Voice, Prevention, Remedy: Key Elements in a Global Supply Chain Convention

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Borrowing from Albert Hirschman's classic work, Exit, Voice, and Loyalty, focused on deteriorating performance in economic organizations, this Article explores the interplay among three key elements of a proposed International Convention on Global Supply Chains (GSCs). In doing so, it suggests that Hirschman's model may not have adequately appreciated the distinctive role of power in the labor setting—in particular the power that firms possess over the job security and conditions of workers. The Article emphasizes the importance of "Voice" as applied to the precarious labor relationships that characterize transnational supply chains. The structure of these relationships makes Exit unlikely and Loyalty less relevant. Relatedly, conditions in GSCs invite, if not demand, creation of institutions that can effectively communicate worker complaints.

Against this background, the proposed GSC convention envisions a robust, institutionally protected role for workers' voice. The Article explains how this role requires proactive worker participation, along with employers and governments, in creating and implementing a process of human rights due diligence.

But voice alone is not enough in the GSC setting. The Article discusses why there must also be a commitment to "Prevention" of human rights abuses. The proposed convention calls for legally binding obligations on business enterprises, and the Article examines several issues that governments must face when implementing prevention provisions. Further, in addressing how efforts at prevention become meaningful only when supported by "Remedy," the Article discusses an array of remedial approaches, including government-imposed penalties, civil liability available to victims, and a competent authority to oversee this structure. The Article concludes that the proposed convention, as a policy mechanism setting international standards, may encourage workers to actualize their labor rights in ways that transcend Hirschman's understanding of the role of voice shaped by market forces.

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Introduction

In a global supply chain (GSC) setting, workers' voice may be understood as the extent to which employees and others toiling in the supply chain are able to participate—individually or collectively—in decisions affecting their labor conditions and rights.[1] Policy instruments may strengthen this voice insofar as they provide mechanisms that enable workers to identify and actualize their labor rights within the GSC, including though not exclusively at the local level.[2]

This Article initially situates the role of workers' voice in GSCs by reference to the writings of political economist Albert O. Hirschman. In his classic book, *Exit, Voice, and Loyalty,*[3] and related articles,[4] Hirschman focused on mechanisms for addressing declining performance in firms, organizations, and states. He identified two basic responses to such declines and their attendant dissatisfactions: exit and voice. Exit refers to leaving — forsaking or abandoning membership in the relevant enterprise. Voice encompasses attempts to change rather than escape from the objectionable state of affairs—using complaints, protests, or organized opposition in an effort to persuade or force managers to reverse the deterioration.[5] Loyalty to the firm or government can

1. *See generally* Thomas Haipeter et al, *Industrial Relations at Center Stage: Efficiency, Equity and Voice in the Governance of Global Labour Standards*, 28 Industrielle Beziehungen 148, 151 (2021). The extension to supply chain actors beyond employees avoids the restrictive definitions of "employee" under most national labor statutes, which exclude temporary, irregular, subcontracted, casual, and home-based workers. *See* ILO, Nonstandard Employment Around the World: Understanding Challenges, Shaping Prospects 15, 103-04 (2015).

2. *See* Haipeter et al. *supra* note 1; Hiba Hafiz & Ioana Marinescu, *Labor Market Regulation and Worker Power*, 90 U. Chi. L. Rev. 469, 508-09 (2023).

3. Albert O. Hirschman, Exit, Voice, and Loyalty: Responses to Declines in Firms, Organizations, and States (Harv. Univ. Press 1970).

4. *See, e.g.* Hirschman, *Exit, Voice, and the State,* 31 World Pols. 90 (1978); Hirschman, *Exit, Voice, and Loyalty: Further Reflections and a Survey of Recent Contributions,* 58 Milbank Mem. Fund Quarterly 430 (1980) [hereinafter *Further Reflections*]; Hirschman, *Exit, Voice, and the Fate of the German Democratic Republic: An Essay in Conceptual History,* 45 World Pols. 173 (1993).

5. *See* Hirschman, *supra* note 3, at 30.

tilt one's choice toward voice rather than exit, assuming other factors remain stable.[6]

Although Hirschman focuses more on how consumers might respond to a firm's declining performance, his framework also implicates challenges faced by workers seeking to counter onerous labor conditions. Hirschman's analysis, especially of the relationship between exit and voice, is directly relevant to issues that arise in the contemporary GSC setting. At the same time, in order to redeem Hirschman's commitment to voice as a meaningful option, the distinctive obstacles facing workers within GSC operations call for new mechanisms that can enable and facilitate workers' power.

Accordingly, this Article proposes a modified framework to recognize and apply workers' voice in the GSC setting. Relying on the *Draft Text for an ILO Convention on Decent Work in Global Supply Chains* (Draft GSC Convention), formulated by an international group of labor rights scholars,[7] the Article contends that state regulation must play a distinctive role in enhancing prospects for workers' voice within GSCs. It goes on to address how that voice should be linked to mechanisms for *preventing* labor rights abuses, in both process and outcome terms, and also to r*emedial* approaches that can make prevention effective in vindicating the role of voice.

Part I summarizes Hirschman's approach as applied to workers' voice and explains why his framework requires further development to account for the realities of labor conditions, especially conditions confronting workers in GSCs. Power imbalance is a more central feature of relations between employers and workers than between firms and consumers. Even in the Global North, there are obstacles to workers' effective expression of voice, and their exit option is often neither neat nor fluid. But in the GSCs of the Global South, the barriers to both voice and exit are far more substantial. These barriers, along with other factors, contribute to the suppression of workers' voice.

Part II suggests a set of interventions, based on the international draft for a GSC convention, to facilitate the recognition of voice as an effective option. In doing so, it discusses the distinctive role for voice when workers—including unions—participate in the formulation, implementation, and monitoring of labor rights in GSCs. It also addresses the special role of governments in the Global North. Firms in these economically powerful countries are likely to maintain a central presence where they reside, are incorporated, and do substantial business. Accordingly, governments in the Global North become a primary focus for reform initiatives such as the proposed convention, thereby encouraging the GSC network to ameliorate the problems it has created.

Part III discusses the Draft Convention's approach to prevention and remedy, focusing on key features and noting how workers' voice is important at

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6. *See generally id.* at 78-79 (describing loyalty as a barrier to exit, though one of limited height).

7. The Draft GSC Convention consists of 39 Articles covering 18 pages; it is current as of 5 December 2023. The Convention is accompanied by an Explanatory Memo of 33 pages, also dated 5 December 2023 (hereinafter "Exp. Memo"). The chief convention drafters are Professors Shelley Marshall and Ingrid Landau (Australia), with participation from Hila Shamir (Israel), Judith Fudge (Canada), and Mark Anner, James Brudney, Jennifer Gordon, and Jeff Vogt (United States).

each of those stages. Part III also addresses the role to be played by the ILO under the draft proposal, and contends that such an ILO convention is both appropriate and feasible.

I. The Hirschman Model and its Extension for GSCs

A. The Basic *Exit, Voice and Loyalty* Model Summarized

A principal tenet of Hirschman's model, particularly relevant for economic organizations, is the inverse relationship between exit and voice. When consumers are dissatisfied with a firm's products, or workers with a firm's labor conditions, they are presumptively free to exit—taking their product or working condition preferences to new locations.[8] In this respect, reasonable prospects for exit may serve to inhibit voice, if not preempt it entirely, with the caveat that if loyalty is a strong factor, consumers and workers may persevere and seek improvements from within.[9]

Another way of expressing the interaction is that voice is most necessary when the exit option is least available; this may be due to high costs of exiting and may also be accompanied by induced loyalty.[10] At the same time, the risk to firms of substantial exit and the potential for voice can combine to produce organizational change. And efforts to achieve such change are more likely to succeed when there is a real possibility the firm will lose a sufficient number of essential consumers or workers.[11]

An important element of this relationship between voice and exit concerns the role of power. Hirschman is sensitive to the power dynamic when applying his model to political settings. He discusses the state's role in suppressing both exit and voice in Stalin's Soviet Union, as well as the approach that suppressed voice but allowed for exit in Castro's Cuba.[12] For democratic regimes, Hirschman recognizes that political managers may divert discontent, which leads to exit, by allowing for the expression of ineffectual voice based on an illusion of influencing policy. He illustrated this point with reference to the failure to resign by leading figures in President Johnson's administration who disagreed with the president's Vietnam policy.[13] Managers also may tolerate the exit of more motivated and demanding customers or workers, thereby weakening the overall effectiveness of remaining voices.[14]

It is less clear whether Hirschman appreciated the distinctive role of power in the labor setting—specifically the power that firms possess over the

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8. *See* HIRSCHMAN, *supra* note 3, at 22-24. ("A substantial enough exit by consumers or workers may lead to a management reaction, undertak[ing] to repair its failings."); *Id.* at 23.

9. *See id.* at 78 ("as a rule, . . .loyalty holds exit at bay and activates voice").

10. *Id.* at 92-93 (discussing how managers may use high fees for entering an organization or stiff penalties for exiting as a way to convert conscious into unconscious loyalist behavior).

11. *Cf.* HIRSCHMAN, *supra* note 3, at 24 (discussing role of "alert consumers" whose exit "provides the firm with a feedback mechanism which starts the effort at recuperation").

12. *See* Hirschman, *Further Reflections*, *supra* note 4, at 443-44.

13. *See* Hirschman, *supra* note 3, at 115, 118, 123.

14. *See id.* at 45-46 (discussing exit from U.S. public schools to private schools of quality-conscious member-customers who would be the most motivated or determined to combat deteriorating performance but for their departure).

job security and conditions of workers. Voice for workers entails affirmative steps aimed at addressing what are often challenging and even harsh objective conditions. In the United States, this typically means seeking to unionize or filing a lawsuit,[15] actions that include a role for state regulation and intervention. A persistent concern is whether the focus and volume of this voice will be sufficient to persuade or compel managers to improve their performance.[16] And a related question for workers is the nature and extent of government intervention that is needed for their voice to become effective and for retaliatory action by the firm to be deterred.

B. Extension of Hirschman's Approach for GSCs

As suggested above, imbalance of power is a greater focus in the employer-employee setting than for relationships between a firm and its consumers.[17] While the exit option for consumers—changing purchasing habits—is impersonal and tidy,[18] changing jobs for workers is more challenging. This is well understood in the Global North, where economic and political freedoms are enshrined in law, if not always fully respected. Employees seeking to exit face information asymmetries regarding the presence of other jobs and their comparability in terms of skills and educational requirements as well as the quality of alternative working environments.[19] Moreover, employees must deal with the rigors of the application process in addition to more individualized transaction costs associated with changing jobs: both intrinsic (ending professional or personal relationships, sacrificing accrued job-related benefits) and extrinsic (relocating family members, finding new housing and schools).[20] Finally, the exit option—the ability to quit—may be reduced or nullified if no comparable jobs are available.[21]

The presence of trade unions in Europe, and to a lesser extent the United States, has been associated with a lower rate of voluntary job change.[22] This is at least partly due to unions' collective bargaining efforts—a clear expression of voice—which generate more acceptable working conditions and dilute managerial authority, while also protecting workers from retaliation when they

15. *See* Michele Hoyman, *Female Participation in the Informal Economy: A Neglected Issue,* 43 The Annals of the Am. Acad. of Pol. and Soc. Sci. 64, 80 (1987).

16. *See, e.g.,* Brian Barry, *Review Article: 'Exit, Voice, and Loyalty,'* 4 Brit. J. Pol. Sci. 79, 88 (1974).

17. *See* Matthew M.C. Allen, *Hirschman and Voice, in* Handbook of Research on Employee Voice 38 (A. Wilkinson et. al. eds., Elgar Press 2d ed. 2020).

18. *See* Hirschman, *supra* note 3, at 15-16 ("It is neat — one either exits or one does not; it is impersonal — any face-to-face confrontation between customer and firm with its imponderable and unpredictable elements is avoided").

19. *See* Allen, *supra* note 17, at 45; Hafiz & Marinescu, *supra* note 2 at 474-75.

20. *See* Tove Helland Hammer & Ariel Avgar, *The Impact of Unions on Job Satisfaction, Organizational Commitment, and Turnover*, *in* What Do Unions Do? A Twenty-Year Perspective 346, 365 (James T. Bennett & Bruce E. Kaufman eds., 2007).

21. *See* Allen, *supra* note 17, at 45.

22. *See* Tomas Berglund & Brent Furaker, *Employment Protection Regulation, Trade Unions and Tenure of Employment: An Analysis of 23 European Countries*, 47 Indus. Rel. J. 492, 494-96 (2016); Richard B. Freeman, *'What Do Unions Do?' The 2004 M-Brane Stringtwister Edition, in* What do Unions Do? A Twenty-Year Perspective, *supra* note 20, at 346, 365.

express grievances.[23] But because unions represent only six percent of the private workforce in the U.S.,[24] their encouragement and protection for voice as an alternative to exit is fairly limited.

Positive law provides additional safeguards for workers whose complaints reflect efforts to improve job conditions or prevent their deterioration. Protections in the U.S. include federal and state laws prohibiting job loss due to race, sex, or other forms of status discrimination,[25] as well as laws and Supreme Court decisions prohibiting retaliation for attempts to unionize, for whistleblowing, or for speech by public employees criticizing their employer.[26] The impact of these laws in assuring a robust level of employee voice is at times open to question,[27] but their presence and enforceability provide a meaningful degree of protection against forced exit and the quelling of workers' voice.

The prospects for worker exit and voice options are bleaker in the Global South, where GSC operations are principally located. Writing in 1970, Hirschman did not anticipate how workers' voice in developing countries would be muted or stifled due to multiple factors, regardless of whether exit is available.[28]

Governments in GSC countries have labor laws in place but they are too often disinclined to monitor or enforce them, based on a desire to attract or retain foreign investment or to remain competitive with working conditions in neighboring countries.[29] Additionally, the national laws typically extend protections only to full-time and regular employees, excluding the temporary, irregular, subcontracted, casual, and home-based workers who comprise a majority of the GSC labor force.[30] These precarious and informal GSC jobs encourage

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23. *See* Berglund & Furaker, *supra* note 22 at 498-500, 509; David G. Blanchflower et. al., *Trade Unions and the Well-Being of Workers*, 60 British J. Ind. Rel. 255, 257-58 (2021); Anil Verma, *What Do Unions Do in the Workplace? Union Effects on Management and HRM Policies*, in Bennett & Kaufman eds., What do Unions Do? A Twenty-Year Perspective, *supra* note 20, at 275, 296-97; Bruce Kaufman, *What Do Unions Do? Evaluation and Commentary*, *in* What do Unions Do? A Twenty-Year Perspective, *supra* note 20, at 520, 539-40; Richard Freeman and James Medoff, What Do Unions Do? 9, 107-08 (Basic Books 1984).

24. *See Union Members—2023*, Bureau of Lab. Stats. (Jan. 23, 2024) https://www.bls.gov/news.release/pdf/union2.pdf [https://perma.cc/8DAV-XFVK].

25. *See, e.g.* 1964 Civil Rights Act, Title VII, 42 U.S.C. § 2000e-2; 1967 Age Discrimination in Employment Act, 29 U.S.C. § 621; 1990 Americans With Disabilities Act, 42 U.S.C. § 12101.

26. *See, e.g.* National Labor Relations Act 29 U.S.C. § 158(a)(3); Whistleblower Protection Act of 1989, 5 U.S.C. § 2302(b)(8) (covering federal executive branch employees); Sarbanes-Oxley Act, 18 U.S.C. § 1514A; Minnesota Whistleblower Act, Minn. Stat. § 181.932; Pickering v. Bd. of Educ., 391 U.S. 563 (1968); Gantt v. Sentry Ins., 824 P.2d 680 (Cal. 1992).

27. *See, e.g.* Gross v. FBL Fin. Servs., 557 U.S. 167 (2009) (limiting protections under ADEA); Lechmere v. Nat'l Labor Rels. Bd., 502 U.S. 527 (1992) (limiting protection under NLRA).

28. For an overview discussion of relevant shortcomings in national law and practice in developing countries, *see* James J. Brudney, *Hiding in Plain Sight: An ILO Convention on Labor Standards in Global Supply Chains*, 23 Chi. J. Int'l L. 272, 281-85 (2023).

29. *See, e.g.* Gary Walter Florkowski, *Foreign Investment Sensitivity to Employment Regulation: Reassessing What Really Matters*, 45 Employee Rels. 1098 (2023); William W. Olney, *A Race to the Bottom? Employment Protection and Foreign Direct Investment*, 91 J. Int'l Economics 191 (2013).

30. *See* Int'l Lab. Org. [ILO], Nonstandard Employment Around the World: Understanding Challenges, Shaping Prospects 15, 103–04 (2015) (temporary work constitutes 67% of wage

silence in the face of oppressive conditions, even for workers who have some (albeit limited) exit options.[31] Moreover, for the millions of migrants who are understandably sensitive to the exit threat of deportation, voice is further suppressed in the interest of a low-cost compliant workforce.[32] In addition, migrants are often expressly excluded from labor protections, including being barred from unionization.[33]

Unions are present in many countries in the Global South and may play a role in securing improved conditions, including as part of transnational industrial relations agreements that also involve multinational enterprises (MNEs) and global union federations (GUFs).[34] That said, union leaders in many GSC countries endure physical violence, threats, and imprisonment, none of which are part of the political culture in developed nations.[35] Moreover, in some GSC

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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); Muhammod 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);

31. See, e.g., Katherine Scully, *Blocking Exit, Stopping Voice: How Exclusion From Labor Law Protection Puts Domestic Workers at Risk in Saudi Arabia and Around the World,* 41 Colum. Hum. Rts. L. Rev. 825, 851-65 (2010) (discussing how Saudi Arabia uses high entrance costs and stiff penalties for exit to hamper exit and voice for foreign domestic workers). Although Hirschman observed that "high fees for entering an organization and stiff penalties for exit are among the main devices generating or reinforcing loyalty in such a way as to repress either exit or voice or both," he was not addressing, even indirectly, the precarious status of GSC workers. See Hirschman, *supra* note 3, at 93.

32. See George Menz, *Employers and Migrant Legality*, *in* Migrants at Work 44–59 (Cathryn Costello & Mark Freedland 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); Emmanuel Josserand & Sarah Kaine, *Labour Standards in Global Value Chains: Disentangling Workers' Voice, Vicarious Voice, Power Relations, and Regulation*, 71 Relations Industrielles 741, 747 (2016).

33. See Jennifer Gordon, *In the Zone: Work at the Intersection of Trade and Migration*, 23 Theor. Inqs. in L. 147, 157-160 (2022) (describing conditions for migrant workers in special industrial zones in Jordan, Malaysia, and Thailand).

34. See, e.g., *International Accord for Health and Safety in the Textile and Garment Industry,* Int'l Accord (Nov. 1, 2023), https://internationalaccord.org/wp-content/uploads/2023/11/International-Accord-for-Health-and-Safety-in-the-Textile-and-Garment-Industry-1-November-2023_Public-Version.pdf [https://perma.cc/8CFY-H2UP]; *A Decade of Progress in Workplace Safety in Bangladesh*, Int'l Accord, https://internationalaccord.org/countries/bangladesh/ (last visited, Jan. 2, 2025) [hereinafter the Bangladesh Accord]; Tim O'Connor et al, The Freedom of Association Protocol: A Localized Non-Judicial Grievance Mechanism for Workers' Rights in Global Supply Chains, (2016), https://corporateaccountabilityresearch.net/njm-report-xvix-protocol#:~:text=In%20Indonesia%20freedom%20of%20association,routine%20violations%20continue%20to%20occur [https://perma.cc/J2YM-KH93] [hereinafter the Indonesia Protocol on Freedom of Association]; Reingard Zimmer, *International Framework Agreements: New Developments through Better Implementation on the Basis of an Analysis of the Bangladesh Accord and the Indonesian Freedom of Association Protocol*, 17 Int'l Orgs. L. Rev. 178-205 (2020), *available at* https://doi.org/10.1163/15723747-01701008 [https://perma.cc/69QR-7DQN].

35. *See, e.g.,* Matthew Miller, *On Worker Rights and Wage Protests in Bangladesh*, U.S. Dep't of State (Nov. 8, 2023), https://www.state.gov/on-worker-rights-and-wage-protests-in-bangladesh/ [https://perma.cc/M6YU-Y2R4]; *Organizing Workers in Bangladesh Remains a Challenge,* IndustriALL Global Union (Sept. 19, 2023), https://www.industriall-union.org/

countries unions are instruments of the state as well as (in theory) representatives of the interests of workers. As a practical matter, this duality ends up subordinating traditional union priorities to governmental interests, with the result that trade unions fail to reflect genuine worker voice.[36]

In the GSC setting, where MNEs operate atop layers of subsidiaries, subcontractors, local businesses, and homeworkers, mechanisms are needed that will enable workers to influence, and if necessary disrupt, production between different links of the supply chain in order to improve labor rights protections.[37] Global Framework Agreements (GFAs) have proliferated in recent years;[38] while they typically extend coverage to suppliers and contractors and identify sanctions for non-compliance, their enforcement at the local level remains weak.[39] Certain other worker-initiated options may address lower links on the chain by exploiting logistical choke points,[40] but these successes are ad hoc and isolated, rather than reflecting anything more systemic.

Fundamentally, workers and unions must be linked across multiple levels and at various locations within GSCs if they are to gain respect and influence.[41] Connections among workers and unions, at subcontractors and suppliers as well as lead firms, will enhance workers' ability to promote and protect voice by initiating and coordinating bargaining, protests, strikes, and other solidarity actions.[42] At the same time, given the challenges described above that workers in GSCs face, an institution or mechanism must engage at the top of the GSC,

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organizing-workers-in-bangladesh-remains-a-challenge; *Cambodia Condemned After Union Leader Jailed Over Casino Strike,* Al Jazeera (May 25, 2023), https://www.aljazeera.com/news/2023/5/25/cambodia-condemned-after-union-leader-jailed-over-casino-strike [https://perma.cc/4SG7-EN9T]; *Cambodia: Union Busting,* Hum. Rts. Watch, (Nov.17, 2022), https://www.hrw.org/video-photos/video/2022/11/17/cambodia-union-busting [https://perma.cc/U23J-8E9L]; Danielle Mackey, *In Honduras and El Salvador, "Trade Union Leaders are Vulnerable to Possible Assassination at Any Moment,"* Equal Times (Mar. 4, 2020), [https://perma.cc/4ECQ-J4P2]. For additional reports of violence and imprisonment, *see*: Int'l Lab. Conf., 111th Session, ILO CEACR Observations on Convention 87: Report of the CEACR 2023 at 105-107 (Bangladesh); 144-145 (Guatemala); 155-156 (Indonesia); 193-195 (Nicaragua); 199-200 (Pakistan); Int'l Lab. Conf., 109th Session, ILO CEACR Observations on Convention 87: Report of the CEACR 2021 (Addendum to 2020 Report) at 118-119 (Cambodia); 174-175 (El Salvador); 199-202 (Honduras).

36. *See, e.g.,* Dave Lyddon et al, *A Strike of "Unorganised" Workers in a Chinese Car Factory: the Nanhai Honda Events of 2010*, 46 Indus. Rel. J. 134-152 (2015); Mark Anner & Xiangmin Liu, *Harmonious Unions and Rebellious Workers: A Study of Wildcat Strikes in Vietnam,* 69 Indus. & Lab. Rels. Rev. 3-28 (2016).

37. See, e.g. Greg Asbed & Steve Hitov, *Preventing Forced Labor in Corporate Supply Chains: The Fair Food Program and Worker-Driven Social Responsibility*, 52 Wake Forest L. Rev. 497 (2017); Jimmy Donaghey et al, *From Employment Relations to Consumption Relations: Balancing Labor Governance in Global Supply Chains*, 53 Hum. Res. Mgmt. 229 (2014).

38. *See, e.g.*, Remi Bourguignon et al, *Global Framework Agreements and Trade Unions as Monitoring Agents in Transnational Corporations,* 165 J. Bus. Ethics 517 (2019); Felix Hadwiger, *Global Framework Agreements: Achieving Decent Work in Global Supply Chains?* 7 Int'l J. Lab. Rsch. 75 (2015).

39. *See* Haipeter et al, *supra* note 1, at 160 (citing numerous sources); Hadwiger, *supra* note 38, at 91-92.

40. *See, e.g.,* Anner & Liu, *supra* note 36; Lone Riisgaard & Nikolaus Hammer, *Prospects for Labour in Global Supply Chains: Labour Standards in the Cut Flower and Banana Industries*, 49 Brit. J. of Indus. Rels. 168 (2011).

41. *See* Josserand & Kaine, *supra* note 32, at 749.

42. *See* Donaghey et al, *supra* note 37, at 238.

regulating and incentivizing the MNEs that structure these chains. As observed by Hirschman, an effective voice option depends both "on the general readiness of a population to complain and on the invention of such institutions and mechanisms as can communicate complaints cheaply and effectively."[43]

State regulation properly conceived can serve as an essential mechanism.[44] Workers have the ability to promote voice collectively, but their response to the vast power imbalance with firms up and down the supply chain is limited in Global South countries that do not consistently or genuinely require firms to negotiate for terms and conditions of employment.[45] Bridging this gulf warrants state regulation to enable workers to complain and achieve redress "cheaply and effectively."[46] The need for a regulatory approach is especially important insofar as regulations set clear requirements aimed primarily though not exclusively at MNEs.

These requirements should address procedural standards, with workers actively involved in both formulation and implementation, and also substantive standards that hold MNEs and other supply chain actors accountable for adverse labor rights outcomes.[47] In addition, such regulation must be sensitive to the role of lead firms in shaping, if not determining, how funds as well as material and human resources are allocated across the GSC.[48] For regulation to be instrumental in effectuating improved labor conditions, it must encourage a broadening of traditional incentives signaled by lead firms (currently based on price points and delivery times) to include incentives that recognize and reward managers at different levels or in different departments for improving labor conditions.[49]

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43. Hirschman, *supra* note 3, at 43. *See also* Iyola Solanke, *Black Women Workers and Discrimination: Exit, Voice, and Loyalty . . . or 'Shifting'?*, *in* Migrants at Work 321-22 (Costello & Freedland eds., 2014) (observing that antidiscrimination law is one effective mechanism for voice).

44. In the analogous area of international trade regulation, *see, e.g.,* Tonia Novitz, *Enforceable Social Clauses in Trade Agreements With 'Bite'?: Implications of the EU-South Korea Panel of Experts Report of 20 January 2021,* ETUI Pol'y Brief (2021); Martin Myant, Labour Rights in Trade Agreements: Five New Stories 46-50 (2022) (discussing industrial relations consequences of USMCA); Ninestar Corp. v. United States, 2024 WL 864369 (CIT 2024) (sustaining preliminary injunction against Chinese manufacturer, presumptively subjecting them to embargo under Uyghur Forced Labor Prevention Act).

45. *See* Jennifer Gordon, *Raising Labor Standards in Supply Chains: Top-Down and Bottom-Up Approaches to the US Forced Labor Import Ban*, 76 UC L. J. ___ (forthcoming 2025).

46. Hirschman, *supra* note 3, at 43.

47. For an example of how meaningful worker engagement addresses supply chain labor abuses in the U.S. agricultural setting, *see* Greg Asbed & Sean Seller, *The Fair Food Program: Comprehensive, Verifiable, and Sustainable Change for Farmworkers*, 16 U. Penn. J. L & Soc. Change 39 (2013) (describing Fair Food Program, a partnership involving multinational retailers, agricultural growers/employers, and farmworkers in southeastern United States); James J. Brudney, *Decent Labour Standards in Corporate Supply Chains: The Immokalee Workers Model*, in Temporary Migration in the Global Era: The Regulatory Challenges 351-376 (Joanna Howe & Rosemary Ownes eds., 2016) (same).

48. See Josserand & Kaine, *supra* note 32 at 755-56.

49. See Jason Judd & J. Lowell Jackson, *Repeat, Repair, or Renegotiate? The Post Covid Future of the Apparel Industry* 50-51 (ILO Discussion paper July 2021) (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*

II. The Need for Effective Voice Through a GSC Convention

A. The Importance of an International Approach

The Draft GSC Convention represents an effort to render the voice of workers effective at an international level after decades of failed attempts[50] and in the face of often grim supply chain conditions. By requiring that both governments and business enterprises play a substantial role in regulating supply chain activities, the Convention builds on state obligations and business responsibilities set forth as part of a voluntary framework by the U.N. Guiding Principles on Business and Human Rights (UNGP).[51] The UNGP convey that both businesses and governments must assume leadership in order to protect human rights, and that business enterprises are expected to conduct human rights due diligence (HRDD). The due diligence approach requires MNEs to become aware of and respond to adverse human rights impacts caused by the operations of firms or individuals within their supply chains.[52]

One might ask why an international convention is the preferred mechanism for state regulation, rather than allowing individual states to initiate their own GSC regulatory approaches. In fact, a number of Global North countries have responded to the crisis in GSC worker protections by enacting national laws that take two distinct directions. Some laws focus on disclosure through reporting obligations aimed specifically at forced labor, slavery, and human trafficking.[53] A second set of statutes borrow from the UNGPs' due diligence template.[54]

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as Labor Regulation: The Missing Middle, 73 Indus. & Lab. Rels. Rev. 817, 818, 838 (2020) (criticizing absence of incentives for compliance in that lead firm did not increase purchase orders when supplier labor standards improved);

50. In addition to the shortcomings of national labor laws in the Global South (summarized in Part I.B above), the promotion of transnational workers' voice through corporate social responsibility programs and other voluntary multistakeholder initiatives has failed due to deficiencies in design and implementation as well as the challenge of voluntary action. *See e.g.,* 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 in the Global Economy 51, 52–57 (Richard P. Applebaum & Nelson Lichtenstein eds., 2016); Sabrina Zajak, *Channels for Workers' Voice in the Transnational Governance of Labour Rights?*, 8 Glob. Pol'y Issue 4 (Nov. 2017).

51. *See* UN Hum. Rts. Council, Guiding Principles on Business and Human Rights, HR/PUB/11/04, (2011) [hereinafter UNGP].

52. *See* UNGP at Principles 11-24 (14 principles dealing with business responsibility to respect human rights). *See also Id.* at Principles 1-10 (addressing state's duty to protect human rights); *Id.* at Principles 25-31 (addressing access to remedy through state-based and non-state-based grievance mechanisms)

53. *See* California Transparency in Supply Chains Act of 2010, Cal. Civ. Code § 1714.43(c); Modern Slavery Act of 2015, 2015 c. 30 § 54(1) - (5) (UK); Modern Slavery Act 2018, 2018 (Act No. 153) § 16(1) (Austl.). The annual revenue threshold for coverage under these statutes ranges from £36 million (U.K. statute) to $100 million (California statute).

54. *See* Wet zorgplicht kinderarbeid [Child Labour Due Diligence Act], Stb. 2019, 401 (Neth.); 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 [J.O.] [Official Gazette of France], Mar. 28, 2017; Lieferkettensorgfaltspflichtengesetz [LkSG] [Act on Corporate Due Diligence Obligations in Supply Chains], July 16, 2021, Bundesgesetzblatt, Teil I [BGBl I] at 2959 (Ger.); Åpenhetsloven, 1. Jul 2022 (Nor.).

These two approaches are positive developments but they have fallen well short of providing adequate enforceable protection, as a number of studies and commentaries document.[55] In addition, the mandatory disclosure and due diligence statutes that have emerged in developed countries vary considerably in terms of the types of human rights protected, the size of companies covered, the breadth of applicability to supply chains, the extent of public authority administration and enforcement, and the nature of penalties and liability, as well as the proactive involvement of worker voice.[56]

Governments presumably differ in their approaches to controlling GSC human rights abuses based, *inter alia,* on how to protect their companies' competitive positions while also minimizing their own regulatory burdens.[57] These variations are likely to generate conflicting applications for at least some MNEs and inconsistent protections for similarly situated supply chain workers. Further, the statutes are themselves the exception rather than the rule: it is doubtful whether similar human rights due diligence laws will be enacted in many other high-income countries where MNEs are registered or conduct substantial business.[58]

An international law response offers the promise of greater uniformity, setting forth requirements to be adhered to by both governments and business enterprises. To be sure, international conventions must be enacted and administered through national law. But while national laws responding to a GSC convention may generate some inconsistencies that pose challenges for MNEs, the variations will be reduced because they arise within an agreed-upon international framework and set of guidelines. Moreover, as is suggested by the statutes emanating from Europe, Australia, and the United States[59] as well as a recent EU Directive,[60] the main pressure for state regulation of GSCs is coming

55. For an analysis of the shortcomings, relying on numerous sources, *see* Brudney, *supra* note 28, at 293-301.

56. *See supra* notes 53-55 (identifying text of the laws, and sources analyzing their features).

57. Protection of competitive advantages may encompass minimizing business costs associated with establishing and implementing a mandated due diligence program, including, whether to cover more remote or indirect suppliers. In addition, limiting the coverage to larger business enterprises reduces the expansion of government bureaucracy for administrative functions needed under such a new program.

58. *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.

59. *See* Uyghur Forced Labor Prevention Act, Pub. L. No. 117-78, 135 Stat. § 1525 (2021).

60. *See* Press Release, Council of the EU, Corporate Sustainability Due Diligence: Council Gives its Final Approval (24 May 2024) https://www.consilium.europa.eu/en/press/press-releases/2024/05/24/corporate-sustainability-due-diligence-council-gives-its-final-approval/ [https://perma.cc/E69X-FJ6A]. The Directive has certain parallels to the HRDD statutes referenced above, although in its compromised version it affects a very small number of businesses operating in the EU and will be phased in over an extended period of three to five years. *See* Jon McGowan, *After Delays, EU Approves Corporate*

from Global North countries, where the transnational enterprises most heavily involved in controlling and directing GSC operations are principally located.[61]

An international convention, implemented in law and practice by ILO member states, will encourage the same governments to exert increased leverage over the MNEs that are domiciled in or do business within their borders. As a result, these governments will be better able to protect against labor rights harms taking place in supply chains located to a large extent in the Global South. Of critical importance, these governments' implementation will be shaped and strengthened by the voices of national unions in their home countries as well as unions and other worker-driven organizations from the Global South. Further, the MNEs subject to this new regulation are likely to continue to reside and do extensive business in their current home states, given stable and supportive legal cultures, continuing consumer populations, and favorable investment climates.[62] Finally, assuming that MNE suppliers and contractors in Global South countries are rewarded with additional business for implementing labor standards requirements,[63] those countries may well benefit from greater MNE investment as well as engendering a ripple implementation effect among neighboring states.[64]

The Draft GSC Convention calls on ILO member states to adopt "an inclusive, integrated and gender-responsive approach for the prevention, elimination, and remediation of labor rights harms in global supply chains."[65] Before examining the prevention and remediation aspects, it is important to focus on how voice (as set forth in Article 6 of the Convention) is integrated into the due diligence provisions of Article 5.

Sustainability Due Diligence Law, Forbes (Mar. 25, 2024), https://www.forbes.com/sites/jonmcgowan/2024/03/15/after-delays-eu-approves-corporate-sustainability-due-diligence-law/?sh=39b96cd97f33 [https://perma.cc/M3GY-KP24]; *EU Council Approves Corporate Sustainability Due Diligence Directive,* Ernst & Young LLP: Tax News Update, U.S. Edition (March 19, 2024), https://taxnews.ey.com/news/2024-0628-eu-council-approves-corporate-sustainability-due-diligence-directive [https://perma.cc/297J-EY6L].

61. *See supra* note 58.

62. *See, e.g.* Simon Collinson & Alan M. Rugman, *The Regional Nature of Japanese Multicultural Businesses*, 39 J. Int'l Bus. Stud. 215 (2008).; Alan M. Rugman & Alain Verbeke, *A Perspective on Regional and Global Strategies of Multinational Enterprises*, 35 J. Int'l Bus. Stud. 3 (2004); Alan M. Rugman & Cecilia Brain, *Multinational Enterprises Are Regional, Not Global*, 11 Multinational Bus. Rev. 3, 7 (2003. In describing the international mobility of capital, Hirschman emphasized that "[c]apital flight is obviously much less of a weapon in the largest and most powerful countries where the owners of capital feel that there is no place else to go. Here it can be expected that voice will be activated by the impossibility of exit." *Exit, Voice, and the State*, *supra* note 4, at 100.

63. *See* ILO, Draft Text for an ILO Convention on Decent Work in Global Supply Chains art. 5.3(b), Exp. Memo. ¶ 28, (2023) [hereinafter Draft GSC Convention] (requiring MNEs to provide incentives to their suppliers aimed at improving labor practices).

64. *See* 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 eastern European EU countries since the late 1990s with respect to ratification of collective labor rights conventions, notably ILO Conventions 87 and 98). *See generally* 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").

65. Draft GSC Convention, *supra* note 63, at art. 3.2.

B. Voice as an Essential Part of Human Rights Due Diligence

As noted earlier, the concept of mandatory due diligence in the labor rights setting builds on the UN Guiding Principles approach, while establishing that HRDD becomes an obligation imposed on states, with enforcement available against MNEs and other firms. Specifically, Article 5 of the Draft Convention requires that governments adopt measures to "ensure that [business] undertakings *domiciled or operating in or from their territories* . . . exercise due diligence with respect to potential or actual *labor rights harms arising from their own activities or those of their subsidiaries, their supply chains and other business relationships*."[66] The Convention spells out the components of this labor rights due diligence, tracking what had been set forth in a voluntary context by the Guiding Principles and also in Guidance from the OECD.[67] The principal HRDD requirements imposed on undertakings involve (i) identifying the existence of human rights risks through management systems and policies; (ii) regularly assessing the extent of those risks up and down the supply chain; (iii) acting to mitigate and prevent the actual or potential labor rights harms identified; (iv) monitoring the implementation and effectiveness of the measures taken; and (v) establishing a grievance procedure for complaints with respect to the labor rights harms.[68]

Significantly, the Draft GSC Convention requires governments to ensure that undertakings engage in "effective consultations" with workers and their organizations for each of the due diligence stages set forth above.[69] Although the UNGP and OECD Guidelines encourage such consultation, their standards are not legally binding on business enterprises. As noted, several European countries in recent years have incorporated the due diligence concepts and stages as requirements under national legislation.[70] However, these laws either limit required worker consultation to the complaint stage of due diligence or are silent altogether on the role played by workers and their organizations.[71]

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66. Draft GSC Convention, *supra* note 63, at art. 5.1 (emphasis added). The labor rights harms are specifically defined to include interference with rights accorded under the ten ILO fundamental conventions as well as ILO instruments covering wage and hours protections and violence and harassment at work *See id.* at art. 1.1(i).

67. *See* Org. for Econ. Coop. and Dev. [OECD] Due Diligence Guidance for Responsible Business Conduct (2018); Exp. Memo, *supra* note 7, at ¶ 25, n.38.

68. *See* Draft GSC Convention, *supra* note 63, at art. 5.2 (a)–(e).

69. *See Id.* at art. 5.2(f), art. 6.1.

70. *See* 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 [J.O.] [Official Gazette of France], 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.), *translated in* The French Commercial Code in English (Philip Raworth trans., 2020); Lieferkettensorgfaltspflichtengesetz [LkSG] [Act on Corporate Due Diligence Obligations in Supply Chains], July 16, 2021, Bundesgesetzblatt, Teil I [BGBl I] at 2959 (Ger.); Åpenhetsloven, 1. Jul 2022 (Nor.) at § 1 (relating to enterprises' transparency and work on fundamental human rights and decent working conditions).

71. *See* sources cited *supra* note 70. The French law limits worker consultation to the complaint stage. The German and Norwegian laws are silent altogether on worker consultation. *See also* Wet Zorgplicht Kinderarbeid Jaargang 2019, Stb. 2019, 401 (Neth.) (The Dutch Child Labor Due Diligence law is similarly silent on worker consultation).

When creating and implementing a due diligence process, the Draft Convention recognizes that the workers themselves are the primary victims of supply chain risks and abuses. Decades of experience with corporate social responsibility, multi-stakeholder initiatives, and other voluntary programs have shown that unless there is direct and continuous involvement by workers or their representatives, efforts at due diligence become little more than tick-box exercises which fail to produce meaningful results.[72] Conversely, social auditing programs that incorporate extensive worker participation and consultation have achieved substantial improvements in labor standards,[73] a goal publicly sought by MNEs with respect to their networks[74] as well as by workers and their advocates. Accordingly, the voice provisions in Articles 5 and 6 of the Draft Convention are vitally important in mandating direct and substantial worker participation in the due diligence process. This will ensure that the process is best able to protect against human rights abuses.

Moreover, a due diligence process that requires regular worker engagement with MNEs and their suppliers at various points in the supply chain may effectively encourage MNEs to reward both suppliers and their own personnel for compliance with labor standards. To that end, the Draft Convention expressly requires undertakings to make necessary investments and extend incentives to suppliers, aimed at improving labor practices.[75] A number of observers have called for such adjustments, which would serve to alter the current incentive structure that is based almost exclusively on short-term

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72. *See, e.g.* Kuruvilla, *supra* note 50; Esbenshade, *supra* note 50. Initial reports from the mandatory HRDD statutes in EU countries indicate challenges in the implementation processes. *See, e.g.* The Law on Duty of Vigilance of Parent and Outsourcing Companies, Year 1: Companies Must Do Better (Juliette Renaud et al. eds., 2019) (reviewing eighty HRDD plans under France law, across the extractive, arms, agri-food, banking, and garment sectors); Pauline Barraud de Lagerie et al., *Implementing the French Duty of Vigilance Law, in* Decent Work in a Globalized Economy 165, 170–81 (ILO, 2021) (reviewing various problems in first sets of plans); Surya Deva, *Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?*; 36 Leiden J. Int'l L. 389 (2023) (evaluating HRDD statutes from France, Germany, Norway, Netherlands, Switzerland).

73. *See, e.g.* Jessica Champagne, *From Public Relations to Enforceable Agreements*, *in* Power, Participation, and Private Regulatory Initiatives 154, 162-169 (Daniel Brinks et al. eds., 2021) (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); Brudney, *supra* note 47, at 360-372 (describing Fair Food Program's achievements, including substantial wage premiums; bans on child labor, forced labor, and sexual harassment; and elimination of previously unpaid waiting time in the fields—all reinforced by effective complaint resolution process and comprehensive auditing structure). *See also Workers and Unions*, Better Work, https://perma.cc/6KRV-UR9Y (last visited Jan. 2, 2025); Kuruvilla, *supra* note 50, at 102–05. Better Work operates in thirteen countries, focusing on working conditions improvement over repeated assessments; the key to success is factory-level social dialogue through a Performance Improvement Consultative Committee (PICC) comprised of equal numbers of factory-level management and worker representatives).

74. *See* Org. for Econ. Coop. and Dev. [OECD], Due Diligence Guidance for Responsible Business Conduct, 18-19, 48–51 (2018).

75. *See* Draft GSC Convention, *supra* note 63, at art. 5.3(b), Exp. Memo ¶ 28.

sourcing decisions.[76] The provisions for voice in Articles 5 and 6 should lead MNEs to recognize suppliers who demonstrate high levels of human rights compliance by increasing product orders and making longer-term commitments. Such recognition would reflect a more equitable allocation of human rights responsibilities between MNEs on the one hand and suppliers and workers on the other.

The ILO has adopted this inclusive and participatory approach to voice in a recent convention. In its 2019 Violence and Harassment Convention, the ILO recognized the importance of workers' voice at each stage of the assessment, mitigation, monitoring, and complaint procedures. The Convention includes a multi-stage obligatory due diligence process aimed at preventing a specific form of workplace abuse.[77] Significantly, the Convention requires governments to consult with workers or their representatives: (i) when developing an "inclusive, integrated and gender-responsive approach"; (ii) when adopting and implementing their 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.[78]

C. Additional Channels for Workers' Voice

In addition to mandating proactive worker participation at each prescribed stage of the HRDD process, the Draft GSC Convention in Article 11 requires states to facilitate workers' ability to organize and engage in collective bargaining in GSCs. The Article does not require states to promote or adopt any particular collective bargaining approach; rather, it follows the ILO model that leaves to the discretion of bargaining parties both the level of bargaining and the substantive content of agreements.[79] The drafters are well aware of the challenges faced by GSC workers seeking to organize and collectively bargain in Global South settings.[80] They recognize the importance of transnational union organizing in a GSC setting as well as the absence of an adequate legal infrastructure allowing for its development.[81]

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76. *See, e.g.*, Judd & Jackson, *supra* note 49, at 50-51; Matthew Amengual et al., *Global Purchasing as Labor Regulation: The Missing Middle*, 73 Indus. & Lab. Rels. 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 50, at 178, 216.

77. A convention focused on one particular labor rights harm does not involve the range of economic considerations addressed in this Draft GSC Convention. Nonetheless, the Violence and Harassment Convention provides for worker voice on a scale that exceeds what most national labor laws incorporate; in that respect, it is an appropriate model.

78. ILO Convention No. 190 art. 4(2), 9(a), 9(c), June 21, 2019, 3444 U.N.T.S. 3. Further, the Convention requires that governments take all appropriate measures to *prevent* violence and harassment, and mandates action to ensure easy access to *effective remedies* for victims of such violence and harassment. *See id.* arts. 7, 8, 10(b), 10(d).

79. *See* Draft GSC Convention, *supra* note 63, at Exp. Mem. ¶ 68.

80. *See*, *e.g., id.* at ¶ 63 (discussing mismatch between traditional collective bargaining frameworks and economic realities of GSC operations, and quoting from 2016 ILO report that "the purchasing practices between buyers and suppliers [in buyer-driven supply chains] and intense competition between firms at the end of supply chains places limits on how much value is available for distribution through collective bargaining").

81. *See. id.* at ¶ 62.

Accordingly, the bargaining parties ought to have the freedom to exercise their discretion in a legal and institutional environment that promotes and protects collective bargaining potential. Tracking the language of the ILO Convention on Freedom of Association, Article 11 provides that states should recognize the rights of both worker and employer organizations "to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administrations and activities, and to formulate their programs."[82] Further, states should review and remove obstacles to cross-border organizing and bargaining, support binding and enforceable cross-border collective bargaining agreements, and promote a central role for collective bargaining in the due diligence process.[83]

This form of government intervention under Article 11, while not mandatory like the provisions on due diligence participation, further advances the role of voice as envisioned by Hirschman. Bargaining arrangements may address particular labor abuses; in doing so, they can involve local and transnational trade unions, NGOs, women's rights organizations, suppliers at different levels of the chain, and transnational brands.[84] Such arrangements also reflect the possibility that ongoing dialogue with employers, accompanied by resolution on particular issues, can help engender a measure of loyalty, further enhancing workers' interest and capacity for pursuing multiple channels of voice.

In that regard, the Draft Convention in Article 8 recognizes a third approach, requiring business undertakings to establish internal grievance procedures. These procedures are to provide for timely, accessible, equitable, and transparent responses to concerns raised about labor rights harms, based on engagement and dialogue.[85] The scope of the grievance mechanism must extend to adverse labor rights impacts throughout the supply chain of a given undertaking.[86] In addition, the procedures must be supported by sufficient financial resources and appropriate expertise, and also must assure protection against retaliation for workers or their representatives.[87] Although these grievance mechanisms are required, procedures that conform to the provisions of Article 8 may be regulated through collective agreements.[88]

In sum, the Draft GSC Convention authorizes, protects, and promotes workers' voice through several channels. At the same time, these channels alone cannot assure that the exercise of such voice will be successful at achieving results. To ensure an appropriate level of effectiveness, there must also be mechanisms for prevention and for remedy.

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82. *Id.* at Art. 11.1(b), adopting the precise language of ILO Convention 87, art. 3.

83. *See* art. 11.1 (c), (d), (f).

84. *See, e.g. Id.* at Exp. Mem. ¶ 66, referring to Lesotho Agreement on Gender-Based Violence. Other examples include Bangladesh Accord, *supra* notes 34 and 73 (addressing fire safety and building inspections); Indonesia Protocol on Freedom of Association, *supra* note 34; and Fair Food program in the United States, *supra* notes 37 and 73.

85. *See id.* at art. 8.3(a).

86. *See id.* at art. 8.1.

87. *See id.* at art. 8.3(b), (c).

88. *See id.* at art. 8.6. Further, undertakings may participate in an external grievance procedure if it meets the criteria discussed above; *see id.* at art. 8.7.

III. Prevention, Remedy and the Role of the ILO

The Draft GSC Convention includes a broad range of provisions addressing the duty of member states to prevent undertakings from inflicting labor rights harms and to provide remedies for situations where such harm is inflicted. What follows in this part is a selective review of certain key elements, including where relevant the link between these provisions and the exercise of voice by workers and their representatives.

A. Prevention

The Draft Convention in Article 5 imposes a duty to prevent on each member state. This duty entails overseeing implementation of human rights due diligence requirements to be fulfilled by business enterprises domiciled or operating within its borders. As noted earlier, the HRDD requirements encompass a sequence of operations—applicable to entire supply chains—including identification and assessment of labor rights harms to mitigation of these identified harms, monitoring the effectiveness of the assessment and mitigation efforts, and communicating regularly on measures undertaken. As part of their oversight responsibilities regarding these HRDD stages, member states must address a number of structural options and challenges regarding the operation of undertakings.

One challenge is requiring undertakings engaged in due diligence to initiate change when their supply chain business practices contribute to human rights harms.[89] An undertaking that consistently pressures its subsidiary to provide goods at low production prices and on short-term delivery schedules may be viewed as contributing to the predictable results of those demands: forced overtime, unsafe working conditions, and low wages.[90] Moreover, relationships between an MNE buyer and repeat-player suppliers at various levels of the GSC may reflect sufficient MNE control or influence to justify action with respect to human rights violations committed by the suppliers.[91] Voice is critical to success in this context. A rigorous and engaged HRDD process, inviting active worker consultation at each stage, should reduce adverse human rights outcomes in the direct supply chain. Conversely, an informal or irregular HRDD process, where worker consultation is at best *ad hoc* and on a limited basis, will likely lead to more instances of human rights abuse and liability for the undertaking based on its due diligence process.

A related challenge involves restraining member states' delegation of their due diligence obligations. The GSC Convention specifies that the duty to prevent is non-delegable; undertakings remain responsible for their due diligence obligations and may not delegate them to a third party.[92] This aspect of the

89. *See id.* at art.5.3(a), Exp. Mem. ¶ 27

90. *See* Peter Rott & Vibe Ulfbeck, *Corporate Liability of Multinational Corporations*? 3 Eur. Rev. of Priv. L. 415, 419-20, 434-45 (2015).

91. *See* 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).

92. *See* Draft GSC Convention, *supra* note 63, at Art.5.4, Exp. Mem. ¶ 29.

duty to prevent has special relevance because many undertakings rely heavily on third-party certifications or social audits for their due diligence efforts.[93]

In the workplace setting, employers may not delegate the provision and operation of a safe place of work for their own employees to third parties.[94] This applies in direct terms to 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 setting, undertakings are under the same duty to protect workers from human rights abuses when they are engaged in furthering the commercial venture.[95]

A final issue arising under prevention, which involves choices for the member state, is the requirement to "designate one or more Competent Authorities to supervise compliance with the obligations laid down" in the Draft GSC Convention.[96] This competent authority is responsible for implementing, investigating, encouraging, and enforcing compliance by undertakings.[97] In fulfilling its responsibilities, the competent authority must have appropriate financing, possess or have access to necessary expertise, and operate independently—both from undertakings and from other private or government pressures.[98]

A member state may designate its existing labor inspectorate as the competent authority.[99] There are advantages to such a designation, especially if a member state's laws and practices conform reasonably closely to the ILO conventions on labor inspection.[100] Due diligence inspections must be conducted in conformity with the detailed requirements of Convention 81,[101] and—importantly—that convention specifies the need for promoting collaboration with workers or their organizations.[102] In addition, certain enforcement and sanctioning powers entrusted to the competent authority broadly parallel those

93. *See id.* at Exp. Mem. ¶ 29.

94. *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)*; Wilsons & Clyde Coal Co. Ltd. v. English* [1938] AC 57 (HL); McDermid v. Nash Dredging Ltd. [1987] AC 906 (HL).

95. *See* Art. 5.4; Restatement (Third) of Agency § 7.06 and accompanying comment; Douglas Brodie, Enterprise Liability and the Common Law 158-164 (2010). On the other hand, it might be argued that an undertaking 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).

96. Draft GSC Convention, *supra* note 63, at art. 12.1.

97. *See id.*

98. *See id.* at art. 12.4, 12.5.

99. *See id.* at Exp. Mem. ¶ 70.

100. *See* ILO Convention 81 Concerning Labor Inspection in Industry and Commerce, Apr. 7, 1950, 54 U.N.T.S. 3 [hereinafter Convention 81]; *see also* ILO Convention 129 Concerning Labor Inspection in Agriculture, Jan. 19, 1972, 812 U.N.T.S. 87 (as applicable). Conformity could be through ratified implementation or effective adherence even without ratification.

101. *See* Draft GSC Convention, *supra* note 63, at art. 22.5

102. *See* Convention 81, *supra* note 100, at art. 5(b).

assigned to labor inspectorates under the ILO convention.[103] Moreover, labor inspectorates in many countries pursue forms of strategic compliance, engaging directly with workers' groups and using proactive and data-based strategies to target and prioritize inspections.[104] Relying on an existing cadre of trained professionals, who presumptively enjoy civil service protection and possess a real-world orientation toward pursuing compliance with national labor statutes, seems conducive to the supervision and implementation of due diligence compliance.

On the other hand, assigning this role exclusively or primarily to the labor inspectorate entails certain risks. The Draft GSC Convention is explicit that a competent authority must possess expertise beyond the ability to inspect and prevent labor rights harms.[105] One example is expertise on the complex business relationships that often obscure responsibilities within GSCs.[106] Another is possessing the requisite knowledge and initiative to encourage and facilitate adoption of sectoral or cross-sectoral due diligence plans.[107] There is also the prospect that labor inspectorates, already burdened by existing duties and often operating with scarce resources,[108] will be unable to fulfill the full complement of due diligence oversight responsibilities. Given these comparative advantages and risks, one option under the Convention is for a competent authority to be comprised of more than one state agency, providing for appropriate coordination between them.[109]

B. Remedy

The Draft Convention includes extensive provisions on the duty to remedy. In broad terms, member states must adopt policies to assure that undertakings domiciled in or operating within their borders act to remedy labor rights harms they have caused or to which they have contributed.[110] Workers are to have a voice in the development of these policies and also in the determination of remedies for specific situations.[111] The policies should encourage prompt remediation, ascribing responsibility proportionate to the undertaking's contribution to the harms with an aim of restoring the *status*

103. *Compare* Draft GSC Convention, *supra* note 63, at art. 22.8, Exp. Mem. ¶ 107 (detailing minimum enforcement powers of Competent Authorities) *with* Convention 81, 812 U.N.T.S. 87 *supra* note 100, at arts. 12, 13, 17, 18.

104. *See*, *e.g.*, ILO, Building a Culture of Workplace Compliance Through Development Cooperation: Compendium of Good Practices 53-56 (Colombia), 57-60 (Philippines) (2021); ILO, Strategic Compliance Planning in Action: Stories of Change 14-15 (Madagascar), 18-20 (Senegal) (2023), *available at* https://www.ilo.org/publications/strategic-compliance-planning-action-stories-change [https://perma.cc/Q22J-RY9P].

105. *See* Draft GSC Convention, *supra* note 63, at art.12.6.

106. *See id.* at Exp. Mem. ¶ 71.

107. *See id.* at art.17.1, Exp. Mem. ¶ 86. A further component is member states' use of public procurement as a strategic tool to improve due diligence compliance. *See id.* at art. 20.1(b), Exp. Mem. ¶ 98.

108. See Brudney, *supra* note 28, at 284-85 (describing low number of inspectors, inadequate salaries, insufficient number of inspections, and shortage of computer and transportation equipment that afflict labor inspectorates in developing countries).

109. *See* Draft GSC Convention, *supra* note 63, at Exp. Mem. ¶. 70.

110. *See id.* at art. 9.1.

111. *See id.* at art. 9.1; art. 9.5.

quo ante for victims to the greatest extent possible.[112] If undertakings fail to remedy within a reasonable period of time, the Convention specifies a range of administrative, civil, and criminal remedies,[113] including the requirement that an undertaking terminate a supply chain relationship in certain circumstances.[114]

There are additional important features to the remedial provisions set forth in Articles 9, 22 and 23. To start, competent authorities are given broad remedial powers that they may exercise directly, including ordering injunctive relief, proportionate remediation, and imposition of penalties.[115] In addition, both competent authorities and claimants have access to courts to pursue appropriate relief. This includes standing to sue for workers' organizations bringing civil liability claims on behalf of victims.[116] Supply chain victims in Global South countries have a difficult time bringing litigation against Global North undertakings or their suppliers for labor rights harms. Authorizing unions and other "relevant organizations acting in the public interest" to carry this burden and cost is an important step.

Regarding civil liability, the GSC Convention authorizes strict liability for damages where an undertaking "*has caused labor rights harm through its own activities and business practices, or through those of its subsidiaries*."[117] Thus, if a major U.S. or EU footwear retailer owns or operates factories in Vietnam 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. Strict liability recognizes the considerable difficulties victims of these harms face in attributing "fault" in complex supply chain structures.[118] Traditional justifications for applying strict liability apply here. It is fair and proper to assume that undertakings operating or coordinating their own supply chain activities have knowledge of industry practices and available technologies, that they exercise control in setting prices for their own or their subsidiaries' goods or services, and that their direct relationship with consumers means they can pass on a portion of the costs associated with assuring decent working conditions. Without a serious prospect of liability for human rights outcomes in this setting, undertakings are unlikely to carry out robust preventive measures.[119]

If an MNE "*has contributed to labor rights harm through its own activities or business practices or through those of its subsidiaries,*"[120] a more extended analysis takes place to determine whether the MNE was complicit in the violation. In settings where an undertaking has contributed to labor rights harms through its own activities or those of its subsidiaries, the GSC Convention provides for presumptive strict liability, with a defense if the undertaking can

112. *See id.* at art. 9.2; art. 9.3; art. 9.4.
113. *See id.* at art. 9.6 (referring to remedies in arts. 21–23).
114. *See id.* at art. 9.8.
115. *See id.* at art. 22.8(a); (b); art. 22.10(a).
116. *See id.* at art. 22.10(c) (competent authority access to judicial relief), art. 23, and especially art. 23.8 (states must recognize standing for workers' organizations to bring claims on behalf of a victim or group of victims).
117. *Id.* at art. 23.1 (emphasis added).
118. *See id.* at Exp. Memo ¶ 116.
119. *See id.*
120. *Id.* at art. 23.2 (emphasis added).

prove by clear and convincing evidence that neither it nor its subsidiaries contributed in any way to the labor rights harms at issue.[121] This provision draws on the approach taken in the Uyghur Forced Labor Prevention Act, recently enacted and implemented in the U.S.[122]

A separate and important element is that satisfying the procedural due diligence requirements of the Convention is not a defense or safe harbor when causing or contributing to labor rights harms.[123] Responsibility for violations of the due diligence *process* requirements and for the *outcome* of inflicting labor rights harms constitute separate and equally necessary obligations under the GSC Convention. A business may develop and responsibly implement its due diligence approach across its supply chain but then discover six months later that widespread child labor and sex-based wage discrimination are present in plants owned or controlled by its subsidiary. The business has been fulfilling its procedural obligations; at the same time, it has been contributing to adverse human rights impacts. This approach follows from the principles set forth in UNGP 17 and its commentary.[124]

Finally, on remedy the Convention requires states to "identify and address legal and practical obstacles to victims in accessing judicial remedy for labor rights harms in global supply chains."[125] Workers, unions, and human rights advocacy groups have long faced obstacles to the effective pursuit of remedies for labor rights violations in GSCs.[126] States must take particular steps to reduce if not eliminate barriers to workers' litigation that are both legal (e.g. overcoming limits on jurisdiction, providing for collective redress mechanisms, and ensuring adequate limitation periods for civil claims) and practical (reducing court fees and related litigation costs).[127]

C. The ILO and the Draft Convention

In the ILO's efforts to overcome challenges posed by GSCs, there are continuing disagreements among the tripartite constituencies as to the best way forward.[128] At the same time, scholars as well as activists are increasingly

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121. *See id.* at art. 23.2, Exp. Memo ¶ 117.

122. Pub. L. No. 117–78, § 3(b) (1921); *see* Draft GSC Convention, *supra* note 63, at Exp. Memo ¶ 117.

123. *See id. at* art. 23.3, Exp. Memo ¶ 118.

124. *See id.* at Exp. Memo ¶ 118, quoting from commentary on Principle 17 ("Business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for . . .contributing to human rights abuses.").

125. *Id.* at Art. 24.

126. *See, e.g.*, Nicolas Bueno & Claire Bright, *Implementing Human Rights Due Diligence Through Corporate Civil Liability*, 69 Int'l & Comp. L.Q. 789, 816–18 (2020) (highlighting challenges when implementing HRDD requirements in legal liability regimes); Kari Otteburn, *Reaching the Limit: Access to Remedy through Nonjudicial Mechanisms for Victims of Business-related Human Rights Abuses*, 28 Int'l J. Hum. Rts. 220 (2023) (arguing that non-judicial mechanisms are ill-suited to provide remedies proportional to serious transnational human rights abuses). *See also* Exp. Memo ¶ 122 and sources cited therein.

127. *See* Draft GSC Convention, *supra* note 63, at art. 24(a), (b), (c), (d), (e), Exp. Memo ¶¶ 122–124.

128. *See generally* Huw Thomas & Mark Anner, *Dissensus and Deadlock in the Evolution of Labour Governance: Global Supply Chains and the International Labour Organization (ILO)*,

calling for stronger and more focused ILO action in cross-border and transnational terms.[129] There is reason to believe an ILO solution is feasible, especially given a current political environment that has led to several national statutes and an EU directive, along with an ongoing initiative from a UN-established Intergovernmental Working Group.[130]

The transnational scope of the 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 conventions specifically reference cross-border cooperation, either between governments or involving private entities. Some conventions merely contemplate such cooperation while others use mandatory language.[131]

One recent example is the 2011 Domestic Workers Convention, requiring government cooperation to ensure that the convention's extensive provisions—which include attentiveness to core ILO convention protections as well as detailed protections on information-sharing, written job offers and other conditions—are applied beneficially to migrant domestic workers.[132] Further, the Maritime Labor Convention, 2006 ("MLC"), is perhaps the highest-profile example of a convention that functions effectively across national borders.[133] The MLC establishes extensive minimum working and living standards for all seafarers on ships flying the flags of ratifying countries.[134]

With these and other examples in mind, the Draft GSC Convention calls for the ILO to "promote and facilitate effective cross-border social dialogue" aimed at preventing labor rights harms in GSCs.[135] These efforts should include facilitating global collective bargaining framework agreements that may focus on certain sectors, products, or services, as well as monitoring cross-border collective bargaining agreements and reporting on innovative and effective practices.[136]

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184 J. Bus. Ethics 33 (2023) (contending that ILO gridlock on this issue is due primarily to shifting power asymmetries between the tripartite constituents of governments, employers, and workers).

129. See, e.g. Desirée LeClercq, *Gender-Based Violence and Harassment at Sea*, 57 Cornell Int'l L.J. 1 (2024); Brudney, *supra* note 28; 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 (2017).

130. *See* Brudney, *supra* note 28, at 337 n. 300 (citing to Nov. 2021 commentary on UN Human Rights Council draft instruments).

131. Two relatively recent instances that use mandatory terms are the ILO, Protocol of 2014 to the Forced Labor Convention, 1930, art. 5 (2014) (requiring cooperation between member states to ensure the prevention and elimination of forced labor); and the ILO Indigenous and Tribal Peoples Convention (No. 169), art. 32, Sept. 5, 1991, 1650 U.N.T.S. 383 (requiring in more detail that governments take appropriate measures "to facilitate contacts and cooperation between indigenous and tribal peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields)."

132. *See* ILO Domestic Workers Convention, 2011 (No. 189), Arts. 3, 7, 8, 10, 15, 16, 17, Sept. 5, 2013, 2955 U.N.T.S. 409. There have been 38 ratifications of the Domestic Workers Convention.

133. Maritime Labour Convention, 2006, Feb. 23, 2006, 2952 U.N.T.S. 3 (as amended, 2022) (entered into force, Dec. 23, 2024). There have been 108 ratifications of the MLC.

134. *See Id.* at Arts. IV, V, VI; Regs 1.1-5.3.

135. Draft GSC Convention, *supra* note 63, at art. 28.

136. *Id.*at art. 28 (a), (h).

Apart from the ILO's experience in creating or encouraging transnational obligations, a distinct aspect of supply chain regulation concerns lower tiers of the chain, where large numbers of workers participate as part of the informal economy. Assuring decent labor standards in the informal economy is a daunting challenge for national governments and the ILO alike. That said, a number of recent ILO instruments exhibit a commitment and capacity to address this objective in the informal economy, including as part of global supply chains. A leading example is the 1996 Home Work Convention, promoting in specific terms equality of treatment between homeworkers and other wage earners.[137]

In this connection, the Draft Convention requires the ILO to issue guidelines (in consultation with member states and, where appropriate, international agencies) focused *inter alia* on specific economic sectors.[138] The ILO has unparalleled expertise and experience providing technical advice in labor matters to countries of varying sizes and incomes. Sharing that expertise in the form of guidance and accompanying support is essential to facilitate compliance with the Convention, including with special regard to the informal economy.[139]

Further, the Draft Convention calls for comprehensive annual reports by the competent authorities of member states[140] and requires the ILO to analyze these reports to create a public database. This database can, among other things, act as an accountability mechanism for the independence and diligence of the competent authorities in promotion, protection and enforcement activities.[141] Such a database is expected to cover all aspects of competent authority activity—including the special challenges of promoting and protecting labor rights in the informal economy. The Convention anticipates that such ILO reports can identify effective regulatory strategies in this and other areas.[142]

To be clear, the domestic law of many countries where MNEs are located (US, EU, UK) may not currently conform to the convention framework being proposed. To take one example, the proposed treatment of strict or quasi-strict liability in article 23 may require domestic law adjustments in terms of jurisdiction and 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.

Further, the influence of ILO conventions is broader than their simple number of ratifications. Governments at times have acted to bring their national laws closer to proposed norms during a convention's preparatory process. Such adjustments may reflect initiatives among ruling elites, responding to the extended exchange and dialogue between the ILO and member states

137. *See* ILO Convention Concerning Home Work (no. 177) art. 4, June 20, 1996, 2108 U.N.T.S. 161.
138. *See* Draft GSC Convention, *supra* note 63, at art. 33.
139. *See id. at* Exp. Memo ¶ 138.
140. *Id.* at art. 13.
141. *Id.* at Art. 31, Exp Mem. ¶ 136.
142. *Id.*

prior to a convention's promulgation.[143] In addition, governments may act to strengthen domestic standards following a convention's promulgation even though they are unwilling to ratify. Their reasons for acting may be affirmative, such as an interest in joining trade agreements that require respect for certain ILO conventions, or pursuit of enhanced legitimacy in a community of neighboring nations; they may also be negative, such as avoiding the administrative costs that stem from having to engage with ILO supervision.[144] Based on any or all of these factors, a new GSC convention can establish a basis for a more consistent and persuasive approach to GSC regulation at national statutory levels even if not initially widely ratified.

Conclusion

The protection and elevation of workers' voice, especially when faced with challenges and barriers to exit, is a key objective of the Draft GSC Convention. Although Hirschman's model recognized the importance of voice when exit is severely limited, he may not have adequately accounted for the role of power in relations between firms and workers. This Article has explained how workers' voice is severely restricted under current laws and practices in the Global South and why voice must be a crucial component of any effective transnational arrangement. The Draft Convention, by institutionalizing the role of workers' voice and providing it with various procedural and substantive safeguards, establishes a mechanism "for the prevention, elimination, and remediation of labor rights harms in global supply chains."[145] The success of this policy mechanism will be a function of practices at national and sub-national levels, as Hirschman would have expected. At the same time, the presence of a mechanism that sets international standards may encourage workers to actualize their labor rights in ways that transcend Hirschman's understanding of the role of voice shaped by market forces

143. *See* Faradj Koliev, *Promoting International Labour Standards: The ILO and National Labour Regulations*, 24 Brit. J. Pol. & Int'l Rel. 361, 362–63 (2022) (focusing on period from 1970–2013 and finding that ILO has had influence on domestic labor regulations during the preparatory process of ILO conventions).

144. On trade advantages and legitimacy pursuits, *see* Brudney, *supra* note 28, at 323, nn. 238–39. *See also* Keonhi Son, *Do International Treaties Have an Impact Only on Ratifying States? The Influence of the ILO Maternity Conventions in 160 Countries Between 1883 and 2018,* 162 Int'l Lab. Rev. 245, 260–61 (2023) (empirical analysis demonstrating that non-ratifying States tend to bring their domestic standards up to the level of international maternity convention standards five years after they are exposed to these standards).

145. Draft GSC Convention, *supra* note 63, at art. 3.2.