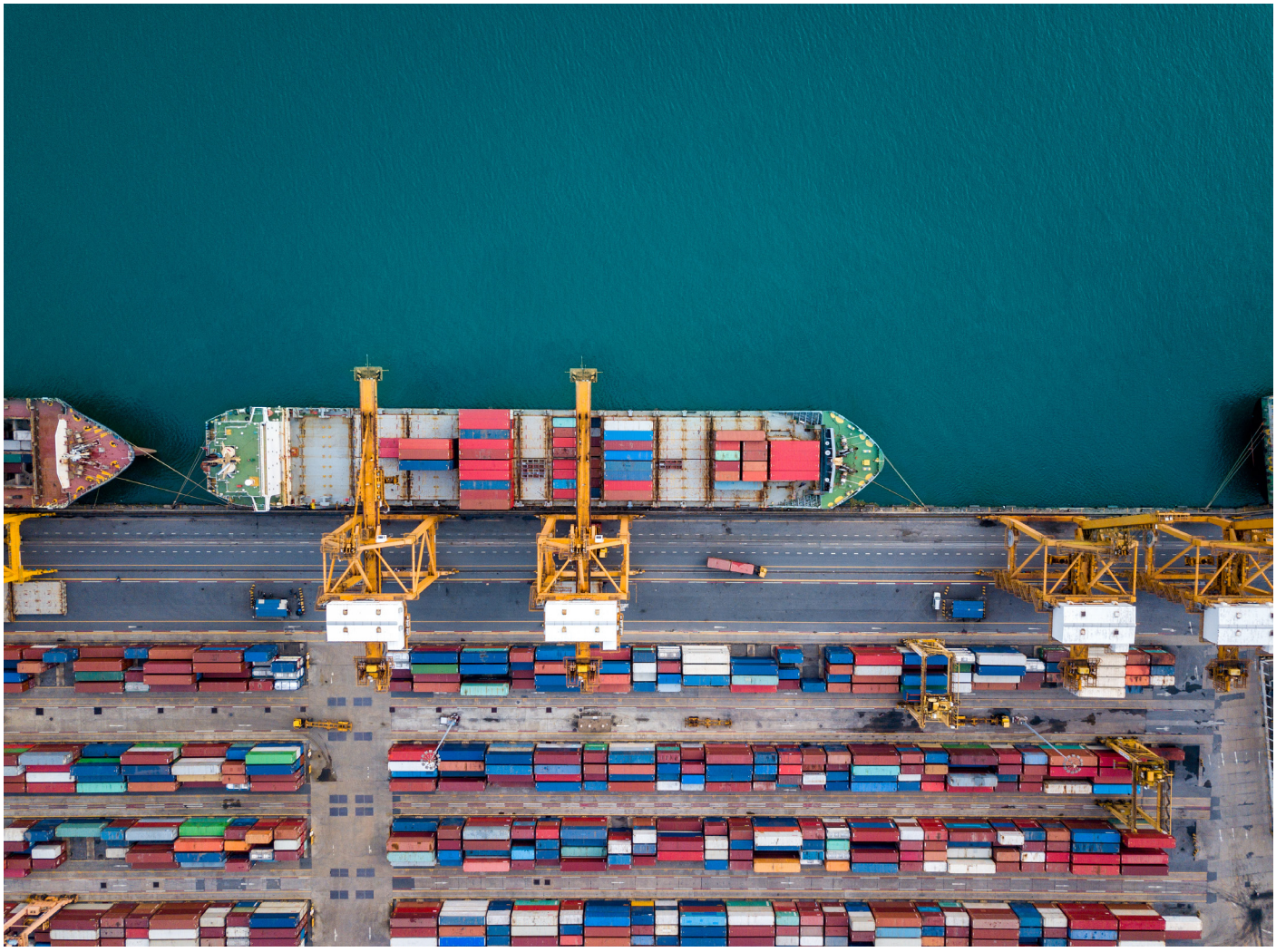
INTERNATIONAL LAWYERS ASSISTING WORKERS NETWORK

DRAFT TEXT FOR AN ILO CONVENTION ON DECENT WORK IN GLOBAL SUPPLY CHAINS



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1130 CONNECTICUT AVE, NW 8TH FLOOR WASHINGTON DC, 20036

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Research and drafting: Dr. Ingrid Landau, Senior Lecturer, Department of Business Law and Taxation, Monash Business School, Monash University and Professor Shelley Marshall, RMIT Vice Chancellor's Principal Research Fellow, RMIT Business and Human Rights Centre, Royal Melbourne Institute of Technology

ABOUT THE ILAW NETWORK

The International Lawyers Assisting Workers Network (ILAW Network) is a membership organization for union and worker rights' lawyers. The core mission of the ILAW Network is to bring together legal practitioners and scholars in an exchange of ideas and information in order to best represent the rights and interests of workers and their organizations wherever they may be.

DISCLAIMER

PREAMBLE

The General Conference of the International Labour Organization,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its xxx Session on xxx, and

Desiring to create a single, coherent instrument embodying as far as possible all up-to-date standards of existing Conventions and Recommendations covering work in global supply chains, as well as the fundamental principles to be found in other international labour Conventions, in particular:

- the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87);
- the Right to Organise and Collective Bargaining Convention, 1949 (No. 98);
- the Forced Labour Convention, 1930 (No. 29);
- the Equal Remuneration Convention, 1951 (No. 100);
- the Abolition of Forced Labour Convention, 1957 (No. 105);
- the Discrimination (Employment and Occupation) Convention, 1958 (No. 111);
- the Minimum Age Convention, 1973 (No. 138);
- the Worst Forms of Child Labour Convention, 1999 (No. 182);
- the Occupational Safety and Health Convention, 1981 (No. 155);
- the Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187);
- the Protocol of 2014 to the Forced Labour Convention, 1930 (P029);
- the Migration for Employment Convention (Revised), 1949 (No. 97);
- the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)
- the Private Employment Agencies Convention, 1997 (No. 181);
- the Maritime Labour Convention, 2006;
- the Violence and Harassment Convention, 2019 (No. 190); and
- Mindful of the core mandate of the Organization, which is to promote decent conditions of work, and

Recalling the ILO Declaration on Fundamental Principles and Rights at Work, 1998, and

Recalling other relevant international instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and

Recalling the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, and

Having regard to other international standards, in particular the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct.

I. DEFINITIONS

Article 1

1. For the purposes of this Convention:

   (a) "business practices" means strategic planning, sourcing, development, purchasing, and the underlying behaviours, values and principles which impact workers. For the avoidance of doubt, this includes delivery times, pricing, duration, and severance of contracts.

   (b) "business relationship" includes relationships with business partners, sub-contractors, franchisees, investee companies, clients, and joint venture partners, entities in the supply chain which supply products or services that contribute to the undertaking's own activities, products

or services or which receive, license, buy or use products or services from the undertaking, and any other non-State or State entities directly linked to its activities, products or services.

(c) "cause" refers to situations in which there is causality between the operations, products or services of an undertaking and the labour rights harm.

(d) "Competent Authority" means the minister, government department or other authority having power to issue and enforce regulations, orders or other instructions having the force of law in respect of the subject matter of the provision concerned.

(e) "contribute to" refers to situations in which the actions or omissions of an undertaking cause, facilitate or incentivise another undertaking to cause labour rights harm. Contribution must be substantial, and the degree or scale to which the enterprise causes, facilitates, or incentivises another undertaking to cause labour rights harm is relevant to determining the degree of contribution.

(f) "directly linked to" refers to situations in which an undertaking has not caused or contributed to a labour rights harm but is connected to the harm through its relationship with another undertaking (i.e. business relationship).

(g) "export processing zones" means industrial zones with special incentives set up to attract foreign investors in which imported materials undergo some degree of processing before being exported again.

(h) "global supply chains" means supply chains that cross national borders.

(i) "labour rights harm" refers to any action which removes or reduces the ability of an individual or group to enjoy the rights or to be protected by the prohibitions enshrined in the following ILO instruments:

- the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87);
- the Right to Organise and Collective Bargaining Convention, 1949 (No. 98);
- the Forced Labour Convention, 1930 (No. 29);
- the Equal Remuneration Convention, 1951 (No. 100);
- the Abolition of Forced Labour Convention, 1957 (No. 105);
- the Discrimination (Employment and Occupation) Convention, 1958 (No. 111);
- the Minimum Age Convention, 1973 (No. 138);
- the Worst Forms of Child Labour Convention, 1999 (No. 182);
- the Occupational Safety and Health Convention, 1981 (No. 155);
- the Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187);
- the Protocol of 2014 to the Forced Labour Convention, 1930 (P029);
- the Hours of Work (Industry) Convention, 1919 (No. 1);
- the Hours of Work (Commerce and Offices) Convention, 1930 (No. 30);
- the Weekly Rest (Commerce and Offices) Convention, 1957 (No. 106);
- the Weekly Rest (Industry) Convention, 1921 (No. 14);
- the Protection of Wages Convention, 1949 (No. 95) and Recommendation, 1949 (No. 85);
- the Minimum Wage Fixing Convention, 1970 (No. 131) and Recommendation, 1970 (No. 135);
- the Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173);
- the Violence and Harassment Convention, 2019 (No. 190).

(j) "supplier" includes any undertaking that, either directly or indirectly, provides finance, products or services to another undertaking.

(k) "supply chain" refers to:

(i) the activities of an undertaking's upstream business relationships related to the production of products or services by the undertaking; and

(ii) activities of an undertaking's downstream business relationships related to the finance, distribution, transport, storage and disposal of a product or service, including the dismantling, recycling, composting or landfilling, but expressly excluding the disposal of the product by consumers.

(l) "third party" includes any independent entity, or industry or multi-stakeholder initiative, engaged by an undertaking to support, monitor, evaluate, certify and/or verify aspects of an undertaking's due diligence, or the due diligence conducted by their subsidiaries and/or business relationships.

(m) "undertaking" means a body corporate or partnership, a sole proprietorship, or an unincorporated association carrying on a trade or business, with or without a view to profit.

(n) "worker organization" refers to all types of organizations of workers, whatever the status of such associations or organizations, that have as their objective the promotion and defence of workers' interests.

II. SCOPE

Article 2

1. This Convention protects workers and other persons in the world of work, including employees as defined by national law and practice, as well as persons working irrespective of their contractual status or place of work, or immigration status, persons in training, including interns and apprentices, workers whose employment has been terminated, volunteers, jobseekers and job applicants.
2. This Convention applies to all sectors, whether private or public, both in the formal and informal economy, and whether in urban or rural areas.

III. CORE PRINCIPLES

Article 3

1. Each Member that ratifies this Convention shall take measures to realise decent work in global supply chains.
2. Each Member shall adopt, in consultation with representative employers' and workers' organizations, an inclusive, integrated and gender-responsive approach for the prevention, elimination, and remediation of labour rights harms in global supply chains. Such an approach should include:

   a) requiring due diligence by both the public and private sectors to prevent and respond to labour rights harms;

   b) strengthening labour administration and labour inspection systems, and other Competent Authorities responsible for decent work in global supply chains, in order to ensure full compliance with laws and regulations and access to complaints mechanisms and remedy;

   c) ensuring access to adequate, prompt and effective remedy and support for victims, through administrative, civil and criminal procedures, as appropriate;

   d) providing for sufficient and dissuasive sanctions;

   e) guaranteeing a safe and enabling environment for persons, groups and organizations that promote and defend labour rights, including for witnesses and their families, so that they are able to exercise their rights free from any threat, intimidation, violence or insecurity;

   f) developing tools, guidance, education and training, and raising awareness, in accessible formats;

   g) promoting collaborative governance solutions that address the cross border, multi-tiered nature of supply chains;

   h) cooperating with other Members to provide remedy to workers whose rights have been harmed and to promote decent work in global supply chains; and

i) cooperating with the ILO through the Network of Competent Authorities, and by acting on and developing guidance provided by the ILO.

3. Workers and workers' organizations are central to the legitimacy and effectiveness of programs designed to improve decent work, and should be engaged in the creation, monitoring, enforcement and evaluation of such programs, and in the remediation of harms.

4. Undertakings, employers and employers' organizations are responsible for the implementation of preventative and remedial programs and for good faith engagement with workers and workers' organizations.

Article 4

With a view to promoting decent work in global supply chains, each Member shall respect, promote and realize the fundamental principles and rights at work, namely freedom of association and the effective recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour, the elimination of discrimination in respect of employment and occupation, and a safe and healthy working environment.

IV. PROTECTION AND PREVENTION

Article 5. Duty to prevent

1. Each Member shall adopt, in accordance with guidance provided by the ILO and in consultation with representative employers' and workers' organizations, legal and policy measures that ensure that undertakings domiciled or operating in or from their territories, or territories under their jurisdiction, exercise due diligence with respect to potential or actual labour rights harms arising from their own activities or those of their subsidiaries, their supply chains and other business relationships.

2. Due diligence for the purposes of paragraph 1 shall cover all labour rights harms enumerated in Article 1(i) and be proportionate to the size of the undertaking, the nature and context of its activities, as well as to the nature of its involvement with an adverse impact and the severity and likelihood of the actual or potential harm. It shall comprise:

   a) integrating labour rights due diligence into policies and management systems;

   b) identifying and assessing actual and potential labour rights harms arising from their own activities or those of their subsidiaries, their supply chains and other business relationships;

   c) ceasing, preventing and mitigating identified actual or potential labour rights harms which the undertaking causes or contributes to through its own activities, and taking reasonable, appropriate, and effective measures to prevent or mitigate labour rights harms to which it is directly linked through its supply chains or other business relationships;

   d) tracking the implementation and effectiveness of due diligence activities;

   e) establishing a grievance procedure in accordance with Article 8;

   f) engaging regularly and in an accessible manner with workers and workers' organizations, and other stakeholders at all relevant levels, regarding each of the due diligence requirements set forth in this Article; and

   g) Communicating regularly on measures undertaken pursuant to (a) to (f) above.

3. Due diligence measures for the purposes of paragraph 1 includes:

   a) addressing business practices to ensure that engagement with suppliers and contractors does not contribute to labour rights harms, and incentivizes and enables suppliers and contractors to respect labour rights;

   b) making necessary investments, including into management, contracting or production processes and infrastructures, and relationships including incentives to suppliers and contractors to respect labour rights; and

   c) in compliance with law, collaborating with other undertakings, including, where relevant, to increase the

undertaking's ability to bring the adverse impact to an end, in particular where no other action is suitable or effective.

4. Members shall ensure that, where undertakings rely on third parties to undertake any of the measures enumerated in this Article, the duty to prevent is non-delegable and remains with the undertaking who relied on the third party.

5. Members shall ensure that, for the purposes of conducting due diligence, undertakings are entitled to cooperate and share resources and information within their respective groups of undertakings and with other legal entities in compliance with applicable national law.

Article 6. Consultation

1. Members shall ensure that undertakings carry out in good faith effective consultations with workers and workers' organizations when engaging in each of the steps of due diligence in Article 5. Members shall guarantee, in particular, rights to consultation for workers' organizations at each of the relevant levels, including the local, sectoral, national, regional and global level. Undertakings shall conduct discussions and involve workers and workers' organizations in a manner that is appropriate to their size and to the nature and context of their activities.

2. Members shall require undertakings to ensure that no worker or workers' organisation is put at risk due to participating in the discussions referred to in paragraph 1 of this Article.

3. Consultation with workers and workers' organizations in compliance with this Article is without prejudice to rights or requirements in other applicable laws or collective agreements.

4. Members shall adopt and enforce regulations concerning the obligation on undertakings to consult in paragraph 1 of this Article, including the form, way, and time frames in which such consultation shall take place.

5. Members shall ensure that Competent Authorities are empowered to receive complaints and make orders regarding failure by an undertaking to comply with obligations pursuant to paragraphs 1 and 2 of this Article.

Article 7. Right to request communication and information

1. Members shall ensure that workers and workers' organizations have the right to request information from an undertaking regarding the undertaking's supply chains and other business relationships and how the undertaking addresses potential and actual labour rights harms pursuant to Article 5, beyond that communicated in accordance with Article 5(2)(g).

2. Members shall adopt and enforce regulations concerning exercise of this right to request information, including the form in which such requests and responses may be given, timeframes for responding to any request and the grounds upon which such a request may be denied.

3. Members shall ensure that Competent Authorities are empowered to receive complaints regarding the quality of communication under Article 5(2)(g) or denials of requests for information from an undertaking in accordance with this Article, to review denials and to make orders for the disclosure of information.

Article 8. Grievance procedures

1. Members shall ensure that undertakings establish internal procedures through which workers and workers' representatives that consider that they have grounds for concerns regarding potential or actual adverse labour rights impacts of the undertakings' own activities, the activities of their subsidiaries, their supply chains and business relationships may submit concerns and have these addressed.

2. Members shall ensure that grievances may be submitted by:

    a) any worker who, acting individually or jointly with other workers, is affected or believes that they might be affected by a potential or actual labour rights harm; and/or

    b) workers' organizations in the supply chains concerned.

3. Grievance procedures should be required to conform to internationally recognised standards and ILO guidance.

This includes ensuring they are:

a) timely, legitimate, accessible, predictable, equitable, transparent, rights-compatible, and based on engagement and dialogue;

b) effectively resourced financially and with appropriate expertise; and

c) accompanied by measures to protect from retaliatory behaviour workers and workers' representatives who seek to use grievance mechanisms.

4. Members shall ensure that undertakings are obliged to consult with relevant workers and workers' organizations in relation to the establishment, operation and ongoing evaluation of internal grievance procedures.

5. None of the provisions in this Article should result in limiting the right of a worker or workers' organization to apply to the competent non-judicial or judicial authority in respect of a grievance, where such right is recognised under national laws or regulations.

6. Grievance procedures established in conformity with this Article may be regulated by means of collective agreements.

7. Undertakings may participate in an appropriate external grievance procedure rather than establishing their own, providing the external grievance procedure meets the criteria specified in paragraph 3 of this Article.

Article 9. Duty to remedy

1. Each Member shall adopt, in accordance with ILO guidelines and in consultation with representative employers' and workers' organizations, legal and policy measures that ensure that undertakings domiciled or operating in or from their territories, or territories under their jurisdiction, take appropriate steps to remedy within a reasonable period of time any labour rights harms which they have caused or to which they have contributed in their own activities, the activities of their subsidiaries, their supply chains and other business relationships.

2. Where an undertaking has contributed to a labour rights harm in its supply chains or business relationships, the undertaking's contribution to remedy should be proportionate to the contribution of its conduct to the labour rights harm.

3. The object of remedial measures shall be to restore the affected person or persons to a situation equivalent or as close as possible to their situation prior to the harm.

4. Members shall encourage undertakings to remediate harms early and directly.

5. Members shall ensure that undertakings consult with affected workers and their representatives in determining remedy.

6. Where an undertaking fails to remedy within a reasonable period of time, Members shall provide for, as appropriate, administrative, civil and/or criminal remedies in accordance with Articles 21 to 23.

7. Where an undertaking has not caused or contributed the labour rights harm but is directly linked, the Member shall encourage the undertaking to voluntarily participate in remedial measures and to use leverage with the responsible parties to enable remediation of any harm.

8. Where the undertaking's business relationships result in labour rights harms and the remedial measures have failed to correct the situation, the undertaking shall terminate the business relationship.

Article 10. Cross-border social dialogue

Each Member undertakes to provide an enabling environment for social dialogue, including cross-border social dialogue, to foster decent work in global supply chains. This includes by way of:

a) ensuring respect in law and practice for the rights of all workers to organise throughout all tiers of supply chains, including in export processing zones;

b) ensuring respect in law and practice for the autonomy of workers' and employers' organizations at all levels of the supply chain, including rights to organise freely and to establish and join federations and confederations, which may in turn affiliate with international organizations of workers and employers;

c) fostering collaborative approaches to promoting decent work in global supply chains, whether focused on a country, economic sector, enterprise, region or group of countries, that involve the social partners, workers' organizations and other stakeholders in the negotiation of standards, governance and implementation, monitoring and enforcement, and dispute resolution;

d) ensuring no restrictions are placed on the entry of employers' and workers' representatives from other countries at the invitation of local or national organizations for consultation on matters of mutual concern; and

e) adopting measures to promote inclusion within social dialogue of vulnerable groups of workers in global supply chains.

Article 11. Rights to organise and collective bargaining in global supply chains

1. Each Member undertakes to facilitate the development of collective bargaining in global supply chains, across tiers and including on a cross-border basis, through the following measures:

   a) fostering a favourable legal and institutional environment for effective recognition of the rights of all workers without distinction to organise and bargain collectively;

   b) recognising the rights of workers' and employers' organizations to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities, and to formulate their programmes;

   c) reviewing and removing obstacles to cross-border organising and collective bargaining;

   d) promoting and supporting legally binding and enforceable cross-border collective agreements between organizations of workers and employers;

   e) encouraging and, where appropriate requiring, undertakings to communicate publicly in accordance with Article 5(2)(g) and, in keeping with Article 7, provide information in a timely manner to workers' representatives within the supply chains to enable meaningful negotiations;

   f) promoting the central role of collective bargaining in labour rights due diligence; and

   g) promoting, and facilitating access by social partners on a voluntary basis to, dispute settlement procedures offered by the ILO under Article 28.

Article 12. Designation and support of Competent Authority

1. Each Member shall designate one or more Competent Authorities to supervise compliance with the obligations laid down in this Convention. Members shall develop and support Competent Authorities with powers to effectively oversee, implement, investigate and encourage compliance by undertakings with the obligations laid down in national provisions adopted pursuant to this Convention.
2. The respective competences of the Competent Authority or Authorities shall be clearly defined, and Competent Authorities shall cooperate closely with each other in the manner established in Part VI of this Convention.
3. Each Member shall inform the ILO of the names and contact details of their Competent Authority or Authorities and respective competence, and any changes thereto.
4. Members shall guarantee the independence of its Competent Authority or Authorities and shall ensure that the Competent Authority or Authorities, and all persons acting on their behalf, exercise their powers impartially and transparently. Members shall ensure that its Competent Authority is legally and functionally independent from undertakings falling within the scope of national laws created in accordance with this Convention, and that the persons responsible for its management are free of conflicts of interest, subject to confidentiality requirements, and that they refrain from any action incompatible with their duties.
5. Each Member shall ensure appropriate financing of its Competent Authority or Authorities.
6. Each Member shall ensure that its Competent Authority has appropriate expertise, or is able to access such expertise, including and beyond that required by Labour Inspection Convention, 1947 (No. 81), and where relevant, Labour Inspection (Agriculture) Convention, 1969 (No. 129), to effectively perform its functions under this Convention.

7. Questions or disputes concerning attribution of competence shall be determined with reference to Article 27(6), with cooperation and mutual assistance preferred where more than one Competent Authority is attributed with authority.

Article 13. Transparency of Competent Authority

Each Member shall ensure that its Competent Authority is transparent by making information available publicly for at least three years and by lodging annual reports with the relevant national government and the ILO in accordance with national provisions adopted pursuant to this Convention, and guidance from the ILO. The publicly available information and reports should include:

(a) investigating, monitoring and enforcement resources and activities;

(b) instances where labour harms were identified and the remedies that were provided; and

(c) any significant decisions and determinations, and reasons for not investigating, monitoring, enforcing or making a determination when matters are brought to the attention of the Competent Authority.

Article 14. Preventative functions of Competent Authority

Members shall support effective implementation of national provisions adopted pursuant to this Convention, and effective prevention of labour rights harms in global supply chains, through the provision of reliable information, tools and incentives, including, where feasible, aligning economic benefits and incentives for undertakings. Such preventative actions shall be determined with ILO guidance and in consultation with workers' and employers' organizations, and include the functions set out in Articles 15, 16, 17 and 18 of this Convention.

Article 15. Guidelines

The Competent Authority may, following consultation with representative employers' and workers' organizations, issue guidelines as required, and on the basis of those developed by the ILO, to address specific country, sector and specific adverse impacts relevant for undertakings to fulfil their due diligence obligations.

Article 16. Model contractual clauses

The Competent Authority may, in consultation with representative employers' and workers' organizations as appropriate to national conditions, share guidance on voluntary model contractual clauses, as proposed by the ILO, and modify them as necessary.

Article 17. Sectoral due diligence action plans

1. In accordance with ILO guidance and in consultation with workers' and employers' organizations, as well as with other stakeholders, the Competent Authority may facilitate and encourage the adoption of voluntary sectoral or cross-sectoral due diligence action plans aimed at coordinating the due diligence strategies of undertakings.
2. Undertakings participating in sectoral or cross-sectoral due diligence action plans shall not be exempt from the obligations provided for in the national provisions adopted pursuant to this Convention.
3. Members shall ensure that employers' and workers' organizations have the right to participate in the development of sectoral due diligence action plans without prejudice to the obligation for each undertaking to comply with due diligence obligations under Article 5.
4. Sectoral due diligence actions plans may provide for a single joint grievance mechanism for undertaking within their scope. Any such grievance mechanism shall meet the requirements of paragraph 3 in Article 8 of this Convention.

Article 18. National policy and plan of action

1. Each Member shall, in consultation with employers' and workers' organizations, develop a national policy and plan of action to support and enable compliance with this Convention which shall involve systematic action by

the Competent Authorities and, as appropriate, coordination with employers' and workers' organizations, as well as with other relevant stakeholders.

2. Members shall promote coherence across domestic government agencies and bodies to facilitate alignment and synergies between policies and practices in accordance with this Convention.

Article 19. Removing barriers to compliance

Members shall identify and address unnecessary barriers that may impede realisation of the objectives of this Convention with a view to promoting coherence, including making best efforts to resolve any actual or perceived inconsistencies in laws and policies, and providing additional guidance where a legitimate conflict exists.

Article 20. Members as economic and commercial actors

1. Members shall lead by example and take measures in their capacities as economic actors and in their commercial activities to promote respect for decent work in global supply chains, including by:

   a) incorporating labour rights due diligence in their purchasing policies and practices;

   b) using public procurement as a strategic tool to incentivise the adoption of labour rights due diligence; and

   c) establishing and publicly disclosing clear expectations for state-owned enterprises to undertake labour rights due diligence together with effective mechanisms for their implementation.

2. Members shall take measures to integrate labour rights due diligence into the provision and management of equity, debt, grants, loans, guarantees or insurance, including applications for officially supported export credits.

3. Members shall take measures to promote respect for labour rights in global supply chains through immigration policy, trade and investment policies, as well as bilateral and multilateral agreements.

V. ENFORCEMENT AND REMEDIES

Article 21. General

Members shall take appropriate measures to ensure, through judicial, administrative, legislative or other appropriate means, that employers and workers, and employers' and workers' organizations, have access to effective dispute resolution mechanisms and remedies.

Article 22. Enforcement functions of Competent Authority

1. Each Member shall ensure that its Competent Authority, as designated in accordance with Article 12, has adequate powers and resources to carry out monitoring, investigation and enforcement consistent with this Convention, including the power to request information, carry out investigations, issue decisions and determinations, order remedial action, issue and enforce penalties and other orders related to compliance with the obligations set out in Articles 5, 6, 7, 8 and 9.

2. The Competent Authority shall monitor compliance with national laws implemented pursuant to this Convention.

3. The Competent Authority shall on its own initiative or based on a request from others and as a result of substantiated concerns, initiate investigations of possible labour rights harms described in national provisions adopted pursuant to this Convention.

4. Members shall pass national laws pursuant to this Convention requiring undertakings to provide the Competent Authority with the information and materials these authorities require to carry out their duties pursuant to this Convention. This includes but is not limited to:

a) information on the undertaking's supply chains and other business relationships and how the undertaking addresses actual and potential harms pursuant to Article 5, in line with the duty to communicate in Articles 5(2)(g) and 7.

b) books, registers or other documents relating to conditions of work, in order to see that they are in conformity with the legal provisions pursuant to this Convention, and to copy such documents or make extracts from them; and

c) samples of materials and substances used or handled, subject to the undertaking being notified of any samples or substances taken or removed for purposes of analysis.

5. Inspections shall be conducted in compliance with the Labour Inspection Convention, 1947 (No. 81) and with national laws concerning prior warning.

6. Where, as part of its investigation, a Competent Authority wishes to carry out an inspection on the territory of a Member other than its own, it shall seek assistance from the Competent Authority in that Member pursuant to Part VI of this Convention.

7. Where appropriate, if the Competent Authority finds that an undertaking is in breach of national laws passed pursuant to this Convention which give expression to Articles 5, 6, 7, 8 and 9, the Competent Authority may obtain written confirmation that the infringements of national provisions will cease and allow the undertaking a reasonable period of time to take remedial action. Under this Article,

a) the written confirmation by the undertaking shall describe the steps that will be taken, and within what timeframes such remedial action will occur;

b) what constitutes a reasonable period of time to take remedial action will depend on both the nature of the remedial action and the labour rights harms; and

c) where such remedial action at the discretion of the undertaking is deemed by the Competent Authority not to be possible, the matter is urgent, or the steps planned or conducted by the undertaking are inadequate to remedy the labour rights harm, the Competent Authority may issue a decision or determination regarding appropriate orders, penalties and interim measures in accordance with Article 22(8).

8. Competent Authorities shall have at least the following enforcement powers:

a) to order:

(i) the cessation of infringements of the national provisions adopted pursuant to this Convention;

(ii) the abstention from any repetition of the relevant conduct; and

(iii) where appropriate, remediation proportionate to the infringement and necessary to bring it to an end;

b) to impose penalties; and

c) to adopt interim measures in case of urgency due to risk of severe and irreparable harm.

d) Such enforcement powers may also be directed at abettors and accessories.

9. The taking of remedial action by undertakings, and the making of orders, penalties or interim measures by the Competent Authority, shall not preclude or be used as evidence to prevent, the imposition of penalties or the triggering of civil liability in case of damages in accordance with Articles 21, or criminal liability pursuant to national laws.

10. Competent Authorities may exercise the enforcement powers referred to in this Article:

a) directly;

b) in cooperation with other authorities; or

c) by application to the competent judicial authorities.

11. Members shall ensure that each natural or legal person has the right to an effective judicial remedy against a legally binding decision by a Competent Authority concerning them.

Article 23. Civil liability

1. Each Member shall take appropriate measures to ensure that undertakings domiciled or operating in or from their territories, or territories under their jurisdiction, shall be held strictly liable for damages where it is established that the undertaking has caused labour rights harm through its own activities and business practices, or through those of its subsidiaries.
2. Each Member shall take appropriate measures to ensure that undertakings domiciled or operating in or from their territories, or territories under their jurisdiction, shall be held liable for damages where it is established that the undertaking has contributed to labour rights harm through its own activities and business practices or through those of its subsidiaries; unless the undertaking proves by clear and convincing evidence that its activities and business practices did not contribute, wholly in part, to the harm.
3. Compliance with Article 5 may be taken into account but not interpreted as providing immunity from civil liability under paragraph 2 of this Article.
4. Civil liability arising from paragraphs 1 and 2 of this Article shall be without prejudice to the civil liability of any subsidiaries or any undertaking in the supply chain.
5. Civil liability arising from paragraphs 1 and 2 of this Article shall not limit civil or criminal liability arising from other national laws.
6. Members should ensure that courts or tribunals may grant a broad range of remedial orders directed at ensuring cessation of conduct, compensation of victims and prevention of future harms.
7. Member states shall adopt provisions that allow for joint and several liability to promote greater accountability for labour rights harms in global supply chains, including in circumstances in which an undertaking's decision to reduce or terminate a business relationship causes or contributes to labour rights harms.
8. Member States shall recognise the right of workers' organizations and other stakeholders acting in the public interest to bring civil liability claims under this Article on behalf of a victim or group of victims.

Article 24. Addressing Barriers to Judicial Remedy

Members shall take appropriate steps to identify and address legal and practical obstacles to victims in accessing judicial remedy for labour rights harms in global supply chains. This includes by means of:

a) Ensuring that their courts have jurisdiction over legal claims for contravention of civil liability regimes established pursuant to Article 23, regardless of whether related proceedings against an undertaking's subsidiary, supplier or other entity in the undertaking's supply chain are brought in the courts of another state, and cooperation between judicial bodies pursuant to Article 26;

b) Ensuring that their courts exercise jurisdiction and proceed to hear civil liability claims where no other forum guaranteeing the right to a fair trial is available and the dispute has sufficient connection with the Members concerned;

c) Ensuring adequate limitation periods for bringing civil liability claims;

d) Ensuring that rules of civil procedure provide for the possibility of collective redress mechanisms; and

e) Ensuring that court fees and rules concerning allocation of legal costs do not place an unreasonable burden on victims or act as a barrier to instigating civil claims.

VI. CROSS-BORDER COOPERATION

Article 25. General

In order to ensure consistent application and enforcement of national provisions adopted pursuant to this Convention, Members should cooperate, coordinate, assist each other in performing their tasks and provide mutual assistance.

Article 26. Mutual assistance

1. Members shall make available to each other the widest measure of mutual legal assistance and cross-border cooperation in initiating and carrying out effective, prompt and impartial inspections and investigations, prosecutions, judicial and other criminal, civil or administrative proceedings in meeting the goals of this Convention. Such mutual legal assistance and judicial cooperation may include:

   a) taking evidence of statements from persons;

   b) executing searches and seizures;

   c) examining objects and sites;

   d) providing information, evidentiary items and expert evaluations;

   e) providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;

   f) identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;

   g) facilitating the voluntary appearance of persons;

   h) facilitating the freezing and recovery of assets;

   i) assisting and protecting victims, their families, representatives and witnesses, subject to international legal requirements, including those relating to the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment; and

   j) any other type of assistance that is not contrary to the national law of the Member.

Article 27. Cooperation between Competent Authorities

1. Competent Authorities shall provide each other with relevant information and mutual assistance in carrying out their duties and shall put in place measures for effective cooperation with each other. Mutual assistance shall include collaboration with a view to investigations, inspections and information requests.
2. Competent Authorities shall take all appropriate steps needed to reply to a request for assistance by another Competent Authority without undue delay and no later than 1 month after receiving the request. When it is necessary due to the circumstances of the case, the period may be extended by a maximum of two months based on a proper justification. Such steps may include, in particular, the transmission of relevant information on the conduct of an investigation.
3. Requests for assistance shall contain all the necessary information, including the purpose of and reasons for the request. Competent Authorities shall only use the information received through a request for assistance for the purpose for which it was requested.
4. The Competent Authority in receipt of a request from another Competent Authority shall inform that Competent Authority of the results or, as the case may be, of the progress regarding the measures to be taken in order to respond to the request for assistance.
5. Competent Authorities shall not charge each other fees for actions and measures taken pursuant to a request for assistance. However, Competent Authorities may agree on rules to indemnify each other for specific expenditure arising from the provision of assistance in exceptional cases.
6. When doubts exist as to the attribution of competence, the information on which that attribution is based will be shared with the Network of Competent Authorities, which may coordinate efforts to find a solution. Where this fails, Members will settle disputes in accordance with Article 37.
7. Members may invite Members that have not ratified this Convention, and who are not part of the Network of Competent Authorities, to provide mutual assistance and cooperation on the basis of an ad hoc arrangement or any appropriate basis.
8. Members may consider creating bilateral or multilateral agreements or arrangements to create joint investigative bodies in relation to matters that are the subject of investigations, prosecutions or judicial proceedings concerning undertakings that have breached laws in two or more jurisdictions.

VII. ROLE OF ILO

Article 28. Facilitation of cross-border social dialogue and collective bargaining

The ILO shall promote and facilitate effective cross-border social dialogue and collective bargaining, with a view to achieving decent work in global supply chains, including through the following measures:

a) facilitating global collective bargaining framework agreements on a sectoral, product or service basis where appropriate;

b) upon request, supporting and facilitating negotiations between social partners to reach legally binding and enforceable agreements of a cross-border, collective nature;

c) working with Members and social partners to identify and promote measures to provide greater legal security, transparency, and enforceability of cross-border collective agreements;

d) upon request, assisting in the monitoring, mediation, and dispute settlement by way of facilitation of dialogue, mediation and voluntary arbitration;

e) supporting and promoting model dispute resolution procedures for inclusion within cross-border collective agreements that provide for conciliation, mediation, and voluntary arbitration;

f) maintaining a list of facilitators, mediators and arbitrators, and establishing arbitration panels, where requested;

g) maintaining a public database of agreements; and

h) monitoring cross-border collective agreement processes and agreements, and reporting on innovative and effective practices.

Article 29. List of Competent Authorities

The ILO shall make publicly available, including on its website, a list of the Competent Authorities. The ILO shall regularly update the list on the basis of the information received from the Members.

Article 30. Network of Competent Authorities

1. The ILO shall set up a Network of Competent Authorities, composed of representatives of the Competent Authorities. The Network shall facilitate the cooperation of the Competent Authorities and the coordination and alignment of regulatory, investigative, sanctioning and supervisory practices of the Competent Authorities and, as appropriate, sharing of information and learning among them.
2. The ILO may invite other intergovernmental agencies, and Member agencies with relevant expertise, to join the Network of Competent Authorities on a temporary or permanent basis.
3. The ILO shall facilitate coordination and mutual assistance between national Competent Authorities in order to carry out their duties.

Article 31. Monitoring of Competent Authorities

The ILO shall collect and analyse data from Competent Authorities regarding investigations, preventative actions, orders, sanctions and prosecutions, as well as the preventative actions Competent Authorities take to incentivise behavioural change of undertakings in supply chains and empower workers and workers' representatives. The ILO shall share this information publicly and with the Network of Competent Authorities through a database of decisions, by aggregating data and providing analysis.

Article 32. Promotion of cooperation, assistance and capacity building

The ILO shall promote cooperation, including financial and technical assistance and capacity building between Members for the realisation of this Convention, in consultation with representative employers' and workers'

organizations. Such measures may include:

a) promoting effective technical cooperation and capacity building between Competent Authorities, policy makers, undertakings, unions and other stakeholders;

b) training programs;

c) sharing experience, good practices and challenges;

d) cooperation in research and studies on due diligence, consultation and bargaining;

e) raising awareness of labour rights in global supply chains; and

f) proposing a no-fault global compensation scheme for workers in global supply chains who are unable to secure adequate remedy for certain labour rights harms.

Article 33. Guidelines and accompanying measures

1. In order to provide support to undertakings or to Competent Authorities, the ILO, in consultation with Members and, where appropriate, with international agencies and experts having expertise in labour rights due diligence, shall issue guidelines, including for specific sectors or specific adverse impacts.
2. The ILO may set up new support measures to facilitate adherence with this Convention, including an observatory for supply chain transparency and facilitation of social dialogue and collective agreements.

Article 34. Provide guidance regarding industry schemes and multi-stakeholder initiatives and other arrangements

The ILO may provide guidance regarding the fitness of multi-party arrangements, such as multi-stakeholder initiatives and industry schemes, with regards, in particular, to the extent that they empower workers, employers and their democratically elected representatives, and provide for verifiable monitoring of global supply chains.

Article 35. Model contractual clauses

In order to provide support to undertakings to facilitate their compliance with national laws pursuant to this Convention, the ILO, in consultation with Members, workers' organizations and employers' organizations, may propose guidance on voluntary model contractual clauses.

Article 36. Assessment of operation of the Convention

The ILO shall monitor and assess the operation of the Convention and the extent that it brings about improvements in decent work in global supply chains and make recommendations as to its improvement to the Special Tripartite Committee.

Article 37. Special Tripartite Committee

1. The Governing Body of the International Labour Office shall keep the working of this Convention under continuous review through a committee established by it with special competence in decent work in global supply chains.
2. For matters dealt with in accordance with this Convention, the Committee shall consist of two representatives nominated by the Government of each Member which has ratified this Convention and the representatives of workers and employers appointed by the Governing Body.
3. The Government representatives of Members which have not yet ratified this Convention may participate in the Committee but shall have no right to vote on any matter dealt with in accordance with this Convention. The Governing Body may invite other organizations or entities to be represented on the Committee by observers.

Article 38. Disputes

Disputes that arise between two or more Members about this Convention, or concerning requests for cross-border cooperation, shall be referred to the Special Tripartite Committee after Members first seek a solution by negotiation or other means of dispute settlement acceptable to all parties.

Article 39. Amendment of this Convention

Amendments to any of the provisions of this Convention may be adopted by the General Conference of the International Labour Organization in the framework of Article 19 of the Constitution of the International Labour Organisation and the rules and procedures of the Organization for the adoption of Conventions.

EXPLANATORY MEMO

OVERVIEW

The fragmentation of supply chains across national borders is one of the most prominent features of our globalised economy. Today, global supply chains (GSCs) constitute up to 80 percent of global trade and engage hundreds of millions of workers.[1] The expansion of GSCs has contributed to economic growth, job creation and poverty reduction. However, the dynamics of production and employment relations in GSCs has also contributed to the undermining of labour rights and to decent work deficits.[2] Many supply chains extend into jurisdictions in which labour rights are insufficiently protected in law or in practice. At the same time, while the commercial decisions and procurement practices of global companies shape the conditions under which workers are engaged in their supply chains, these companies are rarely held accountable for the impacts of these decisions in their home jurisdictions or in the jurisdiction in which the goods or services are produced. Many workers engaged in GSCs are thus left without adequate protection of their fundamental rights at work and without meaningful remedies where these rights are violated by their employer or by other entities which benefit from their labour.

International standards are slowly evolving to recognise these new realities. The UN Guiding Principles on Business and Human Rights (UNGPs),[3] the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (ILO Tripartite Declaration)[4] and the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (OECD Guidelines)[5] all now recognise that states have a duty not only to protect workers' rights within their own national borders, but also to take measures to ensure that businesses operating from their jurisdictions take some responsibility for preventing and remediating labour rights harms in their transnational activities, supply chains and other business relationships.

However, governance arrangements at all levels of GSCs remain inadequate to hold businesses accountable for causing or contributing to labour rights harms. While international standards in this area are an important step in the right direction, they overwhelmingly rely on voluntary adherence by states and businesses. Since the 1990s, unilateral and multilateral voluntary private and hybrid initiatives have proliferated in number and complexity in response to public governance gaps, but these have proven consistently to suffer from serious shortcomings. In recent years, some states in the Economic North have moved to adopt laws that require large companies to engage in human rights due diligence (HRDD). However, these initiatives are fragmented and most fail to put in place legal and institutional mechanisms through which to effectively hold businesses to account for preventing and remediating labour rights violations in their transnational operations and supply chains. To date, these initiatives have also failed to sufficiently recognise or empower workers or workers' organisations and to foster collective action. Very few of these laws expand access to remedy for workers. These laws also provide no role or agency for states in the Economic South who act as 'hosts' for multinational enterprises and homes for many suppliers within GSCs.

Most contemporary governance arrangements that aim to address decent work or human rights deficits in GSCs fail to foster cross-border cooperation between states or to genuinely address transnational business relationships. The overwhelming majority of conventions adopted by the International Labour Organization (ILO) are framed to address labour rights protection and employment relations within the borders of the nation-state although they, in principle, apply to workers in supply chains. Very few ILO instruments require member States to collaborate in respect of monitoring and enforcement measures, labour inspection and access to remedy in cross-border cases. Yet the barriers to remedy when business relationships cross borders are considerable. Most jurisdictions will not adjudicate claims that are being adjudicated elsewhere. Member States rarely join forces to remediate or guide business practices at different tiers of the supply chain. Only standards and mechanisms that recognise and address the 'deterritorialised' nature of production will adequately engage with the drivers of labour rights harms in global supply chains.

The ILO is uniquely placed to take a lead role in initiating and stewarding a new international, legally binding standard on decent work in GSCs.[6] It is an organisation with a constitutional mandate to reconcile the objectives of social justice with the realities of international competition, and a long history of helping to advance the protection of

1 UNCTAD, *World Investment Report* (2013); ILO, *World Employment and Social Outlook 2015* (2015).
2 ILO, *Resolution Concerning Decent Work in Global Supply Chains*, International Labour Conference, 105th Session, 2016.
3 UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework* (2011) (UNGPs).
4 ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (6th ed, 2022) (ILO Tripartite Declaration).
5 OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (2023) (OECD Guidelines for MNEs).
6 This is recognised by the tripartite Members of the ILO in the *Resolution Concerning Decent Work in Global Supply Chains,* International Labour Conference, 105th Session, 2016, paragraph 7.

workers' rights globally. The organisation's unique tripartite structure brings together representatives of workers, employers, and governments to collaboratively address global social and economic challenges. Further, its equally strong engagement with both 'host' and 'home' governments empowers the ILO to assist 'host' member States to hold multinational enterprises accountable for labour rights harms within their borders. The challenge of achieving decent work in global supply chains is already firmly on the ILO's agenda.[7]

This Convention seeks to promote decent work in global supply chains by engendering a new cooperative and effective approach to achieving decent work in cross-border supply chains. More specifically, this instrument:

- Recognises and reinforces the role of the ILO as the international organisation with the constitutional mandate and competency to set and deal with international labour standards;[8]
- Seeks to improve regulation and accountability of multinational enterprises by requiring member States to impose distinct and complementary duties on undertakings to carry out labour rights due diligence (a procedural duty) and to remedy any harm caused or contributed to (a substantive duty);
- Promotes social dialogue and encourages member States to begin working together, with the support of the ILO, to construct a new international framework for labour organising, collective bargaining and dispute resolution that is consistent with ILO principles and the realities of our globalised economy;
- Seeks to improve access to justice for victims of labour rights harms in GSCs and to incentivise responsible corporate behaviour by requiring states to provide for civil liability where undertakings cause or contribute to labour rights harms in their own activities or supply chains;
- Proposes a sophisticated and strategic sanctioning regime, involving (i) administrative sanctions (such as fines) for failures to implement adequate human rights due diligence (HRDD); and (ii) civil sanctions (such as reparations) for damages occurring in third party operations;
- Proposes a central role for public, independent and well-resourced 'Competent Authorities' within Member states, with a range of monitoring and enforcement powers and functions;
- Requires member States to cooperate, coordinate and assist each other in performing tasks and provide mutual assistance; and
- Enables the ILO supervisory committees to monitor state efforts to promote and achieve decent work in global supply chains by way of supervision through regular procedures.

7 At the conclusion of the International Labour Organisation (ILO)'s 2016 International Labour Conference, the delegates decided to convene a series of meetings examining specific aspects of supply chains, such as cross- border social dialogue and Export Processing Zones (EPZs), with the possibility of setting a new standard in this area. In 2020 and 2022, a tripartite technical working group (TWG) was established to seek a way forward. In June 2022, the TWG issued conclusions which took note of normative gaps in the ILO body of standards and suggested that the ILO consider standard setting. In March 2023, the Governing Body approved a comprehensive new five-year Strategy on Decent Work in Supply Chains.

8 *ILO Declaration on Fundamental Principles and Rights at Work* (adopted 1998, amended 2022).

I. DEFINITIONS

Article 1

1. This Article defines terms used in the instrument. Subparagraph (a) offers a broad definition of 'business practice' that seeks to capture the multiplicity of ways in which buyer and supplier practices may influence wages and working conditions in GSCs. The definition draws on the definition of 'purchasing practices' adopted by the global bipartite Action, Collaboration, Transformation (ACT) Initiative.[9]

2. The definition of 'business relationship' in subparagraph (b) is drawn from the OECD Guidelines.[10] This definition aligns with, but is more detailed, than the original definition of 'business relationship' offered in the UNGPs.[11]

3. Definitions of 'cause', 'contribute' and 'directly linked' in subparagraphs (c) – (e) are intended to align with usage of the terms in the UNGPs, the OECD Guidelines and OECD sector-specific due diligence guidance.[12]

4. The definition of 'competent authority' in subparagraph (c) is derived from the Maritime Labour Convention 2006 (MLC, 2006),[13] and is intended to provide guidance to member States in designating one or more government departments, agencies or other bodies to be responsible for the actions assigned to Competent Authorities in this Convention.

5. Subparagraph (d) uses the ILO's definition of 'export processing zone'.[14]

6. Subparagraph (e) clarifies that the term 'global supply chains' refers to supply chains (see definition in paragraph (h)) that cross national borders. The term thus has the same meaning as other terms commonly used such as 'cross-border' supply chains or 'transnational' supply chains.

7. The term 'labour rights harm' in subparagraph (f) is formulated for the purposes of this convention. It makes clear that the scope of labour rights protected under the convention includes, at a minimum, those rights articulated in the ILO Declaration on Fundamental Principles and Rights at Work,[15] in ILO standards on working time and wages;[16] and in the Violence and Harassment Convention, 2019 (No. 190). Including international standards on working time and wages aligns this Convention with OECD guidance[17] and with internationally-recognised human rights in the United Nations Convention on Economic, Social and Cultural Rights.[18] ILO standards on violence and harassment in the world of work are included in recognition of the fact that women represent a large share of the workforce in global supply chains, are disproportionately represented in low-wage jobs in lower tiers of the supply chain and vulnerable to discrimination, sexual harassment and other forms of workplace violence.[19] While informed by the concept of an 'adverse impact' in the UN Guiding Principles terminology of 'harm' is proposed over similar concepts such as 'impact' or 'violation' as it is more

9 *The ACT Initiative – A Global Commitment to Living Wages* (2023), https://actonlivingwages.com/app/uploads/2023/05/ACT-Info-Brief-2023.pdf

10 OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (2023), Commentary to Chapter II: General Policies, [17].

11 UN OHCHR, *Guiding Principles on Business and Human Rights* (2011) Commentary to Principle 13.

12 Available at http://mneguidelines.oecd.org/sectors/

13 Maritime Labour Convention, 2006 (MLC 2006), art 2(1)(a).

14 ILO, 'Labour and social issues relating to export processing zones', Report for discussion at the Tripartite Meeting of Export Processing Zones-Operating Countries, Geneva, 28 Sep.–2 Oct. 1998; ILO, 'Promoting Decent Work and Protecting Fundamental Principles and Rights at Work in Export Processing Zones', Report for Discussion at the Meeting of Experts to Promote Decent Work and Protection of Fundamental Principles and Rights at Work for Workers in Export Processing Zones (Geneva, 21-23 November 2017).

15 *ILO Declaration on Fundamental Principles and Rights at Work* (adopted 1998, amended 2022).

16 Hours of Work (Industry) Convention, 1919 (No. 1); Hours of Work (Commerce and Offices) Convention, 1930 (No. 30); Weekly Rest (Commerce and Offices) Convention, 1957 (No. 106); Weekly Rest (Industry) Convention, 1921 (No. 14); Protection of Wages Convention, 1949 (No. 95) and Recommendation, 1949 (No. 85); Minimum Wage Fixing Convention, 1970 (No. 131) and Recommendation, 1970 (No. 135); and the Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173).

17 See, e.g., *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (2023), Chapter V, para 4(b) and *OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector* (2018), Section II, Modules 4 and 7.

18 Article 7.

19 ILO, *Resolution Concerning Decent Work in Global Supply Chains,* International Labour Conference, 105th Session, 2016, paragraph 4.

precise and more commonly used in national legal systems, including as a basis for legal liability.[20]

8. The definition of 'supply chain' in subparagraph (h) draws on the European Council's proposed definition of 'chain of activities' adopted in its general approach to the European Union's Corporate Sustainability Due Diligence Directive (EU's CSDD Directive).[21] This definition covers an undertaking's 'upstream' activities relating to the production and supply of goods or provision of services by the undertaking, and activities of direct and indirect business partners that design, extract, manufacture, transport, store and supply raw material, products, parts of products, or provide services to the company that are necessary to carry out the company's activities. It also covers the 'downstream' activities of an undertaking's direct and indirect business partners that distribute, transport, store and dispose of the product, including *inter alia* the dismantling of the product, its recycling, composting, or landfilling, where those activities are carried out for the undertaking or on behalf of the undertaking. However, it does not extend to the disposal of the product by consumers.

9. Inclusion of both 'upstream' and 'downstream' activities is consistent with the broad 'value chain' approach adopted by the UN Guiding Principles and the OECD Guidelines.[22] Such a broad definition is also critical considering ongoing examples of serious labour rights harms occurring downstream of company supply chains. Examples include unsafe working conditions in shipbreaking yards; and violations of labour rights in delivery of goods through a third party. The convention uses the term 'supply chain' (rather than, for example, value chain) as this is the term widely used by the ILO.[23]

10. Subparagraph (i) offers an expansive definition of 'third party', for the purposes of Article 5(4).

11. Subparagraph (j) makes clear that the term 'undertaking' is to be understood broadly, to encompass a range of different organisational forms. The definition here is adapted from the UK Companies Act 2006. This definition of undertaking covers entities that provide advisory, auditing, and other types of services to entities on a fee-for-service basis.

II. SCOPE

Article 2

12. Paragraph 1 and 2 of Article 2 are intended to ensure the Convention has the broadest possible application. This Article is modelled on Article 2 of the Violence and Harassment Convention, 2019 (No. 190), but does not address employers because this Convention pertains to undertakings. Paragraph 1 includes 'place of work' to make clear that the Convention covers paid work in households. This paragraph also notes that the Convention applies irrespective of immigration status to ensure that it covers non-citizens or non-lawful residents.

III. CORE PRINCIPLES

13. The Core Principles set out the respective roles and responsibilities of member States, workers and workers' organisations, undertakings, employers and employer organisations in realising the principles of this Convention.

Article 3

14. Paragraph 3(2) summarises the various responsibilities of member States set out in this Convention.

20 I Pietropaoli et al, 'A UK Failure to Prevent Mechanism for Corporate Human Rights Harms'(British Institute of International and Comparative Law, February 2020) 27, https://www.biicl.org/documents/84_failure_to_prevent_final_10_feb.pdf

21 European Council, 'Proposal for a Directive of the European Parliament and Of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937' (23 February 2022), art 3(g), see [18]-[19].

22 UN OHCHR, 'Mandating Downstream Human Rights Due Diligence', 13 September 2022. See also Danish Institute for Human Rights, 'Due Diligence in the Downstream Value Chain: Case Studies of Current Company Practice', February 2023.

23 While the ILO has been consistent in its use of the term 'supply chain', it has not been consistent in how this term is defined. See ILO, 'Achieving Decent Work in Global Supply Chains: Report for Discussion at the Technical Meeting on Achieving Decent Work in Global Supply Chains' (Geneva, 25–28 February 2020), Governance and Tripartism Department, Geneva, ILO, 2020, paras 23-25.

Subparagraph 3(2)(b) is elaborated from the ILO Resolution concerning Decent Work in Global Supply Chains.[24]

15. Paragraph 3(3) establishes the pivotal role of workers and workers' organisations to the realisation of the aims of the Convention. This Convention empowers, and provides the framework for, worker and workers' organisation engagement in ensuring compliance with the instrument's goals. This approach can be contrasted that taken in human rights due diligence (HRDD) laws to date in which workers and worker organisations are provided, at best, with rights to consultation.

16. Paragraph 3(4) establishes the vital responsibilities of undertakings, employers and employer organisations to fulfil the goals of the Convention. By requiring good faith engagement with workers and workers' organisations, in particular, the Convention goes beyond the requirements of existing HRDD instruments.

Article 4

17. This Article reiterates the importance of ensuring respect for the fundamental principles and rights at work for all workers engaged in global supply chains. Since the adoption of the ILO Declaration on Fundamental Principles and Rights at Work in 1998, Member States, workers' and employers' organizations, businesses and other stakeholders have repeatedly expressed their recognition of the universal application and relevance of the fundamental principles and rights at work. The universality of these rights is recognised in instruments such as the UNGPs, the ILO Tripartite Declaration and the OECD Guidelines.

IV. PROTECTION AND PREVENTION

Article 5. Duty to prevent

18. Article 5 places a duty on member States to adopt laws requiring undertakings to take steps to identify and address actual and potential risks of labour rights harms. This duty is preventative in nature and is complemented by a duty to remedy (Article 9) and civil liability in the case of certain harms (Article 23).

19. The expectation that business undertakings exercise human rights due diligence to identify, prevent, mitigate and account for actual and potential adverse human rights impacts in their own activities and in their supply chains and other business relationships was introduced by the UNGPs. It has subsequently been incorporated into the OECD Guidelines and the UN Global Compact. It has also been integrated into the ILO Tripartite Declaration, the Protocol of 2014 to the Forced Labour Convention, 1930, the Employment and Decent Work for Peace and Resilience Recommendation, 2017 (No. 205), and the Violence and Harassment at Work Convention (No. 190).

20. While the UNGPs do not articulate an explicit duty on states to mandate HRDD, UN human rights treaty bodies have subsequently affirmed the existence of an obligation on states to control the conduct of non-state actors where their conduct may lead to human rights violations outside state territories. The UN Committee on Economic, Social and Cultural Rights, for example, has made clear that '[c]orporations domiciled in the territory and/or jurisdiction of States parties should be required to act with due diligence to identify, prevent and address abuses to Covenant rights by such subsidiaries and business partners, wherever they may be located.'[25] The Committee has emphasised that '[t]his responsibility is particularly important in States with advanced labour law systems as home-country enterprises can help to improve standards for working conditions in host countries.'[26] The UN Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises has also called on governments to legislate for HRDD, including by way of imposing mandatory requirements, while taking into account elements to drive effective implementation by businesses and to promote level playing fields.[27] The third revised draft of the *Legally Binding Instrument to Regulate, in*

24 ILO, *Resolution Concerning Decent Work in Global Supply Chains,* International Labour Conference, 105th Session, 2016, paragraph 16(a).
25 UN Committee on Economic, Social and Cultural Rights, 'General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities,' E/C.12/GC/24, August 2017, paragraph 33.
26 UN Committee on Economic, Social and Cultural Rights, 'General comment No. 23 (2016) on the right to just and favourable conditions of work (Article 7 of the International Covenant on Economic, Social and Cultural Rights)', April 2016, E/C.12/GC/23, paragraph. 70.
27 UN General Assembly, Working Group on the issue of human rights and transnational corporations and other business enterprises: Note by the Secretary-General, 73th session, 16 July 2018, A/73/163, 24.

International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises also proposes an obligation on states to require businesses within their jurisdictions to adopt due diligence measures.[28]

21. Human rights due diligence is also being incorporated into legally binding obligations at the national and regional level. Laws imposing a substantive duty on business enterprises within specific sectors or that are above specific thresholds to perform due diligence to identify, prevent, mitigate and account for external harm resulting from adverse human rights and environmental impacts in the company's own operations, its subsidiaries and in the supply chain are found in France,[29] Germany[30] and Norway.[31] The European Union is currently negotiating a Corporate Sustainability Due Diligence (CSDD) Directive which proposes requiring EU Member-states to adopt laws requiring businesses operating in the Union market that meet certain turnover criteria to undertake due diligence with respect to a range of enumerated human rights and environmental standards.[32] Modern slavery laws in Australia, Canada, the United Kingdom and the US state of California also draw on the concept of human rights due diligence.[33]

22. Recent and proposed national laws on due diligence diverge significantly with respect to the rights that they cover, scope, substantive due diligence requirements, and enforcement regimes. This fragmentation presents potential for distortion of competition (including where a company may not fall within the scope of any extant national due diligence framework), regulatory duplication, and lack of certainty for companies arising from diverging and potentially conflicting legal requirements. There are also indirect effects of diverging due diligence laws on suppliers that supply to different companies falling under different laws. Requiring all ILO member States to impose a general due diligence standard on undertakings within their jurisdiction is intended to promote a minimum level-playing field by harmonising minimum standards and strengthening respect for workers' human rights, while recognising the potential for elaboration at the national and sectoral levels.

23. Paragraph 5(1) makes clear that the material scope of the due diligence obligation is determined by reference to potential or actual 'labour rights harms', as defined in Article 1(i) of the Convention. It is important to emphasise that limiting the duty to prevent in this way is not intended to narrow the breadth of human rights due diligence as an international norm of business conduct, but to recognise - and ensure alignment with - the ILO's mandate and with the objective of achieving decent work for all.

24. In all other respects, paragraphs 5(1) and (2) propose that member States impose on undertakings a requirement to exercise due diligence that is intended to align with the UNGPs. This means that the duty to exercise due diligence:

    (i) applies to all undertakings regardless of size or sector.[34] Paragraph 5(2) recognises that due diligence processes may vary in complexity depending on the undertaking's size, nature and context of its activities, the nature of its involvement with an adverse impact and the severity and likelihood of the actual or potential labour rights harm. This may mean that small and medium-sized enterprises (SMEs) may have more informal due diligence processes and management structures than larger companies. However, as the UNGPs emphasise, some SMEs 'can have severe human rights impacts, which will require corresponding measures regardless of their size.'[35]

    (ii) applies to labour rights harms that the business enterprise may cause or contribute to through its

28 'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Third Revised Draft (17 August 2021) art 6, https://www.ohchr.org/sites/default/files/LBI3rdDRAFT.pdf

29 *Loi 2017-399 du 27 Mars 2017 Relative au Devoir de Vigilance des Sociétés Mères et des Enterprises Donneuses D'ordre* (herein referred to as the 'French Duty of Vigilance Law').

30 *Lieferkettensorgfaltspflichtengesetz 2021* (herein referred to as the 'German Supply Chain Due Diligence Act').

31 *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, herein referred to as the 'Norwegian Transparency Act').

32 European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937' COM (2022) 71 final.

33 Modern Slavery Act 2018 (Aust); Modern Slavery Act 2015 (UK) s 54; California Civil Code §1714.43 (West 2012); California Transparency in Supply Chains Act of 2010; Fighting Against Forced Labour and Child Labour in Supply Chains Act, S. C. 2023, c 9.

34 The UNGPs make clear that 'the responsibility to respect human rights applies fully and equally to all business enterprises': UN OHCHR, *Guiding Principles on Business and Human Rights* (2011), Guiding Principle 14.

35 Ibid, Commentary to Guiding Principle 14.

own activities, or which may be directly linked to its operations, products, or services by its business relationships.

(iii) extends to the full scope of the supply chain. Consistent with the UNGPs, this formulation recognises that an undertaking's responsibility flows from the connection between the company's operations, products and services and a negative impact, and is not limited to a specific tier of a supply chain. This is important as it is often those lower tiers of the supply chain where the most severe labour risks and impacts may occur.[36]

(iv) is ongoing, recognising that risks may change over time as an undertaking's operations and operating context evolve.[37]

25. Paragraph 5(2) enumerates seven due diligence obligations. These obligations are intended to be aligned to international standards.[38] However, inspired by the approach taken in the German Supply Chain Due Diligence Act[39] and the European Commission's proposal for the EU's CSDD Directive,[40] establishment of a grievance procedure is included as a distinct due diligence obligation (and elaborated upon in Article 7 of the Convention). While the OECD Guidelines identify remediation as a sixth step in due diligence, this instrument proposes remediation as a distinct and separate duty (see Article 9). A seventh step, which goes to requirements on undertakings to communicate regularly to a broad range of stakeholders, including but not limited to workers, worker representatives, local communities, and civil society, also draws on recommendations within the OECD Guidelines concerning disclosure on responsible business conduct information.[41]

26. The Convention does not elaborate in detail on each of the due diligence steps. However, as anticipated by Articles 32 - 36, the ILO should provide guidance on labour rights due diligence (including model contractual clauses). Articles 14 - 17 also recognise a role for the Competent Authorities in this regard. Guidance on the exercise of due diligence on a general and sector-specific basis is also published by other international organisations such as the OECD.[42] Each of the due diligence steps requires the undertaking to engage in proactive measures, including ensuring regular and accessible engagement with workers, workers organisations and other stakeholders at all relevant levels. 'All relevant levels' refers to all levels of the supply chain at which there is considered to be a significant risk of actual or potential labour rights harm.

27. Paragraph 3(a) is included to ensure that, when engaging in due diligence, undertakings are required to consider and address the extent to which their business practices may contribute to harm. A definition of business practices is provided in paragraph (a) of Article 1. The link between lead firms' business practices – including purchasing practices – and labour impacts at suppliers' production sites is well-established.[43] However many businesses that engage in due diligence are not adequately addressing their purchasing practices.[44] This is the case even in industries such as garments where evidence of such links is strongest.

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36 For discussions of the problematic nature of such formulations, see, e.g., Shift, 'The EU Commission's Proposal for a Corporate Sustainability Due Diligence Directive: Shift's Analysis' (March 2022) 4-5.

37 UN OHCHR, *Guiding Principles on Business and Human Rights* (2011), Guiding Principle 17.

38 UN OHCHR, *Guiding Principles on Business and Human Rights* (2011); OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (2018).

39 *Lieferkettensorgfaltspflichtengesetz* (Supply Chain Due Diligence Act), art 3(1).

40 European Commission, 'Proposal for a Directive of the European Parliament and of the. Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937' COM (2022) 71 final, art 4. The UNGPs also recognise that business enterprises should establish or participate in grievance mechanisms; however, this is addressed in the third 'Remedy' pillar: UN OHCHR, *Guiding Principles on Business and Human Rights* (2011), Guiding Principle 19.

41 OECD Guidelines, Chapter III, para 3 and Commentary.

42 The OECD has developed general and sectoral due diligence guidance in order to promote the effective observance of OECD Guidelines on MNEs. See further http://mneguidelines.oecd.org/sectors/

43 ILO, 'Purchasing Practices and Working Conditions in Global Supply Chains: Global Survey Results', INWORK Issues Brief No. 10, Geneva, 2017, https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_556336.pdf; Better Buying Institute, 'Better Buying Index Report 2021: Purchasing Practices Performance in Apparel, Footwear, and Household Textile Supply Chains' (2021) https://betterbuying.org/wp-content/uploads/2021/11/Better-Buying-2021-Purchasing-Practices-Index-resized.pdf; M Anner, 'Squeezing Workers' Rights in Global Supply Chains: Purchasing Practices in the Bangladesh Garment Export Sector in Comparative Perspective' (2019) 27 *Review of International Political Economy* 320.

44 For example, the 2021 KnowTheChain benchmark report found that purchasing practices were among the lowest-scoring themes in the benchmark, with an average score of 34/100. Know the Chain, '2021 Apparel and Footwear Benchmark Report' (2021), https://knowthechain.org/wp-content/uploads/2021-KTC-AFBenchmark-Report.pdf.

28. Paragraphs 3(b) and (c) are modelled on provisions in the proposed EU CSDD Directive.[45] Paragraph 3(b) clarifies that undertakings are expected to make necessary investments to comply with paragraph 1. This paragraph is important to steer supply chain due diligence measures away from purely punitive approaches and towards the greater use of positive incentives and assistance to suppliers to improve labour practices.[46] Paragraph 3(c) clarifies that undertakings may adopt collaborative approaches with others when engaging in due diligence, and indeed are expected to do so in certain cases where such collaboration is necessary to effectively prevent or mitigate labour rights harm. Collaboration is particularly important where no other action is suitable or effective. While in many cases undertakings can collaborate on due diligence without breaching competition law, this paragraph recognises that such collaboration should take place in compliance with national law.[47]

29. Paragraph 4 makes clear that undertakings remain individually responsible for their due diligence and should not be permitted to delegate this duty to a third party. A definition of third party is offered in paragraph (l) of Article 1. Reliance on third-party verification, and/or participation in a relevant industry or multi-stakeholder initiative, may support aspects of an undertaking's due diligence but does not replace an undertaking's responsibility to ensure the quality of their own due diligence.[48] This paragraph is particularly important given the tendency for many companies to continue to base their due diligence efforts mainly or exclusively on social audits and third-party certifications.

30. Paragraph (5) is directed at encouraging member States to ensure that competition and anti-trust laws do not inhibit the capacity of undertakings to engage in effective labour rights due diligence.

31. It should be noted that the due diligence obligations in Article 5 are intended to apply to *all* types of undertakings, including those that provide advisory, auditing, or other types of services to businesses on a fee-for-service basis.

Article 6. Consultation

32. The purpose of this Article is to ensure that undertakings are required by law to consult with workers and workers' organisations at all stages of due diligence as set out in Article 5. Meaningful consultation with potentially affected groups and relevant stakeholders is identified as an essential feature of due diligence in the UNGPs, the ILO MNE Declaration and the OECD Guidelines. However, these standards are not legally binding on enterprises. Most mandatory human rights due diligence laws adopted to date pay only lip-service to worker engagement and fail to adequately put in place requirements and mechanisms for such engagement to take place on a regular basis.
33. Evidence suggests that exhorting entities to voluntarily engage in 'meaningful consultation' with stakeholders is insufficient to ensure that entities engage with workers and their representatives. For example, KnowTheChain's 2020 Benchmark, which assessed global companies in the apparel and footwear sector on efforts to address forced labour risks in their supply chains, found that only 6 out of 37 companies disclosed involving workers in their risk assessment processes, and just 4 stated that they involved workers in the design and/ or performance of grievance mechanisms.[49] In France, despite the fact that stakeholder engagement is addressed in the Corporate Duty of Vigilance Law, many entities are not mentioning stakeholder engagement in their reports or only doing so by way of vague statements.[50]

34. Mandating consultation with workers recognises that workers have the most relevant knowledge regarding violations of their rights and the effective ways to prevent them. To uncover adequate information regarding systemic human and labour rights breaches throughout the supply chain, undertakings must engage in independent, robust, and rigorous monitoring and assessment that engages on a regular basis with workers at

45 European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937' COM (2022) 71 final, arts 7(2)(c) and (f).
46 Shift, 'From Policing to Partnership: Designing an EU Due Diligence Duty that Delivers Better Outcomes', May 2023, https://shiftproject.org/wp-content/uploads/2023/05/Policing-to-Partnership-May-2023.pdf.
47 OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (2018), p. 19.
48 G Quijano and J Wilde-Ramsing, 'A Piece, Not a Proxy: The European Commission's Dangerous Overreliance on Industry Schemes, Multi-Stakeholder Initiatives, and Third-Party Auditing in the Corporate Sustainability Due Diligence Directive', SOMO, November 2022, https://corporatejustice.org/wp-content/uploads/2022/11/A-piece-not-a-proxy.pdf; OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (2018) 19, 35.
49 2020 Benchmark Ranking of Companies, KnowTheChain, https://knowthechain.org/benchmark/?ranking_year=2020&ranking_sector=apparel-footwear.
50 Shift, 'Human Rights Reporting in France: Two Years In: Has the Duty of Vigilance Law led to more Meaningful Disclosure? (2019), https://shiftproject.org/wpcontent/uploads/2019/11/Shift_HumanRightsReportinginFrance_Nov27.pdf.

the lowest tiers of the supply chain, unions, and other informed NGOs. Consultation with unions from levels of the supply chain with the highest risk profile is particularly vital. Workers at all levels of the supply chain must also be provided with processes and mechanisms to enable them to report on conditions they face so that companies can assess and make changes to their practices. Mandating consultation with workers and their representatives at all stages of the due diligence process ensures that workers are not treated at passive victims of rights abuses. It will also help reduce the risk of companies adopting superficial approaches to due diligence and of further 'privatisation' of human rights due diligence and a 'human rights auditing' industry.[51] It will also help ensure risks are identified and addressed effectively.[52]

35. This Article takes inspiration from national labour law frameworks, making clear that the obligation to consult with workers and their representatives must be made explicit and enforceable. Consultation should be with trade unions and recognised representative collective organisations from throughout the supply chain, not directly with workers selected by the company. Only in cases of workplaces in which there are no such bodies should alternative worker voice mechanisms be established.

36. Consultation must be undertaken in 'good faith'. This means that consultations must be meaningful and that the undertaking must give workers and workers' organisations a genuine opportunity to influence the decision-makers. The obligation to consult in good faith has both procedural and substantive aspects. Procedural aspects of good faith entail, for example, conducting consultations in a timely manner and sharing relevant information without delay. Substantive aspects of good faith require for example, genuinely considering the views of workers and workers' organisations and behaving in a way that is consistent and fair.

37. Paragraph 3 makes clear that these consultation requirements are without prejudice to the application of any other requirements imposed by labour law or collective agreements. If the provisions in this Article conflict with a provision in another applicable instrument that provides for more extensive or more specific obligations, the provisions of the other instrument should prevail to the extent of any inconsistency.

Article 7. Right to Request Communication and Information

38. Article 7 builds on subparagraph 5(2)(g) which concerns the requirement to communicate with respect to human rights due diligence. Where communications issued by the undertaking have not provided sufficient information, Article 7 allows workers, workers' organisations, and other organisations representative of workers to request specific information relevant to their concerns. This requirement is intended to help overcome the frequent criticism of reports lodged by undertakings in response to Australian and UK Modern Slavery Acts that they lack specific enough information to be useful for the purposes linking labour rights harms to lead firms, or remedial negotiations.[53]

39. Article 7 is drawn from Norway's Transparency Act.[54] But while the Norwegian Act states that 'anyone' can request information, Article 7 limits such requests to workers and workers' organisations (as defined in Article 1(n)). Under Article 7, member States have discretion to adopt and enforce regulations in keeping with national practices. They must provide a procedure through which applications can be made for review of a decision by an undertaking to deny a request made. While Norway's Transparency Act elaborates on the grounds for the denial of requests for information by undertakings, Article 7 of this Convention leaves such detail to member States.

40. Article 7 should be read with Article 5(2)(g) and Article 22(4) which provides that Members shall pass national laws obligating undertakings to provide the Competent Authority the information and materials these authorities require to carry out their duties pursuant to this Convention.

51 J Nolan & N Frishling, 'Human Rights Due Diligence and the (Over) Reliance on Social Auditing in Supply Chains' in S Deva and D Birchall (eds) *Research Handbook on Human Rights and Business* (Edward Elgar, 2020) 108.

52 J Brudney, 'Hiding in Plain Sight: An ILO Convention on Labor Standards in Global Supply Chains' (2023) 23 *Chicago Journal of International Law* 272, 310-11. On the benefits of worker engagement in corporate management of supply chains, see S Kuruvilla, *Private Regulation of Labor Standards in Global Supply Chains* (Cornell University Press, 2021).

53 S Marshall et al, 'Australia's Modern Slavery Act: Is It Fit For Purpose?' 2023, https://issuu.com/humanrightsdefender/docs/australia_s_modern_slavery_act/26; F Dinshaw et al, 'Broken Promises: Two years of corporate reporting under Australia's Modern Slavery Act', November 2022, https://www.hrlc.org.au/reports/broken-promises.

54 *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), s. 6.

Article 8. Grievance procedures

41. Grievance mechanisms at the level of the undertaking may play an important role in ensuring workers have access to remedy. Effective operational-level grievance mechanisms are also critical to the capacity of an undertaking to engage in effective due diligence. They support the identification of potential and actual labour rights harms by providing a channel for workers and their representatives, and others, to raise concerns where it is believed that they are or will be adversely affected. By enabling the business to identify and respond to grievances early, they may also prevent harms from becoming more serious and grievances from escalating.

42. Article 8 sets out the obligation for Members to ensure that undertakings provide a grievance procedure through which complaints may be submitted regarding potential or actual labour rights violations, including with respect to an undertaking's supply chains. Undertakings are required to ensure grievances may be submitted by trade unions and other workers' organisations, and civil society organisations.

43. This Article is informed by provisions in the European Commission's proposal for an EU Corporate Sustainability Due Diligence (CSDD) Directive[55] and the German Supply Chain Due Diligence Act.[56] The Article should be read alongside, and in light of, the Examination of Grievances Recommendation, 1967 (No. 130).
44. Paragraph 3 lists the criteria that must be met by a grievance mechanism. These criteria are informed by the effectiveness criteria for non-judicial grievance mechanisms in the UNGPs.[57] To ensure effectiveness, it also includes a requirement that grievance mechanisms be appropriately financially resourced and be staffed by individuals with expertise in labour rights matters. The third criterion reinforces the importance of Members taking measures to ensure a safe and enabling environment for workers and their representatives to raise grievances and concerns. Grievance mechanisms must have formal anti-retaliation policies and procedures in place to respond to any alleged cases of retaliation against workers in the supply chain for raising a grievance.

45. Paragraph 4 is included to ensure that companies adequately consult with workers' organisations when establishing, operating and evaluating the effectiveness of their grievance mechanism.[58] The UNGPs recommend that operational-level mechanisms be based on engagement and dialogue.[59] This provision is also included in light of evidence revealing that companies rarely voluntarily engage adequately with workers and workers' organisations when designing, implementing or evaluating their grievance mechanism.[60]

46. Paragraph 5 is modelled on Article 9 of the Examination of Grievances Recommendation, 1967 (No. 130).

47. Paragraph 6 makes clear that grievance mechanisms may be regulated by means of collective agreements. This is consistent with Article 1 of the Examination of Grievances Recommendation, 1967 (No. 130).

48. Paragraph 7 is based on Article 8(1) of the German Supply Chain Due Diligence Act and clarifies that undertakings may choose to participate in an appropriate external grievance procedure rather than establish and operate their own, providing that the external procedure meets the criteria enumerated in paragraph 3 of this Article.

Article 9. Duty to remedy

49. This Article requires states to impose a substantive duty on undertakings to remedy harm which the undertaking has caused or to which the undertaking has contributed. This duty to remediate exists independently of the duty to undertake due diligence in Article 5 and recognises that implementing due diligence processes is not sufficient on its own to discharge the corporate responsibility to respect human rights. The inclusion of a

55 European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937' COM (2022) 71 final, art 6.
56 *Lieferkettensorgfaltspflichtengesetz 2021* (Supply Chain Due Diligence Act), art 8.
57 UN OHCHR, *Guiding Principles on Business and Human Rights* (2011), Guiding Principle 31 and Commentary.
58 See also ITUC Legal Guide for Setting Up an Operational-Level Grievance Mechanism for the world of Work in the Context of Business and Human Rights, June 2022, https://www.ituc-csi.org/IMG/pdf/ituc_legal_guide_grievance_mechanism_en.pdf
59 UN OHCHR, *Guiding Principles on Business and Human Rights* (2011), Guiding Principle 31(h).
60 The World Benchmarking Alliance's Corporate Human Rights Benchmark 2022, for example, found that 91% of companies did not disclose that they engage with potential or actual users, such as workers and affected communities, on the design, implementation, performance, and improvement of their mechanisms. World Benchmarking Alliance, Corporate Human Rights Benchmark 2022: Insights Report, November 2022, 4, https://assets.worldbenchmarkingalliance.org/app/uploads/2022/11/2022-CHRB-Insights-Report_FINAL_23.11.22.pdf

distinct and complementary duty to remedy harms recognises that efforts to prevent harm are not full-proof and that those affected by a failure of a company to respect human rights should have access to remedy. The right to an effective remedy is also an internationally recognised human right, enshrined in Article 8 of the Universal Declaration of Human Rights and Article 2 of the International Covenant on Civil and Political Rights. It also forms the basis of the third pillar underpinning the UNGPs.

50. This Convention draws a distinction between the general duty to remedy (in Article 9) and civil liability (in Article 23). Civil liability is one (albeit an important one) of a number of possible pathways through which victims may access remedy. The approach taken in this article is intended to be consistent with a labour and human rights perspective in which remedy (and associated preventative measures to be implemented in the future) should be the subject of negotiation between parties and should be capable of taking a wide variety of forms. It should also be capable of being secured by a range of different instruments (including, for example, collective agreements).

51. The duty to remedy in Article 9 is aligned with international standards on responsible business conduct in that the duty is limited to circumstances in which there is an element of causality between the undertaking and the harm.[61] The UNGPs identify three distinct ways in which a company may be involved in an adverse human rights impact. A company can *cause* an adverse impact where its activities on their own are sufficient to result in an adverse impact. A company can *contribute* to an adverse impact where its own activities, in combination with the activities of other entities, cause an impact, or that the activities of the company cause, facilitate or incentivise another entity to cause an adverse impact. Finally, a company can be *directly linked* to an impact, where there is a relationship between the adverse impact and the company's products, services or operations through another business relationship and where the company has neither caused nor contributed to the impact. Where a company *causes* an adverse impact, it has a responsibility to stop the activity that causes the impact and remedy the impact. Where a company *contributes t*o an impact, it should cease its contributions to causing harm and contribute to remediation.[62] Where a company is *directly linked* to an impact, it is expected to 'use leverage' to seek to influence the behaviour of the entity causing the impact.

52. The responsibility to remedy articulated in this Article is a strict (or no fault) form of responsibility: that is, it recognises that an undertaking has a responsibility to provide a remedy where it has caused or contributed to a harm. The focus is on the substantive results; not on whether, and the extent to which, a business has acted with due diligence. By way of example, a business may exercise due diligence in its own activities and supply chains but discover several months later that widespread forced labour exists in a primary supplier factory. In this case, the business is responsible for remediating the harm even though it has undertaken due diligence.[63]

53. Remediation has both procedural and substantive aspects. Paragraph 3 clarifies that the substantive object of remedial measures shall be to 'make good' the harm to the fullest extent possible.[64] This Article does not specify the type of remedy to be provided. A broad suite of remedies should be available, and the type of remedy provided will depend on the circumstances of the case. Remedy may include, but not be limited to, compensation, restitution, rehabilitation, financial or non-financial compensation, public apologies, and/or reinstatement, as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.[65]

54. Paragraph 4 makes clear that undertakings should remedy harms early and directly. This may be done, for example, by way of mutual agreement with victims or their representatives, or, where appropriate, by way of collective or sectoral agreements.

55. Paragraph 6 makes clear that where an undertaking fails to remedy any labour rights harms which they have caused or to which they have contributed, Members should provide administrative, civil and/or criminal remedies as appropriate.

61 See UN OHCHR, *Guiding Principles on Business and Human Rights* (2011); OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (2023).
62 UN OHCHR, *Guiding Principles on Business and Human Rights* (2011), Guiding Principle 22.
63 This example is taken from J Brudney, 'Hiding in Plain Sight: An ILO Convention on Labor Standards in Global Supply Chains' (2023) 23 *Chicago Journal of International Law* 272, 304.
64 UN OHCHR, *Guiding Principles on Business and Human Rights* (2011), Commentary to Guiding Principle 25; OHCHR, 'The Corporate Responsibility to Respect Human Rights: An Interpretative Guide' (2012).
65 UN OHCHR, *Guiding Principles on Business and Human Rights* (2011), Commentary to Guiding Principle 25.

56. Paragraph 7 makes clear that, although a company is not obliged to remediate harm to which it is directly linked, it should be encouraged to use its leverage with responsible parties to enable the remediation of any damage caused by an impact. This paragraph is modelled on proposed Article 8c (4) of the European Parliament's agreed position on the proposed EU CSDD Directive.[66]

57. Paragraph 8 recognises that, in certain circumstances, it is appropriate for an undertaking to terminate a business relationship as a response to persistent labour rights harms. Termination should only be considered where an undertaking lacks leverage to prevent and mitigate impacts and is unable to increase its leverage whether in the short or the longer term, or in cases where actual or potential impacts are so severe that disengagement is the only option. This paragraph draws on the Commentary to Principle 19 of the UNGPs.

Article 10. Cross-Border Social Dialogue

58. This Article is directed at confirming the importance of social dialogue and ensuring member States involve workers' and employers' organisations in decision-making on all relevant issues concerning the promotion of decent work in global supply chains.

59. The term 'social dialogue' is used by the ILO to refer to the involvement of workers, employers and governments in decision-making on issues of common interest related to economic and social policies. It includes all types of negotiation, consultation, and exchange of information among representatives of these groups on common interests in economic, labour and social policy. Social dialogue is both a means of achieving social and economic progress, and an objective in itself, as it gives people a voice and a stake in their societies and workplaces. Social dialogue can be bipartite, between workers and employers, or tripartite. Bipartite social dialogue may take the form of collective bargaining or other forms of negotiation, cooperation and dispute resolution and prevention.[67]

60. There is no official ILO definition of cross-border social dialogue.[68] The report prepared by the International Labour Office for the Meeting of Experts on Cross-Border Dialogue (February 2019) used the term 'cross-border social dialogue' to describe:

> the dialogue developed between or among governments, workers and employers or their representatives beyond national borders in order to promote decent work and sound labour–management relations. Such dialogue may focus on the opportunities and challenges associated with a country, economic sector, enterprise, region or group of countries. It may take place within ad hoc or institutionalized fora, mechanisms involving two or more parties, or as a result of public or private (self-regulatory) initiatives developed in the context of a dynamic of economic integration and the organization of production along increasingly complex GSCs.[69]

61. This Article essentially enumerates several provisions from the Resolution Concerning the Second Recurrent Discussion on Social Dialogue and Tripartism adopted by the International Labour Conference in June 2018.[70]

Article 11. Rights to Organise and Collective Bargaining in Global Supply Chains

62. The absence of conducive legal infrastructure for transnational union organising, collective bargaining, strikes and dispute settlement along supply chains is a key gap in global labour governance.

63. Many workers in global supply chains face significant challenges in realising rights to organise and collectively bargain.[71] This is due to a range of different factors, including inadequate recognition and enforcement in the

66 'Amendments adopted by the European Parliament on 1 June 2023 on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive' (EU) 2019/1937 (COM(2022)0071), 1 June 2023, https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.html

67 ILO, 'Social Dialogue: Recurrent discussion under the ILO Declaration on Social Justice for a Fair Globalization', Report VI, International Labour Conference, 102nd Session, 2013, paragraph 16.

68 ILO, 'Cross-border social dialogue: Report for discussion at the Meeting of Experts on Cross-border Social Dialogue' (Geneva, 12–15 February 2019).

69 Ibid, 2.

70 ILO, *Resolution Concerning the Second Recurrent Discussion on Social Dialogue and Tripartism*, International Labour Conference, 107th Session, 2018, paragraph 3(o).

71 ILO, *Resolution Concerning Decent Work in Global Supply Chains*, International Labour Conference, 105th Session, 2016, paragraph 3.

national context of rights to organise and bargain collectively. Obstacles also arise because of the increasing mismatch between 'traditional' collective bargaining frameworks and practices on the one hand, and the economic realities of global supply chains on the other.[72] While dynamics vary across industries, many supply chains are 'buyer-driven', in that lead firms exercise significant influence over the terms and conditions of work at other links in the chain. In these contexts, where significant cost and other pressures are exerted by entities higher up in the chain, unions may find it difficult to bargain effectively at the level of the individual undertaking as suppliers are not in an economic position to agree to meaningful improvements in wages, working time protections or other benefits. As the ILO has confirmed, in buyer-driven supply chains, 'the purchasing practices between buyers and suppliers and intense competition between firms at the end of supply chains place limits on how much value is available for distribution through collective bargaining.'[73]

64. In recent years, a range of 'multiparty supply chain bargaining' initiatives have emerged at the transnational level that seek to address these problematic dynamics (and in particular lead firm procurement practices that undermine supplier commitment and compliance with labour standards) by drawing in other entities in the supply chain. Such initiatives are now found across a range of industries and include: (i) comprehensive industrial agreements that include specific terms of employment, such as wage levels and benefits, in a range of substantive areas; (ii) thematic agreements designed to prospectively advance particular worker rights issues, such as worker safety, gender based violence, and freedom of association, through ongoing labour-business structures; (iii) remediation agreements aimed at addressing discrete violations, such as a failure to pay legally required wages and compensation schemes for victims of workplace disasters; and (iv) international framework agreements that create structures for union-firm dialogue.[74]

65. This panoply of transnational multiparty bargaining arrangements has emerged, and operates outside of, national and international labour law frameworks.[75] While many of these private arrangements include only general commitments and no enforcement mechanisms, there is a recent trend towards the adoption of agreements in which substantive obligations are enforceable by mediation and binding arbitration.[76]

66. While all these types of bargaining agreements involve workers' organisations, they vary significantly in terms of the nature of the signatories and the level, and way in which, they are implemented. For example, while international framework agreements generally only include a global union federation and a multinational enterprise, the Lesotho Agreements on Gender-Based Violence include five trade unions and women's rights organizations, the U.S.- based Solidarity Center, Worker Rights Consortium and Workers United, Nien Hsing Textile (a major supplier in Lesotho) and three apparel brands.

67. At present, ILO instruments, jurisprudence and structures do not at present envisage an institutional or regulatory role for transnational collective bargaining.[77] There are of course a number of ILO conventions and recommendations that promote, and set minimum rights and standards concerning, rights to organise and voluntary collective bargaining.[78] ILO instruments and jurisprudence also make clear that the choice of bargaining level should not be imposed by law or administrative authorities, but left to the discretion of the parties.[79] However, these standards are applied within national contexts.[80]

72 J Blasi and J Bair, 'An Analysis of Multiparty Bargaining Models for Global Supply Chains', Conditions of Work and Employment Series No. 105, ILO, 2019.

73 International Labour Organization, 'Decent Work in Global Supply Chains' Report IV, International Labour Conference, 105th session, 2016, paragraph 95.

74 J Blasi and J Bair, 'An Analysis of Multiparty Bargaining Models for Global Supply Chains', Conditions of Work and Employment Series No. 105, ILO, 2019.

75 See gen I Schömann, 'Transnational Collective Bargaining: In Search of a Legal Framework' in I Schömann et al (eds), *Transnational collective bargaining at company level: A New Component of European Industrial Relations,* ETUI, 2012; R Zimmer, 'From International Framework Agreements to Transnational Collective Bargaining' in M Bungenberg et al (eds) *European Yearbook of International Economic Law 2019* (Springer, 2020) 167.

76 Examples include the Bangladesh Accord on Building and Fire Safety and the Lesotho Agreements on Gender-Based Violence.

77 ILO, 'Cross-Border Social Dialogue, Report prepared for discussion at the Meeting of Experts on Cross-border Social Dialogue', Geneva, 12–15 February 2019, 39.

78 These include, but are not limited to, the *Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98);* and the *Collective Bargaining Convention, 1981 (No.154).*

79 ILO, 'Freedom of Association: Compilation of Decisions of the Committee on Freedom of Association', 6th ed, 2018, [1404] – [1412].

80 For example, art 4(1) of Collective Bargaining Recommendation, 1981 (No. 163), states that 'measures adapted to national conditions should be taken, if necessary, so that collective bargaining is possible at any level whatsoever, including that of the establishment, the undertaking, the branch of activity, the industry, or the regional or national levels'. See further R-C Drouin, 'Promoting Fundamental Labor Rights through International Framework Agreements: Practical Outcomes and Present Challenges' (2010) 31(3) *Comparative Labor Law & Policy Journal* 591.

68. Article 11 takes a broad approach that recognises the importance of fostering conditions conducive to collective bargaining *at all levels*, including transnationally, but that does not seek to dictate the promotion or adoption of a particular model. This approach is also consistent with ILO principles more broadly, whereby the level of bargaining and the content of agreements are recognised as matters that should be left to the discretion of the bargaining parties.

Article 12. Designation and support of Competent Authority

69. This Convention conceives of a strong and active role for Competent Authorities in promoting the aims of the Convention. As such, Competent Authorities require support in the form of funding, expertise and strong powers.

70. It is envisaged that member States may designate an existing labour administration or inspectorate as the Competent Authority or may alternatively designate a department or agency with powers and responsibilities under existing human rights due diligence laws. Member States may designate more than one Competent Authority; in which case they must ensure that the Competent Authorities coordinate with each other.

71. To ensure monitoring of the correct implementation of undertakings' due diligence obligations and safeguard the proper enforcement of this Convention, member States should designate one or more national Competent Authorities. These Competent Authorities should be of a public nature, independent from undertakings falling within the scope of this Convention or other market interests, and free of conflicts of interest. In accordance with national law, member States should ensure that Competent Authorities are provided with strong legal authority. They should be entitled to carry out investigations on their own initiative or based on substantiated concerns raised under this Convention by workers or workers' organisations. They should be appropriately financed to allow them to conduct the full range of roles envisaged by this Convention. Member States shall ensure that Competent Authorities are staffed with personnel with sufficient expertise on both labour rights harms and the complex business relationships that frequently obfuscate responsibility within global supply chains.

72. Article 12 is primarily modelled on a provision in the European Commission's proposal for an EU CSDD Directive,[81] which specifies the roles and responsibilities of supervisory authorities. This Convention uses the language of 'Competent Authorities', rather than 'supervisory authorities', in line with other ILO conventions.

73. Unlike Article 17 of the proposed EU CSDD Directive, Article 12 of this Convention does not describe how an undertaking determines the correct Competent Authority for reporting purposes, as this Convention does not require regular reporting by undertakings. The Competent Authority of the parent company should be competent to monitor and assess the fulfilment of due diligence obligations of the whole group, apart from the obligations staying with the subsidiaries where the competent supervisory authority should be the one of the relevant subsidiaries.

Article 13. Transparency of Competent Authority

74. Article 13 aims to foster a minimum level of harmonised information regarding how Competent Authorities conduct their activities. Such transparency is aimed to increase the trust of undertakings, employers and employers' organisations and workers and workers' organisations in Competent Authorities. The sharing of such information will also allow other Competent Authorities to compare decisions and learn from each other in keeping with the goal of fostering consistent application and enforcement of national provisions adopted pursuant to this Convention, allowing for differences in national jurisdiction.

75. The ILO will provide guidance to Competent Authorities from time to time, to guide them regarding the form and detail expected in such reports.

76. To ensure public oversight of the application of the rules set out in this Convention, the decisions of the Competent Authorities regarding any failure to comply with the provisions of national law implementing this Convention by undertakings should be published, sent to the Network of Competent Authorities and remain

81 European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937' COM (2022) 71 final, art 17.

publicly available for at least 3 years. Such reports should describe the facts and reasoning on which any decision was based. The publication of decisions should comply with national and regional rules concerning the publication of personal data, including EU Regulation 2016/679 of the European Parliament and of the Council. However, the publication of the undertaking's name is allowed even if it contains a name of a natural person.

77. Article 13 is modelled on the European Commission's proposal for an EU CSDD Directive,[82] which requires Competent Authorities to make reports about their activities public for three years and to report to the ILO and the network.

Article 14. Preventative functions of Competent Authority

78. This Convention aims to ensure that member States require undertakings to engage in preventative measures to bring an end to, and minimise, potential or actual labour rights harms connected with undertakings' own operations, subsidiaries, supply chains and business relationships. Articles 14 to 19 of this Convention are informed by the OECD's Recommendation on the Role of Government in Promoting Responsible Business Conduct. which brings together a coherent set of policy recommendations and principles to support governments in enabling and promoting responsible business conduct.[83]

79. Article 14 provides that Competent Authorities will provide reliable information to undertakings, employers' organisations and workers' organisations, and put in place, and propose a range of tools that undertakings can adopt to bring an end to, and minimise, potential or actual labour rights harms connected with undertakings own operations, subsidiaries, supply chains and business relationships. It also provides for government to issue incentives and economic benefits for undertakings. Such incentives might include linking subsidies or export credit to labour rights performance in operations, supply chains and business relationships.

80. The ILO will provide guidance to Competent Authorities from time to time, to guide them regarding the type of tools and incentives that government can provide. The guidance will also compare practices across the network.

Article 15. Guidelines

81. The Competent Authority may issue guidelines, both as needs arise and on the basis of those developed by the ILO, in order to provide support and information to undertakings, Members, employers and employer organisations, as well as workers and worker organisations, on how undertakings should fulfil their due diligence obligations, and how Competent Authorities can optimally operate and coordinate, the ILO, where necessary in consultation with relevant international bodies having expertise in due diligence implementation, and others.

82. This Article is modelled on the European Commission's proposal for an EU CSDD Directive.[84] However, Article 15 requires consultation with representative employers' and workers' organisations and provides that member States may modify the model contractual clauses to reflect national circumstances.

Article 16. Model contractual clauses

83. The Competent Authority may issue guidelines, based on those developed by the ILO, to outline non-binding model contractual clauses that undertakings can use when cascading due diligence obligations in their supply chain, and member States may modify them before disseminating.

84. This Article is based on the European Commission's proposal for an EU CSDD Directive,[85] but modifies it by requiring consultation with representative employers' and workers' organisations, and providing that member States may modify the model contractual clauses to reflect national circumstances.

82 European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937' COM (2022) 71 final, art 20.
83 OECD, OECD Recommendation on the Role of Government in Promoting Responsible Business Conduct (February 2023).
84 European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937' COM (2022) 71 final, art 13.
85 European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937' COM (2022) 71 final, art 12.

Article 17. Sectoral due diligence action plans

85. This Article is modelled on proposed Article 11 of the European Parliament's agreed position on the proposed EU CSDD Directive.[86]

86. This Article reflects the understanding that the dynamics and causes of labour rights harms and the nature of business relationships differ considerably from sector to sector, or in relation to particular products, and that coordination at the sectoral level can enhance the consistency and effectiveness of due diligence efforts, allow for the sharing of best practices, create communities of learning and contribute to levelling the playing field. It aims to complement existing or planned sectoral and product-related supply chain due diligence instruments, such as those developed by the OECD,[87] and to encourage the development of sectoral due diligence action plans. This Article allows Competent Authorities to facilitate and encourage the adoption of voluntary sectoral or cross-sectoral due diligence action plans aimed at coordinating the due diligence strategies of undertakings across a sector or in relation to a product. Such sectoral action plans will be based on guidance from the ILO. These plans will be developed by member States in consultation with workers' and employers' organisations, as well as with other groups concerned, to ensure that the plans reflect the needs, priorities and capacities of employers and workers, and address the causes of labour rights harms in that sector.

87. Paragraph 2 makes clear that while undertakings may use these sectoral due diligence action plans as the basis for their due diligence actions, the development of such collective measures should in no way absolve the undertaking of its individual responsibility to perform due diligence or prevent it from being held liable for harm it caused or contributed to in accordance with national law.

88. Paragraph 3 provides that member States shall ensure, in particular, the right for trade unions and other workers' representatives at the sectoral or cross-sectoral level, to be involved in the development of sectoral due diligence action plans.

89. Paragraph 4 provides that any grievance mechanism adopted in the context of a sectoral due diligence plan must conform to the requirements for grievance mechanisms enumerated in paragraph 3 of Article 8 of the Convention. Sectoral due diligence plans may include the development of grievance mechanisms for a sector or product. The ability of Competent Authorities, employer organisations and worker organisations to work together to design sectoral grievance mechanisms may overcome the deficiencies of grievance mechanisms currently offered by undertakings. There is considerable literature on the deficiencies of company level grievance mechanisms, including that they lack expertise, they are poorly advertised and communicated to workers, and they are ill equipped to deal with situations where workers whose labour rights are harmed are employed by an employer in the supply chain of an undertaking which supplies to multiple undertakings.[88] While sectoral or product-based grievance mechanisms should be designed to address these flaws, they should not discharge member states from their primary duty to protect human rights and to provide access to justice and remedies.

Article 18. National policy and plan of action

90. Governments play a key role in supporting the effective implementation of standards and action by business to reduce the incidence and severity of labour rights harms by providing an enabling policy environment, creating incentives, and exemplifying responsible conduct in their own activities.

91. Mitigating and reducing the incidence of labour rights harms in global supply chains requires whole of government action. Responsibility lies not only with the Competent Authority, but with the full facilities and capabilities of the Member government. Governments should take action to create principles and standards

86 'Amendments adopted by the European Parliament on 1 June 2023 on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive' (EU) 2019/1937 (COM(2022)0071), 1 June 2023, https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.html

87 The OECD developed such sectoral guidance in order to promote the effective observance of OECD Guidelines on Multinational Enterprises. See the list of sectoral guidance documents at: http://mneguidelines.oecd.org/sectors/

88 International Commission of Jurists (ICJ), 'Effective Operational-Level Grievance Mechanisms', November 2019, https://www.icj.org/wp-content/uploads/2019/11/Universal-Grievance-Mechanisms-Publications-Reports-Thematic-reports-2019-ENG.pdf; F Haines and K Macdonald, 'Nonjudicial business regulation and community access to remedy' (2020) 14(4) *Regulation & Governance* 840; S Zagelmeyer et al, 'Non-State Based Non-Judicial Grievance Mechanisms (NSBGM): An Exploratory Analysis', The University of Manchester Alliance Manchester Business School, 2018.

and create an enabling environment for reducing labour rights harms through domestic legislation, policies, regulations, and initiatives.

92. This Article draws on recommendations in the OECD Recommendation on the Role of Government in Promoting Responsible Business Conduct,[89] and Guiding Principle 8 of the UNGPs, both which encourage vertical and horizontal policy coherence. *Vertical policy coherence* refers to States having the necessary policies, laws and processes to implement their international human rights law obligations. *Horizontal policy coherence* refers to states supporting and equipping departments and agencies, at both the national and subnational levels, that shape business practices. This may include departments and agencies responsible for corporate law and securities regulation, investment, export credit and insurance, trade and labour, and entail the state ensuring such entities are informed of and act in a manner compatible with the Governments' human rights obligations.[90]

Article 19. Removing barriers to compliance

93. This Article is based on Art II(2) of the OECD Recommendation on the Role of Government in Promoting Responsible Business Conduct which recommends that government identify and address unnecessary 'barriers that impede the implementation of responsible business conduct standards by businesses with a view to promoting coherence, including making best efforts to resolve any actual or perceived inconsistencies in laws and policies, providing additional guidance where a legitimate conflict exists, and considering introduction of legislation or regulation to address potential gaps in implementation'.[91]

94. This Article is intended to ensure, in particular, that member States address restrictive rights for trade union organising and collective bargaining, and competition and anti-trust laws which preclude collaboration and coordination by undertakings and other stakeholders.[92]

Article 20. Members as economic and commercial actors

95. Article 20 addresses the responsibilities of states to use their leverage as economic and commercial actors to promote decent work in global supply chains.

96. Subparagraphs 1(a) and (b) address public procurement and reflect the rising recognition globally of the need for states to integrate labour and human rights considerations into their public procurement programs.

97. While the ILO's *Labour Clauses (Public Contracts) Convention, 1949* (No. 94) addresses the role of public procurement in improving working conditions, the focus and scope of Convention No. 94 does not adequately prevent or address potential and actual labour rights harms in the supply chains of the public sector, particularly when these supply chains extend outside national borders.

98. Subparagraph (1)(a) is directed at ensuring that public authorities engage in labour rights due diligence when procuring goods and services from the private sector. Subparagraph 20(1)(b) emphasises the potential for states to use public procurement as strategic tool to incentivise the adoption of labour rights due diligence. This could be done, for example, by requiring private entities who are bidding for public contracts to provide evidence of the adequacy of their labour rights due diligence processes, and/or using debarment from public contracts as a sanction for undertakings that fail to comply with labour rights due diligence requirements.[93]

99. Paragraph 20(2) is adapted from the OECD Recommendation on the Role of Government in Promoting Responsible Business Conduct.[94] Paragraph 20(3) is informed by the UNGPs and the OECD Recommendation on the Role of Government in Promoting Responsible Business Conduct.[95]

89 OECD, OECD Recommendation on the Role of Government in Promoting Responsible Business Conduct (February 2023) II, III and IV.
90 UN OHCHR, *Guiding Principles on Business and Human Rights* (2011), Guiding Principle 8.
91 OECD, OECD Recommendation on the Role of Government in Promoting Responsible Business Conduct (2022), art II(2).
92 For discussion, see, e.g. OECD, 'Competition Law and Responsible Business Conduct', Global Forum on Responsible Business Conduct, 18-19 June 2015, Paris, https://mneguidelines.oecd.org/global-forum/2015GFRBC-Competition-Law-RBC.pdf
93 For example, section 22 of Germany's Supply Chain Due Diligence Act provides that enterprises who have been fined for certain violations of the Act shall be excluded from tendering for public contracts.
94 OECD, OECD Recommendation on the Role of Government in Promoting Responsible Business Conduct (2022), art IV.
95 OECD, OECD Recommendation on the Role of Government in Promoting Responsible Business Conduct (February 2023), art III (2) and (3). See also UN OHCHR, *Guiding Principles on Business and Human Rights* (2011), Guiding Principle 10.

V. ENFORCEMENT AND REMEDIES

Article 21. General

100. Article 21 introduces Articles 22 – 24 and provides for a range of mechanisms for member States to ensure that employers, workers as well as employers' and workers' organisations have access to effective dispute resolution mechanisms and remedies, recognising that national systems differ in terms of the emphasis on judicial, administrative, legislative and criminal proceedings.

Article 22. Enforcement functions of Competent Authority

101. In order to ensure effective enforcement of national measures implementing this Convention, an active role for Competent Authorities is provided for herein. While the Convention also provides for civil liability, because of the well documented barriers to workers, workers' organisations and other civil society actors bringing legal actions, this Convention provides for an active enforcement role for the state. It also recognises that member States often have the flexibility to be more responsive than the judiciary in the types of actions taken to secure changes in corporate conduct and remedial action.

102. As set out in Article 12 of this Convention, Competent Authorities require adequate powers and resources to carry out monitoring, investigation and enforcement.

103. Paragraph 22(3) provides for the Competent Authority to conduct investigations on its own initiative, or based on a request from others, including workers or workers' organisations.

104. Monitoring and investigation necessitate powers of entry of premises and the power to demand documents as set out in paragraphs 22(4) and (5). Such powers should be consistent with the Labour Inspection Convention, 1947 (No. 81).

105. Paragraph 22(6) provides for cooperation between Members where such investigations require cross-border action.

106. Paragraph 22(7) provides Competent Authorities with the discretion to gain a voluntary commitment in the form of a written confirmation from an undertaking about how it will comply with national laws implementing this Convention where a breach is identified. Such voluntary commitments are consistent with reflexive regulation, allowing the undertaking to determine its own method of stopping labour rights harms and providing remediation.[96] Obtaining such a commitment will not always be appropriate, for example, where the breach is severe or urgent action is required, or there is some other reason not to trust that voluntary action will be taken. Where an undertaking is too slow in proposing or undertaking steps, or the steps are inadequate or inappropriate, the Competent Authority may issue orders.

107. Paragraph 22(8) provides Competent Authorities with a range of actions they may take in response to a breach of national laws consistent with this Convention. One option is the imposition of penalties. Penalties should be dissuasive, proportionate and effective for infringements of those measures. In order for such penalties regime to be effective, penalties imposed by the Competent Authorities should include pecuniary penalties. Member States should ensure that pecuniary penalties imposed are commensurate with the undertaking's worldwide net turnover when being imposed. However, this provision does not oblige member States to base the pecuniary penalty solely on the net turnover of the undertaking in every case. Member States should have flexibility to base the penalty also on other criteria, such as the economic situation of the undertaking.[97] Each member State should decide, in accordance with national law and circumstances, whether the penalties

96 R Johnstone and R Sarre, 'Regulation: Enforcement and Compliance' Research and Public Policy Series No. 57, Australian Institute of Criminology, 2004; see also A Blackham et al (eds) *Theorising Labour Law in a Changing World: Towards Inclusive Labour Law* (Bloomsbury, 2019); D Desai, 'Reflexive Institutional Reform and the Politics of the Regulatory State of the South (2020) *Regulation & Governance.*

97 This description matches that provided concerning the enforcement activities of supervisory authorities by the Permanent Representatives Committee (Part 1), Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 - General Approach, 15024/1/22 REV 1, Interinstitutional File: 2022/0051(COD), paragraph 54.

should be imposed directly by Competent Authorities, in collaboration with other authorities or by application to the competent judicial authorities.

108. Subparagraph (8)(d) provides Members with the option of directing enforcement powers at abettors and accessories, similarly to the Norwegian Transparency Act[98] that provides for enforcement powers to be directed at abettors. The aim of this paragraph is to encourage Members to develop a jurisprudence of accessorial liability where multiple actors in a supply chain have contributed to labour rights harm.

109. Article 22 is informed by the European Commission's proposal for an EU CSDD Directive,[99] the Norwegian Transparency Act[100] and the Labour Inspection Convention, 1947 (No. 81).

Article 23. Civil liability

110. Article 23 sets out the basis upon which civil liability should be imposed upon undertakings for causing or contributing to labour rights violations in their own activities, by the actions of their subsidiaries, and in their supply chains and other business relationships. This Article complements the duty to remedy in Article 9 and state-based oversight and enforcement mechanisms in Articles 21 and 22 of the Convention by enabling individuals and groups of individuals who have experienced harm to seek remedy before the courts.

111. To date, the tort of negligence has been the main vehicle through which cases have been brought against companies for causing or failing to prevent labour rights abuses at the level of their subsidiaries or supply chains.[101] Such cases have been decided in different countries based on different rules and approaches. While the test of negligence varies between jurisdictions, these cases generally involve the following elements: (i) the existence of a legal duty of care owed by the defendant to the plaintiff (i.e. to act in a way that others are not harmed by one's actions or omissions); (ii) a breach of the applicable standard of care by the defendant; (iii) a resulting injury to the plaintiff; (iv) caused by the breach. Courts (between and within jurisdictions) have adopted different tests to determine whether a duty of care exists. In some countries, claims have also been based on specific statutory obligations, such as laws prohibiting human trafficking and consumer protection laws.[102] In the cross-border supply chain context, very few of these types of claims have been successful.[103]

112. Some recently adopted mandatory human rights due diligence laws expressly provide for an associated civil liability regime, however these laws take very different approaches.[104] It also remains to be seen how effective any of these recent laws will be in securing remedy.

113. Article 23 seeks to clarify minimum standards for civil liability in case of harm caused in supply chains and provide greater access to remedy. Articulating a common basis for civil liability will also help provide clarity and legal certainty to companies with activities or business relationships that span multiple jurisdictions. It will also further incentivise companies to take due care and proper precautions with respect to workers' rights in supply chains through heightening cost of not doing so.

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98 *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), ss. 9 – 14.

99 European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937' COM (2022) 71 final.

100 *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), ss. 9 – 14.

101 UN OHCHR, 'Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse: The Relevance of Human Rights Due Diligence to Determinations of Corporate Liability' UN Doc 1/HRC/38/20/add.2 (1 June 2018) 19; D Palombo, "The Duty of Care of the Parent Company: A Comparison between French Law, UK Precedents and the Swiss Proposals" (2019) 4(2) *Business and Human Rights Journal* 265.

102 See L Smit et al, 'Study on Due Diligence in the Supply Chain: Final Report', Report prepared for the Director-General for Justice and Consumers, European Commission, January 2020; C Terwindt et al, 'Supply Chain Liability: Pushing the Boundaries of the Common Law?' (2018) 8 *Journal of European Tort Law* (3) 261at 269.

103 See, e.g., UN High Commissioner for Human Rights (2016) Improving accountability and access to remedy for victims of business-related human rights abuse. Report to the Human Rights Council. A/HRC/32/19 (10 May 2016); G L Skinner, *Transnational Corporations and Human Rights: Overcoming Barriers to Judicial Remedy*. Cambridge University Press, 2020; J Fudge and G Mundlak, 'Peeling the Onion: On Choices Judges Make in Transnational Labour Litigation in B Langille and A Trebilcock (eds) *Social Justice and the World of Work: Possible Global Futures* (Hart International, 2023) 249.

104 See gen A Garcia Esteban, 'Scoping the Framework of Corporate Responsibility in Supply Chains: From Soft Law on Human Rights to Hard Law on Labour Issues' (2021) 1(2) *Global Labour Rights Reporter* 29, R Chambers and J Martin, 'Reimagining Corporate Accountability: Moving Beyond Human Rights Due Diligence' (2022) 18(3) *NYU Journal of Law & Business* 773, 798; N Bueno and C Bright, 'Implementing Human Rights Due Diligence Through Corporate Civil Liability' (2020) 69 *International and Comparative Law Quarterly* 789.

114. The broad formulation of this Article – including its use of the terms 'cause' and 'contribute' –will ensure that member States take steps to promote and secure greater legal accountability for working conditions in supply chains, including by way of addressing longstanding barriers to the assignment of business liability in the third-party context such as privity and separate legal personality. However, it leaves it open to member States to determine, based on national law and practice, the precise legal basis upon which fault is to be attributed in the context of both parental company liability and supply chain liability. This approach recognises that different jurisdictions have developed, and are continuing to develop, different approaches – under tort and statutory law - to questions of parental company and supply chain liability for harms to workers' rights.

115. This Article distinguishes between cases in which an undertaking's activities (or the activities of an undertaking's subsidiary) *cause* a labour rights harm and cases in which an undertaking's activities (or the activities of an undertaking's subsidiary) *contribute to* a labour rights harm. Where an undertaking causes labour rights harm, paragraph 1 proposes imposition of a 'strict' or absolute' liability offense. Where an undertaking contributes to a labour rights harm, paragraph 2 proposes imposition of liability unless the undertaking proves by clear and convincing evidence that the harm was not contributed to, wholly or in part, by their supply chain activities or business relationships.

116. Paragraph 1 provides for 'strict' or 'absolute' liability in that the defendant may be held legally liable simply because the harm occurred. There is no need for the claimant to prove intention, knowledge, recklessness or negligence. The imposition of strict liability in cases in which an undertaking causes a labour rights harm is proposed on the basis that only the serious prospect of liability will encourage undertakings to carry out robust preventative measures. Strict liability recognises the immense difficulties claimants face bringing civil claims in the transnational context, and in attributing 'fault' in complex corporate and supply chain structures. This proposal also recognises that alternative, more 'process-oriented' approaches to civil liability found in national human rights due diligence laws, are proving incapable of effecting genuine and meaningful change or securing accountability by business for labour-related harms. In effect, they are privileging corporate processes over outcomes for victims. It should also be noted that civil laws providing strict liability for businesses is by no means a novel proposal: it is found, for example, in consumer protection laws in many national jurisdictions.

117. Paragraph 2 also provides for strict liability but is coupled with the availability of a 'defence' where the undertaking can prove by clear and convincing evidence that the harm was not contributed to, wholly or in part, by their supply chain activities or business relationships. In shifting the burden of proof to the defendant and using the language 'clear and convincing evidence', this paragraph draws on the approach taken in the US Uyghur Forced Labor Prevention Act.[105]

118. Paragraph 3 clarifies that meeting the procedural due diligence requirements in Article 5 is not a defence or a safe harbour with respect to paragraph 2.[106] This paragraph is necessary to ensure that companies are not encouraged to take a 'tick the box' approach to HRDD in which meeting certain procedural requirements will absolve them of liability. It is intended to be consistent with the UNGPs, with the commentary to Principle 17 making it clear that 'business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.'[107]

119. Paragraphs 4 and 5 make clear that the civil liability of an undertaking for damages arising due to its failure to carry out adequate due diligence should be without prejudice to civil liability of its subsidiaries or the respective civil liability of suppliers in the supply chain. Civil liability rules should also be without prejudice to national rules on civil liability related to adverse human rights impacts that provide for liability in situations not covered by or providing for stricter liability than this instrument. These paragraphs are modelled on the European Commission's proposal for an EU CSDD Directive.[108]

120. Paragraph 6 requires member States to ensure that courts and tribunals can grant a wide range of remedial orders. Potential remedies should include remedies for individuals, remedies for workers' organisations and

105 Uyghur Forced Labour Prevention Act (*Public Law No. 117-78), s. 3(b).*

106 See further L Smit et al, 'Muddying the Waters: The Concept of a "Safe Harbour" in Understanding Human Rights Due Diligence' (2023) 8(1) *Business and Human Rights Journal* 1.

107 UN OHCHR, *Guiding Principles on Business and Human Rights* (2011), Commentary to Principle 17.

108 European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937' COM (2022) 71 final, art 22.

preventative remedies.

121. Paragraph 7 requires member States to adopt joint and several liability to address questions of responsibility for working conditions within global supply chains.[109] This is an approach used in multiple jurisdictions in the employment law to hold lead contractors jointly responsible in areas such as workplace health and safety, wages, and social security obligations. Joint liability has also been advanced as an effective legal solution in the context of labour supply chains.[110] Joint and several liability allows for the apportioning of liability amongst more than one more undertaking based on their cause or contribution of the harm.

Article 24. Addressing barriers to judicial remedy

122. It is well established that workers, workers' organisations, and labour and human rights advocacy organisations face a range of barriers to pursuing judicial remedies for labour rights violations in global supply chains.[111] Indeed, despite creative attempts to use contract law, tort law and international law to seek remedy, there has yet to be a single case decided, from beginning to end, on its merits, that holds a lead firm headquartered in the Global North responsible for the labour rights violations committed by its suppliers and subsidiaries located in the Global South.[112] The barriers encountered by victims are both legal (e.g. corporate structures, limits on jurisdiction, and statutes of limitations) and practical (e.g. the high costs of litigation).

123. This Article is intended to oblige member States to take steps to address these practical and legal barriers. It is also intended to enable monitoring of these efforts by the ILO supervisory bodies through regular procedures.

124. Paragraph (a) is necessary to ensure the effectiveness of the civil liability regime established by Article 23. Paragraphs (b) to (e) enumerate, on a non-exhaustive basis, measures that should be taken by states to improve access to judicial remedy for victims of labour rights abuses in GSCs.

VI. CROSS-BORDER COOPERATION

Article 25. General

125. Because this Convention concerns decent work in global supply chains, its effectiveness rests on cross-border cooperation and assistance between Members. Articles 25 to 28 of the Convention draws on the European Commission's proposal for an EU CSDD[113] and the third revised draft of the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises.[114]

Article 26. Mutual Assistance

126. To facilitate the cross-border nature of monitoring, inspections, investigations and enforcement actions concerning the business relationships of undertakings by member States, Article 26 provides for a wide range of forms of mutual assistance. It accommodates refusal of such assistance by a member State where it is contrary to the applicable laws of that member State. Such assistance may be requested and provided between a range of departments, agencies and arms of members States, including courts and judicial bodies and Competent

109 See, e.g., M Anner, J Bair and J Blasi, 'Towards Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks' (2013) 35 *Comparative Labour Law and Policy Journal* 1.
110 J Gordon, 'Global Labour Recruitment in a Supply Chain Context' (ILO, 2015) 19-32.
111 G L Skinner, *Transnational Corporations and Human Rights: Overcoming Barriers to Judicial Remedy* (Cambridge University Press, 2020); K. Otteburn, 'Reaching the Limit: Access to Remedy through Nonjudicial Mechanisms for Victims of Business-related Human Rights Abuses' (2023) 1 *The International Journal of Human Rights* 1; European Coalition for Corporate Justice (ECCJ), ' Suing Goliath' (2021); N Bueno and C Bright, 'Implementing Human Rights Due Diligence Through Corporate Civil Liability' (2020) 69 *International and Comparative Law Quarterly* 789; Report of the Office of the High Commissioner for Human Rights, 'Improving accountability and access to remedy for victims of business-related human rights abuse', A/HR/C/32/19, 10 May 2016.
112 J Fudge and G Mundlak, 'Peeling the Onion: On Choices Judges Make in Transnational Labour Litigation in B Langille and A Trebilcock (eds) *Social Justice and the World of Work: Possible Global Futures* (Hart International, 2023) 249; N Bueno and C Bright, 'Implementing Human Rights Due Diligence Through Corporate Civil Liability' (2020) 69 *International and Comparative Law Quarterly* 789.
113 European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937' COM (2022) 71 final, art 21.
114 'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Third Revised Draft (17 August 2021) art 21, https://www.ohchr.org/sites/default/files/LBI3rdDRAFT.pdf

Authorities. Additional, specific provisions for cooperation are provided for Competent Authorities in Article 27.

Article 27. Cooperation between Competent Authorities

127. Article 27 mirrors a provision in the European Commission's proposal for an EU CSDD [115] and provides for cooperation between Competent Authorities, beyond the means set out in Article 26. In particular, it provides a reasonable time period for cooperation and assistance, details how information shall be provided and imposes a requirement that no fees be charged unless agreed. It also provides means for inviting mutual assistance from member States who have not ratified this Convention.

128. Because states differ considerably in terms of their willingness to investigate and pursue action against corporate actors domiciled or acting in their jurisdiction, additional efforts should be taken to ensure that states do not become safe havens against accountability.[116] This may include bilateral or multilateral agreements or arrangements to create joint investigative bodies in relation to matters that are the subject of investigations, prosecutions or judicial proceedings concerning business that has breached laws in two or more jurisdictions, as envisaged in Article 27(8).

VII. ROLE OF ILO

129. This Convention anticipates an expansive role for the ILO in overseeing implementation of the instrument, fostering coordination between Competent Authorities, and acting as a 'meta-regulator'.[117] Meta-regulatory law adapts itself to plural forms of regulation. The ILO will oversee the implementation of the Convention in countries with diverse legal systems and approach, who are in turn regulating undertakings who will respond to national laws in diverse ways, understood as a form of self-regulation.[118] The Convention provides for a new role for the ILO in facilitating cross-border social dialogue and collective bargaining. It also formalises the role already conducted by the ILO in a range of areas, by requiring that the ILO provide guidance and bring Competent Authorities together in a network to assess and share information about how to respond to changes in global supply chains and new developments in labour rights harms.

Article 28. Facilitation of cross-border social dialogue and collective bargaining

130. This Article identifies, on a non-exhaustive basis, a range of measures that the ILO should adopt to facilitate and promote collective bargaining in global supply chains. It draws, and builds upon, the Conclusions on Decent Work in Global Supply Chains adopted by the International Labour Conference in 2016, and roles already undertaken by the ILO with respect to global framework agreements.[119] It also draws on the ILO Tripartite Declaration, to the extent that the Declaration recognises a role for the ILO in facilitating dialogue and acting as a technical or expert advisor where issues arise between workers and a multinational enterprise and the parties seek ILO assistance.[120]

131. This Article recognises the suitability of mediation and arbitration to disputes that arise in the context of transnational supply chains. Benefits of these types of dispute resolution in this context include the capacity to deal with cross-border and multi-party disputes, cost-effectiveness and procedural flexibility.[121]

132. Paragraph (a) recognises the potential for the model of cross-border collective bargaining that has been developed in the maritime shipping industry to be replicated or modified in other industries. At present,

115 European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937' COM (2022) 71 final, art 21.
116 S Wen and J Zhao, 'The Commons, the Common Good and Extraterritoriality: Seeking Sustainable Global Justice through Corporate Responsibility' (2020) 12 *Sustainability* 9475; J P Doh and T R Guay, 'Corporate Social Responsibility, Public Policy, and NGO Activism in Europe and the United States: An Institutional-Stakeholder Perspective' (2006) 43(1) *Journal of Management studies* 47.
117 J Bomhoff and A Meuwese, 'The Meta-Regulation of Transnational Private Regulation' (2011) 38(1) *Journal of Law and Society* 138.
118 C Parker, 'Meta-Regulation: Legal Accountability for Corporate Social Responsibility' in D Kinley (ed) *Human Rights and Corporations* (Routledge, 2017) 335.
119 See, e.g., Cross-Border Social Dialogue, Report for discussion at the Meeting of Experts on Cross-border Social Dialogue (Geneva, 12–15 February 2019) 39; F Hadwiger, 'Looking to the Future: Mediation and Arbitration Procedures for Global Framework Agreements' (2017) 23(4) *Transfer* 409.
120 ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (6th ed, 2022).
121 F Hadwiger, 'Looking to the Future: Mediation and Arbitration Procedures for Global Framework Agreements' (2017) 23(4) *Transfer* 409.

maritime shipping is the only global industry covered by a global collective bargaining framework agreement between international social partners (ship-owner and seafarer representatives from across the globe). This agreement regulates wages and other terms and conditions of work, including maternity protection, and draws heavily on ILO standards.

133. This Article recognises that arbitration is a promising means of resolving labour disputes that arise in the context of cross-border supply chains.[122] With respect to the potential role of the ILO in promoting and facilitating voluntary arbitration, it should be noted that considerable work has already been undertaken by scholars, labour rights NGOs and global unions to develop model arbitration clauses for enforceable brand agreements[123] and International and Labour Arbitration Rules, which adapt the Hague Rules on Business and Human Rights Arbitration to accommodate the particular characteristics of disputes arising from international labour agreements.[124] Efforts by the ILO to promote and facilitate arbitration should build upon these models.

Article 29. List of Competent Authorities

134. This Article is based on Article 17(7) of the European Commission's proposal for an EU CSDD Directive.[125] It requires the ILO to maintain a list of Competent Authorities designated with responsibility for implementing national laws pursuant to this Convention. Such a list is a minimum requirement to facilitate coordination between authorities.

Article 30. Network of Competent Authorities

135. Much of the influence of this Convention depends on cross-border cooperation. Mirroring the requirements of the European Commission's proposal for an EU CSDD Directive,[126] Article 30 of this Convention provides for the establishment of an international Network of Competent Authorities to work together towards implementation of this Convention. An International Network, coordinated by the ILO, will be composed by the representatives of the Competent Authorities designated by members States and where necessary joined by other agencies or international organisations with relevant expertise in the areas covered by this Convention, to ensure compliance by the undertakings of their due diligence obligations, in order to facilitate and ensure the coordination and convergence of regulatory, investigative, sanctioning and supervisory practices, and the sharing of information among these Competent Authorities. The ILO will foster a spirit of cooperation and coordination between Competent Authorities to both foster decent work and address labour rights harms in complex cross-border supply chains.

Article 31. Monitoring of Competent Authorities

136. Article 31 provides that the ILO will analyse the annual reports required from Competent Authorities under Article 13 and make public a database of decisions. The ILO's analysis will act as an accountability mechanism to check that Competent Authorities are sufficiently independent, responsive, and diligent in their promotion, protection and enforcement activities the ways prescribed by the Convention. Equally importantly, the ILO's analysis will also provide important information about trends in labour rights harms in global supply chains, and effective regulatory strategies.

Article 32. Promotion of cooperation, assistance and capacity building

137. Article 32 notes the various ways that the ILO can promote cooperation, assistance and capacity building between Competent Authorities. Training, as provided for in subparagraph (b), should be conducted, in particular, in relation to inspection and investigation. Subparagraph (f) anticipates proposal of a no-fault compensation scheme, which may be implemented based on evidence of barriers to

122 K Yiannibas, 'Use of Arbitration to Resolve Transnational Labour Disputes' in B Langille and A Trebilcock (eds) *Social Justice and the World of Work: Possible Global Futures: Essays in Honour of Francis Maupain* (Bloomsbury, 2023).
123 See https://www.workersrights.org/wp-content/uploads/2020/07/Model-Arbitration-Clauses-for-the-Resolution-of-Disputes-under-Enforceable-Brand-Agreements.pdf
124 See https://internationalaccord.org/wp-content/uploads/2023/02/2021JU_1.pdf
125 European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937' COM (2022) 71 final, art 17(7).
126 European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937' COM (2022) 71 final, art 17(7).

remedy through civil, criminal and administrative avenues for particular forms of labour rights harm.

Article 33. Guidelines and accompanying measures

138. Article 33 provides that the ILO shall develop guidelines to inform undertakings about how to avoid harming or contributing to harming labour rights. Currently such guidance is developed primarily by the OECD,[127] and as such is targeted at the undertakings and at wealthier countries. Given the ILO's expertise in labour matters, and experience providing technical advice to countries of differing size and income, it is vital that the ILO, either alone or with other international organisations, develop guidance and accompanying support measures to facilitate adherence with this Convention.

Article 34. Benchmarking and guidance regarding industry schemes and multi-stakeholder initiatives and other arrangements

139. In light of the considerable evidence of deficiencies in many industry and multi-stakeholder initiatives, and with social auditing and certification as a means of improving the enjoyment of decent work by workers,[128] there is an important role for the ILO in providing information and guidance regarding such initiatives. While voluntary initiatives are important tools, they have proven inadequate alone in detecting, addressing, and remedying labour abuses that were often hidden, even from well-trained, independent auditors. This guidance will enable Competent Authorities to direct undertakings towards more effective initiatives and provide initiatives with information about the ways that they be more effective. Furthermore, it will provide incentives for such initiatives to improve their conduct. This Article should provide greater transparency regarding both the processes and outcomes of industry and multi-stakeholder initiatives, social auditors and certifiers. Members States may, in addition, consider taking measure to advance the liability of such initiatives as abettors or accessories to liability in accordance with Article 23(8) of this Convention.[129]

Article 35. Model contractual clauses

140. A supply chain contract is a key form of leverage through which undertakings can influence those with whom they are in business relationships to improve their human rights performance. Model contractual clauses are intended to ensure that activities undertaken under the contract occur in accordance with the standards of decent work throughout the supply chain. The ILO can develop model contractual clauses for a range of contractual circumstances which, first, move the contract away a traditional top-down representation and warranty regime to a collaborative labour rights due diligence regime; second, require both undertaking and the party they are contracting with to engage in responsible sourcing and purchasing practices; and third, condition conventional contract remedies on remediation of harm to workers in a manner consistent with this Convention.[130]

Article 36. Assessment of operation of the Convention

141. Building on the ILO's role in monitoring Competent Authorities under Article 31, this Article also provides for the ILO to regularly assess the operation, success and effectiveness of the Convention in reducing labour rights harms and promoting decent work in global supply chains. This assessment shall include whether the provisions on due diligence under this Convention should be extended, how social dialogue and collective bargaining are to be conducted, and whether rules for arbitration should be developed. Recommendations as to the improvement of the Convention should be made to the Special Tripartite Committee, who will in turn make recommendations to the General Conference of the International Labour Organization.

127 OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (2018).
128 M-F Turcotte, and J Pasquero, 'The Paradox of Multistakeholder Collaborative Roundtables' (2001) 37(4) *Journal of Applied Behavioral Science* 447; S Moog, A Spicer, and S Böhm. 'The Politics of Multi-Stakeholder Initiatives: The Crisis of the Forest Stewardship Council' (2015) 128 Journal of Business Ethics 469; F De Bakker et al, 'Multi-Stakeholder Initiatives on Sustainability: A Cross-Disciplinary Review and Research Agenda for Business Ethics' (2019) 29(3) *Business Ethics Quarterly* 343.
129 T Van Ho and C Terwindt 'Assessing the Duty of Care for Social Auditors' (2019) 27(2) *European Review of Private Law* 379.
130 J Sherman, 'Integrating Human Rights Due Diligence (HRDD) Into Model Supply Chain Contracts' in S Maslow and D V Snyder (eds) *Contracts for Responsible and Sustainable Supply Chains: Model Contract Clauses, Legal Analysis, and Practical Perspectives* (American Bar Association, 2023).

Article 37. Special Tripartite Committee

142. The Special Tripartite Committee described herein is inspired by that found in the Maritime Labour Convention, 2006.

Article 38. Disputes

143. Disputes that arise between two or more member States shall be referred to the Special Tripartite Committee. The Special Tripartite Committee may determine procedures for addressing such disputes.

Article 39. Amendment of this Convention

144. Consistent with Article 19 of the Constitution of the International Labour Organization and the rules and procedures of the Organization for the adoption of Conventions, as well as the Maritime Labour Convention, amendments to any of the provisions of this Convention may be adopted by the General Conference of the International Labour Organization.

INTERNATIONAL LAWYERS ASSISTING WORKERS NETWORK
1130 CONNECTICUT AVE, NW 8TH FLOOR
WASHINGTON DC, 20036