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## Labor, Trade, and Populism: How ILO-WTO Collaboration Can Save the Global Economic Order

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## Labor, Trade, and Populism: How ILO-WTO Collaboration Can Save the Global Economic Order

### Abstract

Populists are trying to take down the global economic order and its institutions. While some of those forces might be fueled by racism, they also play to legitimate social concerns that include massive plant closings and deindustrialization, inadequate skills programs, and lack of decent jobs. Some of these problems also concern the Global South, as workers there face exploitation, unhealthy working conditions, and other social ills caused by global capitalism. In light of these problems, this Article argues that the International Labor Organization (ILO) should design new conventions on lead firm liability and mass layoffs. While other scholars and policymakers have already argued that lead firms should shoulder employer responsibilities of their suppliers, contractors, and franchisees, this is the first law review article that calls for an ILO convention that can diffuse such rules globally.

The Article also calls on the World Trade Organization (WTO) to advise the ILO on these labor-protective conventions. The WTO, as an expert trade body, can better ensure stakeholders that these new conventions will comply with international trade law and policy, including with WTO “public morals” exception rules and with rules on technical barriers on trade and tax and subsidies. In doing so, the WTO can guarantee that the new conventions, far from hurting trade, will help to enhance the global trade regime. Moreover, the WTO, through its “peer review” practice, where stakeholders can discuss how to create and implement new labor and trade policies, can help coordinate a muchneeded global dialogue for a more inclusive globalization. This is also true of the ILO conventions that we advocate for here.

We conclude by addressing likely arguments against our proposal, including from scholars and policymakers skeptical of the role that international law can have on the current political turmoil. After addressing those objections to our proposal, we maintain that collaboration between the ILO and the WTO, while certainly not the panacea for all the complex and daunting problems of our times, remains critical to restore legitimacy to the global economic order in a postpopulist era.

## ARTICLES

# LABOR, TRADE, AND POPULISM: HOW ILO-WTO COLLABORATION CAN SAVE THE GLOBAL ECONOMIC ORDER

SUNGJOON CHO\* & CÉSAR F. ROSADO MARZÁN\*\*

### ABSTRACT

*Populists are trying to take down the global economic order and its institutions. While some of those forces might be fueled by racism, they also play to legitimate social concerns that include massive plant closings and deindustrialization, inadequate skills programs, and lack of decent jobs. Some of these problems also concern the Global South, as workers there face exploitation, unhealthy working conditions, and other social ills caused by global capitalism. In light of these problems, this Article argues that the International Labor Organization (ILO) should design new conventions on lead firm liability and mass layoffs. While other scholars and policymakers have already argued that lead firms should shoulder employer responsibilities of their suppliers, contractors, and franchisees, this is the first law review article that calls for an ILO convention that can diffuse such rules globally.*

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#### TABLE OF CONTENTS

Introduction.....	1773
A. The Argument.....	1781
B. Organization of this Article .....	1784
I. The Double Governance Gap.....	1785
A. The Territoriality Gap.....	1785
B. The Labor and Trade Divide.....	1788
II. Attempts of Coupling Labor and Trade Since the Singapore Declaration of 1996 .....	1790
A. The 2007 Report .....	1791
B. The 2009 Report .....	1792
C. The 2017 Report .....	1796
D. Evaluation.....	1797
III. Towards a Post-populist Order.....	1798
A. Re-Embedding the World Economy .....	1799
B. ILO Convention on Lead Firm Liability.....	1802
C. ILO Convention on Mass Layoffs.....	1806
D. The WTO’s Advisory Role for the New ILO Conventions.....	1811
1. Braiding global labor and trade rules with WTO advice .....	1812

2. Fiscal policies that further global labor and trade, but not protectionism.....	1815
3. Bringing together labor and trade policymakers and stakeholders through the WTO's peer review space .....	1817
Conclusion.....	1820

## INTRODUCTION

Since the end of World War II, the General Agreement on Tariffs and Trade (GATT) and its successor, the World Trade Organization (WTO), have governed the regulation of global trade. While closely related to trade, international labor regulation has been separately addressed by the International Labor Organization (ILO) without much input from the trade agency. This decoupling of labor from trade seems no longer tenable. We live in a 21<sup>st</sup> Century economic reality where national economies are importantly structured by global value chains (GVCs),<sup>1</sup> also referred to as global supply chains, production networks, and commodity chains,<sup>2</sup> that know no allegiance to one country or deference to a regulatory body, but with social impacts on a global scale. The 20<sup>th</sup> Century regulatory structure needs an urgent update to deal with the pressing issues of the day, where global markets and social conditions now also appear chaotic and unraveling.

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1. In this Article, we chose to use the term “global value chain” to refer to the same phenomenon that the International Labor Organization (ILO) defines as “global supply chains.” Int’l Labour Office, *Decent Work in Global Supply Chains*, 105th Session 1 (2016), [https://www.ilo.org/wcmsp5/groups/public/-ed\\_norm/-relconf/documents/meetingdocument/wcms\\_468097.pdf](https://www.ilo.org/wcmsp5/groups/public/-ed_norm/-relconf/documents/meetingdocument/wcms_468097.pdf) [<https://perma.cc/QTB3-KCZN>]. The ILO defines global supply chains as “complex, diverse, fragmented, dynamic and evolving organizational structures.” *Id.* The ILO also acknowledges that “[a] broad range of terms exist to describe [GVCs], including global production networks, global value chains and global supply chains. All of these terms focus on the same basic issues of cross-border production and trade, but with slightly different perspectives.” *Id.*

2. See, e.g., Gary Gereffi, *Commodity Chains and Regional Divisions of Labor in East Asia*, 12 J. ASIAN BUS. 75, 75 (1996) [hereinafter Gereffi, *Commodity Chains*] (explaining that the term highlights the overlap in divisions of labor caused by producer-driven and buyer-driven chains); Gary Gereffi, *The Organization of Buyer-Driven Global Commodity Chains: How U.S. Retailers Shape Overseas Production Networks*, in COMMODITY CHAINS AND GLOBAL CAPITALISM 95 (Gary Gereffi & Miguel Korzeniewicz eds., 1994).

GVCs, have revolutionized the way many understand and debate matters related to the world economy.<sup>3</sup> Technological innovations have enabled certain multinational enterprises (MNEs) known as “lead firms”<sup>4</sup> to organize multi-jurisdictional production and trade networks via global sourcing and to maximize the benefits of the division of labor and specialization on a global scale. An increasing number of goods, ranging from aircrafts to iPhones to T-shirts, are now designed, sourced, manufactured, and distributed through GVCs.<sup>5</sup> GVCs’ contribution to globalization has been unprecedented. But while corporate profits soar and some developing countries benefit from new opportunities, Schumpeterian<sup>6</sup> disruptions fueled by industrial relocation from the Global North to the Global South, automation, and other technological innovations have increasingly threatened many workers across the globe.<sup>7</sup> Formerly vibrant manufacturing centers in the U.S. Northeast and Midwest have for decades been

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3. See ORG. FOR ECON. CO-OPERATION & DEV., WORLD TRADE ORG. [WTO] & UNITED NATIONS CONFERENCE ON TRADE & ECON. DEV., IMPLICATIONS OF GLOBAL VALUE CHAINS FOR TRADE, INVESTMENT, DEVELOPMENT, AND JOBS 6 (Aug. 6, 2013), [https://unctad.org/en/PublicationsLibrary/unctad\\_oecd\\_wto\\_2013d1\\_en.pdf](https://unctad.org/en/PublicationsLibrary/unctad_oecd_wto_2013d1_en.pdf) [<https://perma.cc/U3HP-6RM2>] (stating that GVCs encompass all types of economies and have important policy implications).

4. A lead firm is “the company that controls the global supply chain and sets the parameters with which other firms in the chain must comply, and is typically responsible for the final sale of the product.” Int’l Labour Office, *supra* note 1, at 5 (footnote omitted) (citing John Humphrey & Hubert Schmitz, *Inter-Firm Relationships in Global Value Chains: Trends in Chain Governance and Their Policy Implications*, 1 INT’L J. TECH. LEARNING, INNOVATION AND DEV. 258, 258–82 (2008); WILLIAM MILBERG & DEBORAH WINKLER, *OUTSOURCING ECONOMICS: GLOBAL VALUE CHAINS IN CAPITALIST DEVELOPMENT* (2013)).

5. See WORLD BANK GRP. [WBG], *WORLD DEVELOPMENT REPORT 2020: TRADING FOR DEVELOPMENT IN THE AGE OF GLOBAL VALUE CHAINS* 104 (2019) (stating that GVCs have contributed to the global spread of production and after-sales services of goods).

6. Joseph Schumpeter, an Austrian economist, popularized the now famous phrase, “creative destruction,” originally from Karl Marx, to describe the constant process of creation and destruction in capitalist societies, which disrupt old orders to build new ones. See JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 82–83 (Routledge 1976) (1943). Creative destruction was thus a “gale,” a “process of industrial mutation . . . that incessantly revolutionizes the economic structure *from within*, incessantly destroying the old one, incessantly creating a new one.” *Id.* (footnote omitted).

7. According to a recent survey by the Organization for Economic Cooperation and Development (OECD), although automation will radically transform nearly one-third of global jobs, sixty percent of workers lack even basic computer-related digital skills. OECD, *OECD EMPLOYMENT OUTLOOK 2019: THE FUTURE OF WORK* 269 (2019); Steve Johnson, *Rise of the Robots Threatens Developing World Workers*, FIN. TIMES (May 1, 2019), <https://www.ft.com/content/502dd174-682f-11e9-9adc-98bf1d35a056>.

standing idle, making joblessness and unemployment their “new normal.”<sup>8</sup> That new normal now gets compounded by other problems such as depression, alcoholism, and drug abuse, including of opioids.<sup>9</sup> Populations, many white, that are harshly affected by deindustrialization and its side effects have felt “forgotten” by the political establishment and unsurprisingly voted for the populist Donald J. Trump.<sup>10</sup>

By “populism,” and following the lead of political philosopher Jan-Werner Müller, we refer to a political movement that targets elites while creating a unitary, undifferentiated conception of “the people,” with identical interests and aspirations, and which feels legitimately entitled to dominate in politics.<sup>11</sup> Hence, while perhaps anti-elitist,

8. See Ann R. Markusen & Virginia Carlson, *Deindustrialization in the American Midwest: Causes and Responses*, in DEINDUSTRIALIZATION AND REGIONAL ECONOMIC TRANSFORMATION: THE EXPERIENCE OF THE UNITED STATES 29, 29 (Lloyd Rodwin & Hidehiko Sazanami eds., 1989) (stating that net job shrinkage in the industrial Midwest was 4.5% in the 1980s).

9. JUSTIN GEST, THE WHITE WORKING CLASS: WHAT EVERYONE NEEDS TO KNOW 23–24 (2018). The numbers are astounding. In 2017, opioids alone killed over 70,000 Americans. Josh Katz & Margot Sanger-Katz, ‘The Numbers Are so Staggering.’ *Overdose Deaths Set a Record Last Year*, N.Y. TIMES (Nov. 29, 2018), <https://www.nytimes.com/interactive/2018/11/29/upshot/fentanyl-drug-overdose-deaths.html> [<https://perma.cc/QU6M-9BUT>]. Because of these deaths, overall U.S. life expectancy has dropped; the crisis has shaved off four months to American lives, on average. *Id.* Suicide is also reaching alarming heights in these communities. See Olga Khazan, *Americans Are Dying Even Younger: Drug Overdoses and Suicides Are Causing American Life Expectancy to Drop*, THE ATLANTIC (Nov. 29, 2018), <https://www.theatlantic.com/health/archive/2018/11/us-life-expectancy-keeps-falling/576664> [<https://perma.cc/EQ6B-P9F9>] (noting the CDC’s finding that the suicide rate in rural counties has increased by fifty-three percent since 1999).

10. Cf. Paul Crisholm, *Analysis Finds Geographic Overlap in Opioid Use and Trump Support in 2016*, N.P.R. (June 23, 2018), <https://www.npr.org/sections/health-shots/2018/06/23/622692550/analysis-finds-geographic-overlap-in-opioid-use-and-trump-support-in-2016> [<https://perma.cc/E827-TZ8D>] (highlighting research that suggests a geographic relationship between support for Trump and opioid painkiller prescriptions).

11. As described by philosopher Jan-Werner Müller, populism is “a particular *moralistic imagination of politics*, a way of perceiving the political world that sets a morally pure and fully unified . . . people against elites who are deemed corrupt or in some other way morally inferior.” JAN-WERNER MÜLLER, WHAT IS POPULISM? 3 (2016); see also Alan Bogg & Mark Freedland, *Labour Law in the Age of Populism: Towards Sustainable Democratic Engagement*, in COLLECTIVE BARGAINING AND COLLECTIVE ACTION: LABOUR AGENCY AND GOVERNANCE IN THE 21ST CENTURY? 17 (Julia López López ed., 2019) (citing JAN-WERNER MÜLLER, WHAT IS POPULISM? 3 (2016)). *But see* Adom Getachew, *Reclaiming Populism*, BOS. REV. (Apr. 29, 2020), <https://bostonreview.net/forum/adom-getachew-reclaiming-populism> (arguing against critics of populism who merely see “exclusionary anti-pluralism, an unstable anti-institutionalism, and a dictatorial style of political leadership” because of populists’ “appeal to ‘the people’ . . . a central

populism hides an authoritarian tendency, trying to homogenize nations that are necessarily differentiated.<sup>12</sup> Populism is, therefore, anti-pluralistic and undemocratic.<sup>13</sup>

While racism and a relative loss of status has been a major contributing factor to the rise of populism among some white Americans and Europeans, so has been economic discontent.<sup>14</sup> European populist movements, such as the so-called “yellow vests,” have expressed their frustrations, including with the state of economic affairs, in protests. The yellow vests, “largely composed of poorly paid wage-earners,”<sup>15</sup> shook the French presidency of Emmanuel Macron, and then overflowed into Belgium and beyond.<sup>16</sup> The movement protested diminishing earnings and high taxes.<sup>17</sup> The straw that broke the camel’s back was a new fuel tax that President Macron tried to impose. The fuel tax promised to hit working-class communities the hardest.<sup>18</sup> Moreover, the fuel tax was accompanied by a proposal to repeal the French wealth tax, giving Macron’s proposal a pro-wealthy orientation.<sup>19</sup> The protesters were greeted with overwhelming popular support, as polls showed that over

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element of democratic societies”); BRUCE ACKERMAN, *REVOLUTIONARY CONSTITUTIONS: CHARISMATIC LEADERSHIP AND THE RULE OF LAW* 8 (2019) (opining populists have used their charismatic leadership to confer legitimacy to the citizens and institutions of constitutional democracy); CHANTAL MOUFFE, *FOR A LEFT POPULISM* 18 (2018) (contending populism can be inclusive and democratic while at the same time reshapes the constituent order ruled by technocratic elites). Here, thus, we limit our definition of populism to that of Jan-Werner Müller without necessarily closing off debate about a different type of populism that can foment the type of equitable and pluralistic policies that we argue for in this Article.

12. Alan Bogg & Mark Freedland, *supra* note 11, at 17.

13. *Id.*

14. GEST, *supra* note 9, at 63–66. *But see* Joann Wypijewski, *The Politics of Insecurity*, 103 *NEW LEFT REV.* 9, 10–11 (2017) (describing that the average Trump supporter made slightly upwards of \$80,000, and thus included both business owners and blue-collar workers, white men who “almost made it, but not quite”).

15. Stathis Kouvelakis, *The French Insurgency: Political Economy of the Gilets Jaunes*, 116/117 *NEW LEFT REV.* 75, 75–76 (2019).

16. *See* Jake Cigainero, *Who Are France’s Yellow Vest Protesters, and What Do They Want?*, N.P.R. (Dec. 3, 2018), <https://www.npr.org/2018/12/03/672862353/who-are-frances-yellow-vest-protesters-and-what-do-they-want> [<https://perma.cc/5S38-26H9>] (noting that the protests are “the biggest political crisis [Macron] has faced so far” and could affect the remainder of his presidency).

17. *Id.*

18. *Id.*

19. *See* Kouvelakis, *supra* note 15, at 76; “Yellow Vests”: *The Support of the Falling French (Survey)*, *LE FIGARO*, Mar. 20, 2020, <https://www.lefigaro.fr/flash-actu/gilets-jaunes-soutien-en-chute-apres-le-16-mars-sondage-20190320>.



61% of French residents supported the yellow vests' claims.<sup>20</sup> The movement, adding to the anti-globalism, Euro-skeptic chorus threatening the global economic order, has targeted European Union institutions.<sup>21</sup> A similar base of "white working class" support was crucial to the success of the U.K.'s "Brexit" movement and the Tories of Boris Johnson.<sup>22</sup> At the time of this writing, other European countries, including Russia, Hungary, Poland, Turkey, and Italy have populist governments.<sup>23</sup> Darker global forces hostile to immigrants, and raising the banners of xenophobia, Islamophobia, and white supremacy, are also posing substantial threats to the post-World War II order.<sup>24</sup>

Workers from the Global South have also suffered from the externalities of globalization, and very specifically from ill-regulated GVCs. The April 24, 2013 Rana Plaza disaster, arguably the deadliest factory disaster in modern history, is a case in point. It concerned the collapse of an eight-story garment factory building in Dhaka, Bangladesh.<sup>25</sup> Inside the building labored thousands of workers making garments for some of the most visible brands in the world—all GVC lead firms, such as Benetton, Primark, Matalon, Mango,<sup>26</sup> Walmart,<sup>27</sup> and many others. The owners of Rana Plaza had built more floors than legally permitted over an inadequate structure made with poor-quality

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20. Kouvelakis, *supra* note 15, at 76.

21. Gilbert Reilhac et al., *French Police, Yellow Vests Protesters Clash in Strasbourg*, REUTERS (Apr. 27, 2019), <https://uk.reuters.com/article/uk-france-protests/french-police-yellow-vests-protesters-clash-in-strasbourg-idUKKCN1S30EO>.

22. See Fareed Zakaria, *What Britain's Seismic Election Tells Us About 2020*, WASH. POST (Dec. 19, 2019), [https://www.washingtonpost.com/opinions/global-opinions/what-britains-seismic-election-tells-us-about-2020/2019/12/19/3316d5d8-22a9-11ea-86f3-3b5019d451db\\_story.html](https://www.washingtonpost.com/opinions/global-opinions/what-britains-seismic-election-tells-us-about-2020/2019/12/19/3316d5d8-22a9-11ea-86f3-3b5019d451db_story.html) [<https://perma.cc/KUP7-HZAJ>] (describing how the British Tories won the 2020 elections by combining a nationalist Brexit platform and an anti-austerity manifesto, which was in conflict with their conservative legacy since Thatcher); see also GEST, *supra* note 9, at 58.

23. Bogg & Freedland, *supra* note 11, at 16.

24. See Nick Robins-Early, *El Paso Was the Latest Target of a Deadly, Global White Supremacist Movement*, HUFFINGTON POST (Aug. 5, 2019), [https://www.huffpost.com/entry/white-nationalist-el-paso-christchurch-shooting\\_n\\_5d488476e4b0ca604e36aba0](https://www.huffpost.com/entry/white-nationalist-el-paso-christchurch-shooting_n_5d488476e4b0ca604e36aba0) [<https://perma.cc/ZYC5-J2XM>] (describing the global character of white supremacy).

25. *Rana Plaza Accident and Its Aftermath*, INT'L LABOUR ORG., [https://www.ilo.org/global/topics/geip/WCMS\\_614394/lang-en/index.htm](https://www.ilo.org/global/topics/geip/WCMS_614394/lang-en/index.htm) [<https://perma.cc/4CGV-JRSY>].

26. Rebecca Smithers, *Benetton Admits Link with Firm in Collapsed Bangladesh Building*, GUARDIAN (Apr. 29, 2013), <https://www.theguardian.com/world/2013/apr/29/benetton-link-collapsed-building-bangladesh> [<https://perma.cc/69PZ-NAW7>].

27. Steven Greenhouse, *As Firms Line up on Factories, Wal-Mart Plans Solo Effort*, N.Y. TIMES (May 14, 2013), <https://www.nytimes.com/2013/05/15/business/six-retailers-join-bangladesh-factory-pact.html?pagewanted=all> [<https://perma.cc/QXE2-QJL7>].

materials.<sup>28</sup> Cracks, a fatal sign of structure failure, appeared in the building a day before its collapse.<sup>29</sup> Workers had protested outside the building on the day of the accident, claiming the structure was unsafe, but managers threatened to withhold a month's pay if they did not report to work.<sup>30</sup> The workers returned to work, literally under protest, and the building collapsed, killing more than 1,100 people.<sup>31</sup> Many others were injured or maimed.<sup>32</sup> The global "race to the bottom" can thus prove deadly for too many.

And just recently, during the COVID-19 pandemic, Mexican maquiladora workers in Ciudad Juarez, classified as "essential," went on strike because they were compelled to work in unsafe conditions, in part because of pressures by leaders of U.S. industry and the U.S. government.<sup>33</sup> Workers were getting sick with COVID-19.<sup>34</sup> Deaths were mounting.<sup>35</sup> A labor activist told the BBC that while Ciudad Juarez, where the protests occurred, officially reported thirteen COVID-19 deaths, the real number was likely three times that.<sup>36</sup> Their factories were not keeping social distance protocols.<sup>37</sup> To underscore the exploitative context, according to the BBC, some of these workers barely made \$80 a week.<sup>38</sup>

The U.S. National Association of Manufacturers, which likely houses many lead firms, asked Mexican President Andrés Manuel López Obrador to classify these workers as "essential" to compel them to work and safeguard automobile and aerospace U.S. supply chains.<sup>39</sup> These

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28. Tansy Hoskins, *Reliving the Rana Plaza Factory Collapse: A History of Cities in 50 Buildings*, Day 22, *GUARDIAN* (Apr. 23, 2015), <https://www.theguardian.com/cities/2015/apr/23/rana-plaza-factory-collapse-history-cities-50-buildings> [<https://perma.cc/BZ9D-54A9>].

29. *Id.*

30. *Id.*

31. *Id.*

32. Jim Yardley, *After Bangladesh Factory Collapse, Bleak Struggle for Survivors*, *N.Y. TIMES* (Dec. 18, 2013), <https://www.nytimes.com/2013/12/19/world/asia/after-collapse-bleak-struggle.html?pagewanted=all> [<https://perma.cc/ES7Z-FRDZ>].

33. Will Grant, *Coronavirus: Mexico Factory Staff Question 'Essential Work'*, *BBC NEWS* (Apr. 28, 2020), <https://www.bbc.com/news/world-latin-america-52440202> [<https://perma.cc/QX88-QMSK>]; Mark Stevenson, *US Pressures Mexico to Reopen Plants Amid Worker Walkouts*, *ASSOCIATED PRESS* (Apr. 21, 2020), <https://apnews.com/6b2a7eae3be49a1ce6ed03e7b2d9b9f1>.

34. Grant, *supra* note 33.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. Stevenson, *supra* note 33.

supply chains are hardly as crucial in a pandemic, as would be supply chains of food, medical supplies, and personal protective equipment.<sup>40</sup> The BBC reported that the group's "controversial call was echoed by the Trump Administration."<sup>41</sup> As it reported, "[t]he U.S. Undersecretary of Defense for Acquisition and Sustainment, Ellen Lord, said last week that she had contacted Mexican Foreign Minister Marcelo Ebrard 'to ask for help to reopen international suppliers there.'"<sup>42</sup>

The aforementioned disruptions that lead firms inflict on some regions of the world, including workers in the Global North and in the Global South, have been widespread and systemic.<sup>43</sup> GVCs have touted unprecedented wealth to some<sup>44</sup> but inflicted disproportionate damage on others.<sup>45</sup> In this way, global economic governance appears "empirically invalid," i.e., incapable of effectively harmonizing the demands of contemporary economy and society.<sup>46</sup> Unfortunately, this mismatch between the global economy and its regulatory structures is increasingly translating into an emerging crisis of legitimacy, where some sectors of the world population do not recognize the authentic value of international trade and its critical role in maintaining global peace, prosperity, and development.

Some global business leaders have taken note of these challenges and are trying to respond.<sup>47</sup> For example, in a recent meeting of the Business Roundtable, chief executives of many of the world's largest firms declared that companies needed to refocus on their customers, employees, suppliers, and communities, as well as on the long-term value of their shareholders. The declaration broke with more than

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40. Grant, *supra* note 33.

41. *Id.*

42. *Id.*

43. See Int'l Labour Office, *supra* note 1, at 11 (stating how GVCs "are increasingly multi-directional, and include South–South, South–North and North–North flows").

44. *Id.*

45. *Id.* at 1.

46. Sociologist Max Weber used the term "empirical validity" to refer to the "effectiveness of [law] as a determinant of the real behavior of agents (or actors)." Michel Coutu, *With Hugo Sinzheimer and Max Weber in Mind: The Current Crisis and the Future of Labor Law*, 34 COMP. LAB. L. & POL'Y J. 605, 613 (2013).

47. See Geoffrey Kabaservice, *Joe Biden Is the Ultimate Centrist Democrat. Is that a Liability or Strength?*, GUARDIAN (Apr. 25, 2019), <https://www.theguardian.com/commentisfree/2019/apr/25/joe-biden-2020-democrats-choice> [<https://perma.cc/6QS6-LTC8>] (noting that American congresswoman Alexandria Ocasio-Cortez has proposed to raise taxes on the wealthy to seventy percent).

forty years of corporate dogma based on a much narrower, short-term, shareholder emphasis.<sup>48</sup>

But while the Business Roundtable's discovery of society beyond the shareholder is laudable, the reality of GVCs should make us skeptical of any attempts to marry social and economic concerns at the company level.<sup>49</sup> That's because generic, individual companies are not the main agents of globalization. Globalization, its good and bad, is closely tied to the decisions and actions of *lead* firms that head GVCs; lead firms are particular types of firms with superior authority of the global economy.<sup>50</sup> We could blame the owners of Rana Plaza for the 2013 accident, but they are all but the only responsible parties. The lead firms who connected their supply chains to Bangladesh are also to blame. We can also blame governments, such as President Macron's, for workers' diminishing earnings in France, but he's not the only culprit. Workers' deteriorating conditions in France have been slow-moving train wrecks with multiple causes, including loss of manufacturing jobs through automation and a lack of skills programs for workers.<sup>51</sup> In

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48. David Gelles & David Yaffe-Bellany, *Shareholder Value Is No Longer Everything*, *Top C.E.O.s Say*, N.Y. TIMES (Aug. 19, 2019), <https://www.nytimes.com/2019/08/19/business/business-roundtable-ceos-corporations.html> [<https://perma.cc/Q7XX-VK3V>]. *But see What Companies Are for*, ECONOMIST (Aug. 22, 2019), <https://www.economist.com/leaders/2019/08/22/what-companies-are-for> [<https://perma.cc/43XJ-L4PX>] (warning that such "collective capitalism" might lead to the decline of market competition and long-term prosperity of a society).

49. This Article uses the term "embeddedness" to mean, as understood by Karl Polanyi, the manner in which economic activity is constrained by social considerations. *See* Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 AM. J. SOC. 481, 482 (1985); Karl Polanyi, *The Economic Fallacy*, 1 REV. 9, 17 (1977).

50. *See* Gary Gereffi, *A Global Value Chain Perspective on Industrial Policy and Development in Emerging Markets*, 24 DUKE J. COMP. & INT'L L. 433, 438–39 (2014) (stating that lead firms are typically global manufacturers, retailers, or marketers).

51. Didier Fassin & Anne-Claire Defossez, *An Improbable Movement? Macron's France and the Rise of the Gilets Jaunes*, 115 NEW LEFT REV. 77, 79 (2019) (noting that "since the 2008 financial crisis, the income of the bottom 40 percent of the population has dropped. Pauperization has mainly afflicted those who were already the most disadvantaged, among whom joblessness and under-employment became increasingly rife"); *France's New Labour Problem—Skills Shortages*, ECONOMIST (Mar. 8, 2018), <https://www.economist.com/europe/2018/03/08/frances-new-labour-problem-skills-shortages>; Buttonwood, *The Manufacturing Jobs Delusion*, ECONOMIST (Jan. 4, 2017), <https://www.economist.com/buttonwoods-notebook/2017/01/04/the-manufacturing-jobs-delusion> [<https://perma.cc/7YLG-M6RJ>] (discussing that France has lost thirty-three percent of its manufacturing employment between 1993 and 2014); *see also* Liz Alderman, *Self-Checkout in France Sets off Battle over a Day of Rest*, N.Y. TIMES (Dec. 26, 2019), <https://www.nytimes.com/2019/12/26/business/self-checkout-automation.html>

Europe, as in the United States, lead firms have for decades relocated their supply chains to Eastern Europe, the U.S. non-union South, Mexico, Asia, and other locations where wages are much lower.<sup>52</sup> We could also blame maquiladora owners in Mexico, or even the Mexican government, for not properly policing health and safety rules, especially in a pandemic. However, lead firm pressures also share an important part of the blame for the COVID-19 infections in Mexico and the resulting strikes and demonstrations by maquiladora workers.

#### A. *The Argument*

Against the background of global economic inequalities and the populist backlash, now exacerbated by the COVID-19 pandemic, this Article argues that international organizations, as agents of the international economic order, must contribute to a post-populist era sensitive to social concerns while remaining inclusive of the various stakeholders of the global economy.<sup>53</sup> It specifically calls for the ILO and the WTO, which hold the relevant authority and expertise to regulate global labor and trade, respectively, to craft global norms for GVCs. Following the lead of economist and former head of the Wage and Hour Division of the U.S. Department of Labor under President Barack Obama, David Weil, who has argued for placing liability on lead

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[<https://perma.cc/3FKF-CZLS>] (discussing French workers' outrage over automated checkout machines and their implications for the traditional Sunday day of rest).

52. See WTO & INST. OF DEVELOPING ECON.-JAPAN EXTERNAL TRADE ORG., TRADE PATTERNS AND GLOBAL VALUE CHAINS IN EAST ASIA: FROM TRADE IN GOODS TO TRADE IN TASKS 83 (2011) (noting that Asia has contributed to the production chains of Western economies); Oskar Zieba, *How Manufacturing in Eastern Europe Can Benefit Your Business*, ENTREPRENEUR (Nov. 14, 2018), <https://www.entrepreneur.com/article/322616> [<https://perma.cc/7J4C-G3FP>] (stating that European fashion brands moved their production to Eastern Europe to take advantage of the cheaper workforce).

53. In a recent issue of the journal *International Organizations Law Review*, professors Franz Christian Ebert and Tonia Novitz underscore that the ILO is no longer the sole international organization concerned with the world of work. Franz Christian Ebert & Tonia Novitz, *Introduction: International Institutions, Public Governance and Future Regulation of Work*, 17 INT'L ORGS. L. REV. 1, 1–2 (2020). They further note that these organizations might not always complement each other, and at times might even conflict. *Id.* at 2, 5. The volume does not, however, directly advocate for inter-agency collaboration, although it does insist on further studies about inter-agency relationships. *Id.* at 5 (citing Henner Gött, *Interactions Between International Organizations: Approaching a Neglected Governance Dimension*, 17 INT'L ORGS. L. REV. 75 (2020)). While covering an array of international organizations, it does not cover the WTO.

firms as employers of contractors, franchisees, and suppliers,<sup>54</sup> we argue that the ILO should adopt a new convention on lead firm liability. Lead firms that exert control over their contractors, franchisees, and suppliers to affect the terms and conditions of employment should share employer responsibilities. Lead firm employer responsibilities would help better guarantee terms and conditions of employment that meet international labor standards and the national standards in the countries where the contractors, franchisees, and suppliers operate.

For example, lead firm employer responsibility can better guarantee that the employees of said contractors, franchisees, and suppliers will be paid in accordance with wage and hour laws of the country they are located in, will have their rights to join unions respected, and will not face discriminatory treatment. Lead firms can also be held liable in case of industrial accidents such as Rana Plaza, and thus would be compelled to ensure that their contractors, franchisees, and suppliers follow health and safety rules. Indeed, a number of jurisdictions, including Israel, the Netherlands, and various U.S. states—as well as the U.S. Department of Labor under President Barack Obama—have embraced the principle of lead firm liability.<sup>55</sup>

Second, we argue that the ILO should enact a new convention on mass layoffs where employers, including lead firms, assume some of the social costs of full or partial plant closings through what have been called “social plans.”<sup>56</sup> Many countries impose liabilities on firms that partially or fully close operations. Lead firms would have to shoulder the responsibility for the employees of their suppliers, contractors, and franchisees. These social plans could help workers and their communities to retool and re-link themselves to other GVCs once lead firms decide to

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54. See DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 190 (2014) (asking if lead firms should be able to benefit from subcontracting, franchising, and supply chains without accepting responsibility for them).

55. See The IGLP Law & Global Production Working Group, *The Role of Law in Global Value Chains: A Research Manifesto*, 4 LONDON REV. INT'L L. 57, 76 (2016); Mark Anner et al., *Toward Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks*, 35 COMP. LAB. L. & POL'Y J. 1, 37 (2013) (proposing to expand lead firms' liabilities on labor law violations to suppliers and subcontractors over their GVCs beyond lead firms' domestic jurisdictions). On President Barack Obama's Department of Labor policy on joint employment, which arguably aimed to reach to lead firms, see U.S. DEP'T OF LABOR, WAGE AND HOUR DIV., ADMINISTRATOR'S INTERPRETATION NO. 2016-1, JOINT EMPLOYMENT UNDER THE FAIR LABOR STANDARDS ACT AND MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT (Jan. 20, 2016) (David Weil issuing Administrator), at 3.

56. See *infra* note 206 and accompanying text.

exit their communities. However, because only a few countries currently provide for such social plans, we also argue that the ILO should adopt a convention on mass layoffs so that lead firms can shoulder these obligations.

Third, this paper argues that the WTO should advise the ILO when it produces its new conventions on lead firm liability and mass layoffs. The WTO can provide legitimacy, legal and otherwise, to the ILO's lead firm liability convention by declaring how the conventions meet the public morals exception, Article XX(a), of the General Agreement on Tariffs and Trade (GATT), and rules on technical barriers on trade.<sup>57</sup> Second, the WTO can provide the ILO with advice on how to craft a regulatory scheme for lead firms that considers trade impacts. While the ILO's tripartite structure provides employer input that can help create a more balanced convention on lead firm liability, technical assistance from the WTO's trade experts can better guarantee that such conventions will still be consistent with international trade principles.<sup>58</sup>

Moreover, the WTO can also help the ILO ground its conventions in WTO guidelines for taxes and subsidies. Social plans will require revenue raising, and hence, levying additional taxes or providing subsidies for lead firms. The WTO can help establish ways to provide for such fiscal measures to protect workers without slipping into protectionism.

Finally, we argue that the WTO can facilitate a post-populist trade regime through its informal "peer review" space, where it can bring trade and labor policymakers and stakeholders to meet, discuss, and develop normative products. It is here where our proposal importantly diverges from populism, which is characterized by anti-elitism and anti-pluralistic politics.<sup>59</sup> While we are sensitive to the social concerns fueling populist movements, we vehemently oppose populism's anti-pluralistic politics and disdain for expertise. In our view, the ILO's tripartite structure, where employers, workers, and governments co-produce normative products, coupled with the expanded space that peer review might lend to other stakeholders to collaborate, better

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57. General Agreement on Tariffs and Trade ("GATT") Article XX permits signatory countries to adopt or enforce trade measures "necessary to protect public morals." General Agreement on Tariffs and Trade art. XX(a), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

58. See generally *The UN's Structures Built in 1945 Are Not Fit for 2020, Let Alone Beyond It*, ECONOMIST (June 20, 2020), <https://www.economist.com/special-report/2020/06/20/the-uns-structures-built-in-1945-are-not-fit-for-2020-let-alone-beyond-it> (arguing that global problems can be more effectively solved through collaboration between international organizations).

59. Bogg & Freedland, *supra* note 11, at 17.

guarantees a system where a broader variety of actors can participate in and contribute to an inclusive, global norm-making process.

We recognize that too much WTO influence on the ILO could result in meaningless conventions where economic and trade matters reign over social concerns. However, we also caution against a convention that does not consider trade impacts. At the end, ILO conventions produced in collaboration with the WTO will be as useful as the quality of their collaboration turns out to be. If both embattled international organizations want to remain legitimate and relevant in a post-populist era, true cooperation will be as necessary.<sup>60</sup>

### B. *Organization of this Article*

This Article unfolds in the following sequence. Part I demonstrates the governance gap existing between two ideals, i.e., free trade and labor protection, within the GVC context. It first describes how a territorial trap continues to limit the global economic order, particularly economic and social governance and regulation. It then explicates how the global economic order is further mired by structural and historical tensions between trade and labor, contributing to what the paper calls “entropic antimony,” or a regulatory conflict that has generated disorder and instability, rather than order and constancy. Entropic antimony seems to contribute to the rise of populism and the current delegitimizing trend of the global economic order.

Part II describes how, despite the double governance gap, the ILO and the WTO have started a series of modest collaborative projects, that demonstrate two main points: that trade and labor are de facto tied, despite their de jure separation, as well as the fact that what these two international organizations are currently doing is still seriously lacking to craft a post-populist economic order.

Part III argues that these collaborative projects should be encouraged and deepened. It specifically advocates for new ILO conventions on lead firm liability and mass layoffs drawn with some advice and support from

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60. See *It's the End of the World Trade Organisation as We Know It and America Feels Fine*, *ECONOMIST* (Nov. 28, 2019), <https://www.economist.com/finance-and-economics/2019/11/28/its-the-end-of-the-world-trade-organisation-as-we-know-it> [<https://perma.cc/3RS7-Q7DE>] (describing the current crisis of the WTO); Simon Bradley, *Has the Global Labour Organisation Advanced Workers' Rights?*, *SWI* (Jan. 22, 2019), <https://www.swissinfo.ch/eng/decent-work-centenary-has-global-labour-organisation-advanced-workers-rights-/44688686> [<https://perma.cc/82CE-EP3J>]; Claire La Hovary, *The ILO's Employers' Group and the Right to Strike*, 22 *TRANSFER* 401, 401–04 (2016) (describing a walkout by the entire employer delegation to the International Labor Conference, marking a time of crisis at the ILO).



the WTO. WTO advice and support, if done in good faith and not with the intent of watering down the ILO's social concerns, can better guarantee that the new ILO conventions comport with Article XX of GATT and overall international trade policy, adding legitimacy to the project. The WTO can also offer its peer review space to bring together labor and trade policymakers and stakeholders to discuss the ILO's new normative products on lead firm liability and mass layoffs.

Finally, the Conclusion addresses skeptics of the role that international law—typically soft, politically dependent, and greatly ignored in some quarters, including in the United States—can have over highly charged political problems. It also addresses those who might argue that any ILO-WTO collaboration would simply lead to a watering down of international labor standards in favor of business, i.e., to reinforce rather than to change the status quo. After addressing those objections to our proposal, we close by stating that collaboration between the ILO and the WTO, while certainly not a complete solution to the complex and daunting problems of our times, remains critical to restoring legitimacy to the global economic order and ushering in a post-populist era.

### I. THE DOUBLE GOVERNANCE GAP

This Part describes the double governance gap between GVCs and their ossified regulatory structure. It is a double gap because while GVCs are global, regulatory structures remain mostly national.<sup>61</sup> Moreover, while GVCs are networks that coordinate global trade and, for such ends, incorporate millions of workers around the world, the global economic order has remained stubbornly steadfast in keeping global labor and trade regulated by the ILO and the WTO respectively—distinct international organizations with formal, de jure separations.<sup>62</sup> This Part foreshadows our main argument discussed in Part III which proposes that the ILO and the WTO collaborate to contribute to a new global economic order where lead firms shoulder a heavier load of social concerns.

#### A. *The Territoriality Gap*

We live in a world economy that is shaped by transnational lead firms that structure GVCs. We define GVCs in the same vein as the ILO; hence, by GVCs we refer to:

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61. See *infra* notes 81–83 and accompanying text.

62. WTO, Singapore Ministerial Declaration of 13 December 1996, WTO Doc. WT/MIN(96)/DEC/1, 2 ¶ 4 (1996).

[T]he cross-border organization of the activities required to produce goods or services and bring them to consumers through inputs and various phases of development, production and delivery. This definition includes foreign direct investment (FDI) by multinational enterprises (MNEs) in wholly owned subsidiaries or in joint ventures in which the MNE has direct responsibility for the employment relationship. It also includes the increasingly predominant model of international sourcing where the engagement of lead firms is defined by the terms and conditions of contractual or sometimes tacit arrangements with their suppliers and subcontracted firms for specific goods, inputs and services.<sup>63</sup>

As the main architect of GVCs, lead firms design, produce, and distribute commodities and services around the world. They are transnational actors that span various nation-states.<sup>64</sup> GVCs are networks of hundreds or even thousands of firms across the globe tied through seller-buyer relationships.<sup>65</sup> Lead firms search for and link producers and suppliers of goods and services in particular arrangements that maximize value.<sup>66</sup> Researchers and policymakers characterize such organization of GVCs by lead firms as “corporate governance,” i.e., “the ways in which corporate power can actively shape the distribution of profits and risk in an industry and the actors who exercise such power through their activities.”<sup>67</sup>

Lead firms and GVCs have created economic opportunities for many.<sup>68</sup> Ordinary workers have found new opportunities through GVC investments. In fact, the BRICS countries (Brazil, Russia, India, China, and South Africa), large nation-states considered to be “emerging,” are fast becoming important nodes in GVCs, so much that experts have

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63. See Int'l Labour Office, *supra* note 1, at 1 (explaining that GVCs are characterized by their cross-border nature and the connections that develop).

64. See Roger Cotterrell, *What Is Transnational Law?*, 37 LAW & SOC. INQUIRY 500, 501 (2012) (noting that the concept of “transnational” is vague, but includes the extra-national while also superseding ideas of “international” still mired on the nation-state as building blocks).

65. Kevin B. Sobel-Read et al., *Recalibrating Contract Law: Choses in Action, Global Value Chains, and the Enforcement of Obligations Outside of Privity*, 93 TUL. L. REV. 1, 3 (2018).

66. See Gereffi, *supra* note 50, at 440–41 (internal citations omitted).

67. *Id.* at 440.

68. See Int'l Labour Office, *supra* note 1, at 2, 8, 17–19 (explaining how GVCs provided employment opportunities to historically disadvantaged groups in developing economies, including women and migrant workers).

stated the world has now entered a new “inflection point” where emerging economies co-lead in world governance.<sup>69</sup>

Importantly, however, the availability of GVC-created opportunities has been uneven.<sup>70</sup> On the one hand, GVCs have generated new opportunities for some, with countries such as China benefiting tremendously from GVCs, followed by other large emerging countries and an array of developed countries.<sup>71</sup> Countries with larger populations leverage their economies of scale to specialize in niche productive markets or to compel suppliers to set up manufacturing in their territories to serve their consumers.<sup>72</sup> Sociologist Gary Gereffi posits that the emerging economies that have best been able to take advantage of these GVC-created opportunities are those that have reinstated industrial policies focusing on “trade promotion, local content rules, taxes, tariffs, and more indirect programs that drive local production.”<sup>73</sup> These policies form a programs package that the literature labels as “economic upgrading.”<sup>74</sup> Economic upgrading is the flip side of corporate governance.<sup>75</sup> It is “the process by which economic actors—nations, firms, and workers—move from low-value to relatively high-value activities in [GVCs].”<sup>76</sup> Countries that can better create and establish those policies to better insert their private economic actors into GVCs become winners in the brave new world of GVCs.

On the other hand, firms and workers in countries that cannot upgrade lose.<sup>77</sup> We also add that firms and workers in subnational regions, such as the U.S. Midwest, that are also unable to upgrade, also lose out even if upgrading in other subnational locations in their countries is taking place.<sup>78</sup> In this sense, countries and regions that

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69. Gereffi, *supra* note 50, at 444 (arguing that this “inflection point” is a new phase of the global economy that may have dramatic implications for firms and workers worldwide).

70. *Id.* at 451–52.

71. *Id.* at 444 (emerging countries benefitting from GVCs include Russia, India, Brazil, Mexico, South Africa, and South Korea).

72. *Id.* at 448–49, 451–52.

73. *Id.* at 437–38.

74. *Id.* at 440–41.

75. *Id.* at 440.

76. Gary Gereffi, *The Global Economy: Organization, Governance, and Development*, in *THE HANDBOOK OF ECONOMIC SOCIOLOGY* 160, 171 (N.J. Smelser & R. Swedberg eds., 2d ed. 2005).

77. Gereffi, *supra* note 50, at 454–55.

78. Int’l Labour Office, *supra* note 1, at 20–21 (noting how workers in developed economies have lost from GVC decisions to relocate work to the Global South); Markusen & Carlson, *supra* note 8, at 29.

cannot institute effective upgrading policies must make do with “low-value added activities [that] can lock firms and national industries into unprofitable and intellectually narrow segments of the value chain”<sup>79</sup>—if on anything at all.

Given that there are winners and losers created by GVCs, some policymakers are searching for ways to regulate GVCs so that they can produce more equitable results for the world’s populations.<sup>80</sup> However, most upgrading policies are national in scope, while GVCs operate transnationally.<sup>81</sup> Thus, GVCs remain formally regulated by ineffective national norms<sup>82</sup> or by international ones where the nation-state still remains the cornerstone in implementing and enforcing them.<sup>83</sup> This gap between regulatory needs and realities, in light of the winners and losers that GVCs create between states but also within states, sabotages global governance.<sup>84</sup> The growing gap induces some populations, regions, and even nations, to perceive global regulation as unfair (in that global regulation militates against their own interests).<sup>85</sup> Others see it as inept (in that global regulation fails to manage growing interdependency). Either way, the territorial trap signals a problem of empirical validity and of legitimacy in the global governance regime.

### B. *The Labor and Trade Divide*

Nation-state centrism, its ideology and apparatus, which spurs a territorial trap, is not the only phenomenon that prevents a global economic order from meeting its contemporary challenges. Formal (de jure) separation of trade and labor regulation is also a central obstacle towards effective global economic governance. While the global economic order has declared them to be separate, trade and labor are necessarily (de facto) linked to each other. The WTO has declared that the ILO, not the WTO, is “the competent body to set and deal with

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79. Gereffi, *supra* note 50, at 455.

80. *See id.* at 454 (noting that GVC-driven development creates a host of new economic and social policy challenges including gaps in health care and education).

81. *Id.* at 455.

82. *See* KENICHI OHMAE, *THE END OF THE NATION STATE: THE RISE OF REGIONAL ECONOMIES* (1995) (observing that nation states created too many rigid rules captured by domestic special interests that are incapable of addressing contemporary global regulatory challenges).

83. *See id.*

84. Int’l Labour Office, *supra* note 1, at 2, 39.

85. *See* GEST, *supra* note 9, at 35 (describing how white working class people in formerly industrial cities in the United States and beyond express nostalgia and bitterness against corporations that abandoned their city, governments that did not stop them, and immigrant arrivals that changed the complexion of their communities).

[internationally recognized core labour] standards.”<sup>86</sup> Formal linkages between these two agencies barely exist, barring nominal interactions between their two Secretariats.<sup>87</sup>

Things were not always this way. The Havana Charter, the original version of the International Trade Organization (ITO) launched in the 1940s, and eventually aborted, provided an ambitious chapter titled “Employment and Economic Activity.”<sup>88</sup> This chapter stipulated that avoiding unemployment, and underemployment, is “a necessary condition for the expansion of international trade.”<sup>89</sup> ITO members also recognized that “unfair labor conditions, particularly in production for export, create difficulties in international trade and, accordingly, each Member agrees to take whatever action may be appropriate and feasible to eliminate such conditions within its territory.”<sup>90</sup>

However, since the official demise of the Havana Charter, trade and labor concerns in the international arena have been in tension. Many labor rights advocates fear that an unbridled free trade regime undermines labor protection by encouraging a “race to the bottom.”<sup>91</sup> They highlight the inherent pro-trade bias of the WTO under which an extremely narrow set of exceptions under Article XX of GATT could not adequately address social concerns, such as labor protection.<sup>92</sup> They warn that such regulatory failure would delegitimize the entire WTO system and thus make it unsustainable in the long run.<sup>93</sup> In this regard, some scholars maintain that domestic regulators should be given a broad scope of regulatory autonomy in combating societal evils—even if that would compromise free trade.<sup>94</sup> Some propose that importing nations adopt trade restrictions and curb the “race-to-the-bottom”

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86. WTO, *supra* note 62, at 2 ¶ 4.

87. *Id.*

88. DEP'T OF STATE, SUMMARY AND ANALYSIS OF ITO CHARTER (1950), [https://fraser.stlouisfed.org/files/docs/historical/martin/17\\_07\\_nd1.pdf](https://fraser.stlouisfed.org/files/docs/historical/martin/17_07_nd1.pdf).

89. *Id.*

90. *Id.*

91. See C.W., *Racing to the Bottom*, ECONOMIST (Nov. 27, 2013), <https://www.economist.com/free-exchange/2013/11/27/racing-to-the-bottom> [<https://perma.cc/GPS2-ZPHP>] (explaining that to compete in a global economy, countries not only reduce labor protections but also restrict labor law enforcement).

92. Sungjoon Cho, *Linkage of Free Trade and Social Regulation: Moving Beyond the Entropic Dilemma*, 6 CHI. J. INT'L L. 625, 641 (2005).

93. See Philip M. Nichols, *Trade Without Values*, 90 NW. U. L. REV. 658, 660 (1996). See generally Daniel C. Esty, *The World Trade Organization's Legitimacy Crisis*, 1 WORLD TRADE REV. 7, 19 (2002).

94. Michael J. Trebilcock & Robert Howse, *Trade Liberalization and Regulatory Diversity: Reconciling Competitive Markets with Competitive Politics*, 6 EUR. J. L. & ECON. 5, 28 (1998).

phenomenon.<sup>95</sup> In contrast, free trade advocates warn that trade restrictions might unduly regulate the labor market to the detriment of the general welfare<sup>96</sup> and criticize that too much emphasis on labor protection arms protectionists with their preferred excuses.<sup>97</sup> Many economists also fear that linkage between trade and labor law would deliver neither free trade nor harmonized labor protection.<sup>98</sup>

One could thus contend that some sectors have configured trade and labor in a zero-sum way. A pro-trade position is prone to dis-embed social concerns from economic ones, as already documented by the economic historian Karl Polanyi.<sup>99</sup> They appear to be guilty of the “economistic fallacy,” which attempts to separate the economic sphere from the social sphere.<sup>100</sup>

## II. ATTEMPTS OF COUPLING LABOR AND TRADE SINCE THE SINGAPORE DECLARATION OF 1996

Despite the formal and artificial organizational line-drawing in the late 1990s and the early 2000s, as discussed above, the ILO and the WTO have not lived in total isolation from each other. They have been maintaining a relationship, albeit, admittedly, a very limited one. In general, the WTO Secretariat “maintains technical exchanges with the [ILO] with a view to helping members’ global economic policies. Activities range from compiling statistics, research and technical assistance and training.”<sup>101</sup> According to the WTO:

The WTO Secretariat attends sessions of the ILO Governing Body as observer and also routinely participates in [certain] meetings . . . At different times, WTO participation has been at head-of-agency level . . . Further collaboration has occurred in the context of work

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95. See JEFFREY FRANKEL, *THE HARVARD PROJECT ON INT’L CLIMATE AGREEMENTS, GLOBAL ENVIRONMENTAL POLICY AND GLOBAL TRADE POLICY*, 2–4 (Oct. 2008), <https://www.belfercenter.org/sites/default/files/legacy/files/Frankel2Web.pdf> [<https://perma.cc/MR9C-7N3V>] (discussing WTO-consistent import restrictions to tackle climate change).

96. See Frieder Roessler, *Diverging Domestic Policies and Multilateral Trade Integration*, in 2 *FAIR TRADE AND HARMONIZATION* 21, 36 (Jagdish N. Bhagwati & Robert E. Hudec eds., 1996).

97. Jagdish Bhagwati, *Introduction* to 1 *FAIR TRADE AND HARMONIZATION* 1, 5 (Jagdish N. Bhagwati & Robert E. Hudec eds., 1996).

98. Raj Bhala, *Clarifying the Trade-Labor Link*, *COLUM. J. TRANSNAT’L L.* 11, 17–19 (1998).

99. Polanyi, *supra* note 49, at 16–18.

100. *Id.*

101. *The WTO and International Labour Organization*, *WORLD TRADE ORG.*, [https://www.wto.org/english/thewto\\_e/coher\\_e/wto\\_ilo\\_e.htm](https://www.wto.org/english/thewto_e/coher_e/wto_ilo_e.htm) [<https://perma.cc/6XTQ-QMUN>].

undertaken between 2002–2004 by the World Commission on the Social Dimension of Globalization . . . .

As well, the WTO Secretariat participates in follow-up mechanisms to the World Commission, including attendance at meetings of the ILO’s Policy Coherence Initiative. In the last few years, the WTO Secretariat has on several occasions also attended conferences and seminars organized by the ILO, when issues of relevance to the WTO were discussed.<sup>102</sup>

In a burgeoning interagency collaboration, the ILO and the WTO have produced three joint reports: one summarizing the literature in employment and trade, another on trade and informality, and a third on skills development and trade. This sub-section summarizes those reports and draws lessons from them for prospective collaboration to regulate lead firms.

We can observe an evolution of ideas throughout these three joint reports. The first report (the “2007 Report”) problematizes the formal separation of labor and trade policy and identifies a coherent connection between these two issues.<sup>103</sup> Then, the second report (the “2009 Report”) emphasizes the need for policy coordination between the ILO and the WTO as it describes various challenges brought by informal labor.<sup>104</sup> After the identification of labor-trade linkage and the need for policy coordination, the third report (the “2017 Report”) finally spells out a blueprint in the area of skills upgrading.<sup>105</sup>

#### A. *The 2007 Report*

In 2007, the WTO Secretariat and the International Labor Office of the ILO published their first joint report. Titled, *Trade and Employment: Challenges for Policy Research* (“First Report”),<sup>106</sup> it summarizes the social science literature describing the relationship between trade and labor markets.<sup>107</sup> More specifically, it dives into the literature on social protection as vehicles for better transitions toward trade liberalization.<sup>108</sup> It also describes findings on policies that impact trade, and that can also

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102. *Id.*

103. *See infra* Part II.A.

104. *See infra* Part II.B.

105. *See infra* Part II.C.

106. INT’L LABOUR OFFICE & WTO, TRADE AND EMPLOYMENT: CHALLENGES FOR POLICY RESEARCH (2007) [hereinafter FIRST REPORT].

107. *Id.* at v.

108. *Id.* at 59–60.

be impacted by trade, including active labor market policies,<sup>109</sup> freedom of association and collective bargaining, the informal economy in developing countries, redistribution policies, and education policies, among others.<sup>110</sup> While observing that relationships between trade labor markets were not clear,<sup>111</sup> the report concludes that trade and labor policies do interact and that one can affect the other.<sup>112</sup> It calls on policy makers to work toward greater trade and labor policy coherence.<sup>113</sup> In other words, the First Report highlights the de facto linkage between trade and labor, despite their de jure separation in the global economic order.

### B. *The 2009 Report*

The second report, *Globalization and Informal Jobs in Developing Countries* (“Second Report”), was published in 2009 and focused on the relationship between the informal labor market and trade liberalization.<sup>114</sup> The report aims to combine the expertise of the ILO and the WTO to describe and prescribe policy ideas to national governments on how to craft trade and labor market formalization policies so that countries can better benefit from globalization.<sup>115</sup> Providing such policy ideas is particularly important for developing countries given that most economic opportunities in those countries are informal.<sup>116</sup> In many developing economies, most job creation takes place in the informal economy, where around sixty percent of workers labor.<sup>117</sup> However, and herein lies the problem, the informal economy tends to provide less job security to workers, lower incomes, less access to social benefits, and fewer possibilities to participate in education and training programs.<sup>118</sup> Hence, if increased

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109. “Active labor market policies” refer to government policies aiming to actively help workers find jobs. See Marc Tucker, *Industrial Policy and National Success: The Human Element*, 5 STAN. L. & POL’Y REV. 53, 58 (1993). They contrast with passive labor market policies, or programs where government merely provide unemployment benefits with the hope that the workers can find a job on their own. *Id.*

110. FIRST REPORT, *supra* note 106, at 61–80.

111. *Id.* at 85–86.

112. *Id.* at 90.

113. *Id.*

114. See INT’L LABOUR ORG. [ILO] & WTO, GLOBALIZATION AND INFORMAL JOBS IN DEVELOPING COUNTRIES (2009) [hereinafter SECOND REPORT] (analyzing the connections between globalization and the informal labor economy in developing countries).

115. *Id.* at 7.

116. *Id.* at 9.

117. *Id.*

118. *Id.*



trade is to truly benefit developing countries, policies must tackle the problem of informality, which might worsen with increased trade.

While there is no simple or linear relationship between trade and informality, trade generally increases informality in developing contexts because developing countries lack the capacity to compete globally other than by lowering their own costs.<sup>119</sup> Firms and workers thus try to escape costly regulations in light of increased competition by seeking refuge in the informal sector, where they can offer cheaper goods and services.<sup>120</sup> However, informality also brings with it a slew of long-term problems that entangle firms, workers, and countries in poverty traps.<sup>121</sup> For example, evidence shows that workers who labor too long in the informal sector face constricted opportunities to move to the formal sector.<sup>122</sup> Chances to transition to more formal economic activities decline with the duration of informal work.<sup>123</sup> Other evidence shows that informality contributes to smaller firm sizes, reduced growth, and smaller productivity increases.<sup>124</sup> Long-term productivity stagnation keeps unprofitable firms in the informal market and prevents “the necessary churning that is essential for technological advancement.”<sup>125</sup>

To resolve the challenges posed by informality and trade liberalization, the Second Report argues that states should develop policies for firms, and separate ones for workers.<sup>126</sup> For firms, it argues that states must increase benefits and lower the costs of formality.<sup>127</sup> This can be done by reducing red tape, lowering taxes (in particular for start-ups and small companies), and supporting firms’ access to capital markets.<sup>128</sup> For workers, states should work on upgrading skills.<sup>129</sup> Countries can improve worker skills by providing support to transition out of informality, investing in infrastructure so as to promote productivity of informal firms—thus facilitating formalization—and create a basic

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119. *Id.* at 16.

120. *Id.* at 65–66.

121. *Id.* at 91–93.

122. *Id.* at 93 (citing B. Saha & S. Sarkar, *Schooling, Informal Experience, and Formal Sector Earnings: A Study of Indian Workers*, 3 *REV. DEV. ECON.* 187 (1999)).

123. *Id.*

124. *Id.* at 99 (citing WILLIAM W. LEWIS, *THE POWER OF PRODUCTIVITY: WEALTH, POVERTY, AND THE THREAT TO GLOBAL STABILITY* (2004)).

125. *Id.*

126. *Id.* at 17.

127. *Id.*

128. *Id.*

129. *Id.*

network of social protection for those who continue to be employed informally.<sup>130</sup>

The Second Report also notes that informal workers and firms sometimes self-organize and provide members and beneficiaries with social benefits, such as through workers' associations.<sup>131</sup> Sometimes, these self-organized groups also run their own private insurance schemes.<sup>132</sup> The Second Report argues that governments should support these self-help insurance schemes by providing the necessary collateral, without actually running the insurance schemes themselves.<sup>133</sup> More generally, the report argues that local initiatives should be used as multipliers to help implement policies in the informal economy, thereby improving efficiencies.<sup>134</sup>

Perhaps attached to the idea of supporting self-organized groups and the global economic order's important goal to protect freedom of association, the Second Report also argues that governments should promote "social dialogue"<sup>135</sup> between employers and workers for successful formalization strategies.<sup>136</sup> Finally, the Second Report argues that trade liberalization should be implemented in measured steps and not suddenly.<sup>137</sup> Based on prior experiences, states should be afforded time to extend trade liberalization rules, something that the WTO rules already permit to mitigate short-run adjustment costs.<sup>138</sup> Moreover, the

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130. *Id.*

131. *Id.* at 18, 139–40. For example, the report highlights the work of the Self-Employed Women's Association (SEWA) in India. *Id.* at 140 (internal citations omitted).

132. *Id.* at 18.

133. *Id.*

134. *Id.*

135. "Social dialogue" is defined by the ILO as: "[A]ll types of negotiation, consultation or simply exchange of information between, or among, representatives of governments, employers and workers, on issues of common interest relating to economic and social policy." ILO, *Social Dialogue*, <https://www.ilo.org/ifpdial/areas-of-work/social-dialogue/lang-en/index.htm><sup>20</sup> [https://perma.cc/XJ6G-D44W]. "It can exist as a tripartite process, with the government as an official party to the dialogue or it may consist of bipartite relations only between labour and management (or trade unions and employers' organizations), with or without indirect government involvement." *Id.* "The main goal of social dialogue itself is to promote consensus building and democratic involvement among the main stakeholders in the world of work." *Id.* "Successful social dialogue structures and processes have the potential to resolve important economic and social issues, encourage good governance, advance social and industrial peace and stability and boost economic progress." *Id.*

136. SECOND REPORT, *supra* note 114, at 18, 139.

137. *Id.* at 18, 141.

138. *Id.*

Second Report stresses the WTO's commitment to support the ILO's core labor standards,<sup>139</sup> or international labor standards that are applicable to all member states of the ILO.<sup>140</sup> These core labor standards are, to wit, freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labor, the abolition of child labor, and the elimination of discrimination in respect of employment and occupation.<sup>141</sup> Such commitment, however, is not followed by any ideas on how the WTO should create normative products to support said rights.<sup>142</sup> It then states the more recognized policy that the WTO recognizes the ILO as "the competent body to set and deal with these standards."<sup>143</sup>

As in the First Report, the Second Report also calls for active labor market policies.<sup>144</sup> Governments should run employment offices that help to match workers with open positions in their respective territories.<sup>145</sup> This becomes ever more important with liberalization and the structural shifts, i.e., Schumpeterian dislocations<sup>146</sup>, that it necessarily creates. But most importantly, the report calls for coordination of trade and labor market policies.<sup>147</sup> It concludes by stating that close collaboration between ministries can foster further information exchange and be used to establish, and subsequently refine, a broad reform agenda.<sup>148</sup> Hence, the reader can conclude that international organizations should provide coherent support for policy reform, as well as technical assistance in designing, implementing, and coordinating these welfare-enhancing reforms. In all, collaboration across agencies at the international level seems warranted to spur policy coherence.<sup>149</sup>

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139. *Id.* at 144–45.

140. ILO, *ILO Declaration on Fundamental Principles and Rights at Work*, <https://www.ilo.org/declaration/lang-en/index.htm> [<https://perma.cc/4UBM-N7ZZ>].

141. *Id.* at 4.

142. SECOND REPORT, *supra* note 114, at 144.

143. *Id.*

144. *Id.* at 145.

145. *Id.*

146. SCHUMPETER, *supra* note 6 and accompanying text.

147. SECOND REPORT, *supra* note 114, at 146.

148. *Id.* at 147.

149. Shortly after the release of the Second Report, the ILO and the WTO published an edited volume titled *MAKING GLOBALIZATION SOCIALLY SUSTAINABLE*, comprised of contributions from academic researchers. ILO & WTO, *MAKING GLOBALIZATION SOCIALLY SUSTAINABLE* 19 (Marc Bacchetta & Marion Jansen eds., 2011).

C. *The 2017 Report*

In 2017, the WTO and the ILO published a third report titled, *Investing in Skills for Inclusive Trade* (“Third Report”).<sup>150</sup> As the title suggests, it focuses on trade and workers’ skills. It presents evidence, some original, showing that trade increases technological upgrading and, therefore, increases demand for skilled workers.<sup>151</sup> Countries that can better meet that demand for skills end up better performing when trade is liberalized.<sup>152</sup> But as the Second Report also demonstrates, trade does not guarantee better outcomes for workers, or “decent work.”<sup>153</sup> Governments need to develop policies to better succeed in a globalized world and successfully participate in the global economy.<sup>154</sup> The report observes that “investment in skills complements these opportunities to promote decent work, enabling increases in productivity, providing the skills needed for modern forms of [Human Resource Management] and work organization to be effective, and as itself being a component of decent work.”<sup>155</sup>

As in the other reports, the Third Report calls for social dialogue<sup>156</sup> and active labor market policies<sup>157</sup> to craft skill development policies that sustain decent work. Further, it calls for the whole array of stakeholders to participate in the policy scheme. As the report states:

Relevant ministries, regulatory agencies, research centres, industry organizations, professional organizations, supply-chain integrators, major purchasers and specialist providers of training and advice such as farm extension services may collaborate on developing and implementing strategies to raise skills and performance in supply-

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150. ILO & WTO, *INVESTING IN SKILLS FOR INCLUSIVE TRADE* (2017) [hereinafter *THIRD REPORT*].

151. *Id.* at 11.

152. *See id.* at 11, 20 (explaining the complex relationship between the production of goods and services, technological advances, and the demand for skilled workers).

153. *Id.* at 74. The ILO defines “decent work” as:

[T]he aspirations of people in their working lives. It involves opportunities for work that is productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men.

ILO, *Decent Work*, <https://www.ilo.org/global/topics/decent-work/lang-en/index.htm> [https://perma.cc/Z4GV-JX7S]. Decent work has become a major global goal pursued by United Nations and various organs. *Id.*

154. *THIRD REPORT*, *supra* note 150, at 74.

155. *Id.* at 160.

156. *Id.* at 24, 163–64.

157. *Id.* at 128, 165.

chain [Micro-, Small, and Medium-Sized Enterprises], including small agricultural enterprises where appropriate. The purpose is both to improve the effectiveness with which they connect to international markets and to make access to skills development more inclusive.<sup>158</sup>

#### D. Evaluation

One can draw important takeaways from these reports. First, the reports show a continued commitment to ILO and WTO collaboration despite the formal separation of these regulatory areas of the global economic order. In fact, the Second Report even gives an interesting, if not revisionist, interpretation of the Singapore Declaration, stating that the WTO had pronounced its commitment to international labor standards and supported the ILO. Rather than framing the issue as one where the WTO washed its hands of labor issues, as is commonly understood, it underscores WTO commitment to labor standards. Second, the reports acknowledge the persistent importance of social dialogue, an ILO staple, to provide policy coherence and support both trade and labor at a global level, and at the level of nation states. Third, the reports acknowledge the importance of crafting better markets through conscientious policy, not through *laissez faire*. Tied to this point, trade liberalization should be introduced slowly, not abruptly—not through shock therapy, as some policymakers argued for in the 1990s.<sup>159</sup> In all, the reports call for further braiding of labor and trade policies and institutions, despite formal pronouncements against doing so since Singapore and beyond, or at least as Singapore has been generally understood.

However, there are also many limits inherent in these three reports. First, neither report really calls for the new normative products—ILO Conventions or WTO treaties—that combine trade and labor.<sup>160</sup> Second, none of the reports consider in any meaningful way the realities of GVCs. While GVCs are mentioned in a few occasions, the reports still focus

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158. *Id.* at 167.

159. See Jeffrey Sachs, *Shock Therapy in Poland: Perspectives of Five Years*, TANNER LECTURES ON HUMAN VALUES 267, 267 (Apr. 6–7, 1994), at [https://tannerlectures.utah.edu/\\_documents/a-to-z/s/sachs95.pdf](https://tannerlectures.utah.edu/_documents/a-to-z/s/sachs95.pdf) [<https://perma.cc/Z8DK-B9HQ>] (urging a rapid transition from communism to capitalism in Western European post-Communist governments).

160. Even the ILO fell short on calling for new normative ILO products, such as new ILO conventions, when it has directly tackled the issue of GVCs. See Int'l Labour Office, *supra* note 1, at 65–68 (calling for a multiplicity of ILO-led programs except a new convention to regulate GVCs).

on the needs of states, workers, and entrepreneurs, but do not consider the role that GVCs play. Below we provide some ideas to start such a new normative project to regulate GVCs and greet a post-populist era sensitive to the social concerns fueling populism but rejecting its anti-pluralistic and isolationist characteristics.

### III. TOWARDS A POST-POPULIST ORDER

The ILO's General Assembly has the authority, as granted to it by its members, to adopt conventions and recommendations for member state ratification that aim to affect the "conditions of labour."<sup>161</sup> To this date, it has not adopted conventions or recommendations on lead firm liability or mass layoffs, nor has it made any calls for such normative products, even when specifically addressing GVC governance gaps.<sup>162</sup> In the much awaited International Labor Office report to the ILO's International Labor Conference of 2016, the labor office called for an array of policies to regulate GVCs but not a new ILO convention or recommendation.<sup>163</sup> Here we argue that the ILO must be much bolder and adopt at least *two* conventions to deal with the pressing problems created by unregulated GVCs: one imposing employer liability on lead firms whose activities impact the terms and conditions of employment of its supplier, contractor, and franchisee employees, and another one on mass layoffs. In Section B of this Part we also argue and explain how the WTO should provide an advisory role on how these two conventions should regulate GVCs, as they might have significant impacts on trade.<sup>164</sup> Indeed, in its 2006 Report, the ILO envisioned that it may need to collaborate with other international organizations, such as the WTO, in developing new normative products.<sup>165</sup> We argue that the WTO can provide advice on how the conventions can protect workers and enhance trade relationships. The WTO can advise on how Article XX of GATT may support the new ILO conventions, and how the

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161. ILO, *Constitution*, Preamble, (Apr. 1, 1919), [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:62:0::NO::P62\\_LIST\\_ENTRIE\\_ID:2453907](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:62:0::NO::P62_LIST_ENTRIE_ID:2453907) [https://perma.cc/2VF4-ZX5F].

162. Int'l Labour Office, *supra* note 1, at 65–68.

163. *Id.*

164. *See infra* Part III.B (arguing that the ILO should adopt a convention to guide its members in regulating lead firms and holding lead firms liable for violations of core labor standards).

165. ILO, *Resolution Concerning Decent Work in Global Supply Chains*, (adopted on Jun. 10, 2016), [https://www.ilo.org/wcmsp5/groups/public/-ed\\_norm/-relconf/documents/meetingdocument/wcms\\_497555.pdf](https://www.ilo.org/wcmsp5/groups/public/-ed_norm/-relconf/documents/meetingdocument/wcms_497555.pdf) [https://perma.cc/7UA3-F6ZU].

conventions conform with rules related to technical barriers on trade. It can also lend its “peer review” process to the ILO and its stakeholders, as well as the larger labor and trade policymaking community, to develop a space for dialogue and norm-making where labor and trade no longer meet as rivals but as partners in a project for a new, embedded, global economy. The peer review mechanism is an informal space that member countries of the WTO use to resolve disputes and persuade each other of their positions, or even develop new trade practices and norms.<sup>166</sup> In all, ILO and WTO collaboration should braid labor and trade rules.

#### A. *Re-Embedding the World Economy*

In his magnum opus, *The Great Transformation*, economic historian Karl Polanyi introduced a thesis of “double movement,”<sup>167</sup> where the market dis-embeds economic activities from social values, only to be thereafter re-embedded as society applies pressure for change. If one applies double movement view to GVCs, a hitherto neoliberal, deregulatory agenda represents the first prong (dis-embedding), while the labor-trade linkage thesis proposed by this Article embodies the second prong (re-embedding).<sup>168</sup>

Re-embedding the world economy begins with embracing a new paradigm for GVCs. The conventional view of a GVC is economistic, as it considers GVCs profit-creating structures comprised of firms transacting efficiently and focused on core competencies.<sup>169</sup> That view prevails in most business schools, for example.<sup>170</sup> In contrast, the GVC paradigm proposed in this Article is a collective project constituted by a dense web of relationships between and among different actors, with lead firms at their helm, coordinating activities, followed by others, e.g., producers, distributors, consumers, and workers.

The conventional view is increasingly seen as incapable of addressing *social* problems left behind by GVCs. Business leaders have taken note. In a symbolic approach, the Business Roundtable announced a

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166. See *infra* note 269 and accompanying text.

167. Fred Block, *Introduction* to KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME*, xxviii (Beacon Press 1957).

168. Some scholars approach this “re-embedding” process from a “moral” standpoint. See Marion Fourcade & Kieran Healy, *Moral Views of Market Society*, 33 ANN. REV. SOC. 14.1, 14.2 (2007) (viewing a market as a “moralized” or “moralizing” entity).

169. See Int’l Labour Office, *supra* note 1 and accompanying text.

170. WEIL, *supra* note 54, at 49–52 (describing the business school perspective on GVCs based on contemporary firm theories focused on “core competencies”).

“Universal Purpose of a Company in the Fourth Industrial Revolution” stating that:

The purpose of a company is to engage all its stakeholders in shared and sustained value creation. In creating such value, a company serves not only its shareholders, but all its stakeholders—employees, customers, suppliers, local communities and society at large . . .

A company . . . strives for continuous improvements in working conditions and employee well-being . . .

A company is more than an economic unit generating wealth. It fulfils human and societal aspirations as part of the broader social system. Performance must be measured not only on the return to shareholders, but also on how it achieves its environmental, social and good governance objectives.<sup>171</sup>

But will the business sector, and, specifically, lead firms, cooperate in this global norm-making process, which may eventually increase their costs of production and operation?<sup>2</sup> Indeed, similar entrepreneurial attempts to embrace various social concerns, ranging from workers’ health and safety to environmental protection, have been legion under different labels, such as the Corporate Social Responsibility (CSR), Codes of Conduct, and the Global Compact.<sup>172</sup> Social scientists and others have shown that voluntary attempts have largely failed to protect workers.<sup>173</sup> Some observers warn that such voluntary efforts are merely of a corporate public relations strategy, which dramatically lowers the

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171. Klaus Schwab, *Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution*, WORLD ECON. F., (Dec. 2, 2019), <https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution> [<https://perma.cc/5XRD-D9ZQ>].

172. GAY SEIDMAN, BEYOND THE BOYCOTT: LABOR RIGHTS, HUMAN RIGHTS, AND TRANSNATIONAL ACTIVISM 42–44 (2007).

173. *See id.* at 3 (explaining that voluntary codes are unreliable, especially when executives are not committed to compliance); *see also* Matthew Amengual & Sarosh Kuruvilla, *Editorial Essay: Introduction to a Special Issue on Improving Private Regulation of Labor in Global Supply Chains: Theory and Evidence*, 79 ILR REV. 809, 810 (2020) (noting that there is a consensus in the literature that “private regulation as practiced is an inadequate solution to the regulatory challenge in global supply chains”); Frederick Mayer & Gary Gereffi, *Regulation and Economic Globalization: Prospects and Limits of Private Governance*, 12 BUS. & POL. 11, 18–20 (2010) (divulging the limits of private governance and calling for public intervention); Li-Wen Lin, *Legal Transplants Through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example*, 57 AM. J. COMP. L. 711, 743–44 (2009) (pointing out that “legal transplants through private contracting” may be less transparent and efficient than legislative or judicial legal transplants).



threshold of meeting sustainability, and leads to the phenomenon known as “social washing.”<sup>174</sup>

In this regard, some governments hosting lead firms have shifted from a soft “name and shame” approach to a hard “binding due diligence” model.<sup>175</sup> In the latter model, lead firms may be legally responsible for violating certain core labor standards and corporate governance principles *across* their supply chains, covering suppliers and subcontractors.<sup>176</sup> Indeed, leading European countries have already passed domestic statutes in accordance with this new hard law model. For example, France enacted the “Duty of Vigilance Law” in 2017 that requires large French lead firms to publish and execute an observation plan under which those firms detect and prevent human rights risks related to their supply chain operation.<sup>177</sup> This law applies to a French lead firm and its subcontractors or suppliers with whom the lead firm has an established commercial relationship.<sup>178</sup> The law aims to encourage multilateral lead firms to actively monitor any human rights violations within their GVCs, in France or abroad.<sup>179</sup>

A much less *dirigiste* jurisdiction, the United Kingdom, also enacted the Modern Slavery Act of 2015<sup>180</sup> requiring “companies with annual revenue above £36 million to report on their efforts to combat human

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174. See, e.g., Sarah Gordon, *Impact Investing Is About More than Saving the World*, FIN. TIMES (Nov. 21, 2019) <https://www.ft.com/content/85fb1340-0aa8-11ea-8fb7-8fcec0c3b0f9> [<https://perma.cc/C25N-UJXY>] (describing “social washing” as “calling an investment an impact investment when it really is not” because of the label’s marketing appeal); see also SEIDMAN, *supra* note 172, at 133 (describing how CSR without publicly enforceable sanctions is ineffective); Alwyn Lim and Kiyoteru Tsutsui, *Globalization and Commitment in Corporate Social Responsibility: Cross-National Analyses of Institutional and Political-Economy Effects*, 77 AM. SOC. REV. 69, 83–87 (2012) (finding without NGO pressure in developing countries, there is only short-term adherence to CSR policies when trade relationships are at stake).

175. See WBG, *supra* note 5, at 202.

176. *Id.*

177. Loi 2017–399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre [Law 2017-399 of March 27, 2017 on the Duty of Vigilance of Parent Companies and Ordering Companies], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 28, 2017.

178. *Id.*

179. Stéphane Brabant & Elsa Savourey, *Revue Internationale de la Compliance et de l’Éthique des Affaires* [A Closer Look at the Penalties Faced by Companies], 50 REVUE INTERNATIONALE DE LA COMPLIANCE ET DE L’ÉTHIQUE DES AFFAIRES [INT’L REV. COMPLIANCE & BUS. ETHICS] (2017), [http://www.bhrinlaw.org/frenchcorporateduty\\_law\\_articles.pdf](http://www.bhrinlaw.org/frenchcorporateduty_law_articles.pdf) [<https://perma.cc/7MGH-K6MN>].

180. Modern Slavery Act 2015, c. 30, (Eng.), <http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted> [<https://perma.cc/N755-4W4Z>].

trafficking in their supply chains.”<sup>181</sup> Additionally, at least one U.S. state has imposed human rights reporting requirements on lead firms, California. Its Transparency in Supply Chains Act of 2012<sup>182</sup> mandates “retailers and manufacturers doing business in California who have annual worldwide gross receipts of US\$100 million or more to disclose their efforts to eradicate slavery and human trafficking, and to protect basic human rights, along the entire supply chain.”<sup>183</sup>

Against this background, re-embedding the world economy necessitates a closer interagency collaboration between the ILO and the WTO. While the ILO and the WTO have been officially (de jure) decoupled from each other since the late 1990s,<sup>184</sup> both organizations have recently de facto re-coupled, at least somewhat, as they co-published the aforementioned joint reports in areas in which labor and trade issues are linked. Nonetheless, the depth of their collaboration, while incrementally enhanced since early 2000s, has still not reached the point of co-producing any normative product. This deficiency in the interagency collaboration appears to be even more striking considering the absence of effective international norms to regulate lead firms. In this regard, this Article calls for both organizations to bolster their efforts in global norm-making on lead firms. The ILO should work on new conventions on lead firm liability and mass layoffs and, as we argue in Part III.D below, do so with the advice of the WTO.

### B. *ILO Convention on Lead Firm Liability*

In 2006, the ILO adopted Recommendation 198 on the Employment Relationship,<sup>185</sup> where it attempted to tackle the problem of workers who, while in theory should be protected by labor laws, are not because national laws are unclear as to who is covered by them, leaving many workers at the mercy of the market.<sup>186</sup> The Recommendation also shows concern that employers might use contractual strategies to deny workers their rights.<sup>187</sup> In other words, the Recommendation attempts to tackle the problem of worker misclassification, which could result in

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181. Int'l Labour Office, *supra* note 1, at 42.

182. Cal. Transparency in Supply Chains Act of 2010, Civ. Code § 1714.43 (West 2012).

183. Int'l Labour Office, *supra* note 1, at 42.

184. Singapore Ministerial Declaration, *supra* note 62.

185. ILO, *Employment Relationship Recommendation*, 2006 (No. 198) (June 15, 2006), [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312535](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312535) [<https://perma.cc/V35Y-N7X3>].

186. *Id.* at Preamble.

187. *Id.*

denying workers' rights. It thus called, inter alia, for national laws to provide ample ways to determine employment relationships<sup>188</sup> and presumptions in favor of an employment relationship.<sup>189</sup>

However, the Recommendation stopped short of clarifying who the *employer* might be, or how to determine employer status. As Professor Jeremias Prassl has argued, most national legal systems—and we should add, international standards—fail to conceptualize who the employer is, as they focus on *employee* status.<sup>190</sup> But in today's "fissured"<sup>191</sup> work relationships, where lead firms subcontract, franchise, and manage supply chains, identifying and defining who is the employer, and assessing liability, is more salient than ever.<sup>192</sup> International standards should clarify who the employer is.

For Professor Prassl, the employer needs to be understood functionally and not contractually.<sup>193</sup> In other words, any individual or entity, or a combination of them, who take on employer functions, to wit, commencement and termination of the contact of employment, receiving labor and its fruits, providing work and pay, managing the enterprise-internal market, and managing the enterprise-external market, should be treated as an employer.<sup>194</sup> In this fashion, it is possible for employees to have more than one employer, as various individuals and entities may be assuming essential employer functions over a certain group of workers.<sup>195</sup>

U.S. common law clearly recognizes the possibility of employees having more than one employer through the joint employer doctrine.<sup>196</sup> Joint employers are employers who codirect the work of specific employees.<sup>197</sup> U.S. labor and employment laws, since they vary, have

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188. *Id.* at Art. 11(a).

189. *Id.* at Art. 11(b).

190. JEREMIAS PRASSL, *THE CONCEPT OF THE EMPLOYER* 4 (2015).

191. WEIL, *supra* note 54, at 7.

192. *See id.* at 189–90 (explaining the relationship between vicarious liability, liability imposed upon one employer due to actions of its subordinates, and the contradictory incentives employers have to shift their vicarious liability onto subcontractors).

193. PRASSL, *supra* note 190, at 6 (defining the employer as “an entity or combination of entities, playing a decisive role in the exercise of relational employing functions, and regulated or controlled as such in each particular domain of employment law”).

194. Colin Fenwick, *The Concept of the Employer*, by Jeremias Prassl, 155 INT’L LAB. REV. 163, 164–65 (2016) (book review).

195. *See id.* at 165.

196. SERGIO GAMONAL C. & CÉSAR F. ROSADO MARZÁN, *PRINCIPLED LABOR LAW: U.S. LABOR LAW THROUGH A LATIN AMERICAN METHOD* 85–86 (2019).

197. *Id.*

different tests of joint employer status. Under the National Labor Relations Act (NLRA), for example, a joint employer is any entity or individual who controls the work of an employee, or that has a “reserved right to control” the employee, or that indirectly controls the terms and conditions of employment of an employee.<sup>198</sup> On the other hand, under the Fair Labor Standards Act (FLSA), an employer is an individual or entity who “suffer[s] or permit[s]” any person to work.<sup>199</sup> A *joint* employer is any individual or entity who shares employer roles with another employer in relation to one particular employee.<sup>200</sup> While the tests differ given how each law conceptualizes employer status, a common thread ties all of these tests: once employer status is determined under the specificities of each law, more than one employer could be found if those employers share employer duties for the same employee or group of employees.

Other jurisdictions also provide for rules to determine something like joint employer status. In France, the law can uncover employment relationships that might hide under the cover of a contractual relationship, especially in triangular relationships where lead firms hire contractors who, in turn, hire workers who labor at or for the lead firm.<sup>201</sup> As Professors Jean-Emmanuel Ray and Jacques Rojot have explained, French legal institutions, acting under the principle of reality,<sup>202</sup> will determine an employment relationship with any entity or individual if the putative employee is subordinated to that entity or

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198. *Browning-Ferris Indus. of Cal., Inc. v. NLRB*, 911 F.3d 1195, 1199–1200 (D.C. Cir. 2018). In *Browning-Ferris Industries*, the D.C. Circuit underscored that joint employers must exercise control or retain the right to control those “matters governing the essential terms and conditions of employment.” *Id.* at 1209 (internal citations omitted).

199. 29 U.S.C. § 203(g) (2018) (to employ “includes to suffer or permit to work”). Under the FLSA, an employer “includes any person acting directly or indirectly in the interest of an employer in relation to an employee.” *Id.* § 203(d). An “‘employee’ means any individual employed by an employer.” *Id.* § 203(e)(1).

200. 29 C.F.R. § 791.2(a)(1)(i)–(iv), (e)(2)(i)–(iii) (2020) (mandating that joint employers “must aggregate the [employee’s] hours worked . . . if there is an arrangement . . . to share the employee’s services; [o]ne employer is acting directly or indirectly in the interest of the other employer . . . ; or [t]hey share control of the employee”).

201. See Jean-Emmanuel Ray & Jacques Rojot, *The Fissured Workplace in France*, 37 COMP. LAB. L. & POL’Y J. 163, 168–69 (2015) (describing how courts investigate the employee-employer relationship to determine if contract recategorization should occur).

202. Cf. GAMONAL & ROSADO, *supra* note 196, at 64 (recognizing the same principle in Latin America as the principle of “primacy of reality”).

individual, despite contracts stating the contrary.<sup>203</sup> Courts will reform such contracts to better fit the subordinated reality, transforming them into contracts of employment, which would compel those individuals or entities to assume all employment-related obligations under the law.<sup>204</sup> Indeed, Professors Ray and Rojot reported that French courts have ordered such contract reformations, including in cases of franchising.<sup>205</sup> Those employer obligations might include obligations regarding health and safety and wage-based social contributions, among others.<sup>206</sup>

In Latin America, Uruguayan labor courts have developed a similar concept. There, joint employers are recognized as “complex employer[s].”<sup>207</sup>

Recognizing the obvious, that lead firms determine the terms and conditions of employment of many workers of their suppliers, contractors, and franchisees, lead firms have also started to undertake certain responsibilities in monitoring the health and safety standards through CSR initiatives.<sup>208</sup> After the Rana Plaza accident, for example, global labor unions, NGOs, and other groups pressured lead firms to agree to a legally binding commitment where the lead firms placed health and safety requirements and monitoring obligations on their contractors in Bangladesh.<sup>209</sup> The program that it instituted, while robust, will end in 2021.<sup>210</sup> The parties agreed to transition the program to national authorities, under some supervision of the ILO.<sup>211</sup>

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203. Ray & Rojot, *supra* note 201, at 168–69. Judges determine subordination by evaluating key factual issues, such as:

[D]oes the employee receive instructions? Is he submitted to control in carrying them out? Is he included a [sic] in an organized segment of the enterprise? Is he required to conform to a specific work schedule? Does he have to work in a specific assigned place? Does he work with equipment provided by the enterprise?

*Id.* at 169.

204. *Id.*

205. *Id.* at 168.

206. *Id.* at 170.

207. GAMONAL & ROSADO, *supra* note 196, at 35.

208. See Mateo Tonello, *The Business Case for Corporate Social Responsibility*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jun. 26, 2011), <https://corpgov.law.harvard.edu/2011/06/26/the-business-case-for-corporate-social-responsibility> [https://perma.cc/B8DR-Q9KR] (encouraging businesses to consider CSR practices because it can benefit the bottom-line and society at large).

209. *Accord on Fire and Building Safety in Bangladesh*, 1, 1–3 (2013), <https://admin.bangladeshaccord.org/wp-content/uploads/2018/08/2013-Accord.pdf> [https://perma.cc/BLY8-XJ2H].

210. *Id.* at 1.

211. *Id.*

The importance of CSR initiatives, including the important Rana Plaza agreement, is that it provides further evidence for the need to have lead firms assume certain social responsibilities, particularly over the work processes and decisions of their suppliers, contractors, and franchisees, which they effectively control.

Given the need for lead firms to assume greater employment responsibilities, we argue that it is high time the ILO adopted a convention to guide its members in regulating lead firms as employers when they control the work of the employees of their suppliers, contractors, and franchisees, not only in their national territories, but also *globally*. Although the ILO has recognized that lead firms exert control over their suppliers, contractors, and franchisees, while skirting employment liabilities, it has fallen short of calling for a convention to tackle this clear, new reality in the world of work.<sup>212</sup> In situations where lead firms are deemed co- or joint employers, they should be held liable for violations of core labor standards within their sphere of control in GVCs, such as violations of freedom of association rights, discriminatory practices at work, and child labor.

### C. *ILO Convention on Mass Layoffs*

Extending lead firm liability through international labor standards would help workers embedded in GVC-related firms receive their pay under national laws, deter health and safety hazards, better guarantee their rights to join unions, respect their rights against discrimination, and otherwise work in conditions sanctioned by international labor standards. But how would lead firm liability resolve the problem of restructurings, capital flight, and dislocations that have spurred the so-called “forgotten man” problem?<sup>213</sup> One possibility is that by extending lead firm liability to undertake certain employment-related obligations under national laws, lead firms will have to co-produce “social plans” with their suppliers, contractors, and franchisees to help transition workers during restructurings and plant closings.<sup>214</sup> Social plans are generally understood to be schemes agreed to by firms, local governments, and worker representatives to help laid-off workers transition to new

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212. Int'l Labour Office, *supra* note 1, at 1–2, 5–6, 8, 11–12, 17, 21, 29, 39, 42, 48–49, 51, 53, 58; *see also id.* at 65–68 (listing ideas for further policy development lacking any mention of a new ILO convention on GVCs).

213. *See supra* note 10 and accompanying text.

214. *See* Clyde Summers, *Worker Dislocation: Who Bears the Burden? A Comparative Study of Social Values in Five Countries*, 70 NOTRE DAME L. REV. 1033, 1046 (1995) (discussing German social plans).

employment.<sup>215</sup> This is not unprecedented. Some European countries have already imposed such duties on employers, and therefore, lead firm liability would mean that lead firms will also have to play an active role in implementing those social plans.<sup>216</sup> Such social plans might include providing laid off workers with new training, job-matching, and unemployment resources.

German law, for example, defines collective redundancy as “dismissals and other employer-induced ways of bringing an employment relationship to its end.”<sup>217</sup> Collective redundancy protections are triggered if “an employer makes redundant: [1] 6 or more employees of an establishment regularly employing 21–59 employees; [2] 10% or more than 25 employees, of an establishment regularly employing 60–499 employees; or [3] 30 or more employees of an establishment regularly employing 500 or more employees.”<sup>218</sup> If a German company triggers a collective redundancy, the employer must consult with the works council,<sup>219</sup> an employee representation group mandated to exist in some German firms.<sup>220</sup> Together, the employer and the works council develop a Reconciliation of Interests, which determines when and how a lay-off will occur, as well as a Social Plan, which determines the scope of compensation for terminated employees based on their needs.<sup>221</sup> German companies must only lay off employees who require the least “social protection”: employees who have no family to provide for, or who are young enough to seek other employment.<sup>222</sup> One example of a German Social Plan is the use of work-time accounts by Bosch: “employees stock up on overtime pay when times are good, and can then access that money when their hours get cut during a

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215. *Id.*

216. Pieter de Koster & Felicity Gemson, *Cross-Border Restructuring in Continental Europe*, PRACTICAL LAW UK ARTICLES 4 (2006) (noting that France, Germany, Luxembourg, and Spain have mandatory social plans for employers).

217. Hengeler Mueller, *Employment Law Newsletter No 5: Collective Redundancies in Germany and the UK*, 3 (2012), [https://www.hengeler.com/fileadmin/news/BF\\_Letter/05\\_CollectiveRedundancies\\_2012-11.PDF](https://www.hengeler.com/fileadmin/news/BF_Letter/05_CollectiveRedundancies_2012-11.PDF) [<https://perma.cc/4BDP-EY6H>].

218. *Id.* at 4.

219. Annegret Müller-Mundt, *Employees’ Rights on Redundancy in Germany*, Global Workplace Insider (Jun. 13, 2014), <https://www.globalworkplaceinsider.com/2014/06/employees-rights-on-redundancy-in-germany> [<https://perma.cc/WGW2-8GSZ>].

220. Works councils are, generally, employee representation bodies embedded in the corporate governance regime of a firm. *Works Council, Germany*, EUROFOUND (2020), <https://www.eurofound.europa.eu/efemiredictionary/works-council-2> [<https://perma.cc/425G-U2ZU>].

221. María Caprile, *Thematic Feature—Redundancies and Redundancy Costs*, EUROFOUND (2003).

222. *Id.*

downturn.”<sup>223</sup> Other examples are early retirement or buyout packages for workers occupying positions a company wishes to eliminate. From the German perspective, collective redundancy must be socially responsible.

Likewise, in France, employers must negotiate a social plan when there are more than nine layoffs in a company of 50 or more employees.<sup>224</sup> As in Germany, the company may work with a works council, or it may develop its own social plan.<sup>225</sup> In addition to retirement and buyout packages, French social plans contain “a catalog of measures” including job retraining.<sup>226</sup> Employers with more than 1,000 employees must offer redeployment leave, job training, or job search programs.<sup>227</sup> Employees are required to take this redeployment leave during the statutory notice period for the lay-off.<sup>228</sup> Employees are paid regular wages when they take the leave.<sup>229</sup> While official sanction is not required by law for an employer to lay off workers, it appears that in practice few, if any, employers dare to lay off employees without public approval.<sup>230</sup> In fact, because the general welfare of workers has been rooted for so long in the workplace, employers are also expected to provide laid-off employees with some sort of severance payments and benefits.<sup>231</sup>

But Western European countries are not the only ones that mandate some sort of consultation between employers, employees, and local authorities before enacting layoffs. China, for example, formally requires employers to notify the employee’s representatives before laying off workers, solicit the union’s feedback on the layoffs, and

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223. John Boitnott, *Laying off Workers Doesn't Have to Be Painful*, INC. (Sept. 12, 2019), <https://www.inc.com/john-boitnott/laying-off-workers-doesnt-have-to-be-painful-these-german-companies-show-how-to-do-it-more-humanely.html> [https://perma.cc/D8DH-RUFH].

224. *France: Employers Obligation to Support Redundant Employees*, EMCC EUROFOUND (2019), <https://www.eurofound.europa.eu/observatories/emcc/erm/legislation/france-employers-obligation-to-support-redundant-employees> [https://perma.cc/9VTN-XXUJ].

225. *Id.*

226. David Hartmann, *French Dismissal Procedure in France—Redundancy Plan in France*, ALARIS AVOCATS (May 31, 2019), <https://www.alaris-law.com/french-dismissal-procedure-in-france-redundancy-plan-in-france> [https://perma.cc/4F2V-CYKV].

227. *France: Employers Obligation to Support Redundant Employees*, *supra* note 224.

228. *Id.*

229. *Id.*

230. BLANPAIN ET AL., *THE GLOBAL WORKPLACE: INTERNATIONAL AND COMPARATIVE EMPLOYMENT LAW* 710–12 (2012).

231. *Id.* at 711.



notify the local authorities by submitting a report to them.<sup>232</sup> Scholars have reported that employers in China seldom shut down operations without receiving approval from the local authorities; the mass layoff rules are, therefore, resilient, with its practice going beyond mere reporting obligations.<sup>233</sup>

Of course, not all countries, including the United States, require employers to conjure “social plans” with employees and government authorities before enacting mass layoffs. Hence, here we also argue that the ILO should adopt a convention on mass layoffs, with lead firms in mind. Given the volatility of GVCs, and how restructurings might leave large pockets of workers and communities bereft of economic opportunities, countries need to legislate to deal with this problem at the root of global capitalism. Workers and their communities not only need and deserve protections in the case of mass layoffs, but lead firms, which ultimately decide where to buy from, and at how much, should also be held responsible for their decisions to find suppliers elsewhere and abandon communities—perhaps even entire geographic locations.

While the ILO has a convention on employee termination, it does not provide significant prescriptions on mass layoffs.<sup>234</sup> The Termination of Employment Convention, No. 158, mainly concerns the requirement that employers provide cause and sufficient notice of termination to employees, particularly in cases where employees are terminated due to economic reasons. Further, the Convention requires that employers provide notice to employee representatives and competent government authorities upon employee termination. The Convention also engages member states by requiring them to guarantee rights to unemployment insurance, severance, pensions, and other similar payments to workers.<sup>235</sup> It does not deal, however, with any social plans to provide workers and their communities with opportunities to find new livelihoods, and perhaps re-link themselves to other GVCs. The ILO

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232. *Id.* at 710–12; Samuel Estreicher & Jeffrey Hirsch, *Comparative Wrongful Dismissal Law: Reassessing American Exceptionalism*, 92 N.C. L. REV. 343, 382 (2014) (internal citations omitted); see Labor Law of 1994 (promulgated by the Standing Comm. Nat’l People’s Cong., July 5, 1994, effective Jan. 1, 1995) art. 27, 2010 (China), available at <https://www.jus.uio.no/lm/china.labor.law.1994/doc.html#86> [<https://perma.cc/B2NL-5MLU>] (requiring that the employer “shall explain the situation to its trade union or all of its employees 30 days in advance, solicit opinions from its trade union or the employees, and report to the labor administrative department before it makes such cuts”).

233. BLANPAIN, *supra* note 230, at 711.

234. Convention No. 158 Concerning Termination of Employment at Initiative of the Employer, June 2, 1982, 1412 U.N.T.S. 160.

235. *Id.* at 164, 166, 168.

should thus establish a convention that extends the social plan programs to all countries, as they seem crucially important to resolve the problems spurring from the so-called “forgotten man” dilemma.

If lead firms must participate in putting together social plans before effecting mass layoffs, they may have to agree that local governments monitor their implementation as it is typically prescribed in German, French, and even Chinese law. The Convention may also provide that central governments cooperate closely with municipal governments toward effective implementation of such social plans. Given the geographical disparities in value chain operation and dislocation therefrom, as seen in U.S. Rust Belt cities, these “localized” social plans sound even more plausible.<sup>236</sup>

At the same time, however, labor protection must be balanced with competitiveness concerns. Note that GVC workers compete in global markets, which means overly strict labor regulations could turn away investors.<sup>237</sup> Here, Denmark’s “flexicurity” model stands out as an ideal policy balance between inclusion and competitiveness.<sup>238</sup> Flexicurity refers to Denmark’s “golden triangle” of liberal job protection legislation, generous income security, and active labor market programs.<sup>239</sup> However, the idea of flexicurity is no longer merely Danish, as the European Commission has welcomed the concept.<sup>240</sup> This model allows firms to hire and fire employees relatively freely, while requiring authorities to provide generous unemployment benefits to mitigate sudden income loss due to displacement.<sup>241</sup>

Additionally, effective flexicurity requires active labor market programs that connect the unemployed to available jobs after retraining.<sup>242</sup> The key to Denmark’s success, i.e., conspicuously low levels of unemployment, is the heavy investment from the government in active labor market programs, a stark contrast to the United States minimal protection under a petition-based “trade adjustment assistance” program that covers

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236. WBG, *supra* note 5, at 203–04.

237. *Id.* at 202.

238. Thomas Bredgaard & Flemming Larsen, *External and Internal Flexicurity: Comparing Denmark and Japan*, 31 COMP. LAB. L. & POL’Y J. 745, 746 (2010) (“The main idea of the flexicurity concept is that flexibility and security are not contradictory but mutually supportive.”).

239. *Id.* at 747.

240. *Id.*

241. *Id.* at 763–64 (describing the generous welfare policies in Denmark that soften unemployment and mobility transitions).

242. WBG, *supra* note 5, at 202.

income support and training.<sup>243</sup> While developing countries might find it difficult to adopt this model due to weak institutions and budgetary constraints, such a model can help developed countries in avoiding political backlash from trade liberalization.<sup>244</sup> Below we also offer some ideas on how to pay for such plans, namely through subsidies that meet international trade rules.

*D. The WTO's Advisory Role for the New ILO Conventions*

We recognize that getting the ILO to adopt new conventions on lead firm liability and mass layoffs will be politically difficult to execute. Business leaders will likely oppose it, despite the Business Roundtable's recent declaration in favor of expanding corporate interests beyond the narrow confines of the shareholder. True, the ILO has a tripartite deliberative system that includes employer, worker, and government input.<sup>245</sup> Yet more general concerns on the overall impact that these conventions exert on the global economy, and on global trade, might not be completely appreciated or recognized by employers, workers, and government as they worried more immediately about their particular interests. Hence, we argue that the WTO should play an active advisory role in crafting and implementing these new normative products and practices to assuage those concerns.

For example, the WTO can certify that the ILO's attempts to regulate GVCs through new conventions on lead firm liability and mass layoffs are legitimate under international trade law, such as under GATT Article XX, and technical restrictions on trade rules.<sup>246</sup> As such, it can lend support to these new conventions because they will not endanger global economic order upon which millions of people around the globe depend for their subsistence.

The WTO can also advise on how global policies for social plans, which will need changes in fiscal policies (to fund the plans) will not create obstacles to world trade.

Finally, the WTO can lend the ILO and all labor and trade stakeholders, including government officials, business representatives and labor representatives, its "peer review" space. For the purpose of this

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243. *Id.*; see also *Getting Back to Work After a Trade Related Layoff*, TRADE ADJUSTMENT ASSISTANCE PROGRAM, U.S. DEP'T OF LABOR (2014), [https://www.doleta.gov/tradeact/docs/program\\_brochure2014.pdf](https://www.doleta.gov/tradeact/docs/program_brochure2014.pdf) [<https://perma.cc/7268-RT3Y>].

244. WBG, *supra* note 5, at 202–03.

245. *Tripartite Constituents*, ILO (2020), <https://www.ilo.org/global/about-the-ilo/who-we-are/tripartite-constituents/lang-en/index.htm> [<https://perma.cc/7A34-E7ED>].

246. GATT, *supra* note 57, at art. XX.

Article, peer review refers to a collective deliberative process of evaluating a specific labor and trade concern among those stakeholders. As we explain below, the peer review space can promote discussions among stakeholders on how to more effectively link labor and trade policy and build a post-populist, global economic order sensitive to social concerns, while remaining vigilant of the various interests and complexities involved in such a project. It can start the necessary global conversation to make this new system real.

1. *Braiding global labor and trade rules with WTO advice*

Suppose that a new ILO Convention on the Responsibility of Lead Firms (the ILO Convention) endorses participating states to ban products manufactured by those lead firms that have failed to fulfill certain responsibilities (such as providing safe working conditions, personal protective equipment, or paying overdue wages) as co- or joint employers in conjunction with their contractors or suppliers. In a provisional sense, such a ban could constitute a discriminatory measure under GATT Article III:4<sup>247</sup> or other trade restrictions under GATT Article XI:1.<sup>248</sup> Nonetheless, the WTO Secretariat may advise a regulating state in compliance with the ILO Convention to refer to general exceptions under GATT Article XX. Art. XX states:

General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals . . .
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement . . .

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247. GATT, *supra* note 57, at art. III:4 (“The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.”).

248. *Id.* art. XI:1 (“No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.”).

(e) relating to the products of prison labour . . . .<sup>249</sup>

Depending on the types of failures by lead firms, the regulating state may justify its ban under paragraph (a), (d) or (e). Paragraph (a) of Article XX provides the broadest avenue for justification. No matter what duty a lead firm may fail to perform, as long as its failure contradicts a general moral understanding of the regulating state, the regulating state may ban products made by lead firms. As seen in both *Gambling*<sup>250</sup> and *Seat*<sup>251</sup> case law, the WTO case law interprets the scope of public morals rather broadly, affording wide discretion to the local government.<sup>252</sup> Also, suppose that the regulating state passes a domestic statute in conformity with the ILO Convention and banned products from particular lead firms under the statute. Under these circumstances, the regulating state's ban may be justified under paragraph (d). Finally, if the regulating firm, as a joint employer, used any type of forced labor or prison labor, paragraph (e) might offer another justification for a ban.<sup>253</sup>

In addition to constituting public morals (paragraph (a)), WTO-consistent domestic laws or regulations (paragraph (d)) or prison labor (paragraph (e)), a domestic labor policy implementing the ILO Convention must meet the “necessary” or “relating to” test. Suppose that the ILO Convention guides its signatories to ban a product manufactured in a way that violates core labor standards. Also, suppose that in compliance with the Convention a host country bans T-shirts manufactured by a lead firm on the grounds that a contractor retained by the lead firm failed to pay its workers minimum wages. Even though a failure to pay workers minimum wage might violate public morals, the regulating country must still prove that its ban was “necessary” to protect public morals. For a ban to satisfy this necessity criterion, the following factors must be weighed and balanced, as the WTO Appellate Body has already pronounced:

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249. *Id.* art. XX.

250. Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/AB/R (adopted Apr. 20, 2005).

251. Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R (adopted on June 16, 2014).

252. See generally Robert Howse & Joanna Langille, *Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values*, 37 YALE J. INT'L L. 367, 413 (2012).

253. Elissa Alben, Note, *GATT and the Fair Wage: A Historical Perspective on the Labor-Trade Link*, 101 COLUM. L. REV. 1410, 1421–22 (2001) (proposing to expand the concept of “prison labor” under GATT Article XX (e) to cover other forms of “forced labor”).

the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect . . . the extent to which the measure contributes to the realization of the end pursued, the securing of compliance with the law or regulation at issue . . . the extent to which the compliance measure produces restrictive effects on international commerce . . .<sup>254</sup>

This “weighing and balancing” process appears prudent, especially considering that some scholars and policymakers question the efficacy of linking labor standards and trade to achieve social goals. For example, Professors Robert Stern and Katherine Terrell argue that, “[a]lternative policies and existing institutions must be deployed to ensure that: (a) workers in industrialized countries will not be adversely affected by freer trade and globalization in general; and (b) wages and working conditions of workers in the developing countries can be improved at a sustainable pace.”<sup>255</sup>

True, the public morals exception might be abused by some countries to ban products from particular lead firms and suppliers, contractors, and franchisees, for a protectionist purpose. In that case, the WTO Secretariat may advise an exporting country (a country to which those lead firms belong to) to refer to the introductory language of Article XX, which states in relevant part that, *inter alia*, the public morals exception is “[s]ubject to the requirement that [it is] not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”<sup>256</sup> The home country of the lead firm may use that important proviso to ward off a protectionist ban that violated international trade law.

Another vehicle that both a regulating country and an exporting country may rely on to defend or challenge a ban is the WTO Agreement on Technical Barriers to Trade.<sup>257</sup> First of all, a ban adopted and implemented in accordance with the ILO conventions would constitute

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254. Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶¶ 162–63 WTO Doc. WT/DS161/AB/R (adopted Jan. 10, 2001).

255. Robert M. Stern & Katherine Terrell, *Labor Standards and the World Trade Organization: A Position Paper*, 2 (Res. Seminar in Int’l Econ., U. of Mich., Working Paper No. 499, 2003) (emphasis added), <http://fordschool.umich.edu/rsie/workingpapers/Papers476-500/r499.pdf>.

256. GATT, *supra* note 57, at art. XX (“Subject to the requirement that [it is] not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”).

257. Agreement on Technical Barriers to Trade, Apr. 12, 1979, General Agreement on Tariffs and Trade, 1186 U.N.T.S. 286.

a “technical regulation” under the Technical Barriers to Trade Agreement as it “lays down characteristics of a product such as levels of quality, performance, safety or dimensions.”<sup>258</sup> Then, Article 2 provides certain conditions under which technical regulation may be justified. As it states:

Preparation, Adoption and Application of Technical Regulations by Central Government Bodies

With respect to their central government bodies: . . .

2.2 Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment.<sup>259</sup>

The Technical Barriers to Trade Agreement provides an open list of “legitimate” objectives which may include those concerns under the ILO Convention. As long as the aforementioned ban, qua “technical regulation” under the Technical Barriers to Trade, does not constitute “unnecessary obstacles,” the WTO Secretariat may advise the regulating state to rely on Article 2.2.

## 2. *Fiscal policies that further global labor and trade, but not protectionism*

As discussed above, the ILO conventions may encourage participating states to adopt fiscal measures, such as a tax break, to incentivize lead firms to set up social plans in times of mass layoffs or collective redundancies. Governments may reward lead firms through tax incentives when they provide training and skill development opportunities as part of a social plan.<sup>260</sup> According to the International Monetary Fund, if a host country exempts the labor portion of value added from taxation, it will encourage lead firms to create jobs within the host country, while discouraging them to pursue tax avoidance.<sup>261</sup> Such fiscal measures could be a “win-win-win” to the three parties involved. While

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258. *Id.* Annex 1.

259. *Id.* art. 2.2.

260. See Dennis J. Snower, *Toward Human-Centered Capitalism: Exploring a New Social Contract*, GLOBAL ECON. & DEV. BRIEF, BROOKINGS (2019) (discussing the new social contract where taxes finance “employment and training incentives”).

261. IMF, *Corporate Taxation in the Global Economy*, IMF Policy Paper 2, 26 (Mar. 2019).

governments relax fiscal rules, they may also attract more investment from lead firms into that country, which will help them deliver economic prosperity to their countries. Lead firms will save money because of the tax break, giving it an opportunity to fund social plans that might improve employee morale (if employees know the benefit exists, in the case of layoffs). The social reputation of the firm gets a boost.<sup>262</sup> Workers get better job security.

In this regard, Malaysia's "Industrial Linkages Program" (ILP) is a case in point.<sup>263</sup> The ILP was created in 1996 to offer fiscal incentives to both multinational lead firms and local small and medium enterprises ("SMEs"). It matches a lead firm that seeks preferential access to industrial sites with a local SME that seeks financing for skills development. To be eligible for the program, a Malaysian SME must, among other things, supply at least one multinational lead firm a product on the "List of Promoted Activities and Products."<sup>264</sup> Once accepted, in addition to receiving various tax incentives on income and investment tax, those SMEs are offered "matching services" through Malaysia's SME agency (SME Corporation Malaysia) that facilitate worker training in partnership with an interested lead firm.<sup>265</sup>

However, if the lead firm receiving tax breaks belongs to the subsidy-providing country, it may be seen as market-distorting state support. In other words, in the name of complying with the ILO conventions, governments might be tempted to provide their domestic lead firms with unfair competitive advantages in the form of tax breaks. Here, the WTO may monitor whether those subsidies are truly for promoting the social welfare of workers or a disguised form of protectionism. For example, the WTO Secretariat could advise the subsidizing country to ensure that its subsidies are consistent with the WTO subsidy rules. Under the WTO Agreement on Subsidies and Countervailing Measures,<sup>266</sup> a subsidy must be broad ("non-specific") enough not to target any particular company or industry. Article 2 of the Agreement provides:

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262. Admittedly, reputation effects might only be relevant for lead firms with brand name recognition. *See id.* at 49, 55 (highlighting the uniqueness of intangibles like brand names and the difficulty of applying an arm's length pricing scheme for valuing a transaction).

263. WBG, *supra* note 5, at 178; *see also SME Development*, MALAY. MINISTRY OF INT'L TRADE AND INDUSTRY, <https://www.miti.gov.my/index.php/pages/view/1801> [<https://perma.cc/7KT9-88HZ>].

264. WBG, *supra* note 5, at 178.

265. *Id.*

266. Agreement on Subsidies and Countervailing Measures art. 2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization 22417 U.N.T.S. 22420.



### Specificity

2.1 In order to determine whether a subsidy . . . is specific to an enterprise or industry or group of enterprises or industries . . . , the following principles shall apply:

(a) Where the granting authority . . . explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.

. . .

(c) If, notwithstanding any appearance of non-specificity . . . , there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.<sup>267</sup>

In accordance with these specificity conditions, the WTO Secretariat may consult a granting authority in establishing the WTO-consistent eligibility criteria for lead firms in receiving tax breaks in return for funding social plans. In reality, the *de facto* specificity requirement under paragraph (c) of Article 2.1 appears to be most controversial. Given the limited number of lead firms big enough to afford contributions to social plans, tax breaks by a given granting authority may be concentrated on a handful of firms. This concentration would in turn result in “disproportionately large amounts of subsidy to certain enterprises.”<sup>268</sup> Nonetheless, to the extent that the subsidizing government provides tax breaks in return for contribution to social plans, its subsidization may still be justified in a way which inoculates the *de facto* specificity. Moreover, insofar as tax breaks benefit the employment situation within the territory of the granting authority, one can say that these subsidies also contribute to the “diversification of economic activities” within that territory.

### 3. *Bringing together labor and trade policymakers and stakeholders through the WTO’s peer review space*

Adopting and enforcing the ILO conventions that we advocate for here may result in controversy. In fact, they might even precipitate trade disputes. As discussed above, certain exporting countries, in particular those from which lead firms originate, may complain that a regulating country’s regulations on their lead firms runs afoul of WTO

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267. *Id.* art. 2.1.

268. *Id.*

norms, even if they are in compliance with the ILO conventions. Granted, the WTO Secretariat's advice on the aforementioned regulatory and fiscal dimension may mitigate exporting countries' concerns. However, it may not prevent an exporting country from raising disputes. And while disputes will be eventually resolved through the WTO dispute settlement system, the politically sensitive nature of these disputes risks escalating tensions between a complaining party and a defending party, regardless of the final decision declared by the WTO. In this way, dispute prevention via "peer review" might more desirable than dispute resolution.<sup>269</sup> As seen in the Technical Barriers to Trade (TBT) Committee and the Sanitary and Phytosanitary (SPS) Committee, such peer review has been quite successful under the WTO system.<sup>270</sup>

The peer review mechanism is, in essence, an informal space that member countries of the WTO can use to resolve disputes, and perhaps even persuade each other of their positions, or even develop new trade practices and norms. As the WTO explains:

The [peer] reviews focus on members' own trade policies and practices. But they also take into account the countries' wider economic and developmental needs, their policies and objectives, and the external economic environment that they face. These "peer reviews" by other WTO members encourage governments to follow more closely the WTO rules and disciplines and to fulfil their commitments. In practice the reviews have two broad results: they enable outsiders to understand a country's policies and circumstances, and they provide feedback to the reviewed country on its performance in the system.<sup>271</sup>

In this light, the WTO could commission a peer review mechanism to resolve trade and labor disputes or develop norms, including those for the ILO conventions advocated for in this Article. This trade-labor peer review can be commissioned under the banner of what we could call a "Joint Labor and Trade Committee" co-organized by the ILO and the WTO. Under the new tripartite framework of interagency collaboration, the Joint Committee would invite government, business

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269. See Andrew T. Guzman, *Trade, Labor, Legitimacy*, 91 CALIF. L. REV. 885, 887–89 (2003) (arguing that the WTO adversarial system is ill-suited to resolve labor concerns and advocating for WTO reforms so that stakeholders can openly and transparently negotiate labor and trade disputes).

270. See Sungjoon Cho, *How the World Trade Community Operates: Norms and Discourse*, 13 WORLD TRADE REV. 685, 705 (2014) (arguing that peer review tends to avoid the adversarial nature of adjudication) [hereinafter *Norms and Discourse*].

271. *Trade Policy Reviews: Ensuring Transparency*, WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm11\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm11_e.htm) [<https://perma.cc/53RQ-SLKD>].

(lead firms, their suppliers, contractors, and franchisees), and labor representatives to a space where they can discuss specific labor-trade concerns originating from any regulatory concerns that may stem from the ILO conventions described here. While parties advance and defend their own positions in these peer reviews, they are expected to raise awareness, and understanding, of others' positions, which can increase the level of understanding toward each other.<sup>272</sup> Considering a multijurisdictional nature of GVCs, this Joint Committee may be uniquely positioned to address an equally multijurisdictional grievance that may be prompted by the implementation of the new ILO conventions.<sup>273</sup>

The operational logic of the Joint Committee would thus be “learning, perspective taking, mutual persuasion, and eventually the development of non-binary regulatory solutions.”<sup>274</sup> While repeated peer review may not resolve the given grievance completely, it may still manage it in a way that effectively eases tensions.<sup>275</sup>

Hence, our proposal to activate peer review as a collaborative space for the ILO, the WTO, and the relevant stakeholders, resembles Professor Andrew Guzman's call for an open, transparent, and deliberative space within the WTO to negotiate labor and trade disputes and anchor new norms and practices.<sup>276</sup> The difference between Guzman's proposal and ours is that Guzman calls for formal reforms of the WTO structure, while ours informally incorporates the ILO into the existing peer review framework of the WTO. In other words, rather than trying to formally change the WTO, we argue that the ILO and

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272. *Norms and Discourse*, *supra* note 270, at 709 (viewing that diurnal regulatory dialogue, if repeated, tends to incrementally broaden shared grounds among regulators from different countries and thus facilitate mutual understanding on each other's unique regulatory challenges).

273. An “impact analysis” may facilitate the peer review process. The ILO and the WTO Secretariat may provide a labor impact analysis and a trade impact analysis, respectively. While the ILO Secretariat may articulate impacts of social upgrading through the implementation of the ILO conventions, the WTO Secretariat may assess any significant negative impact to trade, including any change in the volume of trade in the most vulnerable industrial sectors. Some national governments adopt similar trade impact assessments (TIAs) in carrying out various regulations. *See e.g., Guidance Note: Trade Impact Assessments* Austl. Dep't of the Prime Minister and Cabinet, Off. of Best Practice Reg. (2016), [https://www.pmc.gov.au/sites/default/files/publications/trade\\_impact\\_qssessments.pdf](https://www.pmc.gov.au/sites/default/files/publications/trade_impact_qssessments.pdf) [<https://perma.cc/Z6WK-Z25M>].

274. Sungjoon Cho et al., *Communitizing Transnational Regulatory Concerns*, 18 CHI. J. INT'L L. 48, 52 (2017).

275. *See* ABRAM CHAYES & ANTONIA CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 245–46 (1995).

276. Guzman, *supra* note 269, at 888–89.

the WTO should informally collaborate. The ILO's tripartite groups should enter the existing peer review framework of the WTO to discuss and deliberate the norms and practices that could best regulate GVCs. In this sense, our proposal requires no formal organizational changes, which are always much harder to affect. It does require a political will to collaborate and start a conversation among all the stakeholders on how to better regulate GVCs.

#### CONCLUSION

We live in world aflame, both figuratively and in reality. The 2019–20 California, Brazil, and Australia wildfires, traced to climate change, itself a product of ill-restrained markets and global capitalism,<sup>277</sup> matched the populist tide engulfing rich and poor states alike, putting serious strains on the global economic order. Even the countries perceived as “winning” from global trade, such as China and Bangladesh, suffer from sinister industrial accidents and worse-than-poor working conditions that violate basic international labor standards.<sup>278</sup> The recent episode of striking workers in Ciudad Juarez, compelled to work during the COVID-19 pandemic, without proper safety measures, and without really being essential, due to U.S. lead firm and government pressures is also on point.<sup>279</sup> This Article proposes that a post-populist era requires a shift in the global economic order: an ILO-WTO collaboration to develop new ILO conventions on lead firm liability

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277. See Jeff Sparrow, *Australia's Fires Give Us a Glimpse of What's Coming*, JACOBIN, <https://jacobinmag.com/2020/01/australia-bushfires-climate-change-new-south-wales-scott-morrison> [<https://perma.cc/6DF7-DVFH>] (Jan. 3, 2020) (describing how pro-fossil fuel policies are partly to blame for the magnitude of the Australian wildfires); see also Meg Kelly & Sarah Cahlan, *The Brazilian Amazon Is Still Burning. Who Is Responsible?*, WASH. POST (Oct. 7, 2019), <https://www.washingtonpost.com/politics/2019/10/07/brazilian-amazon-is-still-burning-who-is-responsible> [<https://perma.cc/PY5L-CFYB>]; John W. Schoen & Jordan McDonald, *Warming Climate, Population Sprawl Threaten California's Future with More Destructive Wildfires*, CNBC (Nov. 9, 2019), <https://www.cnbc.com/2019/11/09/why-californias-wildfires-are-going-to-get-worse.html> [<https://perma.cc/94F6-2X2X>].

278. See Elizabeth Paton, *After Factory Disaster, Bangladesh Made Big Safety Strides. Are the Bad Days Coming Back?*, N.Y. TIMES (Mar. 1, 2020), <https://www.nytimes.com/2020/03/01/world/asia/rana-plaza-bangladesh-garment-industry.html> [<https://perma.cc/W4E3-5DLU>] (highlighting recent changes to labor protections in Bangladesh).

279. Lauren Villagran & Veronica Martinez Jacobo, *'Better Dead than Fired?' Juarez Workers Strike as US Plants Fight to Stay Open Amid COVID-19*, EL PASO TIMES (Apr. 23, 2020), <https://www.elpasotimes.com/story/news/2020/04/23/coronavirus-juarez-factory-workers-electrical-components-international-strike-covid-19/5165842002> [<https://perma.cc/MM72-ML7K>].

and mass layoffs. As the aegis of global trade and much of our global economy, GVCs structure economic opportunities and the life chances of millions of people around the globe. Yet, the indirect, contractual manner in which lead firms control their suppliers, contractors, and franchisees helps lead firms largely escape effective regulation, as many researchers and international organizations have shown, and as reported in this Article.

Moreover, the transnational character of GVCs and the ossified nation-state-based system of regulation, as we have argued here, further contributes to the existing GVC regulatory gap. This regulatory gap must be filled. The ILO, as the international organization with the mandate and know-how to regulate global labor needs to enact new conventions that extend employer liabilities to lead firms. And to better guarantee that lead firms will be, in fact, responsible for shocks that their relocation decisions may bring on entire communities, the ILO should also establish a new convention on mass layoffs where employers, including lead firms, negotiate social plans with workers and local authorities. These social plans should help affected parties retool and re-link themselves to other GVC actors and, thus, no longer be “forgotten.”

Perhaps the more controversial, but also more innovative idea that this Article proposes, is that the WTO should also get involved in structuring the post-populist order. It can provide legitimacy to the ILO conventions proposed here by showing how they can be sustained by Article XX of GATT and Article 2 of the WTO Agreement on Technical Barriers to Trade. It can also provide advice on how to establish fiscal policies that would promote pro-worker global norms without crossing the line into trade protectionism. Moreover, the WTO can structure an arena of dialogue between labor and trade policymakers and stakeholders, via its peer review function, to further relationships that align global labor and trade communities in a post-populist project.

Skeptics might argue, following the lead of the Singapore Declaration, that trade and labor are separate areas of regulation and their formal linkage is unwarranted. However, the joint reports by the organizations reviewed here show that trade and labor are empirically connected. Moreover, the populist backlash against globalism also shows that labor concerns lie at the center of international trade. We cannot hide the sun with our hand. Deeper formal labor-trade linkage is what the global economic system needs.

Others might argue that our approach here to resolve the challenges of populism are, simply, just not enough. International law is too

politically dependent, vague, and non-binding, i.e., “soft,” to have any efficacy over the social conditions of workers. Professor Sergio Gamonal, for example, has argued that soft law approaches to workers’ rights in free trade agreements are doomed to failure because the labor provisions in the trade agreements are apt to mean nothing unless violators can suffer trade sanctions.<sup>280</sup> Other scholars, mostly stemming from the rational choice school, argue that international law is created by states acting in their own self-interest, and not by higher-ordered norms or values established in international law texts.<sup>281</sup> Hence, one could presume that unless those rational actors can be materially deterred, ILO conventions and dialogue between stakeholders coordinated by the WTO would be dominated by the stronger parties—states with large economies, where lead firms reside, and perhaps even the very lead firms that the policymakers attempt to regulate.

While we agree that new ILO conventions and dialogue between the various labor and trade stakeholders will not lead to immediately palpable transformations in global inequality and workers’ rights, our proposal aims to start a *process* toward a post-populist system where lead firms finally start taking on responsibility for their actions. We expect that, eventually, states will legislate enforceable rules to regulate GVCs, and lead firms specifically. But we cannot create this new post-populist era from thin air, or simply legislate for it (even if there was such a thing as a world legislature). There are policymakers and stakeholders who disagree about the benefits of a global economic system that imposes employer liabilities on lead firms. Policymakers and stakeholders thus need a space where they can engage in a much-needed conversation for a regulatory project. As Professor Sungjoon Cho has already argued in prior work, “a calm, modest yet incrementally effective approach to linkage, using soft law and cooperative networking” is what the times require.<sup>282</sup>

And as to the critics that international law is not law at all, and cannot really affect governments, employers, and workers around the world, well, that claim is simply not true. Scholars have noted that the ILO has had an enduring effect on the labor laws of many countries, and

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280. Sergio Gamonal, *Labour Obligations in the US-Chile Free Trade Agreement: The Illusion of Soft Law* 27 4 INT’L J. COMP. LAB. L. & IND. REL. 407, 415–16 (2011).

281. See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 4, 6, 84 (2005) (discussing the rational choice theory and states’ interests when acting as parties to treaties).

282. Sungjoon Cho, *Linkage of Free Trade and Social Regulation: Moving Beyond the Entropic Dilemma*, 5 CHI. J. INT’L L. 625, 669 (2005).

for many years.<sup>283</sup> Professor James Brudney has shown, for example, that countries around the world have incorporated ILO standards on child labor, freedom of association, and collective bargaining through two mechanisms: the ratification of ILO conventions, and the inclusion of ILO standards in free trade agreements.<sup>284</sup> While changes in national laws have not been immediate, they have been “evolutionary.”<sup>285</sup>

Hence why we argue that the ILO’s tripartite system is an excellent place to start a process to regulate GVCs. But in order to further ease anxieties over the impact of ILO rules over the trade regime, we also propose that the WTO advise the ILO on how WTO norms on public morals and rules on subsidies might help support the new ILO conventions. Finally, the WTO’s peer review space would offer labor and trade stakeholders another space to broaden their deliberations beyond the more structured International Labor Conference of the ILO. In other words, while we clearly argue for a post-populist order, the policies to get there still require discussion. A joint ILO and WTO project can help propel a process towards that post-populist goal.

Like international law skeptics, others might argue that the United States, a major base of lead firms, and certainly a host of many other GVC actors, seldom pays attention to international law. The U.S. Congress and the Supreme Court have openly declared in various occasions the exceptional character of the United States, justifying its non-adherence to international law.<sup>286</sup> In fact, some important Supreme Court justices have even been hostile to the influence of international law.<sup>287</sup> Therefore, the role that the ILO and the WTO may have on its trade practices and labor protections will be close to negligible.

Again, we disagree. While it is true that the United States pays scant attention to a lot of international law, it remains true that international

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283. See Juan Manuel Palacio, *From Social Legislation to Labor Justice: The Common Background in the Americas*, in *LABOR JUSTICE ACROSS THE AMERICAS* 35–37 (Leon Fink & Juan Manuel Palacio eds., 2018) (describing the role of the ILO in the Americas as creating “the building blocks of the ‘labor question’ in the Americas”); James J. Brudney, *The Internationalization of Sources of Labor Law*, 39 *U. PA. J. INT’L L.* 1, 15, 39 (2018) (showing the influence of the ILO in U.S. Trade Agreements and domestic labor laws in the Americas).

284. Brudney, *supra* note 283, at 5–6.

285. *Id.* at 6.

286. *Id.* at 7 (citing *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) and *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 1–3 (Michael Ignatieff ed., 2005)).

287. Former Justice Antonin Scalia suggested in his dissent of *Roper v. Simmons* that “foreign and international law have no place in our . . . jurisprudence.” 543 U.S. 551, 604 (O’Connor, J., dissenting) (2005) (referencing Justice Scalia’s opinion).

law plays a central part in the law of many countries and, in this fashion, new ILO conventions done in collaboration with the WTO will likely have important impacts around the world. Moreover, to the extent large countries and regions, such as the European Union and China, adopt these rules for lead firms and mass layoffs, U.S. lead firms will be subject to liabilities for their activities in the European Union and China. The United States may have to respond in similar kind and extend employer liability to foreign lead firms in the United States, including liabilities for mass layoffs, to give American workers similar access to the deep pockets of foreign lead firms. In other words, as lead firm liabilities and social plans diffuse globally, U.S. law might have to mimic those rules for the sake of U.S. businesses and workers alike.

Moreover, we should not forget that while the United States sometimes inoculates itself from international law, it typically contributes to new international norms and expects that other countries will abide with international law. As Professor James Brudney has shown, the United States has included ILO standards in the labor provisions of its free trade agreements with other countries.<sup>288</sup> U.S. trading partners have sometimes changed their domestic laws in order to comply with these labor clauses insisted upon by the United States.<sup>289</sup> In other words, there is a chance that lead firm liability might be diffused by the United States through trade agreements even if, at least initially, the United States does not apply those standards to itself.

Additionally, critics of our proposal might argue that a convention on mass layoffs where lead firms will have to negotiate social plans with local authorities and worker representatives will put developing countries and poor workers at a competitive disadvantage, since a way they attract investment is through lower labor costs.<sup>290</sup> It would be disastrous for countries such as Malawi and Cambodia, for example, to copy the rules of highly advanced countries such as Germany and Denmark. Social plans increase labor costs and the developing world is just not ready for them.

We have several rebuttals to this argument. First, we must underscore that mass layoff rules exist in a variety of countries, not just in Europe. As we describe here, China has rules that require employers to produce a report for the local authorities and notify worker representatives before effecting a partial or complete shutdown of

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288. Brudney, *supra* note 283, at 38–39.

289. *Id.* at 39–40.

290. See Jagdish Bhagwati, *Afterword: The Question of Linkage*, 96 AM. J. INT'L L. 126, 131, 133–34 (2002).



operations. Second, our proposal suggests that countries provide lead firms with subsidies to help defray the costs of social plans, policies that could be coordinated with the WTO to guarantee they are not trade protectionist. Third, social plans are generally negotiated with local authorities. Therefore, local authorities, under our proposal, will retain sufficient space and authority to set the terms of social plans. They can help produce plans that can sufficiently help affected workers without unduly scaring away investors. Finally, this Article has explained that the goal of all GVC actors should be to upgrade in supply chains, produce more complex goods and services and hence improve their relative economic positions. As we have also argued here, economic upgrading will not happen without social upgrading. Rules for mass layoffs are an important step towards helping workers, and perhaps even contractors, suppliers, and franchisees abandoned by some lead firms, to retool and re-link themselves to supply chains. Rules for mass layoffs should thus be seen as important investment in the future of countries.

Finally, other critics might argue that giving the WTO any space to influence the ILO would lead to a colonization of the ILO by the WTO, a hegemonic actor that strongly favors businesses over workers. We do not believe that the WTO must necessarily unduly influence the ILO. First, the WTO is in a current period of crisis, as we reported here, not least due to the populist wave. If the WTO does not take social concerns seriously, its downward trajectory will continue. In fact, we doubt that the WTO has the resources or even status to colonize the ILO in any meaningful way, given that the ILO's structure incorporates member states, labor representatives, and employer representatives who do not necessarily see eye-to-eye with the WTO and will thus guard their interests.

In all, we believe that ILO and WTO collaboration is a project worth the effort to contribute to a post-populist, global economic system that is sensitive to social concerns, while providing a space for the complex web of labor and trade stakeholders to deliberate and develop that order. ILO-WTO collaboration will not solve all our current challenges but can help to pave the way out of our current global political crisis. A post-populist global order is possible. We have the existing institutional materials to start a process to give it form. The ingredient we now need is political will.