group, that foreign investment might well be enhanced if governments soften their approach to business inspections.²⁹

2. Doctrinal limitations in national labor laws

While all national labor laws have doctrinal gaps that allow for worker exploitation, such gaps are particularly problematic in developing countries.

First, national labor laws typically provide protections only for full-time or regular employees. Statutory definitions of “regular” employees tend to exclude temporary, irregular, subcontracted, casual, or home-based workers. These groups, including workers in the informal sector, make up a majority of the labor force.³⁰ Further, supply chain employers that are presumptively covered by national labor statutes can often evade statutory protections by reconfiguring much of their work force as short-term or contract labor.³¹

Another major limitation is the precarious legal status of migrant labor. While transnational labor migration is concentrated in North America and Western Europe, there are 20.4 million international migrant workers in Southeast and South Asia and 17.6 million more in the Arab States—regions where many of the world’s GSCs are located.³² These migrants often have severely limited labor

²⁹ Among the IFC publications addressing these matters is Victoria Tetyora & Sitora Sultanova, *Tajikistan: Improving the Inspections Regime by Addressing Regulatory Implementation Gaps* 11, 14 (IFC 2017) (praising recent law establishing a strict framework for holding unannounced inspections and limiting frequency of planned inspections as part of making Tajikistan a more investor-friendly destination); Florentin Blanc & Marielle Leseur, *How to Reform Business Inspections: Design, Implementation, Challenges* iii, 4 (IFC 2011) (discussing “common misconceptions” about frequency of inspections and importance of unannounced inspections as promoting safety, and acknowledging special contributions from World Bank Group teams in Bosnia and Herzegovina, Latvia, Tajikistan, and Ukraine, as well as Colombia and Jordan).

³⁰ See ILO, NONSTANDARD EMPLOYMENT AROUND THE WORLD: UNDERSTANDING CHALLENGES, SHAPING PROSPECTS 15, 103–04 (2015) (temporary work constitutes 67% of wage employment in Vietnam and is widespread in China, India, Indonesia, and Malaysia; casual work comprises nearly two-thirds of wage employment in Bangladesh and India; incidence of fixed-term contracts is over 15% in Cambodia); Muhammad Shaheen Chowdhury, *Compliance with Core International Labour Standards in National Jurisdiction: Evidence from Bangladesh*, 68 LAB. L.J. 78, 81–82 (2017) (Bangladesh labor law excludes temporary or casual workers, who comprise a majority of labor force, and adds specific occupational exclusions for domestic workers, agricultural workers, and employees in education and research institutions, among others); ASIAN DEV. BANK, INDONESIA: ENHANCING PRODUCTIVITY THROUGH QUALITY JOBS 226–28 (2018) (nearly 80% of regular employees in Indonesia are in nonstandard forms of work).

³¹ See Drusilla Brown et al., *Factory Decisions to Become Non-Compliant with Labour Standards: Evidence from Better Factories Cambodia*, in TOWARDS BETTER WORK, *supra* note 28, at 232–50; Chowdhury, *supra* note 30, at 82.

³² Int’l Lab. Conf., 105th Sess., *Promoting Fair Migration: General Survey Concerning the Migrant Workers Instruments* 4 (2016) (in 2013, out of 150.3 million economically active international migrants of working age, 13.6% were working in Southeast and Southern Asia and 11.7% were working in the Arab states); see also DILIP RATHA ET AL., MIGRATION AND REMITTANCES FACT BOOK 11 (World

standards protections³³ and may justifiably fear being deported if they assert whatever rights they do have.³⁴

Finally, national labor laws lack authority beyond national borders. When GSCs involve major factory production both inside and outside a given country, the ability of that country's government to monitor and enforce labor standards is compromised by the real risks of production being shifted to a more lenient regulatory setting.³⁵ This allows many violations of workers' rights to go unchecked.

3. Strategic and resource restrictions on labor inspection

Even where there are applicable legal protections, workers must cope with weaknesses in national labor inspectorates' monitoring and enforcement of those protections. The principal ILO Convention addressing labor inspection³⁶ has been ratified by 148 countries, constituting 80 percent of all ILO members, including the large majority of supply chain countries in Asia, Africa, and Latin America. Nonetheless, compliance with ratified or enacted inspection standards falls well short in many developing countries.³⁷ Such shortfalls are a product of both purposeful government strategy and a practical dearth of resources for inspection.

Bank, 3d ed., 2016) (volume of South-South migration (38% of total) is larger than South-North migration (34% of total)).

³³ The independent Committee of Experts on the Application of Conventions and Recommendations (CEACR), established by the ILO in 1926, is charged with making impartial observations regarding a country's progress toward compliance with ratified conventions in law and practice. The CEACR has, for example, issued Observations reporting that many countries that have ratified ILO Convention 87 on Freedom of Association and Protection of the Right to Organise nonetheless prohibit or restrict foreign workers or migrant workers from establishing trade unions and/or holding officer positions, in violation of the convention. *See, e.g.*, CEACR Observations on Convention 87: Int'l Lab. Conf., 108th Sess., Report of the CEACR 50, 132 (2019) (reporting on Algeria, Philippines); Int'l Lab. Conf., 109th Sess., Report of the CEACR 43, 117, 155 (2020) (reporting on Albania, Costa Rica, Honduras).

³⁴ *See, e.g.*, George Menz, *Employers and Migrant Legality*, in *MIGRANTS AT WORK* 44–59 (Cathryn Costello & Mark Freeland eds., 2014); Manoj Dias-Abey, *Justice on Our Fields: Can 'Alt-Labor' Organizations Improve Migrant Farm Workers Conditions?*, 53 *HARV. C.R.-C.L. L. REV.* 168, 189, 197, 206 (2018); *see also* Jennifer Gordon, *Regulating the Human Supply Chain*, 102 *IOWA L. REV.* 445, 467 (2017) (noting that migrant workers on temporary work visas in the Middle East face additional abuses from the recruiting agencies through which some 80% have been placed).

³⁵ *See, e.g.*, Worker Rts. Consortium, *Factory Assessment Update* (Dec. 19, 2006), <https://perma.cc/K878-TNYH> (analyzing Gina Form Bra factory closure in Thailand, which had favorable labor conditions, and transfer of work to new facility in China operated by Gina parent company).

³⁶ ILO Convention 81 covers labor inspection for industry and commerce. *See generally* ILO Convention 81: Labour Inspection Convention, Jul. 11, 1947. In addition, ILO Convention 129 covers agriculture inspection using parallel provisions. *See generally* ILO Convention 129: Labour Inspection (Agriculture) Convention, June 25, 1969.

³⁷ In its 2020 General Observation on Labor Administration and Inspection, the CEACR identified many issues discussed below as reflecting a trend that "has been most notable in Eastern Europe

One mechanism used by governments is to suspend labor inspections or remove them from central control.³⁸ Moratoria and outsourcing tend to reflect governments' conclusion that deregulation will help to attract a greater share of foreign investment. Another channel for diminishing the effectiveness of labor inspections is imposing de facto restrictions on inspectors' power to apply their authority. Governments often require that employers be informed in advance of the date of inspection visits, a deviation from the ILO's labor inspection convention, which authorizes unannounced audits and inspections.³⁹ In addition, some developing countries impose limits on the number of worksite visits that regulators may make.⁴⁰ These various constraints undermine detection of labor law violations and impede imposition of penalties or other sanctions prescribed under national law.⁴¹

Further, labor inspectorates in developing countries operate with gravely inadequate staffing and resources. Budgetary challenges pose problems for labor bureaucracies even in developed countries, but the problems in developing countries are especially serious. Governments in developing countries that have ratified ILO Convention 81 regularly operate with a low number of inspectors, an

and Central Asia but [with] examples in other regions as well." ILO CEACR Observation on Convention 81: Int'l Lab. Conf., 109th Sess., Report of the CEACR 461 (2020).

³⁸ See, e.g., ILO CEACR Observations on Convention 81: Int'l Lab. Conf., 108th Sess., Report of the CEACR 470, 479, 481, 504 (2019) (Bangladesh: export processing zones not covered by national labor inspection service; India: export processing zones inspected by agency responsible for attracting investment; Indonesia: decentralization; Ukraine: moratorium); Int'l Lab. Conf., 109th Sess., Report of the CEACR 492 (2020) (Uganda: decentralization); Int'l Lab. Conf., 109th Sess., Addendum to the 2020 Report of the CEACR 571, 595 (2021) (Kyrgyzstan: moratorium; Tajikistan: moratorium). See generally EU-ILO PROJECT, UKRAINIAN LABOUR INSPECTION LEGAL FRAMEWORK: ANALYSIS AND RECOMMENDATIONS 57–58 (2018) (criticizing decentralization model applied at that time as likely to undermine the effectiveness of labor inspections).

³⁹ See, e.g., ILO CEACR Observations on Convention 81: Int'l Lab. Conf., 109th Sess., Report of the CEACR 480 (2019) (India); Int'l Lab. Conf., 109th Sess., Report of the CEACR 490 (2020) (Sierra Leone); Int'l Lab. Conf., 109th Sess., Addendum to the 2020 Report of the CEACR 562, 574, 607 (2021) (Albania, Pakistan, Zimbabwe). Inspection visits typically occur at commercial and industrial worksites; employment of homeworkers at the lower tiers of GSCs presents special difficulties for labor inspection. See generally ILO, *The Regulatory Framework and the Informal Economy: Labour Administration* (2013), <https://perma.cc/H56X-6ALA>.

⁴⁰ See, e.g., ILO CEACR Observations on Convention 81: Int'l Lab. Conf., 107th Sess., Report of the CEACR 445 (2018) (Moldova); Int'l Lab. Conf., 109th Sess., Addendum to the 2020 Report of the CEACR 571, 605 (2021) (Kyrgyzstan, Vietnam).

⁴¹ Implementation of enacted labor law norms is further eroded when inspectorates are charged with separate duties that conflict with their mandate to monitor and enforce workplace standards. In many countries, labor inspectors are assigned to assist in enforcement of the nation's immigration laws. See, e.g., ILO CEACR Observations on Convention 81: Int'l Lab. Conf., 109th Sess., Report of the CEACR 471, 473, 487 (2020) (Italy, Lebanon, Saudi Arabia); Int'l Lab. Conf., 109th Sess., Addendum to the 2020 Report of the CEACR 585–86, 591–92 (2021) (Romania, Slovenia). This assignment directly interferes with inspectors' responsibility to protect foreign and migrant workers from workplace exploitation or abuse. As a result, practices such as human trafficking and hazardous exposure of migrant children go undetected and unpunished.

insufficient number of inspections, and a shortage of computer and transport equipment. Moreover, they often offer low salaries to labor inspectors as compared to other civil servants doing comparable work, making it hard to retain a quality workforce.⁴²

The obstacles in law and practice described in this section have not prevented developing countries from improving GSC working conditions in particular settings.⁴³ Nonetheless, the bigger picture is that on account of these obstacles, the public law approach in developing countries is not able to provide basic protections to the tens of millions of workers in their GSCs.

B. Weakness of the Corporate Social Responsibility Approach

Starting in the 1970s and accelerating since the 1990s, a sizable majority of MNEs have adopted codes of corporate social responsibility declaring, *inter alia*, their respect for workers' rights.⁴⁴ These CSR codes generally include an expectation or commitment that the MNE and its suppliers will adhere to the ILO's eight fundamental conventions and other basic worker protections.⁴⁵ The codes are, in part, self-serving: MNEs regard them as a useful reputational asset, showcased on their websites as part of an effort to attract consumers and investors. Yet they also reflect genuine efforts to address the governance gap that

⁴² See, e.g., ILO CEACR Observations on Convention 81: Int'l Lab. Conf., 108th Sess., Report of the CEACR 481, 495–96 (2019) (reporting on Indonesia, Saudi Arabia); Int'l Lab. Conf., 109th Sess., Report of the CEACR 493 (2020) (reporting on Uganda); Int'l Lab. Conf., 109th Sess., Addendum to the 2020 Report of the CEACR 564, 567–68, 570, 606 (2021) (reporting on Bangladesh, Haiti, India, Vietnam); see also *ILO General Survey on Labour Inspection* 77 ¶ 240 (2006) (noting that in many developing countries, a miniscule proportion of the budget is dedicated to labor administration, and only a fraction of that amount goes to labor inspection).

⁴³ One example is the Better Work program, described *infra* Part IV.B. Coordinated by the ILO and the IFC, Better Work operates in specific factories in five Asian, two African, and two Latin American countries with the support of their governments.

⁴⁴ See Richard Appelbaum, *From Public Regulation to Private Enforcement: How CSR Became Managerial Orthodoxy*, in *ACHIEVING WORKERS' RIGHTS IN THE GLOBAL ECONOMY* 32, 43 (Richard P. Appelbaum & Nelson Lichtenstein eds., 2016) [hereinafter *ACHIEVING WORKERS' RIGHTS*] (as of 2016, 86% of Fortune Global 200 corporations had codes of conduct and two-thirds had updated their codes within past three years). Many companies that adopted a code of conduct after 1998 were influenced by the U.N. Global Compact, launched in 2000; of the ten principles with which thousands of Global Compact member companies pledge to align themselves, the four labor-related ones are the ILO's Fundamental Principles and Rights at Work. See *id.* at 41.

⁴⁵ See, e.g., SIEMENS, *SIEMENS BUSINESS CONDUCT GUIDELINES* 37 (2021), <https://perma.cc/C86S-QL9R>; PROCTER & GAMBLE, *WORLDWIDE BUSINESS CONDUCT MANUAL: HUMAN RIGHTS POLICY STATEMENT 1–2* (2021), <https://perma.cc/S3ZZ-WX4K>; ADIDAS, *ADIDAS CODE OF CONDUCT FOR SUPPLIERS: WORKPLACE STANDARDS* (2016), <https://perma.cc/C4ZP-J6S2>.

exists in most GSC countries where, as just described, governments are unwilling or unable to regulate business conduct that violates basic labor and human rights.⁴⁶

The CSR approach, however, falls far short of adequately protecting workers' rights due to (i) deficiencies in the codes' design and implementation and (ii) the codes' basis in voluntary action.

1. Deficiencies in design and implementation

CSR codes require effective implementation in order to avoid becoming at best a public relations statement of business hopes and at worst an outright sham. Since the 1990s, worker-oriented organizations,⁴⁷ multi-stakeholder initiatives (MSIs),⁴⁸ and MNEs themselves have sought to provide monitoring of how CSR codes are applied and enforced across supply chains. But despite the remarkable growth of corporate self-regulation during this period, CSR concepts and structures have failed to protect supply chain workers.⁴⁹ This failure has been well documented over the past two decades, both by scholars who professed some hope for the success of CSR⁵⁰ and by skeptics in the scholarly and human rights communities.⁵¹

A recent book by Professor Sarosh Kuruvilla examined the inherent shortcomings of CSR codes, drawing extensively on data from MNEs, MSIs, and auditing companies as well as on prior studies.⁵² Kuruvilla did find that the labor standards enumerated in most CSRs have converged over time and have come to

⁴⁶ See generally Robert H. Montgomery & Gregory F. Maggio, *Fostering Labor Rights in Developing Countries: An Investors' Approach to Managing Labor Issues*, 87 J. BUS. ETHICS 199 (2008); Justine Nolan, *Closing Gaps in the Chain: Regulating Respect for Human Rights in Global Supply Chains and the Role of Multi-Stakeholder Initiatives*, in POWER AND PARTICIPATION, *supra* note 26, at 35.

⁴⁷ Two examples of organizations focused on defending and improving workers' rights are the Worker Rights Consortium (WRC) and the Clean Clothes Campaign. See also HUMAN RIGHTS WATCH (HRW), <https://perma.cc/W7AP-74VZ> (addressing worker rights as part of broader human rights agenda).

⁴⁸ MSIs are voluntary collaborations involving business, governments, and civil society that seek to address issues of mutual concern including human rights and sustainability. Some examples are the Ethical Trading Initiative (ETI), Social Accountability International (SAI), and the Global Social Compliance Programme (GSCP).

⁴⁹ On the inadequacy of CSR, see SAROSH KURUVILLA, *PRIVATE REGULATION OF LABOR STANDARDS IN GLOBAL SUPPLY CHAINS* (2021); Jill Esbenshade, *Corporate Social Responsibility: Moving from Checklist Monitoring to Contractual Obligation?*, in ACHIEVING WORKERS' RIGHTS, *supra* note 44, at 51, 52–57.

⁵⁰ See RICHARD LOCKE, *THE PROMISE AND LIMITS OF PRIVATE POWER* 38 (2013) (lamenting transition from belief in the “promise” of private CRS monitoring to conclusion that “[i]n reality, the information collected through [social] audits is biased, incomplete, and often inaccurate”).

⁵¹ See, e.g., Esbenshade, *supra* note 49; Appelbaum, *supra* note 44; James J. Brudney, *Envisioning Enforcement of Freedom of Association Standards in Corporate Codes: A Journey for Sinbad or Sisyphus?*, 33 COMP. LAB. L. & POL'Y J. 555, 570–74 (2012); Jessica Champagne, *From Public Relations to Enforceable Agreements: The Bangladesh Accord as a Model for Supply Chain Accountability*, in POWER AND PARTICIPATION, *supra* note 26, at 154, 156–60.

⁵² See KURUVILLA, *supra* note 49.

be based largely on standards covered in ILO conventions, with the exception of standards for wages.⁵³ But, like scholars before him, he concluded that the auditing methods used to monitor whether suppliers comply with these codes are deeply flawed.

Labor standards compliance audits tend to be superficial tick-box exercises. They are unduly focused on reviewing documents rather than investigating shop-floor processes and interviewing workers. Moreover, the documents themselves can be readily falsified, especially as audits are typically announced in advance. Worker interviews that occur are usually “staged” at the factory site, characterized by advance coaching and/or intimidation. And auditors’ inadequate training and orientation result in part from use of the document-heavy model of corporate financial auditing.⁵⁴

In addition, Kuruvilla found that global buyers have failed to align their compliance aspirations with their sourcing practices by increasing product orders and longer-term commitments for suppliers who demonstrate improved compliance records. Instead, buyers’ sourcing and compliance practices are usually in direct conflict. MNE sourcing departments regularly pressure suppliers for rapid delivery times and minimized production costs, and compliance departments rarely have the power to affect the sourcing departments’ decisions.⁵⁵

This lack of alignment reflects an underlying design flaw in the CSR private regulatory model. A public pledge to promote decent working conditions may help attract or retain consumers and investors who prefer to engage with a socially responsible company. It also may mollify regulators who allocate their scarce resources among more obviously delinquent actors. But this pledge animating the CSR approach focuses on enhancing brand value and limiting legal liability more than protecting labor rights.⁵⁶

In canvassing the scholarship on private regulation outcomes, Kuruvilla cited two model programs that showed progress with respect to workers’ rights.⁵⁷ A feature common to these programs is the extensive involvement of workers’

⁵³ See *id.* at 2, 9 (noting differences in wage standards between focus on minimum wage versus living wage). The U.N. Global Compact’s labor principles, discussed *supra* note 44, are silent on wages.

⁵⁴ See *id.* at 9–10, 36–47 (summarizing and analyzing problems previously identified and citing LOCKE, *supra* note 50, and other scholars).

⁵⁵ See *id.* at 8–10, 216–18; TIM BARTLEY ET AL., LOOKING BEHIND THE LABEL: GLOBAL INDUSTRIES AND THE CONSCIENTIOUS CONSUMER 165–66, 217 (2015); see also Jason Judd & J. Lowell Jackson, *Repeat, Repair, or Renegotiate? The Post-Covid Future of the Apparel Industry* 57 (ILO Discussion Paper, July 2021) (quoting senior apparel industry experts who find no evidence in economics of global apparel industry that would alter buyers’ incentives to continue to shift costs to suppliers).

⁵⁶ See KURUVILLA, *supra* note 49, at 8; see also LOCKE, *supra* note 50, at 176–77 (concluding that upstream business practices are driving many of the unfair labor practices by suppliers).

⁵⁷ See KURUVILLA, *supra* note 49, at 75. These programs—the Accord on Fire and Safety in Bangladesh and the Better Work Program—and the ILO’s involvement in creating and/or administering them, are discussed *infra* Part IV.B.

representatives in program design, implementation, and enforcement, both at the planning stage and at the factory level.⁵⁸ Notably, many MNEs have supported and encouraged this involvement.⁵⁹ Yet such worker engagement is entirely absent from the CSR model. And MSIs do not fare much better in their structure and operations.⁶⁰

The latest summary of findings about private regulation in GSCs shows that there have been no lasting improvements.⁶¹ After several decades of widespread CSR initiatives, that itself is a notable result. And in recent years, the COVID-19 pandemic has provided a dramatic illustration of the inability of CSR and national laws to furnish labor standards protection in GSCs. As apparel brands and retailers slashed production volume in their garment industry supply chains, garment

⁵⁸ For the Accord, see Champagne, *supra* note 51, at 164–68. Following a 2013 factory collapse killing more than 1100 workers, the Accord was designed by workers' rights advocates. Features included worker education committees, a complaint mechanism with protection against retaliation, and a right to refuse unsafe work. For Better Work, see *Workers and Unions*, BETTER WORK, <https://perma.cc/6KRV-UR9Y>. As summarized by KURUVILLA, *supra* note 49, at 102–05, the key to the process of working conditions improvement over repeated assessments is factory-level social dialogue through a Performance Improvement Consultative Committee (PICC) comprised of equal numbers of factory-level management and worker representatives.

⁵⁹ See *Our Approach*, BETTER WORK, <https://perma.cc/QEK3-5XJA>. Better Work provides brands and retailers with compliance assessment reports of their suppliers and asks them to use their commercial influence to encourage needed improvements. Improvements can be financed through IFC-supported preferential interest rates; failure to make improvements can result in public disclosure of serious non-compliance, with consequences for brand and retailer reputations. A number of leading brands list partnership or affiliation with Better Work and/or the Accord on their websites. See, e.g., *Memberships and Collaborations*, H&M GROUP, <https://perma.cc/Z7YA-T4W7>; *Impact Partnerships and Collaborations*, NIKE (June 1, 2021), <https://perma.cc/44TF-U8C4>; *Moving Beyond Audits to Empowerment*, PVH (May 8, 2019), <https://perma.cc/B75H-CQFR>.

⁶⁰ See Ingrid Landau & Tess Hardy, *Transnational Labour Governance in Global Supply Chains: Asking Questions and Seeking Answers on Accountability*, in *DECENT WORK IN A GLOBALIZED ECONOMY: LESSONS FROM PUBLIC AND PRIVATE INITIATIVES* 43, 55–57 (ILO, Guillaume Delautre, Elizabeth Echeverria, & Colin Fenwick eds., 2021) (discussing MSI shortcomings with respect to compliance verification, sanctions, and governance structures). Less than 15% of transnational standard-setting MSIs report including any members of affected populations as part of their primary decision-making body. See *The New Regulators? Assessing the Landscape of Multi-Stakeholder Initiatives* 10 (MSI Integrity and Duke Human Rights Center, June 2017).

⁶¹ See KURUVILLA, *supra* note 49, at 7. See generally Mark Anner, *Squeezing Workers' Rights in Global Supply Chains: Purchasing Practices in the Bangladesh Global Export Sector in Comparative Perspective*, 27 *REV. OF INT'L POL. ECON.* 320 (2019); Tim Bartley, *Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions*, 113 *AM. J. SOCIOLOGY* 297 (2007). MNEs seeking to improve their supply chain compliance through codes of conduct might be expected to support efforts to protect freedom of association and collective bargaining in their supply chains. Those two fundamental rights serve an enabling function, providing a process by which workers can identify compliance deficiencies in areas such as forced overtime or unsafe conditions, and then engage with management to address the deficiencies. In fact, freedom of association and collective bargaining are the least supported ILO-recognized fundamental rights in current private regulatory efforts. See KURUVILLA, *supra* note 49, at 76, 148–49, 153–54, 178–80 (citing his own data and studies by others).

workers around the world suffered steep declines in hours and wages—assuming they were able to retain their jobs at all.⁶² At the same time, major brands recorded substantial profits starting in the second half of 2020.⁶³ Despite these profit figures, millions of workers have been denied wages they were legally owed for work they had already completed.⁶⁴ Brands have withheld payments to their suppliers, who are then far less able to pay their workers even for completed work.

Additionally, one in four workers fired as a result of the pandemic reportedly has not received legally mandated severance pay.⁶⁵ One study of factories in eleven countries⁶⁶ has estimated that severance theft during the pandemic likely exceeds half a billion dollars.⁶⁷ Although the laws of these countries prohibit wage and severance theft,⁶⁸ little has been done to enforce them. There is even an indication that some Asian governments have used the 2020 economic crisis to restrict labor rights and postpone wage negotiations.⁶⁹

2. The dilemma of voluntary action

The most ambitious framework for applying CSR in a transnational setting is the U.N. Guiding Principles on Business and Human Rights (UNGPs or “Guiding Principles”), promulgated in 2011.⁷⁰ Regrettably, however, application of the UNGPs involves purely voluntary action to be undertaken by business enterprises.

⁶² See *Fired, Then Robbed*, *supra* note 11, at 1–3; *Wage Theft and Pandemic Profits*, *supra* note 11, at 3.

⁶³ See *Fired, Then Robbed*, *supra* note 11, at 1 (documenting substantial profits for Amazon, H&M, Inditex, Next, Nike, Target, and Walmart); *Wage Theft and Pandemic Profits*, *supra* note 11, at 4 (identifying sixteen brands that recorded over \$10 billion in profits in the second half of 2020).

⁶⁴ See *Wage Theft and Pandemic Profits*, *supra* note 11, at 3 (referring to cancelled orders, non-payment to suppliers, and other commercial practices by brands), 8–17 (reviewing results from eight case studies in Bangladesh, Cambodia, Myanmar, and the Philippines).

⁶⁵ See *id.* at 3; see also *Fired, Then Robbed*, *supra* note 11, at 1, 16–25 (reporting documented failure to pay legally earned severance at thirty-one factories in nine countries, depriving over 37,000 workers of nearly \$40 million, equivalent to an average of five months’ wages for a typical garment worker in these settings; additional evidence indicates a similar story at 210 export apparel factories in eighteen countries); Anner, *supra* note 11, at 374–76 (discussing how lead firms’ squeeze on their suppliers left perhaps a million workers in Bangladesh and India without severance pay).

⁶⁶ See *Fired, Then Robbed*, *supra* note 11 (documenting wage and severance theft in Bangladesh, Cambodia, India, Indonesia, Myanmar, Thailand, El Salvador, the Dominican Republic, and Jordan); *Wage Theft and Pandemic Profits*, *supra* note 11 (documenting wage and severance theft in Bangladesh, Cambodia, Myanmar, the Philippines, and Ethiopia).

⁶⁷ See *Fired, Then Robbed*, *supra* note 11, at 2–3.

⁶⁸ See *id.* at 7 (listing statutory protections in nine countries for severance pay and pay in lieu of notice).

⁶⁹ See Judd & Jackson, *supra* note 55, at 48 (referring to developments in Cambodia, India, Indonesia, and Myanmar).

⁷⁰ Guiding Principles on Business and Human Rights, U.N. Office of Human Rights High Commissioner 2011 [hereinafter UNGPs].

The UNGPs' fourteen principles dealing with business responsibility to respect human rights⁷¹ set forth an internationally recognized course of action for business enterprises seeking to prevent and address human rights risks.⁷² Under the UNGPs, these enterprises should “know and show” their respect for human rights.⁷³ To do this, they should have in place a “human rights due diligence process” that can “identify, prevent, mitigate and account for” how they address adverse human rights impacts.⁷⁴ As part of the prevention and mitigation stage, a business enterprise that causes or contributes to an adverse human rights impact “should take the necessary steps to cease or prevent” the impact it is causing or to which it is contributing.⁷⁵

The situation is more complicated where an enterprise's involvement is not causal or contributory, but the adverse impact is still directly linked to its operations, products, or services by a business relationship. Appropriate action there depends on factors such as the enterprise's leverage over the third party, the importance to the enterprise of the third-party relationship, and the severity of the abuse.⁷⁶ If business enterprises have caused or contributed to adverse human rights impacts, they should provide for or cooperate in remediation.⁷⁷ When the relationship is one of direct linkage rather than causation or contribution, the enterprise is not responsible for providing remediation, although it may participate in doing so.⁷⁸

Significantly, the UNGPs reflect the idea that businesses as well as states have responsibility for the protection of human rights. Moreover, business enterprises are expected to conduct human rights due diligence (HRDD) by examining their supply chain activities to make themselves aware of any adverse human rights impacts caused by the operations of entities with whom they are directly linked by a business relationship.⁷⁹ The Guiding Principles also expressly

⁷¹ *See id.* princ. 11–24. Principles 1–10 of the UNGPs address the State's duty to protect human rights; princ. 25–31 address access to remedy through state-based judicial mechanisms or other grievance mechanisms both state-based and non-state-based.

⁷² The U.N. Human Rights Council endorsed the UNGPs in 2011. For detailed analysis of the UNGPs' origins and discussion of their importance and limitations, see generally JOHN GERARD RUGGIE, *JUST BUSINESS: MULTINATIONAL CORPORATIONS AND BUSINESS RIGHTS* (2013). Ruggie was principally responsible for developing the Guiding Principles over several years, in his role as the Special Representative of the U.N. Secretary-General.

⁷³ UNGPs, cmt. to princ. 15.

⁷⁴ *Id.* princ. 15(b), 17.

⁷⁵ *See id.* princ. 19(b) and cmt.

⁷⁶ *See id.*

⁷⁷ *See id.* princ. 22 and cmt.

⁷⁸ *See id.* princ. 22 and cmt.

⁷⁹ *See id.* princ. 17 and cmt.; Nicola Jagers, *U.N. Guiding Principles on Business and Human Rights: Making Headway Toward Real Corporate Accountability?*, 29 *NETHERLANDS Q. OF HUMAN RTS.* 159, 162 (2011)

recognize the ILO Declaration on Fundamental Principles and Rights at Work, specifying its eight underlying conventions as an authoritative component of the core human rights that should be respected.⁸⁰

At the same time, the UNGPs are presented only as recommendations. HRDD by business enterprises is a voluntary process and creates no directly justiciable requirements.⁸¹ Moreover, due diligence as a risk-management approach, analogous to minimizing or avoiding business risks and their attendant liability, raises concerns about structural design similar to those identified for CSR in general.⁸² Relatedly, the UNGPs do not contemplate a meaningful role for workers or their representatives. The principles addressing Corporate Responsibility to Respect refer at a few points to business consultation with or feedback from “stakeholders,” but they never expressly mention workers or suggest that stakeholders play more than a peripheral part in the due diligence process.⁸³

Notwithstanding its high profile, the UNGPs’ invitation to business enterprises to develop and implement a voluntary human rights due diligence process has generally been ignored or taken up in desultory fashion. An assessment published in 2020 found that almost half the world’s largest companies failed to show any evidence at all of identifying or mitigating human rights issues in their supply chains.⁸⁴

Due in large part to the shortfalls associated with the UNGPs’ voluntary nature, some developed countries have recently enacted national laws that mandate corporate obligations to undertake HRDD, as discussed in the next section. The HRDD framework is further analyzed in Part III as a starting point for developing an international convention that goes beyond these current national laws.

(welcoming the responsibility to pursue due diligence down the supply chain, including the conduct of a range of affiliates and subsidiaries).

⁸⁰ See UNGPs, princ. 12 and cmt.

⁸¹ See Anne Trebilcock, *Due Diligence on Labour Issues: Opportunities and Limits of the U.N. Guiding Principles on Business and Human Rights*, in RESEARCH HANDBOOK ON TRANSNATIONAL LABOR LAW 93, 96, 104–05 (Adelle Blackett & Anne Trebilcock eds., 2015); see also Jagers, *supra* note 79, at 162 (decrying the “weak approach to corporate responsibility” in the Respect pillar of the UNGPs).

⁸² See *supra* note 54 and accompanying text.

⁸³ See, e.g., UNGPs, princ. 18 (discussing consultation with “potentially affected groups and other relevant stakeholders” during the initial risk assessment process), princ. 20 (discussing feedback “from both internal and external sources, including affected stakeholders” when tracking the effectiveness of risk response).

⁸⁴ BHRRRC, TOWARDS EU MANDATORY DUE DILIGENCE LEGISLATION: PERSPECTIVES FROM BUSINESS, PUBLIC SECTOR, ACADEMIA, AND CIVIL SOCIETY 6 (Nov. 2020), <https://perma.cc/KDV7-S5RU> [hereinafter BHRRRC, TOWARDS EU MANDATORY DUE DILIGENCE LEGISLATION].

C. Limitations of Recent National Laws in Developed Countries

As discussed above and as confirmed by multiple studies, the UNGPs' voluntary framework has been ineffective.⁸⁵ In response to this state of affairs, many large companies in Europe have called for a statutory approach that mandates HRDD in order to create legal certainty and a level playing field.⁸⁶ Some EU legislators and national agency officials also have urged a mandatory approach that imposes obligations (not just "responsibilities") on companies to manage adverse human rights risks in most or all of their supply chains and makes international standards, like the ILO fundamental conventions, enforceable under national or EU law.⁸⁷ As part of these proposed obligations to address risks in a concrete and detailed manner, there have been calls for provisions imposing sanctions, including possible liability before European courts, and for victims to have direct access to remedies.⁸⁸

Statutory developments at the national level in developed countries have taken two distinct directions. One set of laws has emphasized disclosure through reporting obligations specifically aimed at slavery and human trafficking. A second

⁸⁵ See, e.g., Markus Krajewski et al., *Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Right Direction?*, 6 BUS. & HUM. RTS. J. 550, 552 (2021) (only 13–17% of all German companies with more than 500 employees actively applied human rights due diligence in 2019 and 2020); Mathew Millen et al., *Human Rights Disclosure in ASEAN* 6–7, 9–10 (2019) (human rights disclosure records for large publicly traded companies in Indonesia, Malaysia, the Philippines, Singapore, and Thailand fall substantially short of the standard set in the UNGPs in terms of both extent and quality; one example is that despite focus on human trafficking in the southeast Asia region, only 15.6% of top-listed companies make any mention of human trafficking as a significant issue); *The Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. A/73/163 ¶¶ 25–29 (July 16, 2018) (discussing systematic shortcomings in business compliance with the Guiding Principles, including, *inter alia*, erroneous focus on risk to the business and not risk to rights holders; tick-box human rights assessments that fail to engage with stakeholders; pervasive weaknesses in taking action, tracking responses, and remediation).

⁸⁶ See, e.g., *Our Responsibility in a Globalized World*, BHRCC (Aug. 2020), <https://perma.cc/8ZV2-SVPK>; *Statement of 65 German Businesses Calling for Legislation that Requires Companies to Conduct Human Rights and Environmental Due Diligence*, BHRCC (Aug. 2020), <https://perma.cc/B3JJ-BBSC>; see also Janos Amman & Silvia Ellena, *Company Coalition Calls for Robust Human Rights Due Diligence Laws*, EURACTIV (Feb. 8, 2022), <https://perma.cc/FXB4-FNYK> (more than 100 companies signed a joint statement calling for mandatory HRDD legislation covering all companies in Europe).

⁸⁷ See BHRCC, TOWARDS EU MANDATORY DUE DILIGENCE LEGISLATION, *supra* note 84, at 17–19 (views of three members of European Parliament, from the Netherlands, Germany, and Finland), 28–31 (statement of Odile Rousel, French Ministry for Europe and Foreign Affairs).

⁸⁸ See *id.* at 18–19, 30–31. Other prominent participants recommend that access to trade markets be made conditional on compliance with core requirements defined under such a mandatory human rights statute. See *id.* at 41–43 (statement of Olivier De Schutter, U.N. Special Rapporteur on Extreme Poverty and Human Rights & Sharon Burrow, International Trade Union Confederation).

statutory approach builds upon the UNGPs' due diligence template. Both approaches have serious limitations in principle and practice.

1. The disclosure requirements approach

The approach that emphasizes disclosure of workers' rights violations through reporting obligations has notably been used to address slavery and human trafficking. Statutes enacted in California, the U.K., and Australia require larger commercial organizations to make disclosures identifying steps they have undertaken to prevent slavery and/or human trafficking within their supply chains or any part of their business organizations.⁸⁹ This focus on mandatory public disclosures is intended to promote socially conscious decisions by consumers and investors, but it has been less than effective for several reasons.⁹⁰

First, the absence from the statutes of specified uniform disclosure standards allows companies significant discretion in how they choose to comply with statutory requirements.⁹¹ This makes it unlikely that consumers or investors will receive a consistent picture of what compliance means. Second, even if a company's report affirms the presence of slavery or states that the company is declining to make efforts to eradicate slavery in its supply chain, that disclosure has no legal consequences under the statutes.⁹² Finally, the statutes provide no serious enforcement mechanism for nondisclosure. Authorities can seek an injunction to compel compliance but there are no penalties for noncompliance and consumers are given no private right of action.⁹³ Accordingly, it is not

⁸⁹ See California Transparency in Supply Chains Act of 2019, Cal. Civ. Code § 1714.43(c); U.K. Modern Slavery Act of 2015, § 54(1)–(5); Australian Modern Slavery Act 2018, § 16(1). The annual revenue threshold for coverage under these statutes ranges from £36 million (U.K. statute) to \$100 million (California statute).

⁹⁰ For detailed critiques of the three statutes, including references to empirical results, see David Hess, *Modern Slavery in Global Supply Chains: Toward a Legislative Solution*, 54 CORNELL INT'L L.J. 247, 260–69 (examining all three statutes); Chiara Macchi & Claire Bright, *Hardening Soft Law: the Implementation of Human Rights Due Diligence Requirements in Domestic Legislation*, in LEGAL SOURCES IN BUSINESS AND HUMAN RIGHTS: EVOLVING DYNAMICS IN INTERNATIONAL AND EUROPEAN LAW 218, 222–29 (Martina Buscemi et al. eds., 2020) (examining U.K. and Australia statutes); Rachel Chambers & Jena Martin, *Foreign Corrupt Practices Act for Human Rights: A Due Diligence Plus Model for the United States?*, 12–17, WVU College of Law Research Paper No. 2021–019 (May 12, 2021), <https://perma.cc/87LU-LHL3> (examining California statute); Marcia Narine, *Disclosing Disclosure's Defects: Addressing Corporate Irresponsibility for Human Rights Impacts*, 47 COLUM. HUM. RTS. L. REV. 84, 120–22 (2015) (examining California statute).

⁹¹ See, e.g., Cal. Civ. Code § 1714.43(a)(1), (c) (2014) (in disclosing “efforts to eradicate slavery and human trafficking from [their] direct supply chain for tangible goods offered for sale,” companies must disclose “to what extent, if any” they conduct or maintain verification, auditing, supplier certification, internal accountability standards, and employee training).

⁹² See Narine, *supra* note 90, at 121–22; Chambers & Martin, *supra* note 90, at 13.

⁹³ See Hess, *supra* note 90, at 263, 264; Narine, *supra* note 90, at 122; Chambers & Martin, *supra* note 90, at 13; Macchi & Bright, *supra* note 90, at 226. The U.K. law does require annual disclosure

surprising that the majority of companies covered by the California law and 40 percent of covered U.K. companies have not complied with even the soft requirements.⁹⁴

Mandated disclosure as a tool for regulating companies is often justified as a means of promoting consumer or investor empowerment, by reducing information asymmetries without imposing onerous behavioral requirements on those companies.⁹⁵ But apart from broader concerns about whether most consumers read or understand such disclosures,⁹⁶ scholars have been skeptical that supply chain disclosure regimes will lead consumers or investors to punish businesses with poor human rights records.⁹⁷

Unlike consumer disclosures focused on a product's features that directly affect individual use, supply chain disclosures address the more intangible moral possibility that the process by which the product is made will allow for human rights abuses. Such disclosures require that consumers act, sometimes against their own financial interest, to further their ethical ideals on the basis of unclear signals (such as audits conducted, certifications granted, or training offered) expressed in vaguely worded language. That, in turn, can lead consumers to shirk their ethical ideals, rationalize unsettled choices, or perhaps seek more information that can then become overwhelming. And the nature of supply chain operations further exacerbates these challenges, given that risk levels can vary considerably based on industry, country of operation, and number of tiers or suppliers. Unsurprisingly, studies indicate that disclosure alone does not change consumer or investor behavior regarding human rights abuses, whether due to confusing information, disclosure overload, capricious priorities, insufficient passion to sustain a boycott, or a combination of these elements.⁹⁸

statements from covered companies, a step beyond the one-off disclosure mandated under California law. See Hess, *supra* note 90, at 263.

⁹⁴ See *Five Years of the California Transparency in Supply Chains Act*, KNOW THE CHAIN (Sept. 30, 2015), <https://perma.cc/29GR-WXPP>; Chris N. Bayer & Jesse H. Hudson, *Corporate Compliance with the California Transparency in Supply Chains Act: Anti-Slavery Performance in 2016* (Mar. 7, 2017), <https://perma.cc/8AU4-6MA3>; Macchi & Bright, *supra* note 90, at 225 (citing to an independent final report on the U.K. Act, completed in 2019). Although the Australia statute includes certain modest advances in the accessibility and content of company reports, there is still an absence of independent oversight, financial penalties, a civil liability regime, or any requirement for companies to undertake due diligence. See Macchi & Bright, *supra* note 90, at 229; Hess, *supra* note 90, at 266.

⁹⁵ See generally Christopher Busch, *Implementing Personalized Law: Personalized Disclosures in Consumer Law and Data Privacy Law*, 86 U. CHI. L. REV. 309 (2019).

⁹⁶ See generally OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 3 (2014) (“‘Mandated disclosure’ may be the most common and least successful regulatory technique in American law.”).

⁹⁷ See Narine, *supra* note 90; Adam S. Chilton & Galit Sarfaty, *The Limitations of Supply Chain Disclosure Regimes*, 53 STAN. J. INT'L L. 1 (2017).

⁹⁸ For more detailed analysis of the challenges related to mandated disclosures in the supply chain setting, see Narine, *supra* note 90, at 129–37; Chilton & Sarfaty, *supra* note 97, at 21–25.

2. The due diligence requirements approach

The risk management concept of human rights due diligence set forth in the UNGPs reflects commitment to a detailed process of voluntary corporate self-regulation. No actual human rights outcomes are required, nor are there specified consequences for failure to comply with the designated process. Several European countries have built upon the Guiding Principles' approach, promulgating statutes that mandate HRDD by business enterprises. While this should be viewed as a promising step toward providing meaningful protection for workers, the statutes fall short in both their process and their outcome requirements. The Netherlands, France, and Germany have enacted laws that offer examples of these limitations.

In the Netherlands, the Child Labour Due Diligence Act,⁹⁹ enacted in 2019 and expected to take effect in 2023, once implementing regulations are passed, requires companies to investigate whether there is a reasonable suspicion that the goods or services they sell or supply to Dutch end-users have been produced using child labor.¹⁰⁰ If a company identifies such a suspicion, it must develop a plan of action aimed at addressing the problem.¹⁰¹ Companies are required to submit a statement to a designated state regulator declaring that they are exercising due diligence with respect to their investigation and plan of action.¹⁰² Failure to produce such a statement, or to exercise due diligence, is subject to potentially sizable administrative fines, with affected third parties able to initiate the sanctions process by filing a complaint with the regulator; repeat offenses may lead to criminal sanctions for company directors.¹⁰³

Although the Dutch statute moves beyond CSR by *requiring* due diligence from companies, it covers only a single adverse human rights impact: child labor. Moreover, liability attaches to companies only if they fail to develop and articulate

⁹⁹ Wet zorgplicht kinderarbeid [Child Labour Due Diligence Act], Stb. 2019, 401 (Neth.).

¹⁰⁰ See discussion in Liesbeth Enneking, *Putting the Dutch Child Labour Due Diligence Act in Perspective*, 12 ERASMUS L. REV. 20 (2019); Macchi & Bright, *supra* note 90, at 229–31; Hellios Information B.V., *Dutch Child Labour Due Diligence Act* (June 2021); Michael R. Littenberg et al., *Dutch Child Labor Due Diligence Act Approved by Senate: Implications for Global Companies*, ROPES & GRAY (June 5, 2019), <https://perma.cc/Y9XX-RETG>. Child labor is defined by specific reference to the two ILO fundamental conventions on child labor. See Enneking, *supra*, at 31; Littenberg, *supra*. Unlike the anti-slavery disclosure laws discussed earlier, the Dutch law covers companies of all sizes although there is a provision allowing for administrative exemption for certain categories of companies. See Enneking, *supra*, at 30.

¹⁰¹ See Wet zorgplicht kinderarbeid art. 5(1). The statute is based on the UNGPs, though its plan of action contains no specific requirements as to the plan's form or content—while stating that further requirements may be established through secondary legislation. See Enneking, *supra* note 100, at 21.

¹⁰² See Wet zorgplicht kinderarbeid art. 4(1). The regulator is to make these statements widely available through an online public registry. See Macchi & Bright, *supra* note 90, at 230.

¹⁰³ See Wet zorgplicht kinderarbeid art. 5 (administrative fines), art. 9 (criminal offense); Macchi & Bright, *supra* note 90, at 230–31; Hellios Information B.V., *supra* note 100, at 3; Littenberg, *supra* note 100.

a plan aimed at preventing child labor. Assuming such a plan is developed and circulated, no liability attaches even if there are numerous instances of child labor that contribute to the goods or services marketed to Dutch consumers.¹⁰⁴

In France, the Corporate Duty of Vigilance Law,¹⁰⁵ enacted in March 2017, imposes a more substantial due diligence obligation on large companies to monitor the extraterritorial human rights abuses committed as part of their operations and supply chain.¹⁰⁶ This due diligence obligation calls on parent companies of a sufficient size¹⁰⁷ to establish and publish a monitoring plan that follows the UNGPs' due diligence process approach,¹⁰⁸ specifically requiring that they (i) determine the human rights risks that arise in connection with activities in their supply chain; (ii) regularly assess the extent of those risks associated with the activities of subsidiaries, subcontractors, or suppliers with whom they have an established business relationship; (iii) specify actions they will take to mitigate or prevent any abuses; and (iv) monitor the measures they have taken and evaluate their effectiveness.¹⁰⁹ A concerned party has standing to request that a judge compel a company to establish, implement, or publish a vigilance plan, with injunctive fines available for failure to comply. Companies also may be subject to civil liability if individuals are harmed by a failure to establish or implement a plan and they seek damages for corporate negligence.¹¹⁰

¹⁰⁴ Apart from this gap in formulation, the process under the Dutch law fails to specify the form or content of action plans, creating legal uncertainty for companies seeking to comply. It requires only a single due diligence statement, which conflicts with the UNGPs conception of due diligence as an ongoing process, *see* UNGPs, princ. 17(c); it suggests that a third-party complaint is needed to trigger government enforcement; and it contains no provision addressing access to remedy for victims of child labor. *See* Enneking, *supra* note 100, at 21, 33; Macchi & Bright, *supra* note 90, at 231.

¹⁰⁵ Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Corporate Duty of Vigilance Law], Journal Officiel de la République Française, Mar. 28, 2017. The law is set forth in two articles of the French Commercial Code, Code de commerce [C. com.] [Commercial Code], L.225-102-4-5 (Fr.). *See* THE FRENCH COMMERCIAL CODE IN ENGLISH (Philip Raworth trans., 2020).

¹⁰⁶ For analysis of the law's provisions, see Almut Schilling-Vacaflor, *Putting the French Duty of Vigilance in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?*, 22 HUM. RTS. REV. 109, 115–23 (2021); Macchi & Bright, *supra* note 90, at 231–36; Dalia Palombo, *The Duty of Care of the Parent Company: A Comparison Between French Law, U.K. Precedents, and the Swiss Proposals*, 4 BUS. & HUM. RTS. J. 265, 275–76 (2019).

¹⁰⁷ The law applies to French parent companies controlling a multinational corporate group of at least 10,000 employees worldwide or 5,000 employees in France. *See* Code de commerce [C. com.] [Commercial Code], L.225-102-4(I).

¹⁰⁸ *See* UNGPs, princ. 15(b), 17; *supra* text accompanying note 74.

¹⁰⁹ *See* Code de commerce [C. com.] [Commercial Code], L.225-102-4(I.1,2,3,5).

¹¹⁰ *See* Code de commerce [C. com.] [Commercial Code], L.225-102-4(II), L.225-102-5. The law as enacted also authorized French courts to impose substantial civil fines for noncompliance, but the French Constitutional Court invalidated that provision, based on what in the Court's view amounted to an intent to sanction indeterminate obligations. The Court further concluded that the

The French law goes beyond the Dutch statute in a number of respects: it covers a range of human rights abuses, it provides details on specified required elements of due diligence plans, it mandates regular (not simply one-off) assessments and evaluations of effectiveness, and it provides for civil liability. These differences arguably strengthen the accountability of parent companies with respect to HRDD obligations. But the French statute is not without its flaws. It applies only to large parent companies, whereas the Dutch statute covers companies of all sizes (an approach that is more consistent with the UNGPs).¹¹¹ In addition, the French statute relies exclusively on the courts to enforce by responding to applications from interested persons. It is silent regarding any government agency role in providing supplemental enforcement or even guidance materials to help address asymmetries of information and resources.¹¹²

The French law explicitly requires parent companies to consult with their trade unions when establishing a complaints mechanism as part of the risk assessment process.¹¹³ There is, however, no similar requirement for trade union involvement when adopting actions to prevent or mitigate human rights abuses, monitor the actions being taken, or evaluate their effectiveness. This implied exclusion of a duty to consult with organizations representing workers—including NGOs or other civil society organizations representing supply chain workers in foreign countries—suggests that the design and implementation of monitoring plans are unlikely to be any more effective than the plans designed and implemented by business enterprises pursuant to the UNGPs or voluntary CSR codes. As discussed in Part III, preventive measures, monitoring, and evaluation are more likely to succeed when workers and their organizations have substantial input in designing and implementing the processes.

Although French companies may be responsible in principle for the extraterritorial human rights abuses of their subsidiaries, subcontractors, and suppliers, victimized workers can establish civil liability in practice only by proving several distinct elements: (i) the parent company breached its due diligence

civil liability provision simply reiterated the classic rules of civil liability in tort and did not create any new system of vicarious liability. See STEPHANE BRABANT & ELSA SAVOUREY, COMMENTAIRES: FRANCE'S DUTY OF VIGILANCE LAW: A CLOSER LOOK AT THE PENALTIES FACED BY COMPANIES 1–2 (2017); Vincent Brenot, *The French Constitutional Court Partially Invalidates the Corporate Duty of Vigilance Law*, AUGUST-DEBOUZY (Mar. 24, 2017), <https://perma.cc/V6XN-3GC6>.

¹¹¹ See UNGPs, princ. 17(b) (HRDD will vary in complexity with the size of business enterprise). As explained *supra* note 100, the Dutch law covers companies of all sizes, although there is a provision allowing for administrative exemption for certain categories of companies.

¹¹² See Schilling-Vacaflor, *supra* note 106, at 115–21 (arguing that weak enforcement of French law since 2017 relates directly to the government's failure to rigorously monitor or enforce implementation; civil society organizations lack knowledge and resources to analyze quality of companies' vigilance plans and collect sufficiently reliable information about negative human rights consequences attributable to plan deficiencies).

¹¹³ See Code de commerce [C. com.] [Commercial Code], L.225-102-4(I.4).

obligation by failing to establish and implement an effective monitoring plan; (ii) as a result of that breach, a supply chain actor was able to commit human rights abuses against the workers; and (iii) those abuses resulted in damages.¹¹⁴ Thus, if a company's vigilance plan is well established and effectively implemented, workers will be unable to establish liability, regardless of whether a subcontractor or subsidiary has committed extensive supply chain abuses against them. And even if the vigilance plan is not well designed and implemented, liability still depends on proving that the subcontractor or subsidiary abuses occurred as a result of the plan's deficiencies. Liability emerges as a function of the due diligence *process* adopted and applied by the parent company, not based separately on the human rights *outcomes* experienced by workers.

This difference between process-oriented and outcomes-oriented approaches to liability reflects an ambiguity in the Guiding Principles as to whether an HRDD risk management process, standing alone, can fulfill business enterprises' responsibility not to infringe on human rights. Certain language in the UNGPs indicates that HRDD consists of a range of procedures that businesses should have in place.¹¹⁵ Yet there is also language indicating that regardless of whether a business enterprise has implemented due diligence processes, it should be held responsible for causing or contributing to an adverse human rights impact.¹¹⁶ French lawmakers chose not to hold companies strictly liable for infringements of human rights which they themselves cause or to which they contribute.¹¹⁷

The first vigilance plans pursuant to the French statute were published in 2018 and 2019, and initial assessments are not encouraging.¹¹⁸ The majority of the

¹¹⁴ See Tiphaine Beau de Lomenie & Sandra Cossart, *Stakeholders and the Duty of Vigilance*, DOSSIER THEMATIQUE 5-6 (2017); Palombo, *supra* note 106, at 276; Macchi & Bright, *supra* note 90, at 235.

¹¹⁵ See UNGPs, princ. 17–21.

¹¹⁶ See UNGPs, princ. 11–13 (suggesting that business enterprises breach their responsibility whenever they infringe human rights), princ. 17 cmt. (stating that business enterprises conducting due diligence should not assume that it “will automatically and fully absolve them from liability for causing or contributing to human rights abuse”). See generally Jonathan Bonnitcha & Robert McCorquodale, *The Concept of ‘Due Diligence’ in the U.N. Guiding Principles on Business and Human Rights*, 28 EUR. J. INT’L L. 899, 901–05, 909, 912 (2017); Mark B. Taylor, *Human Rights Due Diligence in Theory and Practice*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND BUSINESS 88, 103–06 (Surya Deva & David Birchall eds., 2020).

¹¹⁷ Cf. Schilling-Vacaflor, *supra* note 106, at 116 (describing legislative history of the statute; as initially submitted in 2013, the law imposed a burden of proof on companies to show they could not have avoided the human rights abuse and attendant damage by precluding the risk or its realization, given the power and means at their disposal).

¹¹⁸ See THE LAW ON DUTY OF VIGILANCE OF PARENT AND OUTSOURCING COMPANIES, YEAR 1: COMPANIES MUST DO BETTER (Juliette Renaud et al. eds., 2019) [hereinafter COMPANIES MUST DO BETTER] (reviewing eighty plans across the extractive, arms, agri-food, banking, and garment sectors); Pauline Barraud de Lagerie et al., *Implementing the French Duty of Vigilance Law: When Enterprises Drew Up their First Plans*, in DECENT WORK IN A GLOBALIZED ECONOMY, *supra* note 60,

plans exhibited problems of readability and accessibility;¹¹⁹ failure to identify and consult with stakeholders;¹²⁰ insufficient detail on the distinct approach to mitigation and prevention measures;¹²¹ frequent erroneous focus on risks that human rights abuses could cause *for* the company, rather than risks provoked *by* the company, which is what the law requires;¹²² and monitoring and evaluation components that were either not mentioned at all or identified as under development.¹²³ While these early returns may yield over time to an improved compliance landscape, it seems possible if not probable that the French statute will function as another form of corporate self-regulation, albeit under the soft control of judges who are at times responsive to suitably knowledgeable and aggressive private parties.¹²⁴

Germany adopted the Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chains in June 2021, to take effect in 2023.¹²⁵ The German statute has more depth than its French counterpart in a number of respects. It defines human rights risks to encompass specific international conventions, including the eight ILO fundamental conventions.¹²⁶ It

at 165, 170–81 (reviewing various problems in first sets of plans); Schilling-Vacaflor, *supra* note 106, at 117–23 (presenting case study of French oil and gas company affecting indigenous communities in Bolivia); Sherpa, *Creating a Public Authority to Enforce the Duty of Vigilance Law: A Step Backward?* 6–8 (Apr. 2021), <https://perma.cc/AVT9-5SMA> (discussing ways to reinforce currently weak implementation other than creating a supervisory authority).

¹¹⁹ See COMPANIES MUST DO BETTER, *supra* note 118, at 11 (most plans were only a few pages long, and extensive cross-referencing of other chapters on corporate disclosure meant reading the plans required constant flicking back and forth).

¹²⁰ See *id.* at 13; de Lagerie et al., *supra* note 118, at 171.

¹²¹ See COMPANIES MUST DO BETTER, *supra* note 118, at 17; de Lagerie et al., *supra* note 118, at 176–78.

¹²² See COMPANIES MUST DO BETTER, *supra* note 118, at 15.

¹²³ See *id.* at 19.

¹²⁴ See Sherpa, *supra* note 118, at 5–6 (proposing a facilitation of court cases through requiring better access to internal company information, providing for a more favorable civil liability regime, and strengthening the role of the Public Prosecutor’s office in civil proceedings); Macchi & Bright, *supra* note 90, at 235–36 (expressing concern about the current state of superficial compliance).

¹²⁵ Lieferkettensorgfaltspflichtengesetz [LkSG] [Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chains], July 16, 2021, Bundesgesetzblatt, Teil I [BGBl I] at 2959 (Ger.), translated in *Act on Corporate Due Diligence in Supply Chains*, FED. MINISTRY OF LAB. & SOC. AFFS. (Aug. 18, 2021), <https://perma.cc/5FPC-ZG97>. The Act is examined in Krajewski et al., *supra* note 85; GUNTHER MAIHOLD ET AL., RESPONSIBILITY IN SUPPLY CHAINS: GERMANY’S DUE DILIGENCE ACT IS A GOOD PLACE TO START (Mar. 2021), <https://perma.cc/7C4K-9TPT>.

¹²⁶ See LkSG, *supra* note 125, at § 2(1), Annex nos. 1–11. The Annex also includes the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). By contrast, the French statute refers in open-ended language to “serious infringements of human rights and fundamental freedoms and impairment of the health and safety of persons.” L.225-102-4.

also includes extended and nuanced discussion of the distinct due diligence obligations applicable to business enterprises and their direct suppliers.¹²⁷ This includes a section on remedial action specifying circumstances under which an enterprise must act to end a recognized human rights violation in its own business area or at a direct supplier, as well as relevant factors when deciding whether to terminate a business relationship if the violation cannot be ended.¹²⁸ Certain due diligence obligations extend further down the supply chain, enabling persons to report risks and violations that occur due to economic actions of an indirect supplier.¹²⁹ In addition, the German statute identifies specific supervisory and implementation roles for public authorities,¹³⁰ in contrast to the French law which is silent regarding any presence for administrative agencies.

At the same time, the German statute, like its French counterpart, applies only to very large enterprises.¹³¹ The statute also makes only brief mention of giving “due consideration” to the interests of employees in establishing and implementing its risk management system.¹³² Consultation with affected workers or their representatives is not required, suggesting minimal interest in having them participate meaningfully as part of the due diligence process.¹³³ Further, although companies must conduct risk analysis of an indirect supplier if they are informed via “substantiated knowledge” suggestive of a human rights violation,¹³⁴ the coverage of due diligence in this one limited respect indicates that systematic due diligence towards indirect suppliers is not envisioned under the statute.¹³⁵ Finally,

¹²⁷ See LkSG, *supra* note 125, § 3 (due diligence obligations), § 4 (risk management), § 5 (risk analysis), § 6 (preventive measures), § 7 (remedial action), § 8 (complaints procedure), § 10 (documentation and reporting obligation).

¹²⁸ See *id.* § 7(1) (when enterprise discovers that a human rights violation has occurred or is imminent, “it must, without undue delay, take appropriate remedial action to prevent, end, or minimize the extent of the violation”; in Germany, “the remedial action must bring the violation to an end”; abroad, “the remedial action must usually bring the violation to an end”), § 7(3) (termination of a business relationship is required only if the violation is very serious, implementation of remedial measures has not remedied the situation, and there are no less severe means available).

¹²⁹ See *id.* § 2(5) (definitions), § 9 (obligations regarding complaints procedure and carrying out a risk analysis in response to “substantiated knowledge” of a violation).

¹³⁰ Further regulations may be issued through an ordinance. See, e.g., *id.* § 9(4) (authorization to regulate risk assessment details for indirect suppliers), § 13(3) (authorization to regulate procedures for submission and auditing of annual due diligence reports), § 14(1) (authorization to monitor compliance with multiple due diligence requirements using proper discretion).

¹³¹ *Id.* § 1 (from 2023, the law covers enterprises with at least 3,000 employees in Germany; from 2024, the number is reduced to 1,000).

¹³² *Id.* § 4(4).

¹³³ See Krajewski et al., *supra* note 85, at 55; Maihold et al., *supra* note 125, at 34.

¹³⁴ LkSG, *supra* note 125, § 9(3).

¹³⁵ See Krajewski et al., *supra* note 85, at 556; Maihold et al., *supra* note 125, at 2; see also Alan Beattie, *Why Import Bans to Combat Forced Labour May Backfire*, FIN. TIMES (Feb. 14, 2022), <https://www.ft.com/content/4a5dafa9-a867-4d0a-b611-4f9a8a2e7194> (pointing to the German

because the German statute will not become effective until 2023, application of these provisions may give rise to additional questions or challenges as a matter of law and/or practice.

Stepping back, the mandatory disclosure and HRDD statutes that have emerged thus far in developed countries exhibit considerable variation in terms of the size of companies covered, the types of human rights protected, the scope of applicability to supply chains, the role of public authorities in administration and enforcement, and the nature of penalties and liability.¹³⁶ Governments presumably adopt varied approaches to preventing human rights abuses based on national political realities and differing assessments of how best to protect their companies' competitive positions.¹³⁷ These variations raise the likelihood of conflicting applications for at least some MNEs, and inconsistent approaches for similarly situated supply chain workers.¹³⁸

An international law response offers the prospect of greater uniformity at least in principle, setting forth requirements to be adhered to by both governments and business enterprises. To be sure, ILO conventions must be enacted and administered through national law. But while even improved national laws may generate inconsistencies that pose challenges for some MNEs, the variations will arise within an agreed-upon international framework and set of guidelines. In that

law's failure to go deep into supply chain tiers as an important reason why big German companies are satisfied with the new statute). Regarding remedies, violations may result in administrative fines and—for large enough fines—an exclusion from the award of public contracts; however, civil liability as a remedy for violations of the Act is expressly precluded. *See* LkSG, §§ 24, 22, 3(3).

¹³⁶ Norway's Transparency Act, effective July 1, 2022, requires large multinationals doing business in Norway to conduct human rights due diligence, publish a statement at least annually regarding the results of this due diligence, and respond to third party requests for information as to adverse human rights impacts. *See* Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold (åpenhetsloven) [Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions (Transparency Act)], Lov 18 June 2021 nr. 99. For present purposes, it is sufficient to note enactment of yet another distinct national law mandating due diligence.

¹³⁷ Protection of competitive advantages may encompass minimizing business costs associated with establishing and implementing a mandated due diligence program, including, *inter alia*, whether to cover more remote or indirect suppliers. In addition, limiting the costs to larger business enterprises may minimize the expansion of government bureaucracy for administrative functions necessitated under the new law.

¹³⁸ Further, the statutes are themselves the exception rather than the rule: *ceteris paribus*, similar laws are unlikely to be enacted in most high-income countries where MNEs are registered or conduct substantial business. *See* WORLD BANK, WORLD BANK COUNTRY AND LENDING GROUPS (2022), <https://perma.cc/4597-U9Y9> (listing eighty high-income countries). Of the world's 100 top non-financial MNEs, the only ones located outside high-income economies are in China (eleven MNEs). Roughly two-thirds of the 100 top MNEs are in the U.S., U.K., Germany, France, and Japan; others are in fifteen additional high-income countries. *See* UNCTAD, WORLD INVESTMENT REPORT 2021, ANNEX TABLE 19 (2021), <https://perma.cc/M3G5-WBWB>. Four of the eighteen high-income countries with MNEs have enacted HRDD statutes: the Netherlands, France, Germany, and Norway.

regard, existing disclosure and due diligence statutes share certain critical weaknesses. They do not establish liability for human rights abuses even when a business enterprise causes or contributes to those abuses; liability attaches only for failure to follow certain processes established under national law. The laws also do not require that workers—the putative victims and beneficiaries—participate in the design and implementation of the processes being established.

III. KEY FEATURES OF AN ILO CONVENTION ON GSCs

As established above, neither existing national laws and practices nor the voluntary CSR approach adequately address the issue of human rights abuses in GSCs. Instead, this Article contends that legal liability and related obligations should be imposed on transnational business enterprises as well as governments. Specifically, this Part argues that the ILO should take the lead in formulating a GSC convention setting out requirements for both businesses and governments related to workers' rights.

The description and justification for a GSC convention begins by explaining why HRDD requirements alone are not sufficient—legal obligations must encompass substantive as well as procedural responsibilities. This Part then presents the proposed convention's three central requirements. First, the convention should contain provisions mandating substantive responsibility for businesses to avoid involvement in supply chain human rights violations, recognizing the distinct possibilities of strict, fault-based, and vicarious liability. Second, it should mandate procedural adherence to HRDD that assures direct and meaningful participation by workers and their representatives, along with other interested parties, at each stage of the process. Third, its scope of coverage should embrace all workers engaged in supply chain activities, regardless of their formal employment or contractual status under relevant national law. This Part concludes by discussing elements of jurisdiction, enforcement, and remedies that should also be addressed in a GSC convention.

A. Two Distinct Obligations: Procedural *and* Substantive Responsibility

Under a GSC convention, business enterprises should be required to fulfill two distinct obligations: (i) a procedural responsibility to adhere to a detailed set of due diligence processes and (ii) a substantive responsibility to avoid involvement in supply chain human rights violations. The UNGPs' corporate responsibility framework, which contains these two separate conceptions of business responsibility, provides a natural and helpful starting point for the structure of the dual obligations in a GSC convention.

Despite the frailty of their voluntary nature, the Guiding Principles have been recognized as the U.N.'s primary continuing model for progress in the GSC

human rights area. Their statement of business responsibilities to protect human rights, both in direct and more extended dealings, has been endorsed or incorporated in communications from the EU, guidelines from the Organization for Economic Cooperation and Development (OECD), and various private and multi-stakeholder initiatives.¹³⁹ Governments enacting laws to mandate human rights due diligence have borrowed heavily from the UNGPs framework.¹⁴⁰

The Guiding Principles contain both conceptions of business responsibility that this Article argues should be integrated into a GSC convention. On the one hand, they emphasize business enterprises' procedural responsibility, defining human rights due diligence as a process that enables businesses to account for how well they address their own adverse human rights impacts.¹⁴¹ This concept of procedural responsibility shows up prominently in Principle 17, which specifies that the due diligence process should include a number of distinct stages. Principles 18 through 21 elaborate that those stages should: (i) identify and assess human rights impacts or risks; (ii) integrate and act upon the assessment findings; (iii) track the effectiveness of the actions taken; and (iv) communicate what has been done, orally and in writing. Faithful adherence to these due diligence stages is one key aspect of implementing a business's responsibility not to abuse or infringe on human rights.¹⁴²

But importantly, several of the Guiding Principles also set forth standards of business conduct that focus on substantive results, as distinct from procedures, creating responsibility related to certain outcomes—namely, the avoidance or mitigation of human rights abuses in a supply chain. In Principle 13, business enterprises are held directly responsible for causing or contributing to adverse human rights impacts through their own activities,¹⁴³ and they should seek to prevent or mitigate any such impacts that are linked to their operations, products, or services by their business relationships.¹⁴⁴ In Principle 22, business enterprises are responsible for providing a remedy whenever they cause or contribute to adverse human rights impacts.¹⁴⁵ And in Principle 24, they should respond to the

¹³⁹ See Michael K. Addo, *The Reality of the United Nations Guiding Principles on Business and Human Rights*, 14 HUMAN RTS. REV. 133, 141–45 (2014).

¹⁴⁰ See discussion *supra* Part II.C; see also OECD, *Due Diligence Guidelines for Responsible Business Conduct* (2018).

¹⁴¹ See UNGPs princ. 17–21.

¹⁴² See Taylor, *supra* note 116, at 105.

¹⁴³ See UNGPs princ. 13(a).

¹⁴⁴ See *id.* princ. 13(b).

¹⁴⁵ See *id.* princ. 22; see also Bonnitcha & McCorquodale, *supra* note 116, at 912 (arguing that causation or contribution results in strict liability for a business).

risk of causing or contributing to gross human rights abuses regardless of conflicting requirements.¹⁴⁶

The UNGPs also imply that businesses can be liable for complicity in human rights abuses. While complicity in legal terms often involves knowingly providing practical assistance or encouragement to a supplier's violation of a fundamental human rights convention, this level of affirmative causation may not be necessary.¹⁴⁷ In Principle 17, business enterprises may be viewed as morally complicit in the acts of a supplier "when they are seen to benefit from an abuse committed by that [supplier]."¹⁴⁸ Such moral complicity does not require relations of ownership or control: as expressed by one scholar, "[i]t is enough that lead firms are on notice that their contracts with suppliers are the occasion for which these workers are subject to oppressive conditions."¹⁴⁹ This notice may be a function of MNE sourcing departments regularly pressuring suppliers for rapid delivery times and minimized production costs.¹⁵⁰

Using the UNGPs' concepts as a template, responsibilities for process and outcome should constitute separate and equally necessary obligations under an ILO convention. A business may develop and implement its HRDD approach on a continuing basis across its supply chain and yet discover two months later that widespread forced labor exists in its primary supplier factory. Weeks after that, the business may find that sex discrimination in wage levels is rampant in a plant controlled by its subsidiary. The MNE has been fulfilling its HRDD process; at the same time, it has been causing or contributing to adverse human rights impacts.

One response would be to accept a safe-harbor defense for MNEs that conduct appropriate due diligence yet still, on occasion, discover human rights violations within their immediate supply chain. That approach characterizes the regulation of corrupt business practices under U.K. law.¹⁵¹ And without a safe-

¹⁴⁶ See UNGPs princ. 24(c).

¹⁴⁷ See UNGPs princ. 17 cmt; *see also id.* (emphasizing that even business entities conducting reasonable HRDD may be liable for causing or contributing to human rights abuses).

¹⁴⁸ *Id.*

¹⁴⁹ Aditi Bagchi, *Production Liability*, 87 *FORDHAM L. REV.* 2501, 2521 (2019).

¹⁵⁰ See *supra* note 55 and accompanying text; Bagchi, *supra* note 149, at 2519 (discussing certain payment structures and production timelines as foreseeably leading to abusive working conditions at supplier factories), 2522 (observing that while lead firms may be arms-length actors with their suppliers, their supply contracts "reflect a common interest in inattention to workers' interests").

¹⁵¹ Under the U.K. Bribery Act 2010, § 7(1) makes it unlawful for a company to fail to prevent a person associated with the company from committing bribery, but § 7(2) provides a defense if the company can prove it had "adequate procedures" in place to prevent such bribery. See Ministry of Justice, *Bribery Act 2010: Post Legislative Scrutiny Memorandum*, Cm. 9631, at 8 (U.K. 2018) ("The Bribery Act offence, coupled with the full adequate procedures defence, was designed to encourage the business community to maintain the momentum in incorporating bribery prevention as an essential part of corporate good governance. The aim was, and still is, to encourage not to oblige.").

harbor reward for MNEs that implement due diligence in good faith, at least some companies may feel less incentive to pursue HRDD with the requisite rigor and dedication.

On the other hand, if due diligence is viewed as a sufficient defense to escape liability for actual human rights violations within the supply chain, MNEs may be tempted to practice a minimal form of due diligence. This HRDD process would presumably be more sophisticated than the tick-box auditing methods associated with CSR codes.¹⁵² However, it would also be less than optimally demanding and responsive given the absence of collateral consequences when forced labor or discrimination are found to exist.¹⁵³

After decades of disheartening results from good faith and bad faith business efforts at voluntary compliance, and disappointing early returns from statutes mandating compliance based only on a due diligence process, the argument for two sets of obligations has become increasingly powerful. Relatedly, the U.S. Foreign Corrupt Practices Act (FCPA), unlike its English counterpart, prohibits bribery of foreign officials and provides no defense based on a company's due diligence-type procedures.¹⁵⁴ Its substantive prohibition model places a heavier burden on corporations to search for and eliminate corruption in their operations. While the FCPA met with initial resistance, many U.S. businesses seem to have accepted and to some extent even endorsed a situation that reduces risks and uncertainties associated with corruption while basing competition more predictably on traditional market factors.¹⁵⁵

In the end, the harm of a faulty due diligence process and the harm from perpetrating or contributing to human rights abuse are distinct. They justify different approaches to establishing liability and different channels of access to relief.

B. Liability Regimes for Substantive Violations

As discussed in Part II, the current state of law and practice allows governments in developing countries and companies with CSR codes to ignore or

¹⁵² See *supra* note 54 and accompanying text.

¹⁵³ See generally Neil Robson, *The Bribery Act: A Decade On*, REUTERS (Aug. 6, 2021), <https://perma.cc/6KCG-HJ2G> (noting few examples of enforcement of U.K. Bribery Act during first decade and adding that “[t]he past decade’s repeated anti-bribery training has . . . resulted in firms and their employees taking a hardline stance on anti-bribery and corruption (ABC) issues. Well, at least on paper. ABC clauses are now routinely added to contracts with suppliers, agents, consultants and other third parties so as to be able to demonstrate that the firm has a robust and no-nonsense attitude towards bribery, wherever the third party may be located.”).

¹⁵⁴ See Pub. L. No. 95-213 (1977), codified in relevant part at 15 U.S.C. § 78dd-1(a).

¹⁵⁵ See Connel Mack, *Six Reasons Why Corporations Like (and Want) the Foreign Corrupt Practices Act Even if They Won’t Admit It*, BHRCC (June 13, 2017), <https://perma.cc/NDS4-MRZP>; Chambers & Martin, *supra* note 90, at 6–9.

overlook human rights abuses in GSCs. While recent statutes in developed countries require a focus on human rights assessment procedures, they do not address accountability for adverse human rights outcomes. It has become readily apparent that the economic incentives underlying supply chain production practices give rise to substantial and foreseeable risks of abusive working conditions. A convention aimed at reducing those risks must motivate the actors that are in the most efficient position to minimize, if not eliminate, the risks: MNEs at the top of supply chains.¹⁵⁶

These MNEs have knowledge of industry practices and available technologies that allow for overview planning to reduce at least some human rights risks. Further, MNEs' control in setting prices empowers them to agree to certain price increases for supplier goods or services in exchange for participating in, or exerting greater control over, the monitoring of supplier workplace conditions. MNEs' direct relationship with consumers also means they can pass on to those consumers a portion of the costs associated with assuring decent supply chain working conditions. Finally, MNEs have substantial assets, extended institutional lives, and regular interaction with the legal system—making them a reasonable focus for enforcement of new legal requirements.

The most straightforward case regarding a supply chain violation of human rights is when an MNE itself causes the human rights harm. Thus, if a major U.S. or EU garment retailer owns and operates factories in Indonesia or Cambodia, and conditions at those factories include extensive forced labor or sexual harassment, that retailer should be subject to strict liability under the convention.¹⁵⁷ Although U.S. law erects substantial obstacles to bringing tort actions against MNEs based on events outside the country,¹⁵⁸ there may well be jurisdiction in this instance under the Alien Tort Statute (ATS),¹⁵⁹ another federal

¹⁵⁶ The discussion in the following paragraph borrows from the thoughtful analysis of these risk-shifting factors by Bagchi, *supra* note 149, at 2526–29.

¹⁵⁷ The Article makes use of U.S., U.K., and EU tort law examples and references. An ILO convention addressing liability in GSCs must be responsive to the common law basis for U.S. and U.K. tort law and the civil law foundations of law in EU countries.

¹⁵⁸ See generally *Nestle USA v. Doe*, 141 S. Ct. 1931 (2021) (discussing limits on extraterritorial application of Alien Tort Statute); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) (discussing limits imposed under *forum non conveniens* doctrine).

¹⁵⁹ See *Nestle USA*, 141 S. Ct. at 1937 (discussing what qualifies as a sufficiently specific allegation of aiding and abetting in the U.S. a child slavery violation overseas). In May 2022, two U.S. senators introduced a bill that would amend the ATS to give it extraterritorial application. See *USA: Senators Introduce Bill to Clarify Extraterritorial Application of Alien Tort Statute to Ensure Companies are Held Accountable for Human Rights Abuses Abroad*, BHRRC (May 9, 2022), <https://perma.cc/69YC-W476>.

law specifying extraterritorial application,¹⁶⁰ or customary international law.¹⁶¹ Even if U.S. law needs some adaptation, however, what matters for present purposes is that the convention identify liability for such business conduct, building from the causation provisions of the UNGPs.

If an MNE contributes to human rights violations by its own subcontractors or subsidiaries, a more extended analysis might take place to determine whether there was complicity in the violation.¹⁶² For instance, it may be reasonable to infer that an MNE regularly dictating low production prices and specific short-term delivery schedules to its subsidiary has contributed to the predictable results of those demands: forced overtime, unsafe working conditions, and low wages.¹⁶³ More broadly, the close relationship between an MNE buyer and its repeat-player supplier may result in sufficient control on the part of the MNE to establish vicarious liability for certain human rights violations committed by the supplier.¹⁶⁴ The question of how far such a relationship can be understood as being under the control of an MNE—or to what extent the MNE assumes responsibility for working conditions at that supplier—requires consideration of specific context, possibly including the longevity or permanence of the relationship; the extent of their collaboration; and the MNE’s inspection and oversight process, as contracted for and applied in practice.¹⁶⁵

MNEs that have not caused or directly contributed to human rights abuses may still be linked to those abuses through business relationships they maintain with entities in their supply chain. A linkage may be deemed to exist if the MNE knowingly benefits from the human rights violation by the supply chain entity, and perhaps even if the MNE should have known that the “beneficial” violation was being committed. For example, if an MNE has used a particular supplier factory more than once in the past, and that factory has been found on several recent occasions to have used forced labor, the question arises whether the MNE knew or should have known that forced labor would contribute to the completion

¹⁶⁰ See 42 U.S.C. § 2000e(f) (Title VII, prohibiting sex discrimination, applies to the foreign operations of U.S.-controlled companies).

¹⁶¹ See generally James J. Brudney, *The Right to Strike as Customary International Law*, 46 YALE J. INT’L L. 1, 41–50 (2021) (examining components of a federal cause of action for customary international law in human rights setting).

¹⁶² The UNGPs’ commentary on complicity as a legal matter refers to “knowingly providing practical assistance or encouragement that has a substantial effect” on commission of the human rights abuse. UNGPs, princ. 17 cmt.

¹⁶³ See Peter Rott & Vibe Ulfbeck, *Supply Chain Liability of Multinational Corporations?*, 3 EUR. REV. OF PRIV. L. 415, 419–20, 434–35 (2015).

¹⁶⁴ Vibe Ulfbeck & Andreas Ehlers, *Tort Law, Corporate Groups, and Supply Chain Liability for Workers’ Injuries: The Concept of Vicarious Liability*, 13 EUR. CO. L. 167, 173 (2016).

¹⁶⁵ A rigorous and engaged HRDD process is likely to reduce adverse human rights outcomes in the direct supply chain. Conversely, a less-than-rigorous HRDD process is likely to result in more instances of human rights abuse, as well as liability related to the process itself. See *infra* Part III.C.

of its current factory order.¹⁶⁶ Answering this question can be complicated, due in part to uncertainty as to the entities with which the MNE maintains a business relationship. Moreover, corporate law in Europe and the U.S. generally prohibits piercing the corporate veil with respect to negligent actions or omissions of independent contractors or subsidiaries.¹⁶⁷ That said, some recent court decisions suggest the possibility of fault-based liability for risks of abuse that may be reasonably foreseeable.¹⁶⁸

Another model for assessing business liability in the third-party context is the non-delegable duty doctrine under U.S. and U.K. tort law. Under this doctrine, some responsibilities have been deemed so important to the community as to be non-transferrable. In the workplace setting, it is relatively settled that employers may not delegate to third parties the provision and operation of a safe place of work for their own employees.¹⁶⁹ This would apply in direct terms against an employer who engages a subcontractor to oversee protection for her own employees against threats to worker safety, including human rights abuses such as forced labor or sexual violence. In the supply chain context, if the convention imposes on an MNE a duty to protect from human rights abuses workers who are furthering the MNE's commercial venture, this would arguably trigger the same non-delegable duty.¹⁷⁰

Finally, one might address business liability in the third-party context by invoking enterprise causation. Under this vicarious liability theory, "a business enterprise cannot justly disclaim responsibility for [harms or abuses] which may

¹⁶⁶ Cf. Chambers & Martin, *supra* note 90, at 24 (discussing similar issues in the drafting of a Foreign Corrupt Practices Act for Human Rights).

¹⁶⁷ See generally CARSTEN GERNER-BEUERLE & MICHAEL SCHILLIG, *COMPARATIVE COMPANY LAW* 814–88 (2019); Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability & the Corporation*, 52 U. CHI. L. REV. 89 (1985).

¹⁶⁸ See Susana C. Mijares Peña, *Human Rights Violations by Canadian Companies Abroad: Choc v. Hudbay Minerals Inc.*, 5 WESTERN J. LEGAL STUD. 1, 14 (2014) (discussing 2013 decision from Ontario Superior Court of Justice involving assaults and rapes committed by subsidiary mining project's security personnel in Guatemala during eviction of indigenous peoples from contested land); Rott & Ulfbeck, *supra* note 163, at 431–35 (discussing *Chandler v. Cape*, a 2012 decision from the English Court of Appeal involving subsidiary employee's exposure to asbestos dust).

¹⁶⁹ See generally Restatement (Third) of Agency § 7.06 (including Comment discussing Restatement Second, Torts, §§ 416, 427); DAN B. DOBBS ET AL., *THE LAW OF TORTS* § 432, WESTLAW (2d ed., database updated June 2021); *Wilson & Clyde Coal Co. Ltd. v. English* [1938] AC 57 (HL); *McDermid v. Nash Dredging Ltd.* [1987] AC 906 (HL).

¹⁷⁰ See Restatement (Third) of Agency § 7.06 and accompanying comment (thanks to Ben Zipursky for this insight); DOUGLAS BRODIE, *ENTERPRISE LIABILITY AND THE COMMON LAW* 164 (2010). A counterargument would be that the business is delegating production of a product, not responsibility for workplace safety, and its own employees are not involved in producing that product. See Vibe Ulfbeck & Andreas Ehlers, *Direct and Vicarious Liability in Supply Chains*, in *LAW AND RESPONSIBLE SUPPLY CHAIN MANAGEMENT* 91, 103–05 (Vibe Ulfbeck et al. eds., 2019).

fairly be said to be characteristic of its activities.”¹⁷¹ If the human rights abuses in supply chain factories or on supply chain farms are “inevitable by-products of planned activities—not the random consequences of discrete acts,”¹⁷² then removal of supply chain causation can eliminate the risk of harm. Yet the abuses themselves may not be inevitable, based on MNEs’ capacity to develop and implement an effective regime of deterrence.¹⁷³ For that reason, an enterprise causation approach may encourage MNEs to be creative and aggressive in searching for ways to reduce the risks of supply chain abuses.¹⁷⁴

In an analogous non-supply chain setting, the U.S. Supreme Court has endorsed an enterprise risk approach to vicarious liability for hostile environment sexual harassment under Title VII.¹⁷⁵ The Court deemed it “well recognized” that this form of harassment by supervisors “is a persistent problem in the workplace,” and concluded it was fair to hold employers vicariously liable as “one of the costs of doing business, [a cost] to be charged to the enterprise rather than the victim.”¹⁷⁶ The Court noted that vicarious liability in this setting enhances enterprise efficiency, given that “the employer has a greater opportunity to guard against misconduct by supervisors . . . [and a] greater opportunity and incentive to screen them, train them, and monitor their performance.”¹⁷⁷

Businesses have long asserted that they are committed to reducing human rights risks in their supply chains. While the history of CSR codes casts some doubt on that commitment, a suitably constructed and effective human rights due

¹⁷¹ Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266, 1379 (1997) (quoting *Ira S. Bushey & Sons, Inc. v. U.S.*, 398 F.2d 167, 171 (2d Cir. 1968) (Friendly, J.)).

¹⁷² *Id.* at 1267.

¹⁷³ *Cf.* Ulfbeck & Ehlers, *supra* note 170, at 173 (suggesting that supply chain buyers may exercise some control over worksites through inspections and similar oversight processes).

¹⁷⁴ See Martha Chamallas, *Vicarious Liability in Torts: The Sex Exception*, 48 VALPARAISO L. REV. 133, 151–56 (2013).

¹⁷⁵ *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

¹⁷⁶ *Id.* at 798.

¹⁷⁷ *Id.* at 803. See Chamallas, *supra* note 174, at 173–78 (discussing *Faragher*’s application of enterprise liability based on causation rather than negligence). The employer’s incentive to screen, train, and monitor its agents is analogous to incentives for MNEs with knowledge of supply chain practices and available technologies. See text following *supra* note 156. The Court in *Faragher* created a limited two-part defense to this enterprise liability: the employer must prove (i) that it had acted reasonably to prevent and promptly correct harassment abuses, and (ii) that the employee had acted unreasonably in not utilizing the employer’s complaint procedure to report the harassment and mitigate the harm. See 524 U.S. at 807. Such a two-part defense might have some relevance in the HRDD setting, although an MNE would have to prove both that it had prevented and promptly corrected human rights abuses in the past *and* that its complaint procedure was a reasonable option (demonstrably effective results plus workers not chilled from participating due to fear of retaliation) that affected workers unreasonably failed to utilize. This defense to enterprise causation would in effect require a due diligence process that is comprehensive, rigorous, and includes extensive worker participation.

diligence process might come closer to fulfilling it. The catch is that HRDD needs to be well-designed and rigorously implemented. A genuinely effective due diligence process should be able to reduce the risk of human rights abuses, thereby diminishing the potential for vicarious liability under enterprise causation or any other substantive liability theory. At the same time, if the due diligence process is not well designed and/or is poorly implemented, the prospect of detecting and preventing supply chain abuses diminishes—and liability for such outcomes is likely to increase. In addition, as discussed below, an inadequate HRDD process should itself give rise to liability regardless of its relationship to specific human rights abuses.

C. Worker Participation in the Due Diligence Process

Throughout the HRDD process, the primary target of supply chain risks and possible abuses is the workers themselves. Decades of experience with CSR codes and initial mandatory HRDD statutes show that when workers or their representatives are not directly involved in formulating and implementing the due diligence process, that process becomes little more than a tick-box exercise, failing to produce meaningful progress.¹⁷⁸ Conversely, social auditing programs that provide for extensive worker participation and consultation have achieved notable levels of success,¹⁷⁹ a goal publicly sought by MNEs as well as by workers and their advocates.¹⁸⁰

Accordingly, a GSC convention must provide for direct and substantial worker participation in the due diligence process, as this will ensure that the process is meaningful and best able to protect against human rights abuses. There are several models for worker engagement in the due diligence process on which the convention could base its framework.

The Fair Food Program, a partnership involving multinational retailers, agricultural growers, and farmworkers in the southeastern U.S.,¹⁸¹ illustrates

¹⁷⁸ See KURUVILLA, *supra* note 49; Esbenschade, *supra* note 49; COMPANIES MUST DO BETTER, *supra* note 118; de Lagerie et al., *supra* note 118.

¹⁷⁹ See *supra* note 58 (discussing the Accord and ILO/IFC Better Work programs); *infra* notes 307–310 and accompanying text (discussing Fair Food Program); Anner, *supra* note 11, at 376–78 (advocating for labor-centric mechanisms to address decent work deficits in supply chains, including trade unions and also worker-employer co-governance social responsibility programs). See generally Mark Anner, Jennifer Bair, & Jeremy Blasi, *Learning from the Past: The Relevance of Twentieth-Century New York Jobbers' Agreements for Twenty-First-Century Global Supply Chains*, in ACHIEVING WORKERS' RIGHTS, *supra* note 44, at 239–58.

¹⁸⁰ See OECD, *Due Diligence Guidance for Responsible Business Conduct* 17–18, 48–51 (2018).

¹⁸¹ See FAIR FOOD PROGRAM, FAIR FOOD PROGRAM 2021 REPORT 4 (2021), <https://perma.cc/AXY8-LGT8>. See generally Greg Asbed & Sean Sellers, *The Fair Food Program: Comprehensive, Verifiable, and Sustainable Change for Farmworkers*, 16 U. PENN. J. L. & SOC. CHANGE 39 (2013); James J. Brudney, *Decent Labour Standards in Corporate Supply Chains: The Immokalee Workers Model*, in TEMPORARY

vividly how meaningful worker engagement can help address labor abuses in supply chains. Under the Program, the farmworkers who have experienced and understood these abusive conditions are integral in identifying the risks to be addressed.¹⁸² A third party monitor launched by the workers' organization collaborates with retailers, growers, and workers to conduct regular risk assessments.¹⁸³ The monitor then responds to identified abuses with a detailed plan for corrective action and tracks the results of that plan.¹⁸⁴ As part of the identification and correction stages, workers have multiple ways to report violations and are protected in doing so.¹⁸⁵ There is close attention to management accountability, framed primarily with reference to market-based consequences; suppliers who do not remedy identified abuses can lose their ability to sell to participating retailers.¹⁸⁶ The third-party monitor tracks the responses, evaluates their effectiveness, and compiles a detailed report reviewing the process and its results.¹⁸⁷ In short, farmworkers are integrally involved in identifying, assessing, monitoring, and reporting on human rights risks, allowing for significantly better results from the due diligence process.

The Fair Food Program model is hardly the only means of achieving successful worker participation,¹⁸⁸ and the GSC convention should not specify any particular model. However, the convention should make clear that meaningful worker consultation is required at every stage of the HRDD process. Continuous consultation and input from workers and their representatives diminishes the likelihood of serious or prolonged human rights abuses, and may also serve to rebut certain HRDD-based charges against a business. For example, rebuttal

MIGRATION IN THE GLOBAL ERA: THE REGULATORY CHALLENGES 351–376 (Joanna Howe & Rosemary Owens eds., 2016).

¹⁸² See FAIR FOOD PROGRAM 2021 REPORT, *supra* note 181, at 32–34 (listing code standards).

¹⁸³ See *id.* at 8.

¹⁸⁴ See Asbed & Sellers, *supra* note 181, at 46–47; Brudney, *supra* note 181, at 365–68.

¹⁸⁵ These mechanisms include growers' provision of a booklet and video to all workers at point of hire, with contents written and acted by worker representatives; periodic worker education sessions at worksites; health and safety committees established at every grower worksite; and a twenty-four-hour hotline operated by the monitor and focused on collaborative factfinding with growers. See Asbed & Sellers, *supra* note 181, at 46; FAIR FOOD PROGRAM 2021 REPORT, *supra* note 181, at 8–11.

¹⁸⁶ See FAIR FOOD PROGRAM 2021 REPORT, *supra* note 181, at 11. The code includes zero tolerance for child labor, forced labor, sexual harassment with physical contact, or other forms of violence, *id.* at 32, but does not address the right to collective bargaining, which is unavailable to agricultural workers under U.S. statutory law.

¹⁸⁷ See *id.* at 30–61, reporting detailed results under eleven separate headings. The 2021 Report contains data updated through the program's ninth season (2019–20).

¹⁸⁸ Other participatory models include traditional collective bargaining agreements, sectoral bargaining arrangements with transnational unions, and oversight systems that include labor rights organizations performing various monitoring functions. See Judd & Jackson, *supra* note 55, at 54. See generally Jeremy Blasi & Jennifer Bair, *An Analysis of Multiparty Bargaining Models for Global Supply Chains*, ILO (2019), <https://perma.cc/QV93-5R9U>.

might include an MNE's ability to demonstrate that the workers' complaint procedure—intended to assist in mitigation and prevention of abuses—was in fact a reasonable option from workers' standpoint, by showing that it was achieving or had achieved effective results and that workers were not deterred from participating due to any justified fear of retaliation.¹⁸⁹

In its 2019 Violence and Harassment Convention, the ILO demonstrated its capacity and willingness to include a multi-stage obligatory due diligence process aimed at preventing a particular kind of workplace abuse and also its appreciation for the value of consultation with workers as an integral part of that process. The Convention requires governments to consult with workers or their representatives at multiple stages: (i) when developing an “inclusive, integrated and gender-responsive approach”; (ii) when adopting and implementing the workplace policy; (iii) when identifying hazards and assessing risks; and (iv) when identifying sectors, occupations, or work arrangements that give rise to added exposure to violence and harassment.¹⁹⁰

A due diligence process that includes regular engagement between workers, suppliers, and brands at the top of a supply chain, when combined with the attention to outcomes liability already discussed, could encourage MNEs to reward both suppliers and their own personnel for compliance with labor standards. Such an adjustment, altering the current incentive structure that is based almost exclusively on short-term sourcing decisions, has been called for by many observers.¹⁹¹ As part of a more equitable sharing of human rights risks between business enterprises on the one hand and suppliers and workers on the other, a GSC convention should encourage MNEs to recognize suppliers who demonstrate high levels of compliance (in process and outcome terms) with increased product orders and longer-term commitments.

¹⁸⁹ See discussion of similar business defense in *Faragher*, *supra* note 177.

¹⁹⁰ ILO Convention 190 art. 4(2), 9(a), 9(c). The ILO's comprehensive strategy on workplace violence and harassment is also expressly outcome-oriented. The Convention requires governments to take all appropriate measures to prevent violence and harassment, and mandates action to ensure easy access to effective remedies for victims when violence and harassment has occurred. *See id.* arts. 7, 8, 10(b), 10(d).

¹⁹¹ *See, e.g.*, Judd & Jackson, *supra* note 55, at 50–51 (discussing adjustment of pay systems for sourcing executives and others to focus more on supply chain labor outcomes instead of short-term pricing cycles); Matthew Amengual et al., *Global Purchasing as Labor Regulation: The Missing Middle*, 73 *INDUS. & LAB. REL. REV.* 817, 818, 838 (2020) (criticizing absence of incentives for compliance in that MNE did not increase purchase orders when supplier labor standards improved); KURUVILLA, *supra* note 49, at 178, 216. The prospects for shifting pay incentives and priorities may be modestly enhanced due to recent developments suggesting some MNE consolidation of supplier sources. *See* Judd & Jackson, *supra* note 55, at 7–11, 37.

D. Scope of Coverage

1. *All* GSC workers

A GSC convention should protect *all* workers engaged in supply chain activities from human rights abuses, regardless of whether they are defined as employees under relevant national law. This breadth of coverage is essential to avoid the pitfall of failing to provide legal protections for temporary, home-based, casual, or migrant workers, as has occurred under many national laws.¹⁹² Once again, the recent ILO Convention on Violence and Harassment provides a template or model for this broad coverage, by declaring its protection of “workers and other persons in the world of work, including employees as defined by national law and practice, as well as [other] persons working irrespective of their contractual status, [and] persons in training, including interns and apprentices, . . . volunteers, jobseekers, and job applicants”¹⁹³ A GSC convention should utilize this model, while also explicitly covering both private and public sectors, in both the formal and informal economies.¹⁹⁴

2. Business enterprises operating transnationally

With respect to supply chain brands and retailers, a GSC convention should cover business enterprises of sufficient magnitude to operate transnationally, either in their direct operations or through supply chain relationships.¹⁹⁵

That said, considerable variations exist in the size, sector, and structure of such business operations. The UNGPs recognize that “the scale and complexity through which enterprises meet their responsibility [to respect human rights] may vary” based on the factors just mentioned as well as others, including “the severity of . . . adverse human rights impacts.”¹⁹⁶ Assuming that all businesses in the supply chain setting will have some obligation to prevent and remedy their human rights abuses, along with an obligation to carry out human rights due diligence, the

¹⁹² See *supra* notes 30–31 and accompanying text (discussing these gaps in worker protection under many national laws—in developed and developing countries).

¹⁹³ ILO Convention 190 art. 2(1).

¹⁹⁴ See *id.* art. 2(2).

¹⁹⁵ Although this Article focuses on brands and retailers sitting at the top of extended GSC networks, transnational suppliers such as Foxconn Technology Group (Apple’s main supplier) and Li & Fung (supplier for many garment brands) also oversee GSCs and would be covered by the proposed convention. For discussion of the substantial role played by transnational suppliers in GSCs, see Trang (Mae) Nguyen, *Hidden Power in Global Supply Chains*, 63 HARV. J. INT’L L. (forthcoming 2023), <https://perma.cc/NQW8-A6B8>.

¹⁹⁶ UNGPs princ. 14; see also UNGPs princ. 17(b) (HRDD “[w]ill vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of operations”), princ. 24 (if business enterprises need to prioritize remedial responses, they “should first seek to prevent and mitigate those [adverse human rights impacts] that are most severe or where delayed response would make them irremediable”).

nature and extent of these twin obligations may depend on the abovementioned factors, among others.

For instance, a large MNE working with regular subcontractors and its own subsidiaries may have ample resources and clarity of control to develop and administer an elaborate HRDD process. By contrast, medium-sized businesses involved in irregular supply relationships or small businesses dependent on informal economy suppliers will have less control in devising and implementing an HRDD process. At the same time, the likelihood of undetected and possibly severe human rights abuses may be higher in such unbounded settings. If business coverage is defined in unduly precise or prescriptive terms, the convention may well exclude aspects of supply chain relationships falling outside the definitional ambit even when those aspects involve serious human rights abuses. Yet a malleable approach to supply chain definitions may create uncertainty for MNEs seeking to assess their compliance in HRDD terms as well as their vulnerability to human rights abuses in the lower tiers of a possible chain.

All these variations and uncertainties take on added significance given the consequences: when and whether to assess injunctive relief, civil penalties, individual or group damages, and perhaps even criminal sanctions. Thus, for instance, a set of HRDD requirements might apply comprehensively and rigorously to an MNE that has ample resources and knowledge capability about its regular supply chain activities, but somewhat less rigorously to a mid-size business that has only ad hoc dealings with its various supply chain producers. Rather than seek a one-size-fits-all approach, it seems prudent to allow national governments to define the nature and extent of coverage for businesses involved in supply chain production at different levels.

3. Essential workplace human rights

A final issue on scope of coverage concerns possible limits on the human rights to be protected. The baseline for an ILO convention should include the human rights enumerated in the ILO Declaration on Fundamental Principles and Rights at Work: freedom from child labor, forced labor, and discrimination; plus rights to freedom of association and collective bargaining; and the right to a safe and healthy workplace.¹⁹⁷ Additionally, the right to an adequate living wage is inextricably linked to considerations of safety and health—and also perhaps forced labor—and thus should be included as part of this baseline.¹⁹⁸

¹⁹⁷ See *supra* note 15.

¹⁹⁸ See generally SHELLEY MARSHALL, LIVING WAGE: REGULATORY SOLUTIONS TO INFORMAL AND PRECARIOUS WORK IN GLOBAL SUPPLY CHAINS (2019); John C. Landefeld et al., *The Association Between a Living Wage and Subjective Social Status and Self-Rated Health: A Quasi-Experimental Study in the Dominican Republic*, 121 SOC. SCI. & MED. 91 (2014).

The UNGPs expressly refer to the ILO Declaration, identifying that the Declaration and the International Bill of Human Rights (which consists of the Universal Declaration of Human Rights and two widely endorsed international covenants)¹⁹⁹ encompass an authoritative core list of rights to be protected in the labor context.²⁰⁰ The latter group of documents adds considerably to the reservoir of workplace-related human rights, folding in rights like free expression,²⁰¹ privacy,²⁰² a high standard of physical and mental health,²⁰³ periodic holidays with pay,²⁰⁴ and technical and vocational guidance.²⁰⁵

One might contend that all workplace-related human rights referred to in the preceding paragraph should be covered by the convention, based on considerations of universality and asserted interdependence.²⁰⁶ At the same time, the challenges of assessing, monitoring, and enforcing compliance with an HRDD process, and fulfilling an obligation to avoid human rights abuses, become considerably more complex and arduous as the list of human rights expands. Certain human rights—such as freedom of expression or privacy—may be more directly linked to those set forth in the Declaration of Fundamental Principles while others—such as periodic holidays with pay or technical and vocational guidance—may have a more attenuated relationship to those same ILO fundamental principles. The German Supply Chain Due Diligence Act, for example, largely tracks the ILO fundamental conventions in defining workplace-related human rights risks to include child labor, forced labor, slavery, disregard of occupational safety and health obligations, disregard of freedom of association, and discrimination and unequal treatment, while also adding the withholding of an adequate living wage.²⁰⁷ Rather than seeking to identify priorities or limitations regarding the more extensive collection of human rights enumerated in the International Bill of Human Rights, it may be preferable for a GSC convention to

¹⁹⁹ See G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UD] (containing 30 articles); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] (containing 31 articles); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (containing 53 articles).

²⁰⁰ See UNGPs princ. 12 cmt.

²⁰¹ See UD art. 19; ICCPR art. 19.

²⁰² See ICCPR art. 17.

²⁰³ See ICESCR art. 12.

²⁰⁴ See UD art. 24.

²⁰⁵ See ICESCR art. 6.

²⁰⁶ See *What are Human Rights?*, U.N. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS: SOUTH-EAST ASIA REGIONAL OFFICE, <https://perma.cc/XC9J-PS6C> (“[A]ll human rights are . . . indivisible, interrelated and interdependent. The improvement of one right facilitates advancement of the others. Likewise, the deprivation of one right adversely affects the others.”).

²⁰⁷ See LkSG, *supra* note 125, § 2(2) ¶¶ 1–8. *But cf.* LkSG Annex, nos. 1–11 (listing eight fundamental ILO conventions; 2014 Protocol to Forced Labor Convention 29; and two U.N. covenants, the ICCPR and the ICESCR).

leave to national governments the decision of which additional human rights beyond the fundamental principles should be covered.

E. Jurisdiction; Enforcement; Remedies

In addition to the three central requirements discussed earlier in this Part, a GSC convention is likely to confront a series of issues stemming from its transnational application and associated complexities, such as recognizing standing for certain representative actors, ascribing burdens of proof, or attaching responsibility to high corporate officials. These issues are grouped below under the headings of jurisdiction, enforcement, and remedies, although the issues do not always fall neatly into one heading. Additionally, certain issues grouped under enforcement also implicate ancillary liability concerns that are distinct from the substantive and procedural liability discussion in earlier sections of this Part.

1. Jurisdiction

The UNGPs urge countries to set forth expectations that business enterprises domiciled in their territory and/or jurisdiction will respect human rights in all their operations.²⁰⁸ The understanding is that countries may authorize enforcement against MNEs domiciled within their jurisdiction regarding supply chain operations abroad which the MNEs direct or effectively control.²⁰⁹ This form of extraterritorial jurisdiction has been conferred under HRDD statutes enacted in the Netherlands, France, and Germany.²¹⁰

A similar approach can be followed under a GSC convention. For example, where the HRDD mandate in its various stages would apply to an MNE in one country at the top of a supply chain, it seems appropriate for jurisdiction also to cover that MNE for acts or omissions by its supply chain subcontractors, subsidiaries, or suppliers in other countries related to the HRDD process. It is less clear that these lower-down supply chain actors should have a distinct HRDD obligation enforceable in the courts of the first country, given that they are in effect subject to indirect regulation through the obligations imposed on the MNE.

With respect to alleged violations of human rights, courts in the MNE's home country should have jurisdiction insofar as the MNE is potentially liable under a fault-based or vicarious liability theory. Jurisdictional barriers exist under

²⁰⁸ See UNGPs princ. 2.

²⁰⁹ See *id.* at princ. 2 cmt.

²¹⁰ See *supra* Part II.C.2, discussing these three statutes. The French and German laws confer jurisdiction over companies registered in the country and with more than a certain (substantial) number of employees. The Dutch statute confers jurisdiction over any business that sells or supplies goods or products to Dutch end-users, regardless of where it is registered or principally domiciled.

U.S. tort law,²¹¹ and perhaps under the laws of some other developed countries, but the convention should encourage governments to create new channels of access. Individuals facing the costs of bringing human rights abuse actions in distant foreign courts should be able to rely on representative actors such as trade unions and civil society organizations, and the convention should authorize recognition of such actors for standing purposes.²¹² Individuals still may prefer to sue in their home jurisdiction, although that option has its challenges for victims concerned about the strength of enforcement within their own legal system,²¹³ as well as for MNEs with a more limited presence in the supply chain country. If the MNE did not directly or indirectly cause or contribute to the human rights abuse, its perpetrator will be a supply chain actor and the victim should be able to bring an action in the jurisdiction where the abuse occurred.²¹⁴

An alternative to practical or legal obstacles associated with extraterritorial jurisdiction is arbitration. International framework agreements between MNEs and global union federations illustrate the potential for enforceability through contract norms rather than statutory or regulatory litigation.²¹⁵ A second illustration involves the Accord on Fire and Building Safety in Bangladesh, an agreement among brands, retailers, suppliers, and unions that produced significant improvements in safety at over 1,000 factories.²¹⁶ The Accord adopted applicable procedures from the UNCITRAL Model Law on International Commercial Arbitration, facilitating multi-party arbitration under such agreements.²¹⁷ The convention should at least refer to arbitration as an option for resolving disputes with extraterritorial dimensions.

²¹¹ See *supra* note 159 (discussing limits on extraterritorial jurisdiction under Alien Tort Statute and doctrine of *forum non conveniens*).

²¹² The German statute explicitly allows alleged victims to authorize such representative actions by trade unions or NGOs. See LkSG § 11(1).

²¹³ See, e.g., *supra* notes 31–34 and accompanying text (discussing serious challenges to asserting basic rights for temporary, irregular, home-based, or casual workers, and also for migrant workers).

²¹⁴ There also is the possibility of joint liability for the human rights abuse, between the MNE and one or more supply chain actors.

²¹⁵ See generally Stefania Marassi, *International Framework Agreements and Management of Global Supply Chain: Extra-Judicial Mechanisms to Enforce International Labour Standards*, 74 QUESTIONS OF INT'L L. 51–69 (2020); CLEAN CLOTHES CAMPAIGN ET AL., MODEL ARBITRATION CLAUSES FOR THE RESOLUTION OF DISPUTES UNDER ENFORCEABLE BRAND AGREEMENTS (2020) [hereinafter MODEL ARBITRATION CLAUSES].

²¹⁶ The Bangladesh Accord is discussed in more detail *infra* at Part IV.B.3.

²¹⁷ See James J. Brudney, *Reflections on Labor Standards in Global Supply Chains*, in POWER AND PARTICIPATION, *supra* note 26, at 205, 219–20. Cf. Champagne, *supra* note 51, at 164–65, 172–74 (discussing benefits of arbitration under the Accord while noting that costs were relatively high and adequate transparency was not guaranteed). See generally Kisanthi Parella, *The Stewardship of Trust in the Global Value Chain*, 56 VA. J. INT'L L. 585 (2016); PERMANENT CT. OF ARB., INTERNATIONAL LABOUR ARBITRATION AND CONCILIATION RULES (July 2, 2021), <https://perma.cc/WJ47-LW2B>.

2. Enforcement

Central to the design of an enforcement section for a GSC convention should be the creation or identification of a public agency within each national government's enforcement structure. As discussed earlier, the French HRDD statute omitted any role for public enforcement, while the German law provided for such a role in several distinct respects.²¹⁸ This public enforcement presence should be designed to carry out three separate functions. The enforcement agency should have an education function. It should develop guidance materials supporting the government's efforts to formulate appropriate HRDD strategies, assisting MNEs to develop their own HRDD processes, and helping the public to understand how HRDD is to work and what role citizens can play. The agency also should have a compliance function. It should enable appropriate departments to conduct thorough reviews of the HRDD processes and advise the public on how they can participate—for example, by encouraging or participating in government inquiries or initiating complaints based on particular facts. Finally, the agency should have a sanctions function. It should establish, publicize, and pursue a system of timely and effectively dissuasive sanctions targeted separately to HRDD violations and to human rights abuses caused or contributed to by businesses, and refer violators to courts, tribunals, and alternative dispute resolution mechanisms.²¹⁹

For alleged HRDD violations, enforcement should be expected through a public prosecutor but also permitted for aggrieved private parties. The domestic executive branch has a strong interest in seeing that its own HRDD laws are properly implemented and enforced. It is possible that private parties complaining about HRDD non-compliance, who reside primarily in supply chain countries, will face heavy burdens from pursuing actions in foreign courts over multiple years. Although they are unlikely to do so when aggrieved only about a process violation, they may be aggrieved about far more than process but only be able to establish a process violation. In such circumstances, they should have standing to do so.

A separate issue related to enforcement (though also to scope of coverage) is whether to impose obligations not only on business entities but also, in some circumstances, on the individuals who make relevant operational decisions, such as corporate officers—and if so, whether that should be done under a civil or criminal approach. The Dutch Child Labour Due Diligence Act provides for criminal enforcement and liability, including possible imprisonment, for company directors when they are responsible for two violations of the same Act

²¹⁸ See *supra* note 112 and accompanying text (France); note 130 and accompanying text (Germany).

²¹⁹ ILO Convention 190 art. 10 includes a range of enforcement and remedial responsibilities for member states.

requirement within a five-year period.²²⁰ This repeat-offender liability seems at least presumptively fault-based. By contrast, the U.S. Sarbanes-Oxley Act imposes strict liability on “highly placed corporate actors” for failing to act upon evidence of wrongdoing in the securities area.²²¹ The wisdom of such strict personal liability has been questioned by some scholars²²² but defended by analogy to Calabresian tort theory: because high-ranking corporate officials have specialized knowledge and leadership influence, they are both well-placed to disclose wrongdoing and least vulnerable to retaliation, and are hence in the best position to prevent or mitigate abuses.²²³ It is reasonable for the convention to include the possibility of enforcement against individuals in some circumstances, given that corporate leadership is composed of individuals and the deterrent effect of individual liability is undeniable in certain settings. However, in light of the complexities and variations of supply chain structures and HRDD processes, it may be preferable to use a fault-based approach with regard to enforcement against corporate officials for violations of convention requirements.

Finally, and importantly, a special facet of enforcement involves allocation of the burden of proof in cases alleging a violation of HRDD procedures. The burden of proof to establish liability for failing to devise and implement a required HRDD process would normally fall on the party asserting the violation—either a public enforcement entity or perhaps workers or their representatives pursuing private enforcement. However, the convention should make clear²²⁴ that once the moving party establishes a *prima facie* case that the HRDD process is deficient in one or more respects, the burden shifts to the MNE to establish either (a) that the due diligence process in fact complies with convention requirements or (b) that even if the process has flaws, including flaws that may have contributed to abuses, the MNE could not reasonably have done more to correct or detect these flaws.

²²⁰ See *supra* note 103 and accompanying text (referencing Littenberg, *supra* note 100, at 4; Macchi & Bright, *supra* note 90, at 231).

²²¹ See Elizabeth C. Tippet, *The Promise of Compelled Whistleblowing: What the Corporate Governance Provisions of Sarbanes-Oxley Mean for Employment Law*, 11 EMP. RTS. & EMP. POL’Y J. 1, 3 (2007). Attorneys representing public companies must internally report evidence of securities fraud; the chief legal officer has a duty to investigate upon receiving evidence of a material securities law violation; and top executives must endorse company financial statements and are liable for omissions or false or misleading materials in those statements. See *id.* at 34–35, 39 (citing 15 U.S.C. § 7245; 18 U.S.C. § 1350; 17 C.F.R. § 205.3(b) (2006)).

²²² See, e.g., Reinier Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53, 60 (1986) (contending that mandatory whistleblower rules create strong incentive to withhold information); Larry C. Backer, *Surveillance and Control: Privatizing and Nationalizing Corporate Monitoring after Sarbanes-Oxley*, 2004 MICH. ST. L. REV. 327, 341 (2004) (contending that mandatory reporting mechanism creates atmosphere of constant surveillance).

²²³ See Tippet, *supra* note 221, at 50–51 (invoking Calabresian theory to contend that because high corporate officials are more likely to be viewed as indispensable to the company, compelling them to investigate and report abuses is an effective way to prevent or mitigate tortious conduct).

²²⁴ This could be a matter for *travaux préparatoires* or a prefatory “Whereas” clause rather than text itself.

The most persuasive reason for allowing such a shift in the burden of proof is the comparative access to relevant evidence. Information concerning how an MNE constructs and operates its HRDD process requires examining the fine-grained details of its business operations, typically stretching across multiple countries, including its relations with suppliers, subcontractors, and subsidiaries, and perhaps implicating confidential business matters. This information is located within the business and is not readily accessible to either a potential human rights victim or a government investigator. Moreover, it is simply too easy for an MNE to claim lack of foreseeability in such a complex factual setting, leaving the victim or the government to have to prove its existence.

Accordingly, the MNE should have to rely on the due diligence process evidence within its possession, particularly when establishing it did all it reasonably could to comply. Otherwise, by requiring the moving party to prove—for example—an MNE’s failure to assess with sufficient regularity the extent of human rights risks or to operate an effective monitoring plan, the law would make it exceedingly difficult to establish a violation, in effect denying access to a remedy.²²⁵ This recommended approach is consistent with elements of U.S. labor and employment discrimination law, in which an employer’s privileged access to internal business information justifies a similar shifting in the burden of proof.²²⁶ It is also consistent with U.K. law on equal pay for work of equal value, where the employer is required to explain wage differentials between jobs.²²⁷ Further, this approach has parallels to European tort law, in which reversals of the burden have been applied for breaches of a statutory rule, violations of a safety duty, and accidents at the workplace.²²⁸

A business that demonstrates it did all that could have been reasonably expected to develop and implement its HRDD process should succeed in avoiding

²²⁵ See Macchi & Bright, *supra* note 90, at 235 (criticizing French law for requiring that the burden of proof remain with victims throughout and contending that this requirement conflicts with the provisions of UNGPs principle 26, which calls for the “reduc[ti]on of legal and practical barriers that could lead to a denial of access to remedy”); Palombo, *supra* note 106, at 284 (observing that the demonstrated difficulty under French law for claimants to obtain the relevant information on business practices of MNEs “may de facto result in no real opportunity for [a remedy]”).

²²⁶ See, e.g., 42 U.S.C. § 2000e-2(k) (shifting the burden of proof in Title VII disparate impact cases); *United Food & Commercial Workers Local 150-A v. NLRB* (Dubuque Packing Co.), 1 F.3d 24, 29–32 (D.C. Cir. 1993) (shifting the burden of proof in NLRRA dispute over duty to bargain); see also *Nutrinova Nutrition Specialties & Food Ingredients GmbH v. Int’l Trade Comm’n*, 224 F.3d 1356 (Fed. Cir. 2000) (applying burden-shifting mechanism under 35 U.S.C. § 295 in actions alleging patent infringement); Ana Swanson, *Companies Brace for Impact of New Forced Labor Law*, N.Y. TIMES, (June 22, 2022), <https://perma.cc/UVC8-EQ5H> (describing burden-shifting mechanism under Uyghur Forced Labor Prevention Act, Pub. L. No. 117-78, which took effect on June 21, 2022).

²²⁷ See Equality Act 2010, c. 15, § 136 (U.K.), <https://perma.cc/D35T-W9G8>.

²²⁸ See CEES VAN DAM, EUROPEAN TORT LAW 324 (2013), § 1107-1 (Germany), § 1107-2 (France).

liability for violations at a process level.²²⁹ If, however, it is determined that the business violated its HRDD obligations—for instance, by inadequate monitoring of actions taken to mitigate or prevent previously identified human rights abuses or by failing to submit timely and complete reports documenting the HRDD operation—the business would then be subject to appropriate and effective remedies, as presented in the next subsection.

3. Remedies

Where business enterprises violate their procedural obligations by failing to establish and implement the HRDD process, a GSC convention should authorize a public prosecutor or government agency to seek injunctive relief, compelling compliance and/or restorative actions by businesses as well as prompt compliance by government agencies with performance of the public enforcement functions set forth above. Administrative fines against business enterprises for noncompliance also should be available (as under the German statute discussed earlier), and they should be proportionate to the severity and persistence of HRDD violations. A further available sanction should be exclusion from participation in public procurement contracts for a fixed period of time.²³⁰

Where business enterprises directly or indirectly cause or contribute to human rights abuses, a GSC convention should make civil liability available. Victims should have access to adequate and timely relief, including appropriate compensatory damages for harms inflicted regardless of HRDD compliance. They should also be able to seek punitive damages if the abuses reflect willful misconduct. The convention should allow civil liability actions to be brought on behalf of victims by a public enforcement agency, but with the provision that initiating such an action should not foreclose the separate rights of victims to seek relief as they determine is warranted.

Finally, a GSC convention should provide for additional remedies that may be appropriate based on the relationship between an MNE and its supply chain operators, insofar as that relationship affects workers and their livelihoods. Such remedies could include, in appropriate circumstances, directing MNEs to provide financial support to suppliers in order to enable or facilitate compliance with HRDD requirements, maintenance of income for workers adversely affected by requirements for suppliers to come into HRDD compliance, and compensation

²²⁹ As discussed *supra* Part III.B, assessment of liability for human rights abuse outcomes is a separate matter.

²³⁰ This exclusion is part of the German statute on corporate due diligence. *See* LkSG, *supra* note 125, § 22. Such a sanction adds to the deterrence effect, given that MNEs often depend on government contracts in overall operations. In addition, public procurement accounts for a substantial portion of government budgets, and governments are expected to safeguard public values as well as maintaining a high quality of service delivery when fulfilling public procurement responsibilities. *See generally Public Procurement*, OECD, <https://perma.cc/7DTM-UEMQ>.

(such as severance) for workers adversely affected by suppliers' inability to comply with HRDD requirements.²³¹

* * *

In the past, ILO conventions have often set forth workplace standards with specificity but left forms of enforcement and remedy to be elaborated under national law.²³² Recent conventions have been more explicit about the need for suitable enforcement and sanctions while still appreciating the essential role of national initiative.²³³ The recommendations in this section should be understood in light of the ILO's evolution toward a more specific framework, recognizing that member states retain the political authority to develop their own enforcement and remedial approaches.

IV. IS AN ILO CONVENTION ON GSCS APPROPRIATE AND FEASIBLE?

The GSC convention proposed in this Article differs from the ILO's traditional practice of directing its obligations only at national governments. This Part contends that the ILO is well-positioned to broaden its focus in the GSC setting for a number of reasons.

To start, the ILO is in a unique position to mobilize support and approval for international labor and human rights obligations. In addition, it has a proven track record of promulgating conventions that promote transnational cooperation—involving private entities as well as governments. Further, the ILO has been committed to dealing with issues related to the informal economy. It also has created successful model programs that directly engage supply chain working conditions. While ratification of a GSC convention will face obstacles, these obstacles should not prevent the convention from having a positive impact on government efforts to address GSC issues. In that regard, prospects for a positive impact would be enhanced by broader participation from the employer and worker communities.

²³¹ See generally MODEL ARBITRATION CLAUSES, *supra* note 215, at 13.

²³² Compare, e.g., ILO Convention 111 on Discrimination (Employment and Occupation) art. 1 (specifying substantive standards) *with id.* arts. 2–3 (calling for implementation and enforcement “by methods appropriate to national conditions and practice”); compare ILO Convention 87 on Freedom of Association and Protection of the Right to Organise arts. 2–7 (specifying substantive standards) *with id.* arts. 8, 11 (describing implementation in broad terms).

²³³ See, e.g., Protocol of 2014 to the Forced Labour Convention of 1930 arts. 1–4 (requiring member states to “take effective measures” for prevention of forced labor, protection and remediation for victims, punishment of perpetrators, and education for employers); ILO Convention 190 arts. 10–11 (requiring member states to “take appropriate measures” covering a detailed and nuanced approach to enforcement, remedies, and training).

A. Appropriateness of an ILO Leadership Role

This Article argues for an international GSC convention that would impose liability and related obligations on transnational business enterprises as well as governments. An international law approach like the one proposed here responds to national-level inconsistencies and deficiencies by offering the prospect of a standard floor of rights, establishing a level playing field and a stronger benchmark for universal protection.²³⁴

A threshold question is what incentives exist to generate compliance with this approach, given that international human rights conventions and covenants seek to protect individuals or groups from transgressions by their own governments.²³⁵ Such conventions and covenants create hard-law commitments in that they are legally binding when ratified by national governments, but they are unenforceable through reciprocal pressures from signatory states or other hard transnational means.²³⁶ Instead, they depend on domestic law enforcement for effective implementation—the very type of enforcement that so far has been deficient in the GSC setting.

Countries may adopt and choose to comply with international human rights laws for any number of reasons beyond reciprocity or coercion.²³⁷ They may act from economic motivations such as securing access to trade benefits²³⁸ or based on cultural factors like the desire for shared identity in a surrounding community of nations.²³⁹

²³⁴ See Simon Deakin & Frank Wilkinson, *Rights v. Efficiency? The Economic Case for Transnational Labour Standards*, 23 *INDUS. L.J.* 289, 301, 305 (1994).

²³⁵ See Oona A. Hathaway, *Why Do Countries Commit to Human Rights Treaties?*, 51 *J. CONFLICT RESOL.* 588, 592 (2007). In this respect, they differ from international trade agreements or arms agreements, which seek to regulate relations between governments such that a violation by one government may be met with a reciprocal violation by the other.

²³⁶ See *id.* at 592–93 (arguing that enforcement of these treaties does not depend on other states but rather on actors within the state itself). If, for example, Vietnam accepts or encourages sex discrimination in its garment factories, or arranges for the imprisonment of trade union leadership, the U.S. will not respond or retaliate by tolerating employer sex discrimination or imprisoning its own labor leaders.

²³⁷ See generally Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599 (1997) [hereinafter Koh, *International Law*]; Harold Hongju Koh, *How is International Human Rights Law Enforced?*, 74 *IND. L.J.* 1396 (1999) [hereinafter Koh, *Human Rights Law*]; Anne van Aaken & Betel Simsek, *Rewarding in International Law*, 115 *AM. J. INT'L.L.* 195, 196 (2021).

²³⁸ See Koh, *Human Rights Law*, *supra* note 237, at 1407; van Aaken & Simsek, *supra* note 237, at 213.

²³⁹ See Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 *DUKE L.J.* 621, 626 (2004) (invoking acculturation, meaning “the general process by which actors adopt the beliefs and behavioral patterns of the surrounding culture”); see also Sara Kahn-Nisser, *The Ripple Effect: Peer ILO Treaty Ratification, Regional Socialization, and Collective Labor Standards*, 22 *GLOB. GOVERNANCE* 513, 525 (2016) (finding a ripple effect in EU countries since the late 1990s with respect to ratification of collective labor rights conventions, notably ILO Conventions 87 and 98).

In addition, Harold Koh has pointed to three procedural elements that help explain why governments obey international law: (i) their interaction within a transnational legal process, (ii) the ongoing interpretation of international norms, and (iii) domestic internalization of those norms.²⁴⁰ The ILO's ability to engage national governments with respect to each of these procedural elements has led governments to be particularly willing to incorporate international labor norms into their legal systems.

First, the ILO's structure creates a space for necessary interaction within the transnational legal process. The ILO's 187 member states engage collectively in ILO governance through review and promulgation of all conventions and recommendations,²⁴¹ as well as through participation in annual general surveys that examine their laws and practices on pre-designated conventions or recommendations.²⁴² Second, the ILO continually interprets international labor norms in ways that assist governments with compliance. Its interpretation of these norms is conveyed initially and continuously through ILO supervisory bodies,²⁴³ and also on numerous occasions through transnational tribunals, including the European Court of Human Rights, the European Court of Justice, and the Inter-American Court of Human Rights.²⁴⁴ Third, the ILO supports countries' domestic

²⁴⁰ See Koh, *International Law*, *supra* note 237, at 2634; Koh, *Human Rights Law*, *supra* note 237, at 1399.

²⁴¹ See ILO Constitution art. 19 (describing process for adopting conventions and recommendations, followed by communication of adopted texts to all member states for possible ratification (conventions) or giving effect (recommendations)).

²⁴² Pursuant to article 19 of its constitution, the ILO publishes an in-depth annual General Survey on the national law and practice of member States regarding certain conventions and/or recommendations chosen in advance by the Governing Body. See *General Surveys*, ILO, <https://perma.cc/4QVZ-BH29>. These surveys are completed mainly on the basis of reports received from member States and information transmitted by employers' and workers' organizations. Member states also interact regularly with the ILO's three supervisory committees, and through partnering efforts involving ILO staff in regional, sub-regional, and country offices.

²⁴³ Under article 37 of the ILO Constitution, authoritative interpretations of conventions occur through referral to the International Court of Justice or appointment of a special tribunal. Absent such referral or appointment (which has occurred only once in the ILO's 103 years of existence), the CEACR "determine[s] the legal scope, content and meaning of the provisions of the Conventions, [through] opinions and recommendations [that are] intended to guide the actions of national authorities." CEACR, 2021 Report on the Application of International Labour Standards, Report III/Add. 13 (2021). In addition, there is an established jurisprudence on freedom of association and collective bargaining, developed by the tripartite Committee on Freedom of Association (CFA). See ILO, FREEDOM OF ASSOCIATION: COMPILATION OF DECISIONS OF THE COMMITTEE ON FREEDOM OF ASSOCIATION (6th ed., 2018), <https://perma.cc/9MG6-FWSN>; ILO, FREEDOM OF ASSOCIATION: DIGEST OF DECISIONS AND PRINCIPLES OF THE FREEDOM OF ASSOCIATION COMMITTEE OF THE GOVERNING BODY OF THE ILO (5th ed., 2006), <https://perma.cc/FR7H-ABW3>.

²⁴⁴ See, e.g., *Demir & Baykara v. Turkey*, 2008-V Eur. Ct. H.R. 396 (invoking ILO Convention 87 on freedom of association); *Sidabras & Dziautas v. Lithuania*, 2004-VIII Eur. Ct. H.R. 367 (invoking ILO Convention 111 on nondiscrimination); *Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 151 (Jun. 17,

internalization of those norms by encouraging and often catalyzing actions from national lawmaking entities across all branches of government. These actions include governments creating statutes that embody or assimilate the norms, promulgating executive decrees or regulations that provide for their implementation, and issuing judicial decisions that apply and extend norms in the context of national facts and circumstances.²⁴⁵

There is abundant evidence that the ILO's transnational processes and mechanisms have helped to incentivize endorsement of and compliance with the substantive norms it has created. Its conventions on child labor, forced labor, freedom of association, and nondiscrimination have been ratified collectively by over 90% of its member states.²⁴⁶ The norms contained in those ILO conventions have also influenced diverse initiatives across the globe, showing up in trade agreements between governments, CSR codes, and collective agreements between MNEs and global unions.²⁴⁷

Still, an ILO approach to GSC labor protections may have a harder time achieving similar recognition or broad acceptance. The traditional model for ILO conventions contemplates that member states will approve a convention's provisions for application, under their national law, to conduct occurring within the borders of the state.²⁴⁸ When one state ratifies a convention, implementation

2005) (construing ILO Convention 169 on the rights of indigenous peoples); Case C-214/10, KHS AG v. Winfried Schulte, 2011 E.C.R. I-11794 (invoking ILO Convention 132 on holidays with pay). See generally Tzehainesh Tekle, *The Contribution of the ILO's International Labour System to the European Court of Human Rights' Jurisprudence in the Field of Non-Discrimination*, 49 *INDUS. L.J.* 86 (2020).

²⁴⁵ See *Saskatchewan Fed'n of Labour v. Saskatchewan*, 1 S.C.R. 245 (Can.) (applying C.87 on freedom of association); Corte Constitucional [C.C.] [Constitutional Court], marzo 2, 2004, Sentencia C-170/04 (Colom.) (applying C.138 and C.182 on child labor); Tribunal de Première Instance de Première Classe de Cotonou [Cotonou Court of First Instance, First Class], July 20, 2009, Dossier 54/2002 (Benin) (applying C.183 on maternity protection); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 4/6/2013, "Díaz, Paulo Vicente c. Cervecería y Maltería Quilmes S.A. / recurso de hecho," (D.485.XLIV) (Argen.) (applying C.95 on protection of wages).

²⁴⁶ Six of the eight conventions have been ratified by over 92% of member states, including one (Convention 182) by all 187 member states. The two conventions with sub-90% ratification are Convention 98 on collective bargaining (89.8%) and Convention 87 on freedom of association (83.9%). The overall average is 92.8% for the eight conventions.

²⁴⁷ For trade agreements, see, e.g., Trade Promotion Agreement, U.S.-Panama, arts. 16.2, 16.6 (2007), <https://perma.cc/2Y3N-TMKH>; Free Trade Agreement, EU-Vietnam, art. 13.4 (2019), <https://perma.cc/62DL-WFBS>. For CSR codes, see, for example, *Human Rights and Labor Compliance Standards*, NIKE (Apr. 4, 2018), <https://perma.cc/2XZ6-Q5FG>; *Human Rights*, ADIDAS, <https://www.adidas-group.com/en/sustainability/social-impacts/human-rights/#/modern-slavery/> (last visited Jan. 11, 2023); *Our Code of Conduct*, VODAFONE (2020), <https://perma.cc/VAU8-7JMH>. For international framework agreements, see, for example, International Framework Agreement between ABN ARMO Bank, FNV Finance, and UNI Global Union (Sept. 2015), <https://perma.cc/GY8P-N826>; Framework Agreement between IKEA and the IFBWW (Dec. 2001), <https://perma.cc/4TX6-VHCL>.

²⁴⁸ See *Conventions and Recommendations*, ILO, <https://perma.cc/NQT6-EC3S>.

ordinarily requires domestic government monitoring of the conduct of individual or business actors within that state, but not the conduct of business supply chain actors in other states. In contrast, a GSC convention contemplates different national law circumstances in two important transnational respects. First, a GSC convention would involve regulating supply chain conduct occurring in one country for which an MNE at the top of the supply chain, registered or doing substantial business in a different country, may be held accountable. Second, it would involve traversing jurisdictional boundaries when determining whether or how workers victimized by supply chain conduct in one country may seek relief against a government or business located in another.

But while these transnational elements raise questions regarding the feasibility of a GSC convention, this Article concludes that such questions can be answered in light of the ILO's transnational track record, especially in more recent times.

B. Feasibility of a GSC Convention

As noted in the Introduction, the ILO has struggled for a number of years with the challenges posed by GSCs.²⁴⁹ There are continuing disagreements among the tripartite constituencies as to the best way forward.²⁵⁰ At the same time, scholars are increasingly calling for stronger and more focused ILO action.²⁵¹ And there is reason to believe that an ILO solution is feasible, particularly given the current political environment that has led to many national statutes regulating GSCs.

1. Transnational scope

The transnational scope of this Article's proposed GSC convention may be unusual, but it is hardly unique. Although ILO standards are ratified by national governments and presumptively applied within national borders, a considerable number of ILO conventions specifically reference cross-border cooperation

²⁴⁹ See *supra* note 24.

²⁵⁰ See, e.g., *ILO Decent Work Interventions in Global Supply Chains*, *supra* note 24, at xii (fragmentation of effort identified in 2016 persists as of September 2019); Governing Body, *Report of the Technical Meeting*, *supra* note 24, at 4–8 (reviewing proposals presented in October–November 2020 by Government Group, with amended versions proposed by Workers Group and Employers Group; meeting ended without adopting conclusions).

²⁵¹ See, e.g., Sungjoon Cho & Cesar F. Rosado Marzan, *Labor Trade, and Populism: How ILO-WTO Collaboration Can Save the Global Economic Order*, 69 AM. U.L. REV. 1771, 1802–06 (2020) (calling for an ILO convention to regulate lead firms as employers of persons working for the firms' suppliers, contractors, and franchisees); Anne Posthuma & Arianna Rossi, *Coordinated Governance in Global Value Chains: Supranational Dynamics and the Role of the International Labour Organization*, 22 NEW POL. ECON. 186, 187 (2017) (contending that international organizations should do more to regulate transnational economic sectors, given that "individual nations are limited in their scope to address the transnational dynamics that can drive downgrading for workers").

between governments or involving private entities. Some of these conventions merely contemplate such cooperation, while others use mandatory language.²⁵²

One recent example of a mandatory approach is the 2011 Domestic Workers Convention.²⁵³ It requires cooperation between national governments to ensure that its extensive provisions—which include detailed protections for information-sharing, written job offers, and other conditions—are effectively applied to migrant domestic workers.²⁵⁴ Decades earlier, the 1949 Revised Convention on Migration for Employment included similar requirements, specifying that ratifying states were obliged to assure cooperation between their employment services and the corresponding services of other member states.²⁵⁵

The 2006 Maritime Labor Convention (MLC) is perhaps the most high-profile example of a convention that mandates transnational cooperation and functions effectively across national borders.²⁵⁶ The MLC establishes extensive minimum working and living standards for all seafarers on ships flying the flags of ratifying countries.²⁵⁷ Maritime labor certificates, carried only by ships flying such a flag, serve as evidence that inspections have occurred and convention requirements have been met to the extent so certified.²⁵⁸ This avoids the need for comprehensive inspections of such ships when docked in ports of other countries. The convention includes an obligation prohibiting more favorable treatment for a ship that does not fly the flag of a ratifying government than for a ship that does.²⁵⁹ By establishing an internationally level playing field, the MLC incentivizes

²⁵² Two relatively recent instances that use mandatory terms are the Protocol of 2014 to the Forced Labor Convention of 1930 art. 5 (requiring that governments “shall cooperate with each other to ensure the prevention and elimination of all forms of forced or compulsory labor”) and the 1989 Indigenous and Tribal Peoples Convention art. 32 (requiring in more detail that governments “shall take appropriate measures . . . to facilitate contacts and co-operation between indigenous and tribal peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields”).

²⁵³ ILO Convention 189.

²⁵⁴ *See id.* art. 8(3). In addition, the Convention requires that before crossing a national border, domestic workers recruited in one country for work in another receive a written job offer or employment contract “enforceable in the country in which the work is to be performed” that covers an extensive specified set of terms and conditions. *See id.* art. 8(1) (requiring the enforceable contract or job offer), art. 7 (listing the terms and conditions to be covered).

²⁵⁵ *See* ILO Convention 97 art. 7(1). Where workers more generally are recruited in one country for work in another, the 1997 Convention on Private Employment Agencies encourages states to consider bilateral agreements in order to prevent abuses and fraudulent practices in recruitment, placement, and employment. *See* ILO Convention 181 art. 8(2).

²⁵⁶ *See generally* Maritime Labour Convention, Feb. 7, 2006, as amended (2020), <https://perma.cc/28DU-6NPY> [hereinafter MLC]. There have been 101 ratifications of the MLC.

²⁵⁷ *See* MLC arts. IV, V, VI; Regulations 1.1–5.3.

²⁵⁸ *See* MLC art. V(2)–(3).

²⁵⁹ *See* MLC art. V(7).

placing ships under the flag of a ratifying state, making them subject to ILO supervision.²⁶⁰

Other ILO conventions have authorized cross-border government actions or cooperation without mandating them. One illustration is the 2007 Work in Fishing Convention, which states that a ratifying government may take immediate measures to rectify working conditions “clearly hazardous to safety and health” onboard a vessel flying the flag of another government.²⁶¹ Another example is the 1975 Migrant Workers (Supplementary Provisions) Convention, which states that ratifying governments are free to enter into multilateral or bilateral agreements to resolve problems arising under application of the convention’s provisions on abusive conditions for migrants and equality of opportunity and treatment.²⁶²

The litany of ILO conventions that provide for cross-border enforcement, collaboration, or access to remedies includes instruments dating from the middle of the last century, but most such conventions have been promulgated in recent decades. This progression reflects the ILO’s growing appreciation that international labor standards often require transnational engagement to meet the needs of governments, employers, and workers. This is perhaps most obvious when the convention subject is by definition transnational, such as migration for employment or cross-border maritime employment. Transnational engagement is also relevant when the convention is only partially concerned with cross-border dimensions, as has been true of conventions addressing domestic work, human trafficking, and forced labor. A convention on GSCs can be seen to fit under both headings. Because GSCs often depend on the precarious legal status of migrant labor,²⁶³ and because GSCs involve employment relationships that implicate the

²⁶⁰ See Desirée LeClercq, *Outsourcing Enforcement*, 62 VA. J. INT’L L. 271, 286–87 (2022). The MLC also includes a mechanism for periodic updating through amendments, which have been added in 2014, 2016, and 2018. A new set of amendments, approved by the ILC in June 2022, is expected to enter into force in December 2024. See *Acceptance of Amendments of 2022 to the MLC, 2006*, ILO, <https://perma.cc/R58A-RUAS>.

²⁶¹ ILO Convention 188 art. 43(2).

²⁶² See ILO Convention 143 art. 15 (agreements), arts. 1–9 (abusive conditions), arts. 10–14 (equality of opportunity and treatment). There are also ILO conventions that regulate cross-border relations between workers’ organizations or between employers’ organizations. Thus, article 5 of the 1948 Convention on Freedom of Association guarantees to both trade unions and employer organizations the right to affiliate with international organizations of workers and employers.

²⁶³ See *supra* notes 33–35 and accompanying text. The cross-border aspects of conventions discussed in this section focus on the shifting movement of workers, who themselves can be readily identified. While the transnational elements of supply chains typically involve movement of a product or its components, mobility of migrant workers across borders may also be part of supply chain operations. That said, tracking the relocation of supply chain products may require additional monitoring efforts when seeking to identify human rights abuses or lack of due diligence.

laws and practices of multiple states,²⁶⁴ a transnational approach is effectively the only way forward.

2. Issues related to the informal economy

Apart from the issue of transnational scope, a GSC convention would need to address issues involving lower tiers of the supply chain, where large numbers of workers participate as members of the informal economy.²⁶⁵ As a general matter, assuring decent labor standards in the informal economy is a daunting challenge—for national governments and for the ILO—that is largely beyond the scope of this Article. That said, however, a number of recent ILO instruments have exhibited a commitment and capacity to address decent labor standards in the informal economy, including as part of global supply chains.

The ILO's 1996 Home Work Convention, which promotes equality of treatment between homeworkers and other wage earners, includes a capacious definition of the term “home work” with respect to products or services assigned by the employer.²⁶⁶ Moreover, by specifying that the term “employer” includes persons who give out home work either directly or through intermediaries, regardless of whether the term “intermediary” is provided for in national legislation, the convention allows for a broad conception of supply chain employment coverage.²⁶⁷ The 2011 Domestic Workers Convention provides further benchmarks for protection of lower-tier supply chain workers. In addition to requiring government action to ensure the protection and promotion of fundamental labor rights, the convention imposes obligations related to the informal economy aspects of domestic work.²⁶⁸ And while domestic work is not

²⁶⁴ The very recent ILO convention addressed to violence and harassment supports the ILO's capacity to regulate GSC working conditions in a different respect. *See generally* ILO Convention 190. As explained in Part III, that convention serves as a structural model regarding the breadth of its worker coverage, its approach to due diligence including a requirement for substantial worker involvement, and its attentiveness to outcomes as well as processes.

²⁶⁵ *See generally* Veronica H. Villena & Dennis A. Gioia, *A More Sustainable Supply Chain*, 98 HARV. BUS. REV. 84 (Mar.–Apr. 2020); U.N. GLOBAL COMPACT, NAVIGATING DECENT WORK CHALLENGES IN MULTI-TIERED SUPPLY CHAINS: LEADERSHIP BRIEF 8 (2020), <https://perma.cc/H5M4-U8MT>.

²⁶⁶ ILO Convention 177 art. 1(a) (defining home work).

²⁶⁷ *See id.* art. 1(c) (defining employer), art. 4 (detailing criteria for equal treatment between homeworkers and other wage earners). *See generally* *The Regulatory Framework and the Informal Economy: Specific Groups: Homeworkers: Reducing Vulnerabilities Through Extending and Applying the Law*, ILO (2013), <https://perma.cc/B96K-LRXX>.

²⁶⁸ Obligations include equality of treatment to formal economy workers regarding working hours, overtime compensation, and paid leave, ILO Convention 189 art. 10; direct payment of compensation at regular intervals, *id.* art. 12; labor inspection measures granting entrance to household premises with due respect for privacy, *id.* art. 17(2)–(3); access to effective complaint mechanisms, *id.* art. 17(1); and access to courts and other dispute resolution mechanisms under terms equal to those for workers generally, *id.* art. 16.

itself part of supply chains, its precarious status—often as part of the informal economy—offers useful parallels that could be applied in a GSC convention.

Although ILO recommendations create guidelines rather than obligations, two recent recommendations offer further indications of the ILO’s ability to respond to the special precarities of the informal economy. The 2012 Social Protection Floors Recommendation complements existing social security conventions and recommendations by assisting member states in developing strategies to cover the unprotected, the poor, and the most vulnerable, including workers in the informal economy and their families.²⁶⁹ Additionally, the 2015 Recommendation Concerning the Transition from the Informal to the Formal Economy defines the term “informal economy”²⁷⁰ and offers guidance to facilitate the transition of workers and economic units from the informal to the formal economy while respecting workers’ fundamental rights, as well as guidance to prevent the informalization of formal economy jobs.²⁷¹

The proliferation of ILO instruments attentive to informal economy challenges hardly suggests that these challenges have been adequately addressed.²⁷² Nonetheless, the fact the ILO is seeking to improve the status of workers in the informal economy in diverse and nuanced ways suggests that a GSC convention can and should include approaches to protecting and promoting decent labor standards in that setting.

3. Successful model programs

In addition to its promulgation of conventions and recommendations, the ILO has played a role in the creation of two programs seeking to augment labor protections in supply chains, the Accord on Fire and Building Safety in Bangladesh and the Better Work program. The successes of these programs indicate that brands and retailers at the top of the supply chain are willing and able

²⁶⁹ See ILO Recommendation 202 arts. 4–12.

²⁷⁰ ILO Recommendation 204 I(2) (term “refers to all economic activities by workers and economic units that are—in law or in practice—not covered or insufficiently covered by formal arrangements,” excluding illicit activities).

²⁷¹ See *id.* I(1)(a), (c).

²⁷² A third recent ILO recommendation addresses another aspect of the informal economy directly related to supply chains: workers unprotected by national labor laws that are vague or incomplete as to who is a covered employee. See ILO Recommendation 198 on the employment relationship (2006). See generally *supra* text accompanying notes 30–31 (discussing widespread statutory exclusions from regular employment status of temporary, casual, and home-based workers). See also Yiran Zhang, *The Paradox of Upgrading: Social-Reproduction-Driven Informalization of Manufacturing Work Among Migrants in China 4* (2022) (unpublished manuscript) (on file with author) (reporting that female migrant workers have increasingly returned to their inland hometowns from coastal factories in order to serve as “student companions” to their school-age children, accepting lower pay and no social protection while performing the same work in casually organized home-based workshops).

to work with the ILO to address labor standards deficiencies in ways that parallel this Article's recommendations for the content and structure of a GSC convention.

The Accord on Fire and Building Safety in Bangladesh²⁷³ was negotiated in 2013 in response to a garment factory fire that killed over 1,100 workers. The ILO played a role in the creation of this program and served as independent chair of the Accord Steering Committee to enhance implementation.²⁷⁴ The Accord helped produce significant improvements in fire, electrical, and structural safety standards at more than 1,000 factories during its eight years of existence.²⁷⁵ As a binding agreement among hundreds of brands, retailers, and suppliers, along with local and international unions and NGOs, the Accord required commitments from brands at the top of the supply chain. These commitments included contributing substantial funds to support inspection and remediation at supplier factories, ensuring resources for suppliers seeking to bring their factories into compliance, and ceasing to do business with factories that failed to make needed safety repairs.²⁷⁶

An important element of the program was substantial worker involvement in its implementation. Trade unions were given co-equal representation with brands on the Steering Committee, while workers were further empowered through democratically elected safety and health committees at the factory level, an extensive training program, a confidential complaints mechanism, and a right to refuse unsafe work.²⁷⁷ There was also a serious commitment to monitoring and remediation through independent inspections by qualified safety engineers accompanied by public disclosure of inspection reports and corrective action plans. As a result, 84% of violations identified at 1,620 covered factories were corrected.²⁷⁸ Another important feature of the Accord was its provision for a

²⁷³ Accord on Fire and Building Safety in Bangladesh, May 13, 2013 [hereinafter Bangladesh Accord], <https://perma.cc/5KCP-CFPT>.

²⁷⁴ See Bangladesh Accord art. 4.

²⁷⁵ See Champagne, *supra* note 51, at 160–71. The Bangladesh Accord was terminated in December 2021, and its continuing impact will depend on the extent of support from local employers and the Bangladeshi government. See Youbin Kang, *The Rise, Demise, and Replacement of the Bangladesh Experiment in Transnational Regulation*, 160 INT'L LAB. REV. 407 (2021).

²⁷⁶ See *About, ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH* (2018), <https://perma.cc/524S-NP3F>; Champagne, *supra* note 51, at 160–71; see also ILO, FINAL REPORT: MEETING OF EXPERTS ON LABOUR INSPECTION AND THE ROLE OF PRIVATE COMPLIANCE INITIATIVES 13 (Dec. 2013) (description by Workers' Group of Bangladesh Accord's positive features that could serve as an example for other private regulatory efforts).

²⁷⁷ See Bangladesh Accord art. 4 (Steering Committee equal representation), art. 17 (safety and health committee); art. 16 (training), art. 18 (confidential complaints mechanism), art. 15 (right to refuse unsafe work).

²⁷⁸ See BANGLADESH ACCORD, QUARTERLY AGGREGATE REPORT ON REMEDIATION PROGRESS AT RMG FACTORIES COVERED BY THE ACCORD 3 (April 2018) (copy on file with author).

process by which parties to the agreement could bring disputes about meaning and implementation to the Steering Committee and could appeal a Committee decision to final and binding arbitration.²⁷⁹ This approach to enforcement meant that the parties to the Accord were not dependent on Bangladesh's labor inspectorate to prosecute their complaint.

The other program, Better Work, was originally conceived by the ILO. It aims to remediate labor conditions by providing factory-level advisory and training services built on social dialogue as a foundation for improvement.²⁸⁰ Acting through Performance Improvement Consultative Committees (PICC), equal numbers of factory management and workers' representatives meet regularly to prioritize changes to be implemented at the workplace.²⁸¹ Extensive analysis of PICC performance and results has shown that well-functioning PICCs lead to higher wages and better working conditions.²⁸² Substantial evidence also supports a "business case" for improved compliance: where workers report improved conditions and higher levels of compliance, there is a positive effect on productivity and profitability.²⁸³ In addition to advising factories, Better Work collaborates with governments to improve labor laws, and with brands to ensure progress is sustained.²⁸⁴

The success of these comparatively modest programs does not address issues of scalability, and both programs focus primarily on first-tier and second-tier suppliers rather than lower-tier workers from the informal economy. Nonetheless, the brands' role is noteworthy in creating incentives for factory

²⁷⁹ The arbitration process was governed by the U.N. Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, and awards were enforceable in the domestic courts of the relevant signatory's home country. *See* Bangladesh Accord art. 5. Two global union signatories took two global brands to arbitration under the Bangladesh Accord; positive settlements were reached in both cases, including one resulting in more than \$2 million being made available for remediation to supplier factories. *See* Champagne, *supra* note 51, at 164–65.

²⁸⁰ Initiated in Cambodia in 2001, Better Work is a partnership between the ILO and IFC that is currently active in nine countries, focused on 1700 garment factories that employ over two million workers. *See* *The Programme*, BETTER WORK, <https://perma.cc/UBE9-RAUH> [hereinafter BETTER WORK]; Arianna Rossi, *Better Work: Lessons Learned and the Way Forward for Decent Work in the Global Garment Industry*, in *DECENT WORK IN A GLOBALIZED ECONOMY*, *supra* note 60, at 243, 247, 249.

²⁸¹ *See* Rossi, *supra* note 280, at 249.

²⁸² *See id.* at 249–50 (citing to multiple academic studies). *See generally* Drusilla Brown et al., *The Impact of Better Work: A Joint Program of the International Labour Organization and the International Finance Corporation*, TUFTS U. LABOR LAB (Sept. 26, 2016), <https://perma.cc/CC7Y-LQRC>; Drusilla Brown et al., *The Impact of Better Work: Firm Performance in Vietnam, Indonesia, and Jordan*, ILO & IFC (Aug. 2018), <https://perma.cc/ZLY3-JAJV> (discussion paper).

²⁸³ *See* Rossi, *supra* note 280, at 251 (citing to several studies).

²⁸⁴ *See* BETTER WORK, *supra* note 280.

participation and for increased compliance.²⁸⁵ In Better Work, this participation has extended at times to continuing sourcing relationships even after labor standards violations have been identified, provided the factory commits to participating in advisory and training services.²⁸⁶ And the Accord's use of contract-based remedies through transnational arbitration invites consideration of remedial approaches less heavily dependent on national courts in developing countries.

One further observation about these two model programs seems pertinent in the context of whether a proposed GSC convention can garner commitments to compliance. The Accord responded to egregious factory violations that caused a large-scale tragedy, while the Better Work program addresses supply chain misconduct at less dramatic stages. It might be argued that national governments and MNEs will apply a GSC convention by focusing primarily on egregious cases rather than adopting a more uniform approach. Some focus on egregious cases seems appropriate given considerable evidence of high-profile supply chain violations involving fundamental labor norms.²⁸⁷ But at the same time, Better Work's link between improved workplace standards and enhanced productivity suggests there is also room for a more systematic, if lower-profile, strategy when implementing a GSC regime.

C. Assessing Progress

The domestic law of many countries where MNEs are located (including the U.S., the U.K., and countries in the EU) may not currently conform to the framework of this Article's proposed convention. There are some countries where domestic law developments can already support such a framework or are moving in that direction. Nonetheless, the proposed convention's treatment of liability, especially with respect to liability for human rights abuses as an outcome, may well require domestic law adjustments in terms of jurisdiction and/or substantive doctrine. This is in part the function of ILO conventions and international human rights law more generally: setting standards that are to an extent aspirational while encouraging countries to move toward meeting the new standards in law and practice.

²⁸⁵ See Rossi, *supra* note 280, at 254, 256; Jennifer Bair, *Contextualizing Compliance: Hybrid Governance in Global Value Chains*, 22 *NEW POL. ECON.* 169, 176 (2017) (discussing global buyers' engagement with Better Work, including as Buyer participants, purchasing the factory-level monitoring reports, and as Buyer partners, receiving access to all monitoring reports in exchange for *inter alia* increasing its number of suppliers and using Better Work compliance audits to replace its own audits of those factories).

²⁸⁶ See Rossi, *supra* note 280, at 256.

²⁸⁷ See *supra* notes 3–4 and accompanying text (identifying widespread global incidence of forced labor, child labor, substandard wages, excessive working time, serious safety and health risks, and other abuses).

This final section posits that while widespread ratification of a GSC convention by national governments will likely not be swift or easy, the convention may nonetheless succeed in mobilizing national law in the meantime. It also suggests that if the ILO's tripartite constituencies decide to engage with this Article's proposed convention framework, their efforts would be enhanced by hearing from additional voices within both employer and worker constituencies as part of tripartite engagement.

1. Direct and indirect impact

Although promulgation of a GSC convention will require broad support from both MNEs and member states, any such instrument is unlikely to secure widespread formal ratification in a short time period.²⁸⁸ At the same time, there are reasons why countries may not ratify conventions with which they are in substantial agreement. This could be a matter of the particulars of a country's constitutional structure or partisan politics.²⁸⁹ In addition, because ILO conventions do not permit reservations or qualifications,²⁹⁰ ratifying states must incorporate all elements into their national laws, setting a high threshold. Ratification of a convention also is more onerous than simply adapting national laws to international standards, due to certain costs associated with ILO supervision. As with any ILO convention, countries that ratify the proposed GSC

²⁸⁸ Recently promulgated ILO conventions, with the notable exception of Convention 182 on the worst forms of child labor, have not been widely ratified over the five years following their entry into force. Convention 182 entered into force in November 2000; 160 of 187 countries had ratified it within five years, and all 187 have done so as of today. By contrast, the Domestic Workers Convention (Convention 189) entered into force in September 2013; there have been 35 total ratifications, 25 of which occurred within five years. And the Maternity Protection Convention (Convention 183) entered into force in February 2002; there have been 43 total ratifications, 13 of which occurred within five years.

²⁸⁹ For example, the U.S. is a strong financial and ideological supporter of the ILO, but it ratifies few conventions, for reasons related, inter alia, to its federalist structure and also to partisan politics. Nonetheless, U.S. laws and practices may substantially comport with ILO norms reflected in certain unratified conventions. See, e.g., *Country Baseline under the ILO Declaration Annual Review: United States of America (2000–2019): The Effective Abolition of Child Labour*, INT'L LAB. ORG., <https://perma.cc/G5KJ-EUKE> (regarding child labor); *Country Baseline under the ILO Declaration Annual Review: United States of America (2000–2019): The Elimination of All Forms of Forced or Compulsory Labour*, INT'L LAB. ORG., <https://perma.cc/WRJ4-EKT4> (regarding forced labor). See generally William R. Corbett, *The More Things Change: Reflections on the Stasis of Labor Law in the United States*, 56 VILL. L. REV. 227, 247–48 (2011).

²⁹⁰ Unlike other human rights instruments, such as many U.N. treaties, ILO conventions are the product of a tripartite governance structure, involving voting and decision-making rights for employer and worker organizations. It would undermine this structure to allow one member of the tripartite group—governments—to undo even partially what all three groups have agreed upon. A handful of conventions do allow for flexibility at the national level on an express basis. See, e.g., ILO Convention 182 art. 4(1) (types of hazardous work for children shall be determined by national law); ILO Convention 138 art. 2 (minimum age shall be specified by each country so long as tied to compulsory schooling age level).

convention would have to file regular compliance reports and undertake the necessary formal dialogue with representative employer and worker organizations that precedes each report.

For these and other reasons, the influence of ILO conventions cannot be fully understood by examining sheer quantity of ratifications. Some governments bring their national laws closer to proposed convention norms during a convention's preparatory process. Such domestic law mobilizations may reflect socialization and learning among ruling elites following the extended exchange and dialogue between the ILO and member states that precedes promulgation.²⁹¹ Additionally, governments may improve their domestic standards following a convention's promulgation while declining to ratify—so as to steer clear of internal constitutional or political disputes, avoid administrative costs following from ratification, enable themselves to participate in trade agreements that demand such consistency, or legitimize their status in a larger community of nations.²⁹²

Based on these factors identified from both pre-promulgation and post-promulgation settings, an ILO convention may have the ability to ameliorate workers' rights without ratification. Thus, a new GSC convention could form the basis for a more consistent and persuasive approach at national statutory levels even if not widely ratified.

2. Broader participation from employers and workers

The ILO's unique governance structure—a tripartite body composed of representatives of governments, employer organizations, and trade unions—has long made it more representative of civil society and accountable to a broader range of stakeholders than other international government organizations. To that end, the ILO Constitution specifies responsibilities for employer and worker organizations whose status is “most representative of employers or workpeople, as the case may be, in their respective countries.”²⁹³ At the same time, recent developments in the world of work, including the emergence of powerful transnational enterprises and the corresponding reduction in the role of traditional

²⁹¹ See Faradj Koliev, *Promoting International Labour Standards: The ILO and National Labour Regulations*, 24 BRITISH J. POL. & INT'L REL. 361, 362–63 (2022) (focusing on period from 1970–2012 and finding that ILO has had influence on domestic labor regulations during the preparatory process of ILO conventions).

²⁹² On trade advantages and legitimacy pursuits, see *supra* notes 243–244 and accompanying text. See also Anonymous, *Do International Treaties Only Have an Impact on Ratifying States?: The Influence of the ILO Maternity Conventions in 160 States, 1883–2018*, ___ INT'L LAB. REV. ___ (forthcoming 2023) (on file with author) (empirical analysis indicating influence on non-ratifying states).

²⁹³ ILO Constitution art. 3(5); see also ILO Convention 144, Concerning Tripartite Consultations to Promote the Implementation of International Labor Standards art. 1 (“In this Convention, the term ‘representative organisations’ means the most representative organisations of employers and workers . . .”).

employer organizations, the shrinkage of trade union representation in industrialized countries, and the growth of the informal economy, have led numerous observers to suggest that tripartism must accommodate a wider range of interested actors, at least on a strategic basis.²⁹⁴ To allow for such an accommodation, this Article suggests that established employer and trade union organizations should invite and encourage distinct input from certain participants as part of the tripartite dialogue contributing to a GSC convention.

On the employer side, large numbers of companies, including most MNEs, are not affiliated with their national employer organizations.²⁹⁵ ILO representation of employers comes through the International Organization of Employers (IOE), a body composed of employers' organizations from member states. When IOE "bureaucrats"²⁹⁶ speak for employers at the ILO, MNEs and their preferred positions may not be adequately or fairly represented. The potential for divergence is especially relevant with respect to proposed solutions to the GSC labor standards challenge.

In its 2017 revision of the MNE Declaration, the ILO stated that MNEs "should carry out due diligence" in order to identify, prevent, and account for how they deal with adverse impacts related to international human rights.²⁹⁷ The MNE Declaration went beyond the UNGPs' language to state that as part of the identification and assessment of actual or potential adverse human rights impacts, the process "should involve meaningful consultation with . . . workers' organizations," taking account of the "central role" of freedom of association, collective bargaining, and social dialogue.²⁹⁸ Several years on, many large companies in Europe have called for the "should" in that due diligence provision to become a "shall," urging national governments and the EU to enact mandatory HRDD statutes.

²⁹⁴ See, e.g., GERRY RODGERS ET AL., *THE INTERNATIONAL LABOUR ORGANIZATION AND THE QUEST FOR SOCIAL JUSTICE, 1919-2009* 17–18, 240 (2009); Landau & Hardy, *supra* note 60, at 53; Lawrence R. Helfer, *The ILO at 100: Institutional Innovation in an Era of Populism*, 113 AM. J. INT'L L. UNBOUND 396, 399 (2019); Paul van der Heijden, *The ILO Stumbling Towards Its Centenary Anniversary*, 15 INT'L ORGS. L. REV. 203, 217 (2018); Velibor Jakovleski et al., *The ILO's Role in Global Governance: Limits and Potential*, in *THE ILO @ 100: ADDRESSING THE PAST AND FUTURE OF WORK AND SOCIAL PROTECTION* 82, 95–96 (Christophe Gironde & Gilles Carbonnier eds., 2019).

²⁹⁵ See Landau & Hardy, *supra* note 60, at 53; van der Heijden, *supra* note 294, at 217.

²⁹⁶ The term is invoked by van der Heijden, *supra* note 294, in contrast to what he identifies as the more dynamic environment created by CEOs.

²⁹⁷ See Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, ¶ 10(d) (2017) [hereinafter MNE Declaration]. The MNE Declaration was initially issued by the Governing Body in 1977 and has been amended since then, in 2000, 2006, and 2017.

²⁹⁸ See *id.* ¶ 10(e). The corresponding UNGPs language addressing human rights due diligence never mentions workers' organizations (referring in general terms to "potentially affected groups and other relevant stakeholders," UNGPs princ. 18(b)), nor does it refer to any role for freedom of association, collective bargaining, or social dialogue.

A statement from sixty-five German businesses in August 2020 insisted that only a mandated statutory approach can “help create both legal certainty and a level playing field.”²⁹⁹ A joint statement by over 120 European businesses in February 2022 was more extensive, calling for mandatory HRDD legislation to “bring about a paradigm shift” and specifying that the legislation should cover all businesses regardless of size; should extend a company’s responsibility across its full supply chain; should drive meaningful action rather than invoking the tick-box approach of overreliance on social audits; should include robust engagement with workers, unions, and other stakeholders at all stages of the required due diligence process; and should provide for effective remedies, including administrative penalties and sufficiently strong civil liability.³⁰⁰ The IOE, however, was until recently opposed to mandatory HRDD legislation, arguing instead for “voluntary, flexible, and collaborative efforts.”³⁰¹ Its subsequent recognition that such legislation may be inevitable is ringed with cautionary warnings.³⁰² MNE support for a mandatory approach does not mean that business enterprises will want to go as far as workers do in this respect. But given that transnational and

²⁹⁹ See *supra* note 86 and accompanying text.

³⁰⁰ See *Making EU Legislation on Mandatory Human Rights and Environmental Due Diligence Effective*, BHRR (Feb. 8, 2022), <https://perma.cc/S4D9-Y8AJ>. Later in February 2022, the European Commission issued a Proposal for a Directive on Corporate Sustainability Due Diligence. The Draft Directive has numerous parallels to the HRDD statutes, discussed *supra* Part II.C. It applies to EU and third-country companies above a certain size, requiring them to establish a human rights and environmental due diligence process that includes appropriate measures to identify actual and potential adverse human rights impacts arising from their own operations or those of subsidiaries or established business relationships. The Draft Proposal must be reviewed and approved by the Council of Ministers and the European Parliament; member states would then have two years to transpose the Directive into national law. See European Commission Press Release IP/22/1145, *The Commission, Just and Sustainable Economy: Commission Lays Down Rules for Companies to Respect Human Rights and Environment in Global Value Chains* (Feb. 23, 2022); *European Commission Issues Major Proposal on Due Diligence Obligations to Protect Human Rights and the Environment Across Supply Chains*, WHITE & CASE (Feb. 24, 2022), <https://perma.cc/B5GZ-7L7K>. Since 2014, an open-ended intergovernmental working group (OEIGWG) established by the U.N. Human Rights Council also has produced a series of draft instruments (a third revised draft was issued in August 2021) aimed at regulating the human rights-related activities of transnational corporations and other business enterprises. See *Commentary from the ENNHRI to the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, BHRR (Nov. 1, 2021), <https://perma.cc/7BBZ-WS7J>. Both the EU and Working Group drafts focus primarily on HRDD and do not sufficiently address the three salient features of the GSC convention proposed in this Article. In addition, the EU proposal would have a narrower reach than an ILO convention promulgated for all countries to review and ratify. And the ILO is capable of faster and more coherent decision-making than the U.N. Working Group, which is informally constituted and is now in its ninth year of revising drafts.

³⁰¹ See IOE, IOE PAPER ON STATE POLICY RESPONSES ON HUMAN RIGHTS DUE DILIGENCE 10–22, 28 (May 2018), <https://perma.cc/8N7R-6JZY>.

³⁰² See IOE, KEY DEVELOPMENTS IN MANDATORY HUMAN RIGHTS DUE DILIGENCE AND SUPPLY CHAIN LAW: CONSIDERATIONS FOR EMPLOYERS 31–34 (Sept. 2021), <https://perma.cc/WYD6-N757>.

other larger business enterprises are lobbying in different contexts for a mandatory option, it is important that MNEs have a voice and a place at the table when an ILO convention is discussed and negotiated.

On the workers' side, NGOs and other civil society groups may speak more effectively than traditional trade unions to address working conditions for supply chain workers who are migrants, homeworkers, or otherwise part of the informal economy. Such efforts at times involve workers in a particular informal economy sector banding together to reach agreements with local government officials.³⁰³ Additionally, social dialogue mechanisms aimed at assisting transitions from the informal to the formal economy may receive ILO technical assistance as the parties seek to implement strategies set forth in Recommendation 204.³⁰⁴

With the decline in trade union density, organizations besides unions have become important advocates for decent labor standards in general. To be clear, unions continue to play the leading role in the supply chain setting, through traditional collective bargaining, international framework agreements, and in helping to promote innovative arrangements such as the Bangladesh Accord and the Indonesian Freedom of Association Protocol.³⁰⁵ But some of the more successful co-governance efforts in the supply chain context have involved contributions from worker-focused NGOs,³⁰⁶ resulting in agreements negotiated outside a collective bargaining framework.

³⁰³ One example involves the Federation of Petty Traders and Informal Workers Union of Liberia, which advocates for the rights of Liberian street vendors “to earn a livelihood with freedom from unrelenting police harassment, extortion, and violence.” *FEPTIWUL (Federation Petty Traders & Informal Workers’ Union of Liberia)*, STREETNET INT’L: INT’L ALL. OF STREET VENDORS, <https://streetnet.org.za/organization/federation-petty-traders-informal-workers-union-of-liberia-feptiwul/> (last visited Jan. 11, 2023). The Federation signed a Memorandum of Understanding with the City of Monrovia in 2019 that commits the parties to meeting on a monthly basis, addressing issues such as street zoning, sanitation, and spatial layout of individual vendors. *See Liberia’s Street Vendors Pioneer New Approach with City Officials*, WIEGO (Jan. 29, 2019), <https://perma.cc/U95X-63CE>.

³⁰⁴ *See, e.g.*, ROSA CHENG LO, COSTA RICA: BUILDING A NATIONAL STRATEGY FOR THE TRANSITION FROM THE INFORMAL TO THE FORMAL ECONOMY THROUGH SOCIAL DIALOGUE, ILO 4–5, 13–17, 20–21 (2018), <https://perma.cc/ZPN3-VAZG>.

³⁰⁵ The Indonesian Freedom of Association Protocol was signed in 2011 by Indonesian textile, clothing, and footwear unions; major supplier factories; and global sportswear brands, including Adidas, Nike, New Balance, and Puma. *See* TIM CONNOR ET AL., THE FREEDOM OF ASSOCIATION PROTOCOL: A LOCALISED NON-JUDICIAL GRIEVANCE MECHANISM FOR WORKERS’ RIGHTS IN GLOBAL SUPPLY CHAINS 1, 15 (2016), <https://perma.cc/K6K7-BQ4Z>; Karin Astrid Siegmann et al., *Positive Class Compromise in Globalized Production? The Freedom of Association Protocol in the Indonesia Sportswear Industry*, 156 INT’L LAB. REV. 345 (2017).

³⁰⁶ The WRC, a witness signatory on the Steering Committee of the Bangladesh Accord, worked with Steering Committee members to ensure the principles of the Accord were being fully executed and that inspections and repairs were taking place in a timely fashion. *See International Safety Accord, WORKER RTS. CONSORTIUM*, <https://perma.cc/Q8U2-RH29>.

One prominent example is the Fair Food Program, which includes a series of bilateral agreements between the Coalition of Immokalee Workers (CIW), a worker-based human rights organization acting on behalf of tens of thousands of agricultural workers in the southeastern U.S., and national and international retail brands, including fast food chains, food service companies, and supermarkets.³⁰⁷ The agreements, under which retail brands impose severe market consequences on suppliers who fail to comply with a human rights-based code of conduct, have resulted in substantial wage increases and dramatically improved working conditions for this migrant and minority population.³⁰⁸ The program has been recognized for its innovative processes by the U.N. and the U.S. government³⁰⁹ and its approach is being replicated in other U.S. agricultural settings.³¹⁰ Of immediate relevance, its four-step process of risk identification, assessment, monitoring, and enforcement indicates how an approach like France's Vigilance Plan can be made more effective.

Other NGOs have worked closely with the ILO to address decent work challenges facing informal economy workers in supply chain settings. One example is Women in Informal Employment Globalizing and Organizing (WIEGO);³¹¹ another is the National Domestic Workers' Alliance (NDWA).³¹²

³⁰⁷ See Asbed & Sellers, *supra* note 181; Brudney, *supra* note 181; Dias-Abey, *supra* note 34. The program is discussed *supra* Part III.C for its success in promoting worker participation in the HRDD process.

³⁰⁸ See Fair Food Program 2021 Report, *supra* note 181; FAIR FOOD PROGRAM 2017 REPORT (describing substantial improvements in wages, hours, work environment, health and safety, and housing). As discussed *supra* Part III.C, the monitoring and enforcement process combines worker-driven complaint investigations and comprehensive audits linked to rapid corrective action, all coordinated by the Fair Foods Standards Council, a third-party monitor launched by CIW in 2011.

³⁰⁹ See, e.g., U.N. Working Group on Business and Human Rights, Statement at the End of Visit to the United States U.N. Working Group on Business and Human Rights, Washington D.C., 1 May 2013 (May 2, 2013), <https://perma.cc/F72T-JS9L>; U.S. EQUAL EMP. OPPORTUNITY COMM'N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE, REPORT OF CO-CHAIRS CHAI R. FELDBLUM & VICTORIA A. LIPNIC (2016), <https://perma.cc/GJL4-F37N>; End of Visit Statement, United States of America (6-16 December 2016) by Maria Grazia Giammarinaro, U.N. Special Rapporteur in Trafficking in Persons, Especially Women and Children (Dec. 16, 2016), <https://perma.cc/YED6-XPQV>.

³¹⁰ Under the Milk with Dignity program, developed in consultation with CIW and FFP, Migrant Justice signed an agreement in 2017 with Ben & Jerry's Homemade Holdings (a wholly-owned subsidiary of the British-Dutch conglomerate Unilever), making that MNE the first major dairy corporation to join the program and require its supplier farms to come into compliance with the Milk with Dignity Code of Conduct. See *About the Milk with Dignity Program*, MIGRANT JUSTICE JUSTICIA MIGRANTE (2018), <https://perma.cc/G2UR-QDD4>.

³¹¹ See, e.g., *Homeowners Organizing for Economic Empowerment*, WIEGO, <https://perma.cc/Q3BF-BHSH>; *ILO and WIEGO Policy Brief Series: Childcare for Workers in the Informal Economy*, INT'L LAB. ORG. (Mar. 3, 2020), <https://perma.cc/G3JK-7RM9>; *Home-Based Workers in the World: A Statistical Profile*, INT'L LAB. ORG. (Feb. 19, 2021), <https://perma.cc/P8TJ-6G2X>.

³¹² The NDWA is an advocacy organization promoting the rights of domestic workers in the United States. See, e.g., *Home Economics: The Invisible and Unregulated World of Domestic Work*, NAT'L DOMESTIC WORKERS ALL. (2012), <https://perma.cc/K4PZ-C7B3> (provides an empirically based and

Collective bargaining remains the internationally recognized and preferred means for workers to play an essential role in assessing the compliance of suppliers. But worker-centered organizations besides unions have made important contributions to worker-employer co-governance in the supply chain setting.³¹³ Their voices should be part of the dialogue regarding how to structure an effective compliance program, modifying approaches identified in current and proposed due diligence statutes.

V. CONCLUSION

This Article addresses a critical challenge confronting the international labor law community: how to promote and protect decent labor conditions in global supply chains. Existing approaches to the problem, developed through national law and corporate self-regulation, have been disappointing, and the COVID-19 pandemic has highlighted ongoing human rights abuses in this area. Thus, the time is ripe for a new international law approach. In arguing for the creation of an ILO convention on GSCs, the Article has emphasized three factors that a GSC convention would have to include to overcome the weaknesses of existing laws and practices: (i) separate obligations for business enterprises regarding due diligence *procedures* and human rights *outcomes*; (ii) substantial worker engagement in formulating and implementing due diligence processes; and (iii) application to all supply chain workers, regardless of employment or contractual status under national law.

In contending that the ILO is best situated to deliver such a convention, this Article has pointed to the ILO's preeminent leadership role in developing transnational labor standards and its recent experience promulgating conventions that function effectively across national borders. The Article also asserts that while ratification of a GSC convention may be difficult, the ways in which ILO conventions directly and indirectly affect national law and practice even without ratification mean that this convention could nonetheless have a significant impact.

The challenge of rectifying human rights abuses in GSCs will not be easily met, as should be evident from the ILO's inconclusive struggles with how to address the GSC problem.³¹⁴ An international convention recognizing the scope for national authority on approaches to both prevention and punishment will not assure uniformity among ratifying governments. Wealthier ILO member states

representative picture of domestic employment in twenty-first-century America); *Enforcement of ILO Convention 189 on Decent Work for Domestic Workers*, EUR. PUB. SERV. UNION (Oct. 14, 2013), <https://perma.cc/ZP2M-FMUB> (interviewing leaders from NDWA and other national domestic worker organizations addressing strategies for implementation and enforcement of ILO Convention 189).

³¹³ See generally Anner, *supra* note 11, at 378; Blasi & Bair, *supra* note 188; POWER & PARTICIPATION, *supra* note 26, at 139–53.

³¹⁴ See Thomas & Anner, *supra* note 24.

where more MNEs are based may take a more stringent stance with respect to goods or services entering their market than developing countries, which may choose to regard supply chain working conditions as preferable to the abject poverty or starvation that can occur in the absence of such employment. And current internal tensions between employer and worker organizations over aspects of the ILO supervisory system further complicate the prospects for resolution.³¹⁵

A proposed ILO convention on GSCs may well fuel some of these existing conflicts and tensions within the ILO. But international law discourse contributes to conflicts as well as (or on the way to) reducing or resolving them—that has been its role in other settings.³¹⁶ Moreover, in this setting, the recent statutory movement in EU countries, along with draft proposals emanating from the EU Commission and the U.N. Human Rights Council,³¹⁷ suggest the emergence of a collective will on regulating GSCs that has not heretofore been visible. Insofar as national or regional trains have begun to leave the station, the prospect of inconsistent rules and remedies effectively invites a transnational intervention. This Article has sought to describe and justify both the necessary contours of that intervention and the international organization capable of making it happen.

³¹⁵ See Lee Swepston, *Crisis in the ILO Supervisory System: Dispute Over the Right to Strike*, 29 INT'L J. COMP. LAB. L. & INDUS. REL. 199 (2013); L.C. Hofmann & N. Schuster, *It Ain't Over 'till It's Over: The Right to Strike and the Mandate of the Committee of Experts Revisited*, GLOB. LAB. UNIV. (2016).

³¹⁶ See Monika Hakimi, draft chapter (Feb. 2022) (unpublished manuscript) (on file with author) (arguing that international law's stimulation of conflict among governments is part of a constructive role).

³¹⁷ See *supra* note 300, discussing EU Commission Draft Directive issued in February 2022, and third revised draft issued in August 2021 by Open-Ended Intergovernmental Working Group (OEIGWG) established by the U.N. Human Rights Council.