A Worker-Centered Trade Policy

DESIRÉE LECLERCQ*

What is a "worker-centered" trade policy? The Biden administration claims that it means protecting all workers—foreign and American—from exploitative working conditions in trade sectors. The administration's vigorous enforcement of international labor rights suggests a significant departure from previous U.S. trade priorities centered on domestic interests. For economic and humanitarian reasons, various policymakers and scholars celebrate these developments. They optimistically assume that the administration's new trade policy will influence foreign governments and facilities to comply with international labor rights in trade if the costs of noncompliance outweigh the benefits. They also assume that the policy will influence compliance with strong labor protections as negotiated on the international platform. Both assumptions are misplaced.

Outside the trade context, governments, employers, and workers negotiate how international labor rights

* Assistant Professor, Cornell ILR School & Associate Member of the Law Faculty, Cornell Law School. I would like to thank Anne van Aaken, Harlan Cohen, Lance Compa, Angela Cornell, David Doorey, Franz Ebert, Jack Getman, Joy Gordon, Shannon Gleeson, Kati Griffith, Marissa Jackson, Kebin Kolben, Terri LeClercq, Inu Manak, Fernanda Nicola, Tonia Novitz, Mona Paulsen, and Gregory Shaffer, as well as participants at the Cornell ILR workshop, Richmond Junior Faculty Workshop, JILSA workshop, the 2022 ASIL International Economic Law Interest Group Workshop, the Cornell Law School workshop, and the 2022 ASIL Research Forum. I would also like to thank James Pezzullo, Thomas Hegeman, and Tess Berman for their exceptional assistance and Suzanne Amy Cohen for her tireless efforts to help me navigate Cornell's library materials. I am grateful to former colleagues and friends at the ILO and federal agencies for their willingness to hold extensive conversations over these issues. I am especially grateful for the editorial work of the staff of the *Columbia Journal of Transnational Law*. Any remaining errors are my own and nothing in this Article is reflective of the views of any institution within which I have worked. Nor do they reflect the opinions of the individuals named above, many of whom have engaged in extensive debates over my presumptions and recommendations.

manifest in their countries based on pragmatic issues such as political ideologies, economic capacity, and legal systems. Those actors tend to respect those labor rights because they actively participate in the design, monitoring, and enforcement processes. Despite its newfound interest in ensuring compliance with international labor rights under U.S. trade agreements, the Biden administration excludes foreign workers, employers, and counterpart governments from those processes. That exclusion risks obscuring and distorting enforcement predictability, perceptions of legitimacy, and the scope of international labor rights protections within and outside the United States—all of which may reduce or weaken compliance and protections for workers in trade sectors. If the administration sincerely intends to protect workers from trade-related exploitation worldwide, it must stop reinforcing its own discretion and control and start reinforcing the participatory processes embedded in international labor rights.

INTRODUCTION

This Article is about the underappreciated peril and promise of a trade policy whose stated objectives include protecting the very workers that its interpretive and enforcement procedures exclude. It intends to advance the conversation among trade policymakers, including those in the U.S. administration and foreign administrations, as well as scholars and readers interested in trade and labor policy, on how to influence compliance with labor rights in trade sectors and global supply chains.

Critiquing the Biden Administration's "worker-centered" trade agenda, a new policy that purports to advance workers' rights worldwide,[1] may seem counterintuitive, if not disloyal, to the labor rights movement. At the time of writing, under the United States-Mexico-

1. *See* U.S. TRADE REP. [USTR], EXEC. OFF. OF THE PRESIDENT, 2022 TRADE POLICY AGENDA AND 2021 ANNUAL REPORT 2 (2022) ("The Biden Administration's worker-centered trade policy reflects our commitment to use our trade agreements, tools, and relationships to empower workers.").

Canada Agreement (USMCA),[2] workers in Mexico are enjoying free and fair union election conditions, a greater voice in collective bargaining, and reinstatement with back pay.[3] As a longstanding labor rights advocate, I should celebrate those accomplishments—not risk undermining them.

Nevertheless, as a former U.S. trade negotiator and a former lawyer for both the National Labor Relations Board (NLRB) and the International Labor Organization (ILO), I take a pragmatic approach to labor rights governance. My work experience in closed-door U.S. labor and trade agencies has given me insight into the black box of federal policy-making purporting to protect workers, as well as the reactions to that policy-making by regulated communities. This Article draws from those experiences to identify the potential harms of our current "worker-centered" trade policy for compliance with workers' fundamental rights and to prompt a conversation around needed reforms.

Before doing so, I want to offer a brief background, particularly for those who may question why the trade and labor link—which has plagued trade and labor rights scholars and policymakers for decades,[4] if not centuries[5]—continues to warrant our attention. The notion that governments should avoid interfering with one another's industrial labor policies[6] has contrasted sharply with moral concerns for exploited

2. United States-Mexico-Canada Agreement Implementation Act, Nov. 30, 2018, 134 Stat. 11 (entered into force July 1, 2020) [hereinafter USMCA].

3. *See infra* Part II.

4. *See infra* Part II; *see also* B.A. HEPPLE, LABOUR LAWS AND GLOBAL TRADE 1 (2005) (arguing that the trade and labor link "has been fiercely contested" for the past two centuries). For a relatively recent discussion of the use of labor provisions in trade agreements, see Desirée LeClercq, *The Disparate Treatment of Rights in U.S. Trade*, 90 FORDHAM L. REV. 1, 26–29 (2021) (arguing that the labor conditions regulated under trade agreements are germane to competition and thus trade conditions).

5. *See* HEPPLE, *supra* note 4, at 89; Christopher L. Erickson & Daniel J.B. Mitchell, *Labor Standards and Trade Agreements: U.S. Experience*, 19 COMPAR. LAB. L. & POL'Y J. 145, 148 (1998); Kevin Kolben, *Compensation and Its Limits: Can Trade's Losers Be Made Whole?*, 24 J. INT'L ECON. L. 683, 683 (2021) ("Concentrated harms to import-competing industries, their employees, and to the communities in which they are located have been substantial.").

6. *See, e.g.*, Jagdish Bhagwati, *Aggressive Unilateralism: An Overview*, *in* AGGRESSIVE UNILATERALISM 1, 3–4 (Jagdish Bhagwati & Hugh T. Patrick eds., 1990) (dismissing labor provisions in trade agreements as matters that are "tenuously trade related at best"); Kevin Kolben, *Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes*, 48 HARV. INT'L L.J. 203, 212–13 (2007) (arguing that developing countries such as India oppose labor provisions in trade because they suspect that those provisions "are at their core protectionist" and "would violate a nation's sovereignty,

workers in trade sectors.[7] Irrespective of that ongoing dispute, however, labor rights in trade are now commonplace.[8]

Despite decades of attention and lobbying efforts within the labor community, government parties to trade agreements fail to protect vulnerable workers from carrying the burden of globalized trade.[9] Women and young children continue to be forced into labor, trafficked, sold across borders, and worse.[10] Union participation continues to decline globally, and union leaders are arrested or disappeared.[11] Throughout supply chains, factories continue to enslave and torture

limiting its ability to self-govern"); *see also* Lance Compa, *Trump, Trade, and Trabajo: Renegotiating NAFTA's Labor Accord in a Fraught Political Climate*, 26 IND. J. GLOB. LEGAL STUD. 263, 271 (2019) (describing how U.S. trade agreements have led to broader campaigns that include "media strategies, public hearings, public protests, cross-border trade union and NGO collaboration, consumer demands, and appeals to socially responsible investors.").

7. *See, e.g.*, Lance Compa & Jeffrey S. Vogt, *Labor Rights in the Generalized System of Preferences: A 20-Year Review*, 22 COMPAR. LAB. L. & POL'Y J. 199, 201 (2001) (arguing that a country's comparative advantage "is not acceptable . . . if obtained by jailing or murdering workers who try to organize union, denying workers political rights, using the work of young children, discriminating against women and ethnic minorities, or ignoring life-threatening health and safety hazards in the workplace").

8. *See* Damian Raess & Dora Sari, *Labor Provisions in Trade Agreements (LABPTA): Introducing a New Dataset*, 9 GLOB. POL'Y 451, 454 (2018) ("[T]he data indicates that compared to an average of 32 per cent in the 1990s, the share [of trade agreements with labor provisions] rose to 40 per cent during the first decade of the 2000s, reaching an average of 61 per cent during the period of 2010–2015 (with a peak of 80 per cent in 2013).").

9. A 2022 empirical report by the U.S. International Trade Commission documents how previous administrations have failed to protect workers even in the United States from the collateral damage of global trade even at home. *See* U.S. INT'L TRADE COMM., DISTRIBUTIONAL EFFECTS OF TRADE AND TRADE POLICY ON U.S. WORKERS, Pub. No. 5374 (Oct. 2022). In particular, workers of color, women, LGBQT+, and other marginalized workers have been excluded from trade policy discussions and have not benefitted from trade's gains. On the contrary, they have lost jobs to offshoring, lack maternity benefits, and suffer from poor wages and working conditions, all while American corporations have gotten richer under globalized trade.

10. INT'L LAB. ORG. [ILO], GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOR AND FORCED MARRIAGE 2 (2022) ("Women and girls make up 11.8 million of the total in forced labour. More than 3.3 million of all those in forced labour are children.").

11. *See, e.g.*, Rebecca Gumbrell-McCormick & Richard Hyman, *Democracy in Trade Unions, Democracy Through Trade Unions?*, 40 ECON. & IND. DEM. 91, 106 (2018) ("Trade union membership, as a proportion of the labour force, is almost universally in decline: a trend which . . . can be attributed to the impact of the global financialization of capitalism."); Compa & Vogt, *supra* note 7, at 213–19 (describing the prevalence of union kidnappings, murders, and disappearances notwithstanding trade enforcement).

with impunity.[12] Millions of workers still lose their lives in workplace accidents.[13]

Since the turn of the century, U.S. trade policy has reacted to such labor exploitation by requiring trade partners to commit to the ILO's four "fundamental" labor rights, namely (1) collective bargaining and freedom of association; (2) prohibitions against child labor; (3) prohibitions against forced labor; and (4) non-discrimination in employment.[14] Yet, prior U.S. administrations have proven hesitant, if not unwilling, to enforce those commitments, mainly when doing so threatened more pressing foreign policy and geopolitical objectives.[15]

Further challenging U.S. efforts to regulate international labor rights in trade, the U.S. Senate has agreed to ratify only two of the ILO's eight conventions corresponding to the abovementioned fundamental labor rights.[16] And even if the United States had ratified all eight, there is no certainty that the United States would satisfy the ILO's legal standards. For years, the ILO's supervisory bodies have expressed concern about how U.S. laws and practices mistreat vulnerable workers in the United States. They have pointed out how those laws fail to provide sufficient associational and bargaining rights for

12. *See generally* Desirée LeClercq, *Nestlé United States, Inc. v. Doe. 141 S. Ct. 1931*, 115 AM. J. INT'L L. 694 (2021) (describing how plaintiffs could not hold Nestlé accountable for their child enslavement and torture in U.S. courts).

13. *See generally* WORLD HEALTH ORG. [WHO] & ILO, WHO/ILO JOINT ESTIMATES OF THE WORK-RELATED BURDEN OF DISEASE AND INJURY, 2000-2016: GLOBAL MONITORING REPORT (2021) (noting the deaths of 1.9 million people owing to work-related accidents such as workplace fires).

14. *About the ILO*, ILO, https://www.ilo.org/global/about-the-ilo/lang—en/index.htm [https://perma.cc/JG56-J67Y]. For a discussion on the evolution of labor clauses in trade agreements, see Jordi Agusti-Panareda et al., *ILO Labor Standards and Trade Agreements: A Case for Consistency*, 36 COMPAR. LAB. POL'Y J. 347, 354–56 (2015).

15. *See* KIMBERLY ANN ELLIOTT & RICHARD B. FREEMAN, CAN LABOR STANDARDS IMPROVE UNDER GLOBALIZATION? 89 (2003) ("The principal problem with many of these [U.S. trade agreements] is that they have been largely concerned with finding politically acceptable trade-labor mechanisms that permit trade agreements to proceed, while doing little to ensure that labor standards improve."); *see also* Jeffrey S. Vogt, *Trade and Investment Arrangements and Labor Rights*, *in* CORPORATE RESPONSIBILITY FOR HUMAN RIGHTS IMPACTS 121, 128–29 (Lara Blecher et al. eds., 2014) (describing obstacles arising from prior U.S. administrations' "inconsistent application of" labor rights commitments).

16. *See* LeClercq, *supra* note 4, at 37 & nn.258 & 261 (noting that the United States has only ratified one of the two conventions prohibiting child labor, one of the two prohibiting forced labor, and none of the conventions prohibiting non-discrimination in employment or protecting associational and bargaining rights).

public sector workers,[17] graduate students,[18] immigrant workers,[19] and supervisors.[20] The U.S. government responds that its laws and practices *are* ILO-compliant.[21] It has consequently taken no steps to align its labor standards and practices with ILO recommendations.[22] Nor has it, until recently, compromised its trade relationships by prioritizing compliance with labor rights commitments under its trade agreements.[23]

Of course, norms clash in international law across regimes and within countries all the time[24]—there is nothing unique about international labor rights in that respect. However, this Article does not ask whether international labor rights conflict across regimes. Rather, it asks whether the administration's "worker-centered" trade policy is

17. *See, e.g.*, ILO, REPORT IN WHICH THE COMMITTEE REQUESTS TO BE KEPT INFORMED OF DEVELOPMENT, REPORT NO. 362, ¶ 775(a) (2011) (urging the U.S. government to bring state labor legislation "into conformity with freedom of association principles" concerning public servants and essential workers).

18. *See, e.g.*, ILO, REPORT IN WHICH THE COMMITTEE REQUESTS TO BE KEPT INFORMED OF DEVELOPMENT, REPORT NO. 350, ¶ 805 (2008) (asking the U.S. government "to take the necessary steps, including legislative, if necessary, to ensure that graduate teaching and research assistants, in their capacity as workers, are not excluded from the protection of freedom of association and collective bargaining.").

19. *See, e.g.*, ILO, REPORT IN WHICH THE COMMITTEE REQUESTS TO BE KEPT INFORMED OF DEVELOPMENT, REPORT NO. 332, ¶ 613 (2003) (noting the Supreme Court's decision in Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002), and requesting the U.S. government to "explore all possible solutions, including amending the legislation to bring it into conformity with freedom of association principles, in full consultation with the social partners concerned . . . .").

20. *See, e.g.*, ILO, REPORT IN WHICH THE COMMITTEE REQUESTS TO BE KEPT INFORMED OF DEVELOPMENT, REPORT NO. 349, ¶ 858(a) (2008) ("The Committee requests the Government to take all necessary steps, in consultation with the social partners, to ensure that the exclusion that may be made of supervisory staff under the NLRA is limited to those workers genuinely representing the interests of employers.").

21. *See, e.g.*, ILO, REPORT IN WHICH THE COMMITTEE REQUESTS TO BE KEPT INFORMED OF DEVELOPMENT, REPORT NO. 350, ¶ 770 (2008) ("the US Government has on numerous occasions demonstrated that its labour law and practice are in conformance with the principles underlying Conventions Nos 87 and 98 . . . .").

22. *See generally* CATHLEEN D. CIMINO-ISAACS, CONG. RSCH. SERV., R46842, WORKER RIGHTS PROVISIONS AND U.S. TRADE POLICY 11–12 (2021) (relaying the view of U.S. government officials that extant U.S. laws "meet" or "exceed . . . standards set out in the ILO conventions.").

23. *See infra* Part I.

24. *See* Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT'L L. 535, 535 (2001) (describing the "decentralized" nature of international law).

fulfilling its promise to compel compliance with workers' rights throughout trade and supply chains.

Previous activities under U.S. trade agreements demonstrate how the "worker-centered" trade policy risks *undermining* the scope of rights protections afforded under international labor law. Those activities presuppose that international labor rights are blackletter rules that lend themselves to unilateral interpretation and enforcement. However, U.S. trade agreements do not secure commitments to blackletter rules; rather, they incorporate the ILO's process-oriented rights that member countries domesticate through active consultations between governments and their workers and employers.[25] By excluding those actors in its deliberative processes, the U.S. administration fails to secure pragmatic commitments capable of protecting workers on the ground. Governments either commit to nebulous labor rights as lip service in the hopes that the U.S. administration continues to care little about those rights, or they assume that the U.S. administration will only enforce labor rights that satisfy U.S. standards.[26]

Neither scenario reflects the domestication and enforcement of *international* labor rights, which are far superior to U.S. labor laws. Nor does it ensure that foreign actors, including governments, employers, and workers, understand and support the substantive obligations of the international labor rights commitments in trade agreements. The ILO's longstanding enforcement regime suggests that actor participation, perceptions of legitimacy, and buy-in are inexorably linked to compliance on the ground.[27]

Who cares? As my colleagues point out, *any* advancements in labor rights protections in Mexico and elsewhere mark progress.[28] Gaps between current enforcement efforts and ILO labor protections matter far less than the overarching and fundamental floor of labor rights that the United States is now enforcing under its new trade agenda. Moreover, my critics might argue, efforts to revise the negotiation of labor rights in trade are futile. Current labor rights text offers sufficient ambiguity to allow trade negotiators—U.S. and foreign—to

25. *See* LeClercq, *supra* note 4, at 39 ("The ILO does not prescribe language, numerical values, or labor-market policies.").

26. *See infra* Part II.

27. *See infra* Part III.

28. *See generally* Sandra Polaski et al., *The USMCA: A "New Model" for Labor Governance in North America?*, *in* NAFTA 2.0: FROM THE FIRST NAFTA TO THE UNITED STATES-MEXICO-CANADA AGREEMENT 151 (Gilbert Gagné & Michèle Rioux eds., 2022) (noting potential concerns with USMCA's labor provisions, but concluding that, regardless of those concerns, "the USMCA potentially takes a step toward more meaningful transnational regulation of workers' rights," particularly in Mexico).

seal complicated trade deals without being weighed down by politically-charged discussions over labor unions and working conditions. We should be happy with what the administration has given us.

I offer three reasons why labor rights advocates, policymakers, and scholars should care. First, I correct mainstream presuppositions that the U.S. "worker-centered" trade policy will garner compliance with international labor rights. The administration carries out its interpretive exercises behind closed doors, rendering it impossible to understand or predict how it enforces those ambiguous rights. Does it enforce them according to the ILO's broad scope of international protections or the narrower and more problematic protections afforded to workers under U.S. national laws and jurisprudence? USMCA's negotiated text illustrates what the U.S. administration did— and did not —negotiate into the text. It strongly suggests U.S.-centrism, as does the administration's exclusion of those foreign actors whose participation is required under the ILO's international labor rights.

The genuine possibility that the U.S. administration negotiates and interprets international labor rights that embody U.S. labor norms and not the ILO's labor rights is important. The same labor rights advocates now celebrating the Biden administration's trade policy for compelling compliance with labor rights in other countries have spent decades decrying U.S. labor laws and practices for suppressing worker voices and rights.

Second, I describe two mainstream theoretical assumptions driving this "worker-centered" trade policy—law and economics theory and the transnational legal process approach. I am not implying that these are the only theories applicable to U.S. trade policy.[29] I focus on them because, in my view, and based on my experiences with policymakers and advocates, they form the basis of legislative and political efforts behind the Biden administration's trade agenda. Those theories assume that, first, states will comply with international labor rights as long as the penalties outweigh the benefits of labor exploitation,[30] and second, that the enforcement of labor rights under the U.S.

29. The literature on international legal theories, compliance, behavior, and lawmaking is vast. *See generally* INTERNATIONAL LEGAL THEORY: FOUNDATIONS AND FRONTIERS (Jeffrey L. Dunoff & Mark A. Pollack eds., 2022) (describing thirteen legal theories relevant to policy and international law).

30. *See* Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory*, 95 CORNELL L. REV. 61, 65–66 (2009). For an example of how that theory is applied to the trade and labor conversation, see, for example, ELLIOTT & FREEMAN, *supra* note 15, at 78 (explaining that, so long as trade partner countries are "small and poor," they will "perceive that defying US demands will have higher costs than complying with them.").

trade agenda socializes and thus generates *progressive* international labor rights worldwide.[31]

Drawing from behavioral studies of state actor compliance, I challenge those mainstream assumptions. I posit that excluded foreign actors will be less likely to comply with their international labor rights commitments than included actors. Excluded actors cannot predict the costs of noncompliance because they cannot predict how the U.S. administration intends to interpret labor rights under the trade agreement.[32] They also have numerous reasons to question the legitimacy of U.S. enforcement actions, all of which the administration has carried out against foreign competitors. Those concerns and doubts have tangible effects on compliance behavior.[33]

Furthermore, the U.S. administration is not participating in transnational legal processes by influencing (or coercing, depending on how you look at it) compliance with international labor rights. Its actions reflect U.S. interpretations of international labor rights and not ILO jurisprudence. It consequently generates labor norms that *regress* from ILO international labor rights instruments. These compliance challenges warrant serious attention given the Biden administration's intention to strengthen worker rights protections in other countries.

Third, I use the ILO's procedures to show how actors that are included in the interpretation and enforcement of international labor rights are more likely to negotiate pragmatic commitments capable of compliance on the ground. Against that participatory backdrop, the Biden administration's exclusory procedures stand starkly. When rights advocates and policymakers look askance at those procedural deficits, they mistake a coercive situation that deprives public and private actors of their due process rights for a trade policy that champions fundamental rights. Their accolades also gloss over the ultimate objective of a worker-centered trade policy: to garner commitments to labor rights that are capable of being respected in practice.

Mexican workers are better off now that their rights are protected under USMCA than before U.S. negotiations began—when fake unions victimized them while enjoying legal impunity. Workers in other trade partner countries equally stand to benefit from a worker-

31. *See* Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 192 (1994).

32. *See generally* Ryan M. Scoville, *U.S. Foreign Relations Law from the Outside in*, 47 YALE J. INT'L L. 1, 2–4 (2021) (using various examples in U.S. foreign policy, including trade legislation, that presupposes foreign knowledge of U.S. policies and procedures, to the detriment of successful U.S. policy).

33. *See infra* Part II.

centered trade policy.[34] Yet, at least on some level, prescient celebrations assume that these workers would have elected U.S. interference, or to be treated like the U.S. government and corporations treat American workers under U.S. labor law. They also assume that U.S. trade procedures that secure or coerce commitments to nebulous international labor rights text can galvanize compliance. In this Article, I propose a worker-centered trade policy that would *ask* workers, employers, and governments how to domesticate ILO's minimum floor of fundamental labor rights in their trade sectors.

This Article is organized as follows. Part I provides a descriptive synthesis of U.S. trade and labor governance to explain how the Biden administration's "worker-centered" trade policy suggests a significant departure from previous U.S. trade policy. Part II challenges the theoretical assumptions driving current U.S. trade policy. I use previous cases of U.S. trade enforcement to argue that neither theory aptly depicts compliance in practice. Part III argues that mainstream theories driving U.S. trade policy overlook the myriad *subjective* considerations that affect state and non-state compliance behavior. It explains how the behavioral components of compliance appear throughout the ILO's procedures, which center on consultations and buy-in between governments, workers, and employers.[35] The ILO's tripartite regime, however, is imperfect. Part IV concludes by reconceptualizing a worker-centered trade policy capable of complementing and strengthening the ILO's regime in trade sectors.

I. U.S. TRADE AND LABOR POLICY

This Part contextualizes the potential importance of the Biden administration's new trade policy by tracing the origins of U.S. trade governance of international labor rights. It explains how previous U.S. administrations used labor rights provisions in trade to advance various national objectives rather than protections for workers in other countries. Under its "worker-centered" trade policy, the Biden

34. *See* Brett Fortnam, *USTR: USMCA Rapid Response Tool Key to Future Trade Policy*, INSIDE U.S. TRADE (May 4, 2022, 5:08 PM), https://insidetrade.com/daily-news/ustr-usmca-rapid-response-tool-key-future-trade-policy [perma.cc/4PC6-LSPE] (noting USTR's indication that USMCA's labor model is "likely to be incorporated into U.S. trade policy moving forward.").

35. *See* ILO, RULES OF THE GAME: AN INTRODUCTION TO THE STANDARDS-RELATED WORK OF THE INTERNATIONAL LABOUR ORGANIZATION 12, 22 (2019) (discussing the process under which the ILO's members design international labor rights through consultations).

administration promises to use labor provisions to advance stronger protections for workers worldwide.[36]

The administration's efforts to prioritize workers in trade are laudable. They appear to move the needle towards a trade policy that balances market objectives with essential prerequisites for social justice. Nevertheless, despite its promise, the administration's residual closed-door procedures and lack of due process for foreign actors[37] suggest a dangerous trajectory that could jeopardize compliance with international labor rights abroad.

A. The Origins of Labor Provisions in U.S. Trade Agreements

This Section explains the basic trade policy priority that originated after the Civil War but continues to surface in various U.S. trade legislation: protecting America's emerging businesses and workers from foreign competition.[38] Under that priority, U.S. administrations prioritized retaining discretion and power over trade agreements and were far less concerned with how trade partner countries would react to their trade decisions.[39]

---

36. *See, e.g.*, Press Release, Katherine Tai, USTR, Exec. Off. of the President, *U.S. Trade Representative Katherine Tai Outlines Biden-Harris Administration's Historic "Worker-Centered Trade Policy"* (June 10, 2021), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/june/us-trade-representative-katherine-tai-outlines-biden-harris-administrations-historic-worker-centered [https://perma.cc/BLR5-WJHW] (emphasizing the importance of protecting workers "at home and abroad.").

37. *See generally* Kolben, *supra* note 6, at 215 (arguing that U.S. trade policy "is completely discretionary" and permits the government to make determinations "based more on political grounds than . . . on the merits of an individual case or on any conception of due process."); Philip Alston, *Labor Rights Provisions in US Trade Law: "Aggressive Unilateralism"?*, 15 HUM. RTS. Q. 1, 7–8 (1993) (arguing that the way the United States references international labor rights in its trade instruments "is so bald and inadequate as to have the effect of providing a carte blanche to the relevant US government agencies, thereby enabling them to opt for whatever standards they choose to set in any given situation.").

38. *See* DOUGLAS A. IRWIN, CLASHING OVER COMMERCE 1 (2017) (internal citation omitted); HEPPLE, *supra* note 4, at 134 (arguing, more broadly, that labor rights are relevant to trade disputes because countries "see low labour standards in their peer countries as harmful to their own interests.").

39. *See* LeClercq, *supra* note 4, at 27 ("policymakers incorporated labor provisions to protect against unfair labor practices in trade-partner countries that could 'substantially disrupt or distort trade.'").

Early U.S. trade centered on imposing high tariffs to tax imports and give domestic industries a competitive leg up.[40] As early as 1890, Congress prohibited the importation of goods manufactured with convict labor.[41] Section 307 of the Tariff Act of 1930 prohibits importing any product created wholly or in part by forced labor, including forced or indentured child labor.[42] Under both acts, the U.S. administration unilaterally decides whether or not the labor rights in question are violated and whether to seize the allegedly nonconforming goods at the border.[43]

In addition to deciding which goods cross into U.S. territory and enter the market, the U.S. administration has also sought to harmonize labor standards across trade partners.[44] Research by Elissa Alben and Bob Hepple strongly suggests that those efforts, too, focused less on concerns over the exploitative conditions incurred along global production lines.[45] Instead, they sought to protect the U.S. market and workers from losing to cheaper competition abroad.

Those trade initiatives make policy sense. Without proper assurances,[46] the free flow of goods, services, and capital arguably

---

40. *See, e.g.*, Dani Rodrik, *What Do Trade Agreements Really Do?*, 32 J. ECON. PERSPS. 73, 74 (2018) ("Economists disagree about a lot of things, but the superiority of free trade over protection is not controversial."); John Gerard Ruggie, *Trade, Protectionism and the Future of Welfare Capitalism*, 48 J. INT'L AFFS. 1 (1994) (describing concerns with the "disastrous isolationist trend" in U.S. economic policy and its relationship to trade wars).

41. *See* CHRISTOPHER A. CASEY & CATHLEEN D. CIMINO-ISAACS, CONG. RSCH. SERV., IF1360, SECTION 307 AND IMPORTS PRODUCED BY FORCED LABOR 1 (2022) ("Beginning in 1890, the United States prohibited imports of goods manufactured with convict labor.").

42. 19 U.S.C. § 1307.

43. *See generally* CASEY & COMINO-ISAACS, *supra* note 41 (explaining how U.S. agencies implement legislation such as the Trade Act to prohibit imports produced by forced labor).

44. *See* Elissa Alben, *GATT and the Fair Wage: A Historical Perspective on the Labor-Trade Link*, 101 COLUM. L. REV. 1410, 1411 (2001) (describing early U.S. efforts to "address the concerns of labor interests in the West" on the multilateral level).

45. *Id.*; HEPPLE, *supra* note 4, at 135 (arguing that U.S. trade negotiators have been "primarily concerned with the effect of those standards on the costs of production.").

46. I am not implying that U.S. trade policy has fully subscribed to the "free" trade or "liberalized" trade approach. Despite its rhetoric, the United States (as well as other trade partners) has always imposed obstacles and regulations in its trade policy. *See* Richard L. Trumpka, *The Crisis of Neo-Liberalism and the American Labour Movement*, *in* THE INTERNATIONAL HANDBOOK OF LABOUR UNIONS: RESPONSES TO NEO-LIBERALISM 249, 249–50 (Gregory Hall, Adrian Wilkinson & Richard Hurds eds., 2011). Those obstacles just have not, until the Biden administration, centered on the rights of workers abroad. On the contrary, as Trumpka argues, while the U.S. "government has intervened very actively in the economy to promote the interests of" big corporations, it failed to likewise intervene to address "economic imbalances," in particular the decline of good jobs. *Id.* at 250.

advantages cheap production.[47] Between 1998 and 2019, the United States lost "nearly five million manufacturing jobs," which displaced "a disproportionately large number of good jobs for workers of color."[48] Reports of loss of good jobs and disparate costs imposed on women and persons of color[49] challenge U.S. trade policymakers, who must balance trade goals with declining domestic support.[50]

The United States has sought to protect U.S. workers harmed by trade under two parallel approaches: domestically through trade assistance and internationally through legally enforceable labor provisions in trade instruments. Domestically, since around 1962, the administration has implemented trade adjustment policies that have "generally been adopted concurrently with the launch of negotiations for new trade agreements."[51] The weaknesses in those policies are manifold and have been extensively debated in the literature.[52]

47. *Id.* at 259 ("The result has been the destruction of millions of manufacturing jobs, the weakening of the bargaining power of industrial workers and a global competitive dynamic that makes it difficult for workers in the developing world to increase their incomes."). But note that the conception of the "race to the bottom," or that comparative advantages are reaped through "social dumping," is hotly contested. *See, e.g.*, HEPPLE, *supra* note 4, at 15 (arguing that "there is little empirical evidence to support the claim that comparative advantage does in fact flow from social dumping . . . .").

48. *See* ROBERT E. SCOTT ET AL., BOTCHED POLICY RESPONSES TO GLOBALIZATION HAVE DECIMATED MANUFACTURING EMPLOYMENT WITH OFTEN OVERLOOKED COSTS FOR BLACK, BROWN, AND OTHER WORKERS OF COLOR: INVESTING IN INFRASTRUCTURE AND REBALANCING TRADE CAN CREATE GOOD JOBS FOR ALL 9–10 (2022).

49. *See* Eric D. Gould, *Torn Apart? The Impact of Manufacturing Employment Decline on Black and White Americans*, 103 REV. ECON. & STAT. 770, 771–72 (2018); Mary K. Batistich & Timothy N. Bond, *Stalled Racial Progress and Japanese Trade in the 1970s and 1980s*, at 2 (Inst. for the Study of Lab., Discussion Paper No. 12133, 2019) (arguing that trade-induced skill upgrading disparately harmed Black communities).

50. *See, e.g.*, Gregory Shaffer, *Retooling Trade Agreements for Social Inclusion*, 2019 U. ILL. L. REV. 1, 10 (2019) (noting that "liberalized trade will only be supported politically—and ethically—if the gains from trade are inclusively shared.").

51. *Id.* at 24.

52. *See, e.g.*, Timothy Meyer, *Saving the Political Consensus in Favor of Free Trade*, 70 VAND. L. REV. 985, 990 (2017) (noting studies showing that such assistance is ineffective); Paul T. Decker & Walter Corson, *International Trade and Worker Displacement: Evaluation of the Trade Adjustment Assistance Program*, 48 INDUS. & LAB. RELS. REV. 758, 772–73 (1995) (describing the results of their empirical study on assistance beneficiaries, which showed that changes in the programs reduced benefits and training offered to beneficiaries); Harlan Grant Cohen, *What is International Trade Law For?*, Ed. Comment, 113 AM. J. INT'L L. 333 (2019); Kolben, *supra* note 5, at 684, 689–91 (arguing that policies such as the Trade Adjustment Assistance Program in the United States are "ill-equipped to address" the political backlash against globalization and exemplify "poorly performing policies" in U.S. trade legislation).

Numerous studies conclude that results have been "far from sufficient"[53] to address the disproportionate costs of trade. Because those policies are not incorporated into the trade agreements, they exist as outliers vulnerable to amendment or termination, and their longevity is always in question. That uncertainty contributes to insecurity among job seekers and confusion among lawmakers.[54]

Internationally, the United States has long sought to harmonize labor rights in trade instruments on the multilateral platform, beginning with negotiations for the 1948 Havana Charter,[55] designed to launch the International Trade Organization (ITO).[56] Those rules would have permitted members to "take whatever action may be appropriate and feasible to eliminate [unfair labor] conditions within their territory" while acknowledging that those conditions, "particularly in the production of export, create difficulties in international trade . . . ."[57] However, those efforts failed, as did similar efforts under the General Agreement on Tariffs and Trade (GATT),[58] owing "in large part to vociferous opposition by many of the developing country members."[59]

The United States has also sought to protect U.S. workers and companies from global competition by harmonizing labor rights under U.S. trade arrangements. In 1984, Congress amended the Generalized

---

53. *See* Shaffer, *supra* note 50, at 24.

54. *See* Timothy Meyer, *Misaligned Lawmaking*, 73 VAND. L. REV. 151, 155 (2020).

55. U.N. Conference on Trade and Employment, *Havana Charter for an International Trade Organization*, U.N. Doc. E/Conf.2/78 (Mar. 24, 1948) [hereinafter *Havana Charter*].

56. *See* Sandra Polaski, *Protecting Labor Rights Through Trade Agreements: An Analytical Guide*, 10 U.C. DAVIS J. INT'L L. & POL'Y 13, 14 (2003) (describing how the United States and other likeminded countries attempted to include labor rights commitments in the Havana Charter in 1948).

57. *See Havana Charter*, *supra* note 55, at pt. II, art. II.

58. *See* Polaski, *supra* note 56, at 13–14; Elisabeth Cappuyns, *Linking Labor Standards and Trade Sanctions: An Analysis of Their Current Relationship*, 36 COLUM. J. TRANSNAT'L L. 659, 665 (1998) (discussing the history of the ITO); HEPPLE, *supra* note 4, at 129–130 (describing U.S. attempts to raise the issue of labor standards during the Tokyo Round and Uruguay Round, and later at the Ministerial Conferences at Seattle (1999) and Cancun (2003)).

59. *See* Kolben, *supra* note 6, at 210. Despite that failure, a number of scholars have argued that various provisions in the GATT are broad enough to encompass labor rights. *See, e.g.*, Alben, *supra* note 44, at 1416–23 (synthesizing the literature forming that argument concerning the GATT art. VI ("social dumping"); art. XVI ("social subsidies"); art. XIX (safeguards); art. XXIII (nonviolation nullification or impairment); art. XIII1 (the opt-out provision); and art. XX (the general exceptions clause). *See also* Robert Howse, *The World Trade Organization and the Protection of Workers' Rights*, 3 J. SMALL & EMERGING BUS. L. 131, 136–42 (1999) (arguing that the most favored nation (MFN) clause and various prohibitions on nontariff border restrictions could permit trade measures for violative labor standards).

System of Preferences (GSP),[60] its primary unilateral preference program under U.S. trade legislation,[61] to condition preferences on whether a beneficiary is "taking steps" to afford its workers international labor rights.[62] In 1994, the United States negotiated commitments to international labor rights in the North American Free Trade Agreement (NAFTA) side agreement.[63] Congress has since required the Executive to negotiate enforceable labor rights provisions in all subsequent trade instruments.[64] A 2007 bipartisan agreement in Congress clarified that the Executive must do so based on the ILO's fundamental labor rights.[65]

The nature of those labor rights is critical to my compliance argument, so a brief reflection is warranted here. In its trade agreements, the U.S. administration commits the parties to the fundamental labor rights "as stated" by the ILO.[66] While some may assume that such a commitment incorporates an international labor rights *treaty* linked to authoritative international jurisprudence, that is not the case.

Instead, and reflecting that the United States has not ratified the relevant labor conventions, U.S. trade agreements since 2002 incorporate a soft law ILO *Declaration* that the ILO's members adopted in 1998.[67] That Declaration enumerates ILO's four fundamental labor rights: (1) freedom of association and collective bargaining; (2) the elimination of child labor, including its worst forms; (3) the elimination of forced labor; and (4) the prohibition of discrimination at work.[68]

---

60. 19 U.S.C. §§ 2461–67 (2000).

61. *See* Compa & Vogt, *supra* note 7, at 199.

62. 19 U.S.C. § 2462(c)(7) (2000).

63. *See* Kate E. Andrias, *Gender, Work, and the NAFTA Labor Side Agreement*, 37 U. SAN. FRAN. L. REV. 521, 523 (2003) ("NAALC represents the first time in the modern trading era that an international agreement on labor was linked both politically and legally to a trade agreement.").

64. Trade Act of 2002, Pub. L. No. 107-120, 116 Stat. 933 (2002).

65. Defending Public Safety Employees' Retirement Act, Pub. L. No. 114-26, 129 Stat. 319 (2015).

66. The evolution of labor provisions in U.S. trade agreements has been described extensively in the literature and will not be duplicated here. For such a description, see Carol Pier, *Workers' Rights Provisions in Fast Track Authority, 1974–2007: An Historical Perspective and Current Analysis*, 13 IND. J. GLOB. LEGAL STUD. 77, 83–87 (2006).

67. *See, e.g.*, USMCA, *supra* note 2, art. 23.3.1 (setting out the traditional text, which reads: "Each Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights, as stated in the ILO Declaration on Rights at Work . . . .").

68. In June 2022, the ILO's members voted to adopt an additional fundamental labor right to occupational safety and health protections. *See International Labour Conference Adds Safety and Health to Fundamental Principles and Rights at Work*, ILO (June 10, 2022),

The Declaration does not bind the ILO's members to the conventions associated with those rights or to the ILO's rich body of interpretive jurisprudence.[69]

That constructive ambiguity is intentional. Under U.S. trade legislation, Congress requires trade negotiators to negotiate into the text binding commitments to the ILO's Declaration.[70] Simultaneously, the U.S. administration has argued at the ILO that "the ILO Declaration is a non-binding statement of principles, not a treaty, and it, therefore, gives rise to no legal obligations."[71] Countries may agree to U.S. negotiating demands hoping that the Declaration's legal ambiguity will stave off criticism back home. Graciela Bensusán and Kevin J. Middlebrook argue, for instance, that during trade negotiations, "Mexican officials delayed in-depth negotiations with the United States over labor rights questions so that the topic would not impede progress on trade issues important to Mexico."[72] The resulting textual and legal ambiguity renders the binding commitments to labor rights in U.S. trade instruments subject to various interpretations, granting the U.S. government significant discretion to close its markets or pursue dispute resolution.

B. The Biden Administration's "Worker-Centered" Trade Policy

This section explains how the Biden administration's "worker-centered" trade policy's stated objectives deviate from traditional U.S. trade policy while its trade procedures and text remain the same. The disconnect between the administration's outward-facing objectives for worker rights, its exclusory procedures to interpret and enforce those rights, and its ambiguous textual commitments raises significant compliance questions.

In unveiling its new "worker-centered" trade policy, the administration explained that it is "more than" merely "standing up for

---

https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_848132/lang—en/index.htm [https://perma.cc/Y2CY-RNGJ].

69. *See* Jordi Agustí-Penereda et al., *ILO Labor Standards and Trade Agreements: A Case for Consistency*, 36 COMPAR. LAB. L. & POL'Y J. 347, 363–67 (2015) (explaining how texts that incorporate the Declaration do not benefit from ILO jurisprudence).

70. *See* LeClercq, *supra* note 4, at 25 (describing trade legislation that now incorporates the ILO Declaration).

71. ILO, REPORT IN WHICH THE COMMITTEE REQUESTS TO BE KEPT INFORMED OF DEVELOPMENT, REPORT NO. 332, ¶ 579 (2003) (U.S. government reply brief).

72. *See* Graciela Bensusán & Kevin J. Middlebrook, *Political Change from the Outside in: U.S. Trade Leverage and Labor Rights Reform in Mexico*, 60 FORO INT'L 985, 991 (2020).

workers' rights."[73] Rejecting "unfettered liberalization, cheap goods, and maximizing efficiencies,"[74] it promised to promote "a broader agenda of fair competition to ensure that workers are competing on the basis of skills and creativity, not exploitative cost advantages."[75] That agenda includes "updat[ing] the playbook and bring[ing] more people in," including by "investing in our industries and workers."[76] "The more we invest in our workers at home and abroad," the administration hopes, "the stronger democracy will be worldwide."[77]

Despite those new objectives, the administration has taken no steps to reform its notoriously secretive and exclusory trade negotiations and enforcement procedures. Those procedures offer the administration significant enforcement discretion[78] to accomplish its national objectives, discussed above, to protect U.S. industries and workers from unfair competition abroad. The Biden administration does so in the name of global welfare and international labor rights.

The administration has also not worked with Congress to modify the text of labor provisions in its trade agreement. To be fair, the administration has had no opportunity to do so. To date, it has not launched any formal trade agreement negotiations.[79] Nevertheless, until the administration and Congress decide to stop incorporating the ILO's fundamental rights, the textual ambiguities will continue to pose interpretive and compliance problems, which I will discuss later.

Utilizing old text and procedures, the Biden administration has seized the opportunity provided by USMCA to increase its

---

73. *See* 2022 TRADE POLICY AGENDA supra note 1, at 1.

74. *See* Press Release, Katherine Tai, USTR, Exec. Off. of the President, Remarks by Ambassador Katherine Tai at the Roosevelt Institute's Progressive Industrial Policy Conference (Oct. 7, 2022), https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2022/october/remarks-ambassador-katherine-tai-roosevelt-institutes-progressive-industrial-policy-conference [https://perma.cc/6W3Q-NJWS]

75. *See* 2022 TRADE POLICY AGENDA, *supra* note 1, at 1.

76. *See* Tai, *supra* note 74.

77. *See* USTR, *supra* note 36.

78. *See* Kathleen Claussen, *Trade Administration*, 107 VA. L. REV. 845, 887 (2021) (describing the U.S. administration's "considerable discretion" in administering trade policy).

79. At the time of writing, the administration had launched various "framework agreements" that do not entail market access and thus do not implicate trade legislation like the Trade Promotion Authority. While those framework agreements mention "high labor standards" their text has not been released. For a list of those new initiatives, which notably omit reference to any new trade agreements, see USTR, THE 2022 ANNUAL REPORT OF THE PRESIDENT ON THE TRADE AGREEMENTS PROGRAM 1–4 (2023), https://ustr.gov/sites/default/files/2023-02/2023%20Trade%20Policy%20Agenda%20and%202022%20Annual%20Report%20FINAL%20(1).pdf [https://perma.cc/PJK2-36F4].

enforcement activities to unprecedented levels. Under USMCA's new Facility-Specific Rapid-Response Labor Mechanism,[80] which I will refer to as the Rapid Response Mechanism, the administration has targeted auto facilities in Mexico. In the following Sections, I chart those targeted activities. I make no effort to diminish or downplay the administration's victories in using its trade agenda to elevate workers' voices in Mexico. Instead, in Part II, I explain how, despite those victories, the "worker-centered" trade policy's residual text and procedures may ultimately harm the very workers "beyond our borders" that the policy promises to protect by failing to influence compliance with rights protections.[81]

1. Enforcement of Labor Rights

This Section briefly describes the administration's enforcement activities under USMCA. When assessing those activities, it is important to bear in mind that the Trump administration did not negotiate USMCA or its Rapid Response Mechanism out of concern for foreign workers. On the contrary, it assured domestic lobbyists and Congress that USMCA would eliminate the unfair comparative advantages reaped by firms in Mexico, which benefitted from relatively lax regulations under NAFTA.[82]

The Trump administration consequently required the Mexican government to commit to a series of ex ante labor rights, including amending its labor laws and practices in line with specific language provided by the United States.[83] Frustrating USMCA's pro-worker

---

80. *See* USMCA, *supra* note 2, at Annex 31-A.

81. *See* Press Release, Katherine Tai, USTR, Exec. Off. of the President, United States Announces Successful Resolution of Rapid Response Labor Mechanism Matter at Panasonic Auto Parts Facility in Mexico (July 14, 2022), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/july/united-states-announces-successful-resolution-rapid-response-labor-mechanism-matter-panasonic-auto [https://perma.cc/N5VA-DTRR] ("By enforcing labor rights under the USMCA, we are creating a more competitive North American economy where workers and businesses can operate on a level playing field . . . .").

82. *See* Compa, *supra* note 6, at 284 (comparing the low wages offered to Mexican workers in manufacturing sectors with the wages offered to U.S. and Canadian workers at the time of USMCA negotiations); Robert A. Blecker, *The Rebranded NAFTA: Will the USMCA Achieve The Goals of the Trump Administration for North American Trade?*, 16 NORTEAMÉRICA [NORTHAMERICA] 289, 291 (2021) (arguing that the Trump administration modified USMCA to strengthen labor rights tactically to "win the votes of Democrats in the U.S. Congress . . . .").

83. See Blecker, supra note 82, at 291 (noting how the Trump administration coerced Mexico into agreeing to its proposals through "continual threats" about withdrawing from

optics, the Trump administration also ensured that the Rapid Response Mechanism was one-dimensional. While the United States may enforce international labor rights in factories in Mexico under the Mechanism, Mexico cannot do the same in the United States.[84] That means that when Mexican workers suffer from exploitative labor conditions in the United States—which they do all the time[85]—workers and their organizations have little redress under the trade agreement.

USMCA's Rapid Response Mechanism grants the U.S. administration significant power to decide labor disputes in Mexico. Before those disputes proceed to a panel, USMCA authorizes the United States to revoke trade benefits for factories in Mexico without notice, hearings, or adjudication.[86] That procedural nuance is important. While USMCA is a trade agreement, which implies consent and reciprocity, its enforcement mechanism is more akin to unilateral preference programs, such as the GSP, which permit the U.S. administration to act as judge and jury.

The Biden administration has nevertheless used the Trump administration's trade agreement to influence positive changes in Mexico's labor laws. As interpreted by lawmakers and Mexican companies, Mexico's laws had permitted employers to recognize fake labor

---

NAFTA without a successor). Nevertheless, negotiations between the United States and Mexico concerning Mexico's labor laws and practices had been ongoing for years. In 2018, the Mexican government had committed to undertaking specific labor law reforms to assuage concerns by the U.S. government under the now defunct Trans Pacific Partnership (TPP) Agreement. *See* Shaffer, *supra* note 50, at 28 (arguing that Mexico initiated its processes for labor reform under the auspice of the TPP negotiations); *see also* USMCA, *supra* note 2, at Annex 23-A (noting that the commitments incorporated into USMCA's labor chapter stemmed from the Mexican government's commitments in December 2018).

84. *See* Desirée LeClercq, *Biden's Worker-Centered Trade Policy: Whose Workers?*, INT'L ECON. POL'Y BLOG (May 16, 2021), https://ielp.worldtradelaw.net/2021/05/bidens-worker-centered-trade-policy-whose-workers.html [https://perma.cc/WLK7-YG85].

85. For a description of how longstanding U.S. labor laws and practices harm workers in trade and agricultural sectors, see, for example, LANCE COMPA, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 71–168 (2004).

86. Specifically, it authorizes the U.S. Trade Representative to direct the Treasury Department to suspend the final customs account for goods from the factories implicated in the complaints until resolution. That directive is carried out without advanced notice and before adjudication, yet the suspension may impose significant financial costs on facilities. *See* USMCA, *supra* note 2, arts. 31-A.4.2, 31-A.4.3 (providing that the United States may "delay final settlement of customs account related to entries of goods" so long as it has a "good faith basis" to believe a violation has occurred. There are no procedural requirements regarding evidence, notice, or review. Instead, the provisions merely stipulate that accounts "must resume immediately" once the dispute has been resolved or a panel finds that there is no violation.).

unions.[87] Those fake unions bargained "protection contracts" that were "signed between an employer and a union, often established by the employer, and even subject to criminal elements, without the participation of the workers, and even without their knowledge."[88] The international community, including the ILO[89] and the U.S. government,[90] had repetitively criticized the Mexican labor regime for subverting worker voices and working conditions. The Biden administration has proved willing, if not enthusiastic, to flex its new enforcement authority to address that subversion.

2. USMCA Rapid Response Mechanism Activities

This Section describes the early enforcement activities the Biden administration has carried out under the USMCA Rapid Response Mechanism. At the time of writing, new petitions alleging labor rights violations in additional facilities in Mexico continue to percolate. This Section makes no empirical findings on the rate or outcome of those ever-changing disputes. Instead, it offers a glimpse into the initial Rapid Response Mechanism cases, all of which targeted auto manufacturing facilities in Mexico that compete with facilities in the United States.[91]

---

87. *See* Compa, *supra* note 6, at 285 (describing Mexico's use of protection contracts, in which "[p]oliticians and lawyers connect companies with corrupt union leaders," which would create collective bargaining agreements "even before managers begin operations and hire employees.").

88. ILO, *Individual Case (CAS): Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) – Mexico*, (June 2015), https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3241939:YES [https://perma.cc/S7CK-D9BQ]

89. *Id.*

90. *See, e.g.*, U.S. DEP'T OF STATE, 2020 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: MEXICO 33 (noting that "protection contracts" in Mexico "were often negotiated and signed without the knowledge of workers and undermined genuine collective bargaining.").

91. Labor unions and worker rights advocates petitioned the U.S. government to raise a complaint against a Saint-Gobain glass plant on September 27, 2022. As of the time of writing, USTR had yet to announce its decision on whether to accept the petition and pursue enforcement action. For a description of those recent activities, see USTR, 2023 TRADE POLICY AGENDA OF THE PRESIDENT OF THE UNITED STATES 2–3 (Mar. 2023), https://ustr.gov/sites/default/files/2023-02/2023%20Trade%20Policy%20Agenda%20and%202022%20Annual%20Report%20FINAL%20(1).pdf [https://perma.cc/4DS9-W7X9].

Three months after the new U.S. Trade Representative was sworn in, on May 12, 2021,[92] the Biden administration self-initiated an enforcement action against the General Motors de Mexico facility (GM) in Silao, State of Guanajuato, under USMCA's Rapid Response Mechanism. It did so citing "information appearing to indicate serious violations of these workers' rights in Silao, State of Guanajuato in connection with a recent worker vote, organized by the existing union, to approve their collective bargaining agreement."[93] The United States simultaneously suspended "the final settlement of customs accounts related to entries of goods from GM's Silao facility."[94] Concurrently, the Mexican government "halted voting and impounded ballots" at the facility.[95] On February 3, 2022, workers at the plant held a new round of union elections. With appropriate election protections in place, seventy-eight percent of the Mexican workers voted in favor of the independent union.[96]

On June 9, 2021, the Biden administration announced its second review under the Rapid Response Mechanism based on a May 10 petition filed by the AFL-CIO and other labor groups.[97] The petition alleged that Tridonex harassed and fired workers for attempting to organize an independent union.[98] On August 10, 2021, the United States

92. *See* Press Release, Katherine Tai, USTR, Exec. Off. of the President, *United States Seeks Mexico's Review of Alleged Worker's Rights Denial at Auto Manufacturing Facility* (May 12, 2021), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/may/united-states-seeks-mexicos-review-alleged-workers-rights-denial-auto-manufacturing-facility-0 [https://perma.cc/6AGM-HU5D].

93. *Id.*

94. *Id.*

95. *See* Lance Compa, *NAFTAs Lessons on Labor Standards and Trade Agreements*, *in* HANDBOOK ON GLOBALISATION AND LABOUR STANDARDS 274, 291 (Kimberly A. Elliott ed., 2022).

96. *See* Luis Feliz Leon & Dan DiMaggio, *Mexican Auto Workers to Choose New Union in Landmark Vote*, LABORNOTES (Feb. 2, 2022), https://labornotes.org/2022/01/mexican-auto-workers-choose-new-union-landmark-vote [https://perma.cc/R6U6-RXQH].

97. *See* Press Release, Katherine Tai, USTR, Exec. Off. of the President, *United States Seeks Mexico's Review of Alleged Freedom of Association Violations at Mexican Automotive Parts Factory* (June 9, 2021), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/june/united-states-seeks-mexicos-review-alleged-freedom-association-violations-mexican-automotive-parts [https://perma.cc/ACN7-5EPM].

98. *See* Press Release, Katherine Tai, USTR, Exec. Off. of the President, *United States Reaches Agreement with Mexican Auto Parts Company to Protect Workers' Rights* (Aug. 10, 2021), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/august/united-states-reaches-agreement-mexican-auto-parts-company-protect-workers-rights [https://perma.cc/48KL-XBTV]; USTR, *supra* note 97.

announced that it had reached an agreement with Tridonex and would not pursue further financial penalties.[99]

In exchange for the release of its goods into the United States, Tridonex agreed, among other things, to provide severance pay and six months back wages to at least 154 workers who were dismissed from the plant, commit to supporting their right to determine their union representation and harassment and welcoming election observers in the plant, and remain neutral in future elections.[100] On February 28, 2022, the workers held a new election and voted overwhelmingly in favor of the independent union.[101]

Since those initial cases, the Biden administration has formally requested that Mexico review whether additional facilities have denied their workers associational and organizing rights.[102] While announcing those requests, it has blocked all unliquidated goods from the suspected targeted facilities at the U.S. border,[103] as permitted under the Rapid Response Mechanism's procedures.[104]

The evolution of labor rights in the U.S. trade agenda and the attendant trade tools are important. Trade policy, including binding commitments to labor rights, initially focused on protecting U.S. interests by harmonizing production costs. The administration satisfied those objectives by requiring foreign governments and facilities to

---

99. *Id.*

100. *See* USTR, ANNEX, ACTION PLAN 2 (2021), https://ustr.gov/sites/default/files/enforcement/USMCA/Tridonex%20Action%20Plan.pdf [https://perma.cc/N3X3-AJ3R].

101. *See* Press Release, Katherine Tai, USTR, Exec. Off. of the President, *Statements from Ambassador Katherine Tai and Secretary Marty Walsh on the Vote by Tridonex Workers in Matamoros, Mexico* (Mar. 1, 2022), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/march/statements-ambassador-katherine-tai-and-secretary-marty-walsh-vote-tridonex-workers-matamoros-mexico [https://perma.cc/3DXF-6KZ2].

102. *See* Press Release, Katherine Tai, USTR, Exec. Off. of the President, *United States Seeks Mexico's Review of Alleged Freedom of Association and Collective Bargaining Violations at Panasonic Facility* (May 18, 2022) [hereinafter Panasonic Press Release], https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/may/united-states-seeks-mexicos-review-alleged-freedom-association-and-collective-bargaining-violations [https://perma.cc/U964-LA8L]; Press Release, Katherine Tai, USTR, Exec. Off. of the President, *United States Seeks Mexico's Review of Labor Rights Issues at Teksid Hierro Facility* (June 6, 2022), [hereinafter Teksid Hierro Press Release], https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/june/united-states-seeks-mexicos-review-labor-rights-issues-teksid-hierro-facility#:~:text=WASHINGTON%20%E2%80%93%20United%20States%20Trade%20Representative,the%20rights%20of%20free%20association [https://perma.cc/BM4L-FUYH].

103. Panasonic Press Release, *supra* note 102; Teksid Hierro Press Release, *supra* note 102.

104. *See* USMCA, *supra* note 2, arts. 31-A.4.2, 31-A.4.3.

adhere to U.S. production standards. Disputes were addressed state-to-state and were litigated before the imposition of penalties. The administration's new "worker-centered" trade objectives now purport to protect *foreign* workers, such as the Mexican workers in auto facilities. It does so by imposing financial penalties directly on facilities in Mexico (thus far, those that compete with U.S. facilities) without advanced notice, due process, or litigation.

Those developments pose critical questions. Does U.S. trade policy currently influence counterparts to strengthen or repudiate international labor rights? When U.S. trade policy influences counterparts and foreign factories to comply, what are they complying with? U.S. laws and interpretations of international labor rights or the more expansive interpretations afforded at the ILO? I will address those questions next.

II. THE THEORETICAL ASSUMPTIONS OF TRADE AND LABOR GOVERNANCE

This Part describes and challenges the law and economics theory and the transnational legal process approaches—which I view as the mainstream theoretical assumptions underpinning the U.S. "worker-centered" trade policy. After explaining them, I use previous enforcement activities under current U.S. trade procedures to show how neither theory sufficiently predicted how foreign governments and facilities responded to enforcement activities. I later argue that an emerging behavioral and psychological theory of influence and compliance better explains and anticipates how foreign governments and facilities respond to U.S. trade and labor demands.

A. Law and Economics Theory

The Biden administration's vigorous enforcement of international labor rights in trade reflects law and economics theory in foreign policy. That theory is a top-down approach that characterizes states and facilities as singular actors driven by self-interest. Put simply, it assumes that foreign actors will comply with rules if the costs of noncompliance outweigh the "anticipated benefits" of violations.[105]

105. *See* DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 22 (3d ed. 2015); ELLIOTT & FREEMAN, *supra* note 15, at 78 ("Coercive trade sanctions, or the threat thereof, will change the behavior of a foreign government when the government *perceives* that

In the "worker-centered" trade context, law and economics theory reflects three implicit presumptions. First, it presumes that powerful sovereigns such as the United States are best suited to enforce international labor rights. As an active ILO member, the United States helped to design those rights and has good reason to maintain its control.[106] Because the ILO lacks a sanctions mechanism, the United States must step in to garner compliance.[107]

Second, it "mostly" presumes that "the nation-state [is] a unitary actor."[108] Under this presumption, state decision-making is carried out in a "black box."[109] That is, law and economics theorists presuppose that counterparts, even if otherwise recalcitrant, will comply with international labor rights out of national interest to avoid financial sanctions.[110]

Third, it presumes that states will act and decide rationally. In a series of co-authored works, Jack Goldsmith and Eric Posner argue that states enter into various international agreements and decide when and how to enforce or violate them based on tangible benefits.[111] "If there is an unexplained residuum of behavior," they argue, "it is so small that normative motivations cannot be credited with a great deal of influence on state's behavior."[112]

---

the costs of the sanctions will be greater than the *perceived* costs of complying with the sanctioner's demands."); Nourse & Shaffer, *supra* note 30, at 65–66.

106. *See* Nourse & Shaffer, *supra* note 30, at 65–66.

107. *See* Dursun Pekson & Jacob M. Pollock, *Economic Globalization and Labor Rights: A Disaggregated Analysis*, 22 HUM. RTS. REV. 279, 283 (2021) (contrasting human rights agreements, which lack enforcement mechanisms and thus "fail to exact change" with labor rights commitments in trade agreements, which "are backed by the threat of economic loss if target countries cannot implement [them]."); Geoff Dancy & Christopher J. Fariss, *Rescuing Human Rights Law from International Legalism and Its Critics*, 39 HUM. RTS. Q. 1, 10 (2017).

108. *See* Anne van Aaken, *Rationalist and Behavioralist Approaches to International Law*, *in* INTERNATIONAL LEGAL THEORY: FOUNDATIONS AND FRONTIERS, *supra* note 29, at 261, 261–264.

109. *Id.*

110. *See* Dancy & Fariss, *supra* note 107, at 10.

111. *See, e.g.*, Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1115 (1999) ("States do not comply with [customary international law (CIL)] because of a sense of moral or legal obligation; rather, CIL emerges from the states' pursuit of self-interested policies on the international stage."); Eric A. Posner & Jack L. Goldsmith, *Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective*, 31 J. LEGAL STUD. 115, 118 (2002) ("[N]ations provide legal or moral justifications for their actions, no matter how transparently self-interested their actions are.").

112. *See, e.g.*, Jack L. Goldsmith & Eric A. Posner, *International Agreements: A Rational Choice Approach*, 44 VA. J. INT'L L. 113, 142 (2003).

Former U.S. Deputy Undersecretary of Labor Sandra Polaski, a key actor in designing labor provisions in U.S. trade agreements, similarly argues that trade sanctions "create an important deterrent effect, as other firms see the potential cost of [rights] violations and correct their practices in order to continue to export to the U.S. market."[113] She and other policy advocates[114] urge the administration to use threats of sanctions yet further to "leverage the behavior of a target country's leader with incentives that can alter behavior."[115]

Those presumptions help explain why policymakers are comfortable with the U.S. administration's enormous discretion in enforcing international labor rights in trade. Under law and economics theory, enforcing governments must be able to increase the costs of noncompliance quickly and intuitively. Those enforcement policies "have minimal assumptions about human cognition, such as completeness, transitivity, and independence of irrelevant alternatives."[116]

As a former negotiator and ILO lawyer who spent years experimenting with sticks and carrots during consultations, I am entirely unpersuaded by this approach. As discussed in Part III, it overlooks the myriad *subjective* considerations in the compliance calculus. By focusing on state actors in the aggregate, law and economics theorists overlook the individual or groups, elite decision-makers, inter-agency bureaucrats, lobbyists, and others who contribute to the shaping and execution of trade policy.[117]

Law and economics theory, at least in the "worker-centered" context, also takes for granted that counterparts will be able to predict enforcement action and penalties. It fails to consider whether rules defined behind closed doors are sufficiently clear to garner universal understanding and compliance in the first place.[118] Some might argue

113. *See* SANDRA POLASKI EL AL., HOW TRADE POLICY FAILED U.S. WORKERS AND HOW TO FIX IT 33 (2020); ELLIOTT & FREEMAN, *supra* note 15, at 89 (calling for governments to include sanctions mechanisms that prescribe labor rights in additional multilateral agreements).

114. *See, e.g.*, ELLIOTT & FREEMAN, *supra* note 15, at 78 (explaining that, so long as the trade partner countries are "small and poor," they will "perceive that defying US demands will have higher costs than complying with them").

115. *See* GARY M. SHIFFMAN & JAMES J. JOCHUM, ECONOMIC INSTRUMENTS OF SECURITY POLICY: INFLUENCING CHOICES OF LEADERS 87 (2011).

116. *See* van Aaken, *supra* note 108, at 265.

117. *See* Anne van Aaken, *Behavioral International Law and Economics*, 55 HARV. INT'L L.J. 421, 441–43 (2014) (explaining how the rational actor theories examine state behavior on the macro level).

118. *See* Scoville, *supra* note 32, at 8 (arguing that legal knowledge is essential to compliance).

that the ILO's public comments and jurisprudence offer clear and authoritative guidance on interpreting international labor rights. That argument belies the complexity of those rights, which center more on processes than substance. At the ILO, as explained later, international labor rights are interpreted and enforced based on consultations between governments and their workers and employers.[119] ILO advisers never visit member countries to order compliance with pre-established determinations of labor rights in their country. If anything, they go to listen.[120]

Furthermore, the theory fails to acknowledge the incongruency between U.S. interpretations and those generated on the ILO's consultative platform. Earlier, I described that incongruency, which has significant implications for law and economics' presumptions of compliance. How can counterparts and foreign companies be coerced into compliance if it is unclear whether the U.S. administration intends to enforce its interpretations or those that the ILO has blessed? The significant discretion the United States affords itself under law and economics presumptions undermines compliance by rendering its enforcement unpredictable and questionable.[121]

B. Transnational Legal Processes

Rather than focus solely on compliance as rational decision-making, some foreign policymakers and labor advocates presume that frictions around compliance will socialize and generate progressive international labor rights in trade. This presumption contributes to the current weaknesses in the administration's "worker-centered" trade

119. For instance, the ILO carries out its technical assistance programs after it has brought "together governments, employers' and workers' organizations" to develop those programs. *See* ILO, ILO DECENT WORK COUNTRY PROGRAMME 5 (4th ed. 2016). The ILO notes that its "constituents need to be fully involved in the development, implementation, monitoring and evaluation of" its programs, which should also reflect the "international labour standards, resolutions and conclusions adopted by the International Labour Conference and decisions of the ILO's Governing Body . . . ." *Id.*

120. In some cases, including assistance around the ILO's minimum wage instruments, governments would express frustration that I could not provide an objective "answer" to the ILO's labor rights criteria. Nor could I conceptualize materials and conclusions prior to my arrival. Instead, our legal assistance centered on facilitating discussions among the workers, employers, and government representatives, and finding ways to align the results of their consultations with the ILO's minimum floor of standards.

121. *See* Steven R. Ratner, *International Law: The Trials of Global Norms*, FOREIGN POL'Y 65, 78 (1998) (pointing out that most international lawyers seek to ensure "legal frameworks that render the behavior of global actors more predictable and induce compliance from potential or actual violators").

policy because it advances yet further justifications for affording the administration unbridled discretion to interpret ambiguous labor rights on the ground in other countries.

This latter theory stems from the transnational legal process approach advanced by Harold Koh and others. That approach considers ways transnational public and private actors influence the domestication of international norms through iterative processes.[122] Under that approach, "nation-states, international organizations, multinational enterprises, non-governmental organizations, and private individuals—interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately internalize rules of transnational law."[123]

Through various frictions and consultations, transnational law thus "mutates, and percolates up and down, from the public to the private, from the domestic to the international level and back down again."[124] Public and private actors "use the blend of domestic and international legal process to internalize international legal norms into domestic law."[125]

The transnational legal process approach follows its own series of presumptions, three of which are relevant for present purposes.[126] First, it presumes that through iterative processes and its attendant "transnational legal substance," international law is "recognized, integrated, and internalized into domestic legal systems."[127] Implicit is the notion that, at least at times, domestic and international laws coalesce.[128] Under this account, incongruency between U.S. interpretations of international labor rights and the ILO's consultative processes is temporary and thus inconsequential. Eventually, trade policy's

122. *See* Harold Hongju Koh, *Why Transnational Law Matters*, 24 PA. ST. INT'L L. REV. 745, 746 (2006); *see also* Gregory Shaffer, *Transnational Legal Process and State Change*, 37 LAW & SOC. INQUIRY 229, 229–30 (2012) (describing the generative processes across public and private actors under which "*transnational legal orders* may emerge that impose or impart legal norms governing particular areas of law").

123. Koh, *supra* note 31, at 183–84.

124. *Id.* at 184.

125. *See* Harold Hongju Koh, *Transnational Legal Process and the "New" New Haven School of International Law*, *in* INTERNATIONAL LEGAL THEORY: FOUNDATIONS AND FRONTIERS *supra* note 29, at 113.

126. *See id.* at 116, for a fuller description of the various assumptions undergirding the transnational legal approach.

127. *Id.*

128. *Id.* at 113.

generative processes are just as likely to strengthen *U.S. labor laws and practices* as counterparts' laws and practices.

Second, the transnational legal process approach presumes a tolerance for legal pluralism.[129] Acknowledging that there is no world court, "multiple communities for law development, interpretation, and enforcement can make transnational law matter even in the absence of a global leviathan."[130] Under this presumption, concerns over U.S. hegemony dissipate owing to the pluralistic regime of generative rights.

Third, it presumes that transnational lawmaking stems from "dialectical legal interactions," such as between international bodies and domestic courts.[131] When international bodies such as the ILO's supervisory bodies issue public comments concerning compliance with its international labor rights, for instance, the transnational legal process approach considers how those comments are then taken up in regional and national courts, legislation, and enforcement.

Although this approach marks a good starting point from which to describe the potential benefits of norms interpretation and domestication through trade enforcement, both it and the policies it supports are inadequate to explain pragmatic compliance under current trade policies. Taking generative processes for granted, supporters assume that resulting compliance reflects the space and opportunity for foreign governments and entities to contest the interpretations of labor norms.

Counterintuitively, supporters of the administration's "worker-centered" trade policy fail to consider its potential to undermine critical frictions and contributions vertically through consultations on the multilateral and domestic platforms and horizontally between states. The administration's unilateral and secretive decision-making *obstructs* those critical consultations. Given U.S. labor laws and practice shortcomings, the Biden administration's "worker-centered" trade policy also threatens to harmonize labor rights with its own rather than generate transnational legal norms.[132]

---

129. *See id.* at 116.

130. *Id.*

131. *Id.* at 116 n.83.

132. Even if the administration wanted to draw on the ILO's interpretations in other countries when enforcing labor rights under a trade agreement, the reporting between the ILO's secretariat and member governments discussing the results of national consultations is confidential. *See* ILO, HANDBOOK OF PROCEDURES RELATING TO INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS 35, ¶ 61 (Centenary ed. 2019). The United States would have to read the ILO's public supervisory statements that reproduce the gaps in implementation but not always the interpretive nuances and flexibility afforded under the ILO's system.

The next Section departs from theory and turns to practice. It describes previous U.S. trade enforcement activities, including how foreign governments and entities responded to those activities. It chronicles how those excluded actors responded with suspicion and confusion, ultimately leading to either retaliation or weak compliance.

C. Mainstream Theories in Practice: A Compliance Disconnect

This Part began by describing the two mainstream theories—law and economics and the transnational legal process approach—that support the Biden administration's current "worker-centered" trade policy and its vigorous enforcement activities. This Section assesses whether those theories have thus far predicted how foreign actors will react to U.S. trade demands. Contrary to theory, those actors have either repudiated their international labor rights commitments or complied with a narrower scope of labor rights protections than afforded under international labor law. These findings contradict the compliance presumptions that underpin current trade policy.

Concededly, while the "worker-centered" trade policy's closed-door nature motivates my assessment, it also limits it. Even during the Rapid Response Mechanism enforcement activities, the Biden administration did not explain how it interprets the ILO's international labor rights on behalf of Mexican workers. Given the confidential nature of state-to-state communications and facility-level enforcement activities, I can neither quantify nor qualify the interpretations of international labor rights demanded by the U.S. government nor offer a black-letter comparison of those demands to the demands of the ILO's supervisory bodies. Nor can I draw any causal conclusions between U.S. enforcement activities and specific legislative or policy reactions.

Furthermore, the data from which to draw examples are minimal. The United States has only pursued one formal dispute against another trade partner under the labor provisions of its trade agreements—a case that the United States lost.[133] Consequently, it is difficult to draw broad conclusions about how counterparts, foreign workers, and employers respond to enforcement actions under trade agreements.

---

133. *See* Press Release, Katherine Tai, USTR, Exec. Off. of the President, *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR, Final Report of the Panel* (June 14, 2017), https://ustr.gov/issue-areas/labor/bilateral-and-regional-trade-agreements/guatemala-submission-under-cafta-dr [https://perma.cc/2T3H-HPHH].

Nevertheless, there are plentiful analogous data. Specifically, reports document how foreign governments and entities have reacted to the U.S. administration's preliminary activities, such as threats to bring a labor-related dispute[134] and activities under the labor-rights conditions in unilateral preference programs.

The unilateral nature of preference programs could arguably render them inapposite to studying labor provisions in trade agreements.[135] However, as mentioned earlier, enforcement under USMCA's Rapid Response Mechanism is also unilateral. The U.S. administration decides what activities violate international standards relating to freedom of association and collective bargaining based on its "good faith" belief of misconduct.[136] The administration may then freeze unliquidated assets at the border without advanced notice or a hearing.[137] Consequently, the reactions of foreign governments and entities to the U.S. administration's unilateral activities under preference programs shed valuable insight into the reactions of those actors under the Rapid Response Mechanism.

1. Rational Decision-Making

A key theoretical assumption behind the "worker-centered" trade policy is that foreign governments and facilities, as rational actors, will assess the costs of transgressions and will comply to maximize benefits. Previous U.S. administrations' efforts to compel compliance with labor rights by threatening or revoking trade benefits suggest that foreign governments are also likely to act rationally by repudiating the rights imposed by untrustworthy and unpredictable counterparts.

For instance, in 2019, the United States threatened to withdraw trade benefits under GSP in specific Thai sectors for violating the labor rights criteria. That dispute occurred under the Trump administration, whose trade agenda prioritized reducing trade deficits with other

134. I am not the first to carry out this assessment. *See, e.g.*, Kolben, *supra* note 6, at 222–24 (examining enforcement efforts under prior U.S. trade agreements and concluding that U.S. "labor rights provisions have been ineffective," at least in part because they rely on state-to-state action and exclude private actors).

135. Rather than entail negotiations and concessions between two sovereign states, as occurs in trade agreement negotiations, preference programs unilaterally benefit recipient countries by, for example, eliminating or reducing duties on specific products when beneficiaries fail to take steps to afford "internationally recognized worker rights . . . ." *See* 19 U.S.C. § 2462(b) and (c).

136. USMCA, *supra* note 2, arts. 31-A.4.2, 31-B.4.2.

137. *See id.* art. 31-A.4.2.

countries.[138] That year, the U.S. goods trade deficit with Thailand amounted to approximately $20 billion.[139] Following a long process of closed-door, interagency meetings that juggled competing trade priorities, the administration announced that it was suspending $1.3 billion in trade preferences based on Thailand's "failure to adequately provide internationally-recognized worker rights."[140] The administration's threat merely provoked the Thai government to encourage affected sectors to find "new markets" and engage in "cross-border e-commerce."[141]

And while the benefits of labor-rights-based sanctions are unpredictable, the potential human costs of financial penalties are high. Joy Gordon notes that such state-driven enforcement measures "intentionally, or at least predictably, harm the most vulnerable and the least political" populations by restricting critical resources.[142] Below, I offer an illustration to show how Gordon's observations are equally applicable to trade.

In 2015, the United States withdrew preferential market access for the Kingdom of Eswatini (formerly Swaziland) over the government's exploitation of workers.[143] Neither the Eswatini government nor its factories agreed to the United States' demands. Instead, they shifted Eswatini exports to neighboring South Africa.[144] South African customs unions and trade instruments do not impose rights

138. *See* JAMES K. JACKSON, CONG. RSCH. SERV., R45243, TRADE DEFICITS AND U.S. TRADE POLICY 1 (2018) ("A key element of the Trump Administration's approach to international trade has been the use of the U.S. trade deficit as a barometer for evaluating the success or failure of the global trading system, U.S. trade policy, and trade agreements.").

139. *See* USTR, *Southeast Asia & Pacific: Thailand*, USTR, https://ustr.gov/countries-regions/southeast-asia-pacific/thailand [https://perma.cc/2Y6L-JDEQ].

140. *See* Press Release, Katherine Tai, USTR, Exec. Off. of the President, *USTR Announces GSP Enforcement Actions and Successes for Seven Countrie*s (Oct. 25, 2019), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/october/ustr-announces-gsp-enforcement [https://perma.cc/LS5L-WZMF].

141. *See* Phusadee Arunmas & Lamonphet Apisitniran, *GSP Suspension Gauged to Cost $19m in Losses*, BANGKOK POST (Nov. 3, 2020), https://www.bangkokpost.com/business/2012923/gsp-suspension-gauged-to-cost-19m-in-losses [https://perma.cc/MXZ3-6AUU].

142. *See* Joy Gordon, *A Peaceful, Silent, Deadly Remedy: The Ethics of Economic Sanctions*, 13 ETHICS & INT'L AFFS. 123, 126 (comparing sanctions programs to "the modern equivalent of siege").

143. *See* USTR/DOL, STANDING UP FOR WORKERS: PROMOTING LABOR RIGHTS THROUGH TRADE 19 (2015).

144. *See* Giovanni Pasquali & Shane Godfrey, *Governance of Eswatini Apparel Regional Value Chains and the Implications of Covid-19*, 34 EUR. J. DEV. RES. 473, 481 (2021) ("The country's exclusion from the AGOA in 2014–15 further accelerated its shift towards the South African market.").

criteria.[145] Seven years later, the wages and working conditions of the predominantly female Eswatini workers have declined, and their decent jobs have all but disappeared.[146] The Eswatini government and its factories, on the other hand, have continued to prosper under readily-available market opportunities and lower labor costs.[147]

Unfortunately, to be effectively influential, the threat of sanctions must be backed by the realistic expectation of deployment. The problem, however, is that once the U.S. government pulls the enforcement trigger and withdraws benefits, it loses its leverage over foreign decision-makers. Neither the Thai nor Eswatini governments had any incentive to negotiate with the United States once their benefits were terminated. The reactions of those decision-makers risk imposing disproportionate costs on vulnerable populations, particularly when the corporations within those countries merely find new markets that are less concerned with labor standards.

U.S. trade policy lacks measures to protect foreign workers harmed by its enforcement activities. Hundreds of pages of documents obtained under the Freedom of Information Act (FOIA) show, for instance, that the U.S. administration did not continue to work with the Eswatini unions and workers following its withdrawal of unilateral preferences.[148] After enforcing their rights, the United States left the Eswatini workers to the mercy of their employers and government. While those activities were carried out before the Biden administration adopted its "worker-centered" trade policy, they are relevant to current policy discussions. They suggest that the United States must do more than pull the enforcement trigger if it hopes to protect vulnerable workers in trade sectors.

2. Unilateral Harmonization over Generative Norms

The other key assumption driving the "worker-centered" trade policy is that the U.S. administration's activities generate progressive

145. *See* Giovanni Pasquali et al., *Understanding Regional Value Chains Through the Interaction of Public and Private Governance: Insights from Southern Africa's Apparel Sector*, 4 J. IND. BUS. POL'Y 368, 378 (2021).

146. *Id.* at 381–84 (describing the many ways in which Eswatini employers took advantage of trade with South Africa to repress wages and prohibit worker organizing); Pasquali & Godfrey, *supra* note 144, at 479 (explaining that over ninety percent of the Eswatini apparel workforce is composed of women workers).

147. *See* Pasquali et al., *supra* note 145, at 381–84.

148. Specifically, the FOIA request was submitted to the Office of the U.S. Trade Representative and the Department of Labor's Bureau of International Labor Affairs. The responses are on file with the author.

labor rights at home and abroad. Under USMCA, the administration prioritized international labor rights in negotiations and required foreign facilities to consult with local unions and U.S. trade and labor bureaucrats. Ideally, those activities would have entailed iterative processes that socialized international labor rights in the United States and beyond. These Sections use two examples of USMCA negotiations—the fundamental right to engage in collective bargaining and protections against gender discrimination—to show how the administration's activities socialized compliance with U.S. conceptions of international labor rights. The ILO's broader international labor rights protections have been left to the wayside, boding poorly for the type of compliance presumed under a worker-centered trade policy.

a. The Fundamental Right to Engage in Collective Bargaining

Under USCMA's ex ante requirements, the U.S. administration committed the Mexican government and factories to specific legislative changes and practices. Those requirements stem from Mexico's constitutional reforms initiated during prior trade negotiations with the United States.[149] Therefore, it is impossible to disentangle decisions made to access the U.S. market under USMCA from those that predated USMCA and those that the Mexican government made independently. Nevertheless, based on timing and public discussions, this sub-section explains how the U.S. administration missed critical opportunities to compel compliance with stronger labor rights protections than those afforded in the United States.

During its amendments process, the Mexican government had a variety of industrial labor relations models from which to choose. Some countries, like the United States, have adopted an "exclusive representative" model, whereby only one union—the one with majority support from the employees in the bargaining unit—may represent the employees and demand bargaining rights.[150] That model differs from other models, such as Cambodia's model, whereby several minority unions may co-exist and represent employees.[151]

149. *See* Bensusán & Middlebrook, *supra* note 72, at 986 (arguing that Mexico's constitutional reform "constituted the only known instance of Mexico adopting constitutional amendments in response to an explicit external demand.").

150. 29 U.S.C. § 159.

151. For a recent discussion on Cambodian labor legislation and the challenges its labor model faces, see INT'L LABR. ORG., 109th Int'l Lab. Conf., Individual Case (CAS) – Discussion: Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) – Cambodia (2021).

During its negotiations with the United States, the Mexican government followed the U.S. model.[152] The ILO accepts both exclusive and minority representation models. It merely requests that governments using the exclusive representative model refrain from preventing "minority unions from functioning and at least having the right to make representations on behalf of their members and to represent them in cases of individual grievances."[153] Mexico's decision to follow the U.S. exclusive representative model raises significant flags about compliance with the ILO's standards.[154]

The National Labor Relations Act (NLRA)[155] codifies the exclusive representative model in U.S. federal labor law. In the 1975 paradigmatic labor case, *Emporium Capwell*,[156] the Supreme Court held that a minority unit of Black employees acted outside the NLRA's protections when it boycotted an allegedly racist employer.[157] Those employees had sought to bypass the grievance procedure, which had been bargained for by the White majority union members.[158] Their employer fired them for engaging in collective action.[159] Declining to reinstate the minority workers, the Court reasoned that the exclusive representative rule "extinguishes the individual employee's power to order his own relations with his employer" and that only the majority union could contract terms and conditions of employment.[160]

---

152. *See* Ley Federal del Trabajo [Federal Labor Law] art. 388, Diario Oficial de la Federacíon (DOF) [Official Journal of the Federation] 1970, últimas reformas [latest reforms] DOF 07-2019 (stipulating that only unions with the greatest number of votes from workers within the company may conclude collective bargaining agreements with the employer).

153. *See* ILO, COMPILATION OF DECISIONS OF THE COMMITTEE ON FREEDOM OF ASSOCIATION ¶ 1387 (6th ed. 2018), https://www.ilo.org/dyn/normlex/en/f?p=1000:70001:::NO:::. [https://perma.cc/3LK7-HHRM] ("The ultimate responsibility for ensuring respect for the principles of freedom of association lies with the Government.").

154. The literature is replete with charges that U.S. labor laws and practices violate international labor and human rights instruments and standards so I will not duplicate that work here. For apt descriptions of the concerning nuances of U.S. labor laws, I direct the reader to Lance Compa's rich and voluminous contributions. *See, e.g.*, Lance Compa, *Workers' Freedom of Association in the United States: The Gap Between Ideals and Practice*, *in* WORKERS' RIGHTS AS HUMAN RIGHTS 23, 28–48 (James A. Gross ed., 2003) (offering a descriptive analysis and case studies).

155. 29 U.S.C. §§ 151–69.

156. *See* Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 62 (1975) (expounding the NLRA's "regime of majority rule.").

157. *Id.* at 73

158. *Id.* at 54.

159. *Id.* at 57.

160. *Id.* at 63.

Can a minority union or worker collective *function* if it cannot demand equal treatment of its members under federal laws or advance individual grievances?[161] The ILO has shied away from addressing that question directly.[162] However, in my view, restrictions on collective bargaining authority on behalf of vulnerable workers conflict with the ILO's constitutional principles of free association noted above.

Without acknowledging those tensions, the United States' ex ante commitments include the requirement that "all existing collective bargaining agreements" in Mexico "include a requirement for majority support . . . ."[163] That commitment offers Mexico's government and facilities no clarity on whether "majority support" follows U.S. or ILO jurisprudence. Yet, USMCA's Rapid Response Mechanism centers its enforcement on associational and collective bargaining rights. The Biden administration cites those standards, without explaining how it interprets them, when suspending the unliquidated assets of alleged perpetrators in Mexico. Its lack of communication and transparency risk influencing the Mexican government and factories to follow the United States' problematic exclusive representative model. By doing so, the Mexican government disadvantages Mexican workers represented by minority unions who wish to form minority unions or who wish to act collectively outside of the collective bargaining agreement.

Moreover, as mentioned in this Article's Introduction, the NLRA and its jurisprudence fail to cover several sectors of employees, including supervisors, public servants, and—depending on which way the wind is blowing[164]—graduate students, undocumented immigrants,

161. *See* ILO, *supra* note 153, ¶ 1387.

162. In 2006, the ILO addressed a case in South Africa in which workers were dismissed for striking when the majority union failed to act on their behalf. The ILO responded by recalling "that it is not competent to make recommendations on internal dissensions within a trade union organization, so long as the government does not intervene in a manner which might affect the exercise of trade union rights . . . ." *See* ILO, DEFINITIVE REPORT – REPORT NO. 340, ¶ 259 (2006), https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2909352 [https://perma.cc/L3H9-4ULR]. Unless and until the ILO is tasked with reviewing U.S. jurisprudence, I cannot argue with certainty that the organization would find it appropriate to make recommendations on this issue.

163. USMCA, *supra* note 2, at Annex 23-A, ¶ 2(f).

164. U.S. labor jurisprudence is notorious for "flip-flopping" between presidentially-appointed members of the NLRB. *See, e.g.*, Note, *NLRB Rulemaking: Political Reality Versus Procedural Fairness*, 89 YALE L.J. 982, 988–89, 1001 n.30 (1980); Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163, 163–65 (1985) (lamenting the NLRB's near-weekly "policy oscillation"). While liberal administrations tend to interpret the NLRA's labor rights expansively to cover employees such as graduate students and undocumented immigrants, conservative administrations tend to interpret the same rights narrowly by excluding those employees from protections.

and other vulnerable categories of workers. The next Section explains how the United States has not pressured governments to comply with the ILO's expansive labor rights protections. Instead, it only requires commitments to the extent that U.S. laws and practices comply with those protections. Those procedures leave foreign workers vulnerable to the same sub-par treatment incurred by U.S. workers. The ambiguity surrounding those expectations and standards also permits counterpart negotiators to agree to commitments that may be impractical in practice.

b. The Fundamental Right To Be Protected Against Discrimination

This Section explains how U.S. trade policy (old and new) seeks to harmonize labor rights with U.S. laws but makes no effort to improve the rights of foreign workers beyond those labor protections.[165] I use as an illustration the fundamental international labor right concerning non-discrimination in employment on the basis of sex, which includes equal remuneration for women and men.[166] USMCA incorporates it into the labor chapter.

USMCA negotiations took place while Mexico was amending its labor legislation. The ILO has long urged the Mexican government to "give full legislative expression to the principle of equal remuneration for men and women for work of equal value as set forth in the [equal remuneration convention]."[167] The timing was thus ripe to bring Mexico's legislation in line with the ILO's non-discrimination standards.

The problem, however, is that the United States also fails to comply with the non-discrimination standards in the context of equal remuneration. Like Mexican labor laws, U.S. law[168] requires equal pay for equal work but not *work of equal value* as required under ILO jurisprudence.[169] Rather than examine whether jobs of equal value provide equal pay, U.S. federal courts have consistently held that

165. For a description of the many areas in which U.S. laws and practices fail to effectuate ILO international labor rights, see LeClercq, *supra* note 4, at 36–38.

166. *See* USMCA, *supra* note 2, art. 23.1(d).

167. *See* ILO, *Observation (CEACR): Equal Remuneration Convention, 1951 (No. 100) - Mexico* (2021), https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:4041005,102764 [https://perma.cc/N38Y-U38B].

168. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (1963) (codified as amended at 29 U.S.C. § 206).

169. ILO EQUAL REMUNERATION CONVENTION, *supra* note 167, art. 1(b).

"equal value" claims are not cognizable.[170] The U.S. administration was consequently not in the position to request Mexico to adhere to that standard in its ex ante demands.[171] Tellingly, USMCA does not mention ensuring equal remuneration for equal work of equal value, and Mexico has taken no steps to add that right into its legislative reforms.

Opportunities to revise legislation are few and far between.[172] By only centering its procedures on U.S. laws and jurisprudence, the Mexican government could do the bare minimum to satisfy U.S. demands to the detriment of its workers, in this case, its women workers. It was also under no pressure to afford its supervisors, immigrants, or various other categories of workers excluded under U.S. laws collective bargaining rights, as discussed in the sub-section above. Mexico's compliance elucidates how tensions between U.S. and ILO interpretations of labor rights will favor whichever interpretations are tied to market benefits and not whichever affords stronger worker protections.

III. AN ALTERNATIVE THEORY OF COMPLIANCE: A PARTICIPATORY MODEL

Up to this point, I have painted a fairly bleak picture of a worker-centered trade policy. I have argued that the Biden administration's policy reflects outdated or otherwise incomplete theories of compliance behavior. Relying on presumptions of unitary actors, predictable costs, and socialized labor rights, the administration and its supporters are satisfied with a trade policy that equips U.S. trade and labor bureaucrats with the discretion to interpret open-ended labor rights behind closed doors. The administration's trade policy risks imposing faulty unilateral standards in the name of global labor rights

170. *See, e.g.*, Gerlach v. Michigan Bell Tel. Co., 501 F. Supp. 1300, 1316 (E.D. Mich. 1980) (dismissing a Title VII claim of discrimination on the basis of an "equal value" claim because a cognizable theory under the EPA was not provided); Waterman v. N.Y. Tel. Co., No. 82 Civ. 1512, 1984 U.S. Dist. LEXIS 19093, at 11–12 (S.D.N.Y. Feb. 28, 1984) (rejecting plaintiff's assertion that the equal value to an employer of the services of two employees rendered their positions substantially equal).

171. For the same reason, the United States also did not ask Mexico to include new protections for domestic workers or agricultural workers, despite ILO requests for Mexico to do so.

172. *See* Bensusán & Middlebrook, *supra* note 72, at 1003 (describing "multiple unsuccessful attempts to do so dating back to the late 1980s.").

and leaves workers at the mercy of governmental retaliation and alternative markets.

This Part hopes to prompt a new conversation about trade and labor governance. It draws from an alternative theory of compliance that foregrounds participation with regulated actors. I argue that those actors, including elite state decision-makers, employers, and workers, will—to varying degrees—be more likely to comply with labor rights they trust, understand, and feel a sense of ownership over. I explain how the ILO's system of governance reflects that participatory approach in every step of the labor standards process—from the inception of labor standards to their adoption and, ultimately, their enforcement. And yet, the ILO's system is imperfect. It excludes important actors and has no sanctions mechanism. Consequently, while the ILO's participatory procedures offer valuable lessons for the governance of labor rights, the complementary role of sanctions-based trade agreements under a worker-centered policy should not be understated.

A. An Alternative Theoretical Approach: Behavioral Compliance

This Section offers an alternative approach to trade and labor governance that prioritizes procedures that can pragmatically influence compliance with international labor rights. It draws from burgeoning behavioral studies suggesting that a state's willingness to comply with labor rights obligations "is not simply the sum of preferences and circumstances . . . ."[173] Instead, it reflects "the outcome of series of cognitive and information processing events the complexity of which mirrors—or exceeds—that which we face in daily life."[174] Thus, factors like trust, legitimacy, geopolitics, and power influence all contribute to cost/benefit calculations influencing compliance.[175]

Throughout the negotiations and enforcement processes, decisions to repudiate or comply reflect emotions and perceptions[176] of

173. *See* Daniel Peat, *Perception and Process: Towards a Behavioural Theory of Compliance*, 13 J. INT'L DISP. SETTL. 179, 184 (2022).

174. *Id.*

175. *See* Daniel Peat et al., *Behavioural Compliance Theory*, 13 J. INT'L DISP. SETTL. 167, 174 (2022); Shaffer, *supra* note 122, at 254 ("Coercive measures can de-legitimate a transnational legal process because they generate resentment.").

176. For examples in the sanctions context, see Niccolò Ridi & Veronika Fikfak, *Sanctioning to Change State Behaviour*, 13 J. INT'L DISP. SETTL. 210, 215–20 (2022). The authors offer a series of examples from the International Centre for the Settlement of Investment Dispute, the WTO, and the United Nations Security Council to describe how subjective perceptions affect sanctions behavior throughout all stages—from investigation to the aftermath of sanctions.

legitimacy and power balances between the target and enforcing states,[177] pre-existing social norms,[178] and the levels of engagement and interaction throughout negotiations and enforcement activities.[179] I have seen negotiators veto otherwise attractive counteroffers and deliberately stall negotiations simply because they did not like their counterparts or felt insulted or gaslighted. I have also seen negotiators strike deals, against all odds, after casually discussing disagreements over beers at a nearby pub after hours. Sometimes negotiators are wedded to pre-established talking points and lack any flexibility to deviate. Others have a broad set of objectives and deliberately keep certain asks in the wings as later negotiating tools.

Trade policy must account for those kinds of quotidian discussions and debates, including the relative pressures of domestic lobbyists and interests at stake.[180] It must also account for the "prisoners' dilemma game" domestically, in which "some actors gain while others may lose," depending on whether and how governments comply with international commitments.[181]

For example, the Biden administration has responded to U.S. steel union lobbying by restricting steel imports.[182] Steel, however, is "an upstream product on which large swaths of downstream manufacturing and construction," as well as the workers within those sectors, depend. Alan Beattie notes that a "rise of 1 percentage point in upstream steel tariffs caused a relative decline of 0.2 percentage points in the downstream industry's global market share for steel-intensive products."[183] Even the "worker-centered" trade policy thus reflects, at

177. *See* Peat et al., *supra* note 175, at 167–74.

178. *Id.*

179. *Id.* at 173 (arguing that the ways in which state decision makers perceive information, including their subjective processes and cost-benefit calculations, affect compliance decisions). *See also* Anne van Aaken, *Behavioral International Law and Economics*, 55 HARV. INT'L L.J. 421, 445 (2014) (describing the unique behavioral nuances of trade negotiators, including their imperfect rationality).

180. *See* Xinyuan Dai, *Why Comply? The Domestic Constituency Mechanism*, 59 INT'L ORG. 363, 364 (2005).

181. *Id.*

182. *See* Alan Beattie, *Biden's Trade Policy is Crafted with Political Rewards in Mind*, FIN. TIMES (Dec. 12, 2021), https://www.ft.com/content/bb220c2e-15c9-4f1f-a1b3-c578c57cd386 [https://perma.cc/ZM4D-RL8V].

183. *Id.* (citing Lydia Cox, The Long-Term Impact of Steel Tariffs on U.S. Manufacturing (Nov. 7, 2021) (unpublished manuscript), https://economics.princeton.edu/wp-content/uploads/2022/06/cox_steel_20220601.pdf [https://perma.cc/863G-53L2]).

least in part, the relative weight of competing workers based on which "have crucial leverage over the government" and which do not.[184]

Domestic power battles are not unique to the United States. Its trade counterparts, such as Mexico, deal with their own domestic lobbyists and interest groups.[185] A U.S. trade counterpart may garner greater domestic support for complying with U.S. labor rights demands, for instance, when it appears to be carrying out domestic changes under its own initiatives and not under U.S. pressure.[186] In other instances, the opposite occurs. That is, trade partners blame the United States for undertaking labor legislation reform.[187] Yet other governments repudiate U.S. demands when, domestically, resisting Western pressure is more politically palatable than complying with international labor rights. How U.S. trade policy and enforcement are carried out affects whether and how counterparts can formulate their domestic narratives and garner the necessary political support.[188]

Most of my analysis thus far has centered on negotiating commitments, but what about their enforcement? One could reasonably argue that the negotiations stage is far less important than the compliance stage, using the labor-rights victories under USMCA as evidence. Nevertheless, it is not difficult to imagine the types of resentment such exclusion could elicit in counterparts, as witnessed in Eswatini and Thailand.

Under USMCA, despite much of the optics, the Biden administration's enforcement activities have similarly elicited resentment. In the Tridonex case discussed earlier, the Mexican government protested that "the alleged denial of rights occurred before the USMCA

184. *See* Dai, *supra* note 180, at 364.

185. *See* Camilo Soto Crespo, *A Mexican Outlook on NAFTA, TPP and Their Renegotiation: Investment Arbitration's Transparency and International Supervision at Peril?*, 40 HOUS. J. INT'L L. 937, 940–41 (2018) (drawing critical attention to the domestic pressure facing the Mexican governments in trade negotiations).

186. *See* Bensusán & Middlebrook et al., *supra* note 72, at 985–86 (noting that "there remains a fundamental asymmetry in U.S. and Mexican power capabilities that challenges Mexican leaders' capacity to preserve their decision-making autonomy in bilateral interactions and thereby defend national sovereignty.").

187. This was the case in many Southeast Asian countries during the Trans-Pacific Partnership Agreement—my first experience as a trade negotiator. When President Trump abruptly withdrew from the Agreement, the administration left many foreign governments in the untenable position of continuing reforms without U.S. support. Unsurprisingly, those reforms, including in Malaysia and Viet Nam, have stalled.

188. *See generally* BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS 126 (2009) (arguing that commitments to international human rights empower domestic groups, and that the "real politics" of change takes place at the domestic level).

took effect."[189] Rather than work with the Mexican government to resolve that disagreement, the U.S. administration negotiated an agreement directly with Tridonex. Shortly thereafter, the Mexican government publicly denounced the United States for acting prematurely.[190] Mexico's ambassador then publicized a letter it had sent to the U.S. administration accusing it of mistreating Mexican migrant workers' rights in the agricultural and food processing industries.[191] The letter implied that the United States was hypocritically enforcing high labor standards in Mexican factories while exploiting cheap Mexican labor.[192]

Similarly, the business community denounced the Biden administration's targeted enforcement actions, which they allege took place "before the USMCA entered into force" and before U.S. procedures had been finalized.[193] They complained that the U.S. administration did "not allow for the facility to be included in the consultation or remediation efforts resulting from a review" and failed to offer "an opportunity for the facility to submit evidence or attempt to remediate the problem itself."[194]

---

189. *See* Compa, *supra* note 95, at 291.

190. *See* Secretaría de Economía [Ministry of Economy], *Comprometidos con el Correcto Funcionamiento del T-MEC, se Anuncian Acuerdos Respecto a Petición Laboral de Empresa de Autopartes* [*Committed to the Correct Functioning of the T-MEC, Agreements are Announced Regarding the Labor Request of the Autoparts Company*], GOBIERNO DE MÉXICO [GOVERNMENT OF MEXICO] (Aug. 10, 2021), https://www.gob.mx/se/articulos/comprometidos-con-el-correcto-funcionamiento-del-t-mec-se-anuncian-acuerdos-respecto-a-peticion-laboral-de-empresa-de-autopartes-279274?idiom=es [https://perma.cc/KGV6-J79C].

191. *See* Secretaría de Relaciones Exteriores [Ministry of Foreign Relations], *En el Marco del T-MEC, México Propuso Abrir Cooperación para Aplicación de Leyes Laborales en Algunos Sectores en EE. UU.* [*Within the Framework of the T-MEC, Mexico Proposed Opening Cooperation for the Application of Labor Laws in Some Sectors in the U.S.*], GOBIERNO DE MÉXICO [GOVERNMENT OF MEXICO] (May 12, 2021), https://www.gob.mx/sre/prensa/en-el-marco-del-t-mec-mexico-propuso-abrir-cooperacion-para-aplicacion-de-leyes-laborales-en-algunos-sectores-en-ee-uu?state=published [https://perma.cc/L4BN-E6BD].

192. *Id.* (pointing out the many ways that the Mexican government considered the treatment of Mexican workers in United States to violate fundamental labor rights, while recalling commitments under USMCA to respect those rights).

193. *See* Stephanie Ferguson, *USMCA Rapid Response Mechanism Makes its Debut*, U.S. CHAMBER OF COM. (July 8, 2021), https://www.uschamber.com/international/trade-agreements/usmca-rapid-response-mechanism-makes-its-debut [https://perma.cc/TJ6L-232S] ("By acting on the AFL-CIO's petition, the [interagency] Labor Committee is making it possible for remedies to be imposed upon a facility for an alleged denial of rights that occurred before the USMCA was entered into force.").

194. *Id.* ("[T]he current interim procedural guidelines do not allow for the facility to be included in the consultation or remediation efforts resulting from a review, nor do the

The concerns foreign governments and employers expressed under the U.S. "worker-centered" trade policy should matter. They suggest that the U.S. administration's lofty ambitions to strengthen democracy fail to mobilize and empower all the individuals and groups expected to benefit from and participate in democratic processes. Moreover, such group-level resentment could, in turn, pressure other group members (such as other governments or facility owners) "toward conformity and cohesiveness."[195] Instead of influencing compliance, the U.S. administration may influence corporations and governments to band together to resist or undermine its efforts.[196]

Labor rights advocates and policymakers might, again, charge that I am making much ado about nothing. Under USMCA, the administration enjoys the novel authority to sanction specific factories rather than resort to state-to-state dispute resolution. That narrower sanctions authority permits the United States to break up the group of actors by rewarding good actors and punishing violators.

In a separate article, I maintain that USMCA's Rapid Response Mechanism is simply a form of targeted sanctions—a tool that the United States has deployed since the 1990s, including to punish private entities for violating labor rights such as human trafficking.[197] The Rapid Response Mechanism is just the first such targeted sanctions mechanism in a U.S. trade agreement. Historically, U.S. enforcement agencies have enjoyed full discretion to target foreign entities without procedural protections in place, and the results of those programs have been mixed, at best.[198] Those programs have nevertheless imposed various costs on vulnerable communities such as women and children.[199]

Even if foreign public and private actors do not retaliate or undermine enforcement activities perceived as untrustworthy or illegitimate, financial coercion may influence them to do the bare minimum

guidelines provide an opportunity for the facility to submit evidence or attempt to remediate the problem itself.").

195. Van Aaken, *supra* note 179, at 446.

196. *See, e.g.*, Anne van Aaken & Betül Simsek, *Rewarding in International Law*, 115 AM. J. INT'L L. 195, 231 (2021) (arguing that threats of sanctions "trigger emotions such as fear, anxiety, or anger" that could lead to "noncompliant behavior.").

197. *See* Desirée LeClercq, *Rights-Based Sanctions Procedures*, 75 ADMIN. L. REV. 105, 116 (2023).

198. *See* van Aaken, *supra* note 196, at 219–20.

199. *Id.* at 219 (citations omitted).

to alleviate pressure.[200] Above, I explained that the Mexican government made no effort to align its gender laws with the ILO's requests. Instead, it stuck to the letter of the U.S. demands during trade negotiations, which omitted any reference to gender pay equity.

While behavioralist insights explain the reactions and compliance currently unfolding under USMCA, I do not mean to suggest that law and economics or transnational legal process theories are irrelevant. For over a century, the ILO's supervisory system has struggled to influence compliance with international labor rights without a sanctions mandate.[201] To compensate, the organization influences the domestication of and compliance with a minimum floor of universal labor rights through iterative and socializing processes.[202] Governments should leverage carrots and sticks, while mindful of all the competing interests at stake. It cannot consider those interests, however, if it fails to open a dialogue with the interested actors.

The ILO's results, too, have been mixed,[203] and I do not intend to imply otherwise. Nevertheless, the ILO's procedures offer insight into how national and international consultations generate realistic norms and ownership that help to influence compliance. The following section describes the ILO's procedures, which seek to *avoid* the types of state capture and control witnessed in the administration's "worker-centered" trade policy.[204]

---

200. Of course, it is also possible that business and foreign government concerns are not related to procedural legitimacy and instead reflect discomfort at being held accountable for labor rights. I am not suggesting that the United States' procedural and democratic deficits rule out that possibility. My argument, more broadly, is that when international norms conflict across regimes, "states and constituencies within them should have greater policy discretion, everything else being equal, enhancing their ability to resist a particular transnational legal norm's importation." *See* Shaffer, *supra* note 122, at 252.

201. *See* GERRY RODGERS ET AL., THE ILO AND THE QUEST FOR SOCIAL JUSTICE 1919–2009, 25 n.37 (2009) (explaining that the ILO's closest constitution mandate to a sanctions mandate is article 33 of its Constitution, which "provides an open-ended authority for the Conference to take 'such action as may deem wise and expedient to secure compliance.'").

202. For an explanation of how the ILO's tripartite processes accomplish those objectives, see *id.* at 12–18.

203. *See* Dursun Peksen & Robert G. Blanton, *The Impact of ILO Conventions on Worker Rights: Are Empty Promises Worse Than No Promises?*, 12 REV. INT'L ORGS. 75, 77 (2017) (empirically examining the effects of seven fundamental ILO conventions on worker rights from 1981–2011, concluding that "convention ratification might have the opposite of their intended effects" on protecting workers).

204. *See* ILO, SOCIAL DIALOGUE REPORT 2022, 33 (2019) ("The fact that collective bargaining involves autonomous and representative parties strengthens the legitimacy of the outcome.").

B. The ILO's Participatory Structure

The ILO's participatory structure illustrates how a worker-centered trade policy can influence compliance with labor rights in diverse trade partner countries. It has operated for over a century without a sanctions mechanism to compel such compliance.[205] Instead, it has relied on its unique tripartite governance, which requires governments to consult with representatives of workers and employers over labor rights governance and supervision.[206] By compelling those regulated actors to participate in its labor rights regime, the ILO's structure helps to ensure that state commitments are realizable, reflective of national circumstances, and trustworthy.

The ILO's members created that system because they "realized all too well that economic circumstances differ from country to country, from state to state."[207] They feared that the imposition of strictly homogenous labor standards would invite distrust and disobedience among the ILO's members.[208] Jan Klabbers notes that the ILO's tripartite structure "set in motion an accidental revolution . . . acknowledging that the work of [the ILO] . . . could potentially affect every worker in every member state, and every employer in every member state."[209]

Within the ILO, those tripartite actors decide when international labor standards are needed, when they have become obsolete, and whether they should be binding treaties (ILO conventions) or nonbinding guidelines (ILO recommendations).[210] Once a government decides to ratify an ILO convention, the ILO's processes require it to hold consultations with its national representatives of workers and employers to decide how the government intends to implement the convention in practice.[211] Those governments communicate the outcome

205. *See* RODGERS ET AL., *supra* note 201, at 25.

206. *See* ILO, *supra* note 35, at 17.

207. *See* Jan Klabbers, *An Accidental Revolution: The ILO and the Opening Up of International Law*, *in* INTERNATIONAL LABOUR ORGANIZATION AND GLOBAL SOCIAL GOVERNANCE 123, 129–30 (Tarja Halonen & Ulla Liukkunen eds., 2021).

208. *Id.* at 135–36.

209. *Id.* at 133–34.

210. *See* ILO, *supra* note 35, at 20–25.

211. *Id.* at 29 ("If the Convention is ratified, governments are required to report periodically to the ILO on how they are applying it in law and practice . . . . Government reports must also be submitted to the most representative employers' and workers' organizations, which may comment on their content.").

of their consultations to the ILO through official reports[212] that are not public.[213]

The ILO's supervisory bodies evaluate state compliance based on those governmental reports. The ILO's annual labor conference, composed of government, worker, and employer representatives, discusses cases of significant failure in plenary and adopts conclusions by tripartite consensus.[214]

The ILO offers guidance to its member governments on establishing effective consultative mechanisms notwithstanding diverse political ideologies, cultural norms, and levels of economic development.[215] It foregrounds participatory features as both the means to develop and the ends to resolving emerging challenges in the world of work.[216] The ILO's rights thus reflect a legal pluralism which, as Nico Krisch explains, stresses "multiplicity and heterarchy rather than integration and hierarchy."[217] Those labor rights are consequently open-textured,[218] slippery enough to legitimate diverse national systems yet sticky enough to influence compliance along a universal floor of minimum labor standards.[219]

The ILO's system of flexibility and pluralism should inspire any worker-centered trade policy intended to garner compliance across counterpart governments and foreign workers and employers.

---

212. *See* ILO CONST. art. 22, ¶ 1 ("Each of the Members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party."); ILO, *supra* note 35, at 18 ("Ratifying countries undertake to apply the Convention in national law and practice and to report on its application at regular intervals.").

213. *See* ILO, *supra* note 132, at 35, ¶ 61.

214. *See* ILO, Standing Orders of the International Labour Conference art. 21, ¶ 1.

215. *See* ILO, *supra* note 153, ¶ 16 ("The Committee always takes account of national circumstances, such as the history of labour relations and the social and economic context, but the freedom of association principles apply uniformly and consistently among countries.").

216. *Id.*

217. *See* Nico Krisch, *Global Legal Pluralism*, *in* INTERNATIONAL LEGAL THEORY: FOUNDATIONS AND FRONTIERS, *supra* note 29, at 240, 244 (explaining the formal side of legal pluralism).

218. For an explanation of why the ILO's fundamental rights are not self-explanatory in the trade context, see Agustí-Penereda, et al., *supra* note 69, at 363–67 (discussing the textual ambiguities that arise from the incorporating ILO instruments in U.S. trade agreements).

219. *See* Laurence R. Helfer, *Understanding Change in International Organizations: Globalization and Innovation in the ILO*, 59 VAND. L. REV. 649, 673–74 (2006) (describing how the ILO's founders sought to prevent a race to the bottom by "establishing a common baseline of global labor standards that deters states from entering the race in the first instance.").

Currently, however, under the U.S. "worker-centered" trade policy, the U.S. administration alone interprets the ILO's rights on behalf of foreign workers and their governments and employer counterparts.[220] That procedural disconnect does not defeat the promise of a worker-centered trade policy; it simply suggests that the administration must craft a new approach that seeks to empower rather than silence foreign actors. On the other hand, the ILO's model is hardly flawless—it stands to benefit from complementary trade governance. The next Section describes how a worker-centered trade policy could fortify the ILO's labor rights protections in trade sectors by redressing some of the organization's weaknesses.

C. Opportunities Under a Worker-Centered Trade Policy

An adequately administered worker-centered trade policy could play an important role in protecting global workers in trade and throughout supply chains. As mentioned, the ILO lacks the "teeth" to compel governments to promote and protect workers' fundamental rights.[221] Trade partners are likely to resolve ambiguities and tensions in their international labor rights commitments based on which authority—the United States or the ILO—offers financial incentives to do so. Thus, the ILO's limited mandate is disadvantaged when such tensions emerge.

This Section adds to that well-known criticism[222] by explaining how the ILO's tripartite governance system excludes other critical actors from its participatory processes. Its system is notoriously "corporatist"[223] by restricting formal participation to unions and employer

220. For a discussion of the administrative procedures U.S. agencies follow under labor chapters of trade agreements, including USMCA, see LeClercq, *supra* note 197, at 123–29. This Article shows that U.S. agencies avoid traditional notice-and-comment procedures and do not grant advanced notice or judicial review. *Id.*

221. *See generally* ADRIAN SMITH ET AL., FREE TRADE AGREEMENTS AND GLOBAL LABOUR GOVERNANCE: THE EUROPEAN UNION'S TRADE-LABOUR LINKAGE IN A VALUE CHAIN WORLD 27 (2020) (arguing that the trade and labor "debate made evident that the ILO lacked equivalent enforcement mechanisms . . . and looked insufficient as a guarantor of labour standards.").

222. *See* Laurence R. Helfer, *Monitoring Compliance with Unratified Treaties: The ILO Experience*, 71 LAW & CONTEMP. PROBS. 193, 193–94 (2008) (explaining that the ILO is often dismissed by critics as a "toothless tiger" incapable of improving global working conditions).

223. *See, e.g.*, Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law,* 68 LAW & CONTEMP. PROBS. 63, 101 (2005*)* (arguing that the ILO should not be used as a model for global procedures because it "follows a corporatist model . . . ."); Helfer, *supra* note 219, at 717 (describing ways that the ILO has sought to break from "the

organizations. Although the ILO invites various informal worker and employer groups—those not represented by unions or employer associations—and NGOs to observe at meetings, it does not grant those actors voting authority.[224] The ILO's exclusions suffer three critical drawbacks for international labor governance.

First, by restricting participation to labor unions and employer associations, the ILO's governance model gives each party enormous power. Those power battles are well-documented,[225] so I will not duplicate all the details here. Of relevance is an incident that arose in 2012, just before the ILO held its annual labor conference, when the employer representatives boycotted the ILO conference committee responsible for supervising the implementation of labor standards.[226] It did so to protest what it felt was an ILO mandate creep.[227] Because the ILO's supervisory committee requires consensus, the organization could not process cases and carry out its supervisory functions that year.[228]

Second, despite their exclusion from the ILO's processes, some countries' informal workers and employers comprise most of the industrial sectors.[229] Informal workers tend to be the most vulnerable and in need of protection.[230] They are typically workers of color whose birthrights afford neither the education, pedigree, nor citizenry

corporatists model . . . ."); *see also id.* at 694–95 (arguing that the ILO's restrictive focus on formal trade unions excluded newly independent workers' associations in socialist and developing countries.").

224. *See* HEPPLE, *supra* note 4, at 53.

225. *See, e.g.*, Francis Maupain, *A Second Century for What? The ILO at a Regulatory Crossroad*, 17 INT'L ORG. L. REV. 291, 309–10 (2020); Claire la Hovary, *Showdown at the ILO? A Historical Perspective on the Employers' Group's 2012 Challenge to the Right to Strike*, 42 INDUS. L.J. 338, 339 (2013); Janice Bellace, *The ILO and the Right to Strike*, 153 INT'L LAB. REV. 29, 29 (2014).

226. *See* la Hovary, *supra* note 225, at 339.

227. ILO, REPORT ON THE APPLICATION OF STANDARDS, at 33, 42–43, ILO Doc. ILC.110/Record No. 4A/P.I (2022), https://www.ilo.org/wcmsp5/groups/public/—ed_norm/—-relconf/documents/meetingdocument/wcms_848157.pdf [https://perma.cc/83VD-7A9W].

228. *See* la Hovary, *supra* note 225, at 339.

229. *See* Desirée LeClercq, *Invisible Workers*, 116 AM. J. INT'L L. UNBOUND 107, 109 (2022).

230. *See generally* ADELLE BLACKETT & DZODZI TSIKATA, *Vulnerable Workers*, *in* DIGNITY: A SPECIAL FOCUS ON VULNERABLE GROUPS 59 (Frédéric Mégret ed., 2010) (discussing the rise in work informality and the failure of national laws to protect workers in informal sectors).

to obtain formal employment.[231] Informal workers operate, by definition, along the frays of the law, thus deprived of legal protection and labor inspection.[232] Without affording informal actors affected by trade, on both the workers' and employers' sides, an opportunity to participate in norms construction and enforcement, the ILO's restrictive governance risks further concretizing power and resource asymmetries.[233]

Third, the ILO's exclusion of NGOs and other civil society voices affects the organization's functions. Beth Simmons notes how those groups are key local actors capable of holding governments accountable to international legal commitments.[234] They are also central to ensuring that governments "justify, clarify and/or change their policies."[235] At the ILO, those groups could assist in representing the views of workers and employers at the grassroots level and in assisting the organization in its supervisory efforts.[236]

These points illustrate the importance of a reconstructed worker-centered trade policy for protecting global workers in trade sectors. The ILO's procedures and supervision alone have proven incapable of compelling sufficient protections for workers, particularly vulnerable workers in trade sectors. A worker-centered trade policy could create an aperture for broader participation at the national level to ensure more comprehensive and progressive labor rights in trade sectors. It could also fortify the ILO's role and supervisory impact by linking the ILO's activities to its sanctions. I describe how the administration and Congress should reconceptualize its worker-centered trade policy next.

---

231. *See, e.g.*, ILO, WOMEN AND MEN IN THE INFORMAL ECONOMY: A STATISTICAL PICTURE 30–31 (3d ed. 2018) (describing the characteristics of global informal work in Africa, which is mainly made up of poorly educated women).

232. *See* LeClercq, *supra* note 229, at 109.

233. *See, e.g.*, Adelle Blackett, *Beyond Standard Setting: A Study of ILO Technical Cooperation on Regional Labor Law Reform in West and Central Africa*, 32 COMPAR. LAB. L. & POL'Y J. 443, 489 (2011) (describing how the ILO's tripartite engagement may be interpreted as more of an agenda than end in itself); LeClercq, *supra* note 229, at 109.

234. *See* SIMMONS, *supra* note 188, at 34–35.

235. *Id.*

236. Just as with the informal seat exchanges between the ILO's worker members and unrepresented workers, mentioned above, so too might this area be evolving. A recent ILO convention illustrates a significant departure from the norm by requiring ratifying governments to adopt laws protecting workers "and other persons belonging to one or more vulnerable groups" and to ensure supervision and reporting by the labor inspectorate "and other relevant authorities, as appropriate . . . ." *See* Violence and Harassment Convention arts. 6, 10, June 21, 2019, 58 I.L.M. 1167.

IV. TOWARDS A WORKER-CENTERED TRADE POLICY

A worker-centered trade policy is, paradoxically, promising and perilous. It holds the potential to uphold the international labor rights that unscrupulous actors have long trampled upon. Recent worker-rights victories under USMCA illustrate how enforcement activities might influence compliance with international rights or at least offer vulnerable workers remedies such as backpay, benefits, and legitimate union elections. The Biden administration's efforts to ensure that foreign workers enjoy the agency and protections to bargain with employers on equal footing hold significant promise for integrating the ILO's international labor rights into U.S. trade policy.[237]

Despite that promise, as currently theorized, the administration's "worker-centered" trade policy is equally perilous. It may weaken compliance with international labor rights protections for workers in trade partner countries. Textually, U.S. trade agreements incorporate an ILO soft-law instrument whose meaning is facially unclear and whose legal status the U.S. administration has disputed. Procedurally, the U.S. administration interprets that instrument and its open-ended rights behind closed doors. It thus risks prioritizing its own interpretations over those of local communities. Finally, its procedures arm the administration with the power to skew labor rights in favor of U.S. values and norms, including those advanced by the privileged few invited to the trade policy table.

These factors contribute to a system under which regulated actors may repudiate or otherwise weaken compliance with international labor rights in their countries. Their exclusions of key actors undermine the ILO's participatory processes, which seek to influence compliance through participation and ownership and protect against hegemonic control. They also risk imposing trade costs on the world's most vulnerable workers, such as the Eswatini workers and workers not represented by powerful unions in the United States—all of whom purportedly benefit from the U.S. "worker-centered" trade policy.

The Biden administration has taken some steps towards opening the discussion of its trade policy to foreign counterparts. Under the auspices of a new Trade and Technology Council between the United States and the European Union, for example, the respective

237. *See generally* Pammela Quinn Saunders, *The Integrated Enforcement of Human Rights*, 45 N.Y.U. J. INT'L L. & POL. 97, 104–06 (2012) (arguing that various international legal instruments and regimes dealing with the same rights obligations could integrate and thus reinforce one another).

governments launched a "Trade and Labor Dialogue."[238] According to the U.S. administration, that Dialogue will create an aperture for "labor and business leaders" to learn more "about how trade can promote labor rights and good-paying jobs on both sides of the Atlantic and globally."

While that initiative marks progress in incorporating the views of foreign workers and employers in U.S. trade policy, participation appears to be restricted to "trade unions, businesses and governments in the U.S. and Europe . . . ."[239] It suggests that informal workers and employers, along with other critical civil society actors, remain outliers.

There is, of course, no rule that the United States must include foreign actors in its executive deliberations. But there is also no rule that it must exclude them. The United States has historically taken an exclusory approach while citing foreign policy concerns.[240] Those concerns may be valid in some areas of trade—security, diplomacy, and vital national goods—that directly implicate the health and well-being of U.S. citizens. Those concerns are not valid when it comes to how foreign countries, in consultation with their own private citizens (such as workers and employers), interpret the ILO's labor rights.

Increasingly, scholars argue for "a shift away from command-and-control regulation toward forms that are more decentralized, dynamic, interactive, and responsive."[241] They do so recognizing that "[t]ransnational norms do not travel by themselves."[242] Participation in the construction of norms, and the subsequent compliance with those norms, reflects relationships, trust, and perceptions formed during negotiations and implementation.[243] The following Sections explain how a revised worker-centered trade policy could garner such

238. *See* Press Release, Exec. Off. of the President, *Fact Sheet: U.S.-EU Trade and Technology Council Advances Concrete Action on Transatlantic Cooperation (*Dec. 5, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/12/05/fact-sheet-u-s-eu-trade-and-technology-council-advances-concrete-action-on-transatlantic-cooperation [https://perma.cc/AF8G-VW4T].

239. *See* Press Release, Katherine Tai, USTR, Exec. Off. of the President, *USTR and the U.S. Department of Labor Will Participate in Tripartite Trade and Labor Dialogue with Unions and Businesses* (May 19, 2022) https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/may/ustr-and-us-department-labor-will-participate-tripartite-trade-and-labor-dialogue-unions-and [https://perma.cc/776R-P7V9].

240. *See* Claussen, *supra* note 78, at 907 (noting that the U.S. administration has informed Congress that it would not share drafts of trade text out of foreign-affairs concerns).

241. *See* Kolben, *supra* note 6, at 243.

242. *See* Shaffer, *supra* note 122, at 236.

243. *See* Peat et al., *supra* note 175, at 173–74.

participation and, by doing so, strengthen the protections afforded to workers vulnerable to exploitation under trade arrangements.[244]

A. A Worker-Centered Approach

The U.S. administration should profoundly reconceptualize its worker-centered trade policy's procedures and text. The legal commitments it secures and its negotiations and adjudication procedures must foreground participation across the public and private actors expected to comply with and benefit from negotiated labor rights. Public and private actors in the respective trade sectors must have an opportunity to contest, cooperate, "formulate policies and regulate themselves, and each other, both within and without the framework of the state."[245] Those commitments and processes would align with the vertical and horizontal generative procedures presupposed under the transnational legal approach and embedded within the ILO's labor rights regime.

Under my proposal, the U.S. administration would retain autonomy over its economic agreements while enabling counterpart governments and communities to bargain over substantive labor rights, using preexisting commitments to the ILO as the floor. In other words, U.S. bureaucrats would no longer decide the substantive meaning of international labor rights in trade partner countries—workers, employers, and relevant members of civil society would decide that meaning in consultation with their governments.

Notably, this proposal is bound to disrupt traditional thinking around U.S. trade policy—it requires a sovereign government to base its monitoring and enforcement activities on consultations between foreign actors. A couple of preliminary points are thus in order.

First, this proposal requires the U.S. administration to base its substantive rights commitments on foreign consultations—it does *not* require the government to cede its negotiating or enforcement authority. The ILO entices otherwise sovereign governments to participate in its supervisory processes by assuring that its "consultation" requirement only extends to providing local employers and workers the opportunity to "assist the competent authority in taking a decision."[246] Consultations do not require that the parties agree, nor do they bind

244. I thus agree with Kevin Kolben, who has long argued that trade agreements, while problematic, "hold out the most promise for developing effective and innovative trade and labor regimes." *See* Kolben, *supra* note 6, at 225.

245. *Id.* at 243.

246. *See* ILO, TRIPARTITE CONSULTATION ¶ 29 (2000).

governments to any of the opinions expressed during consultations.[247] Adopting the ILO's approach to consultations would reflect that labor rights commitments in trade are, at their core, political questions.[248]

It also does not require the U.S. administration to commit to changes in U.S. labor law—a process reserved for Congress.[249] Under my proposal, the United States would conduct its own consultations to determine how U.S. laws and practices interpret the ILO's labor rights in trade sectors. Those consultations may prompt domestic measures to amend U.S. labor laws—as presupposed under transnational legal process theory—but that is certainly not required.

I nevertheless recognize that requiring the United States to base its interpretations and enforcement on foreign consultations will strike many, particularly my trade colleagues, as quixotic. Negotiators agree to nebulous international labor rights to avoid potential trade irritants such as social standards and not to open the door to foreign control. The more those commitments appear to require changes in domestic policies, such as setting up consultative mechanisms, the thornier their negotiations and the greater attention they will attract. Nevertheless, if the Biden administration is sincere in its stated ambition to protect foreign workers, securing commitments to worker voice and agency will be worth the political costs at the negotiations stage.

Second, this proposal is not altogether new. On the contrary, it borrows heavily from the longstanding consultative procedures at the ILO, which delicately balance the organization's autonomy to govern and supervise with tripartite consultations and pluralism. Foreign

---

247. *Id.*

248. *See generally* Lance Compa, *International Labor Rights and the Sovereignty Question: NAFTA and Guatemala, Two Case Studies*, 9 AM. U. J. INT'L L. & POL'Y 117 (1993) (describing the various political and lobbying process behind labor rights reform in Mexico and Guatemala); Anne Orford, *Theorizing Free Trade*, *in* THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW 701, 709–10 (Anne Orford & Florian Hoffman eds., 2016) (arguing that international law, including trade law, "renders opaque the political choices and struggles involved in institutionalizing liberalism because of the way in which the law turns politics into routine.").

That approach carries its own legitimacy and pragmatic attributes. However, the risk of dismissal or disregard is not unique to these circumstances. The Administrative Procedure Act (APA), which governs U.S. agency consultations with local communities in rulemaking, similarly permits agencies to formulate their own decisions while requiring consultations with regulated communities before finalizing legal and administrative rules. *See generally* Administrative Procedure Act, 5 U.S.C. §§ 551–59, 561–70a, 701–06 [hereinafter APA]. The benefits of consultations and notice have, decidedly, outweighed the cost of government control, particularly in light of evidence that agencies have modified proposed rules following public consultations.

249. U.S. CONST. art. I (granting Congress sole authority to enact legislation).

workers and employers are accustomed to electing representatives at the ILO and presumably have internal processes to that effect—consequently, the consultative procedures discussed below are manageable.

Furthermore, this proposal builds off previous literature advancing an "integrative linkage" approach in labor rights enforcement. Under that approach, public and private regulation are combined "to achieve a more effective trade and labor rights regime."[250] Although the inclusion of private actors may appear to support deregulation or decentralization, in practice, as Kevin Kolben assures, the approach would "bolster public regulatory capacity and improve democratic functioning."[251] And by integrating the ILO's participatory approach and U.S. trade enforcement, the U.S. administration could fortify commitments to international labor rights worldwide.[252]

B. Reconceptualized Trade and Labor Policy

This Section sketches out a reconceptualized worker-centered trade policy that could more effectively influence compliance with international labor rights in trade. It explains how the U.S. administration should negotiate, monitor, and enforce international labor rights in its trade instruments. Using a fictional case study with the Ivory Coast, it shows how that reconceptualized policy would benefit the U.S. administration and foreign workers by securing pragmatic commitments to international labor rights as determined through consultations.

1. The Negotiation of International Labor Rights Commitments in Trade

The U.S. administration's influence is, arguably, at its strongest after it signals its willingness to negotiate a trade agreement but before the trade agreement has been concluded.[253] Governments are motivated by potential access to U.S. markets and may make policy

250. *See* Kolben, *supra* note 6, at 205.

251. *Id.*

252. *See, e.g.*, Saunders, *supra* note 237, at 106 (arguing that international instruments that are merely subject to reporting requirements—like the ILO's international labor conventions—would benefit from adjacent enforcement mechanisms with sanctions authority).

253. *See, e.g.*, SMITH, ET AL., *supra* note 221, at 6–7 (noting studies showing that USTR's "*ex ante* conditionality" produced positive labor law reforms and improvements while its "*ex post*" activities often failed to elicit compliance).

concessions to eliminate any obstacles. Those concessions must nevertheless be practical.[254]

The U.S. administration has not capitalized on that momentum to garner realistic commitments. Instead, it has incorporated labor rights in its trade instruments that are deliberately open-ended and vague. U.S. negotiating priorities have centered on securing national trade interests, not international labor rights protections. Consequently, the U.S. administration has relinquished a critical opportunity to establish predictability, transparency, and compliance.

Textually, the U.S. administration should secure commitments from counterpart governments to establish or maintain consultative machinery. That machinery would determine the substance of international labor rights in the applicable trade sectors. Those commitments would replace current commitments to an ILO Declaration that, again, is legally ambiguous and disconnected from substantive certainty or guiding ILO jurisprudence.[255] The administration should require evidence of that consultative machinery before authorizing the agreement to enter into force.[256]

Under this revised procedure, the U.S. administration would require its trade partners to announce negotiations over international labor rights publicly[257] and establish portals for comment submissions accessible to employers, workers, and members of civil society that deal with national trade sectors. The United States must commit to doing the same.

It would be unmanageable to require every worker, employer, and member of civil society to consult with governments on trade matters. Instead, those groups should elect representatives just as workers, employers, and governments do at the ILO.[258] Once elected,

---

254. *Id.* (noting the lapse in political will following the entry into force of a U.S. trade instrument).

255. *See* Agustí-Penereda et al., *supra* note 69, at 363–67.

256. The counterpart government would not be required to adopt new mechanisms if it already has such mechanisms in place. *See, e.g.*, ILO, *supra* note 246, ¶ 52 (making clear that governments did not need to adopt "new machinery when consultations could be conducted within the framework of existing bodies . . . .").

257. These consultative procedures could draw inspiration from the APA, which requires federal agencies to publish notice of potential rulemaking within the United States. *See* APA, *supra* note 248, at § 553 (b)–(c) (notice-and-comment rulemaking requirements under which federal agencies must provide the public with adequate notice of a proposed rule followed by a meaningful opportunity to comment on the rule's content).

258. These types of election proceedings take place before ILO meetings. For example, the ILO recently convened a "tripartite meeting of experts" on decent work and global supply

representatives would negotiate over the ILO's labor rights to ensure practical approaches and interpretations. Ideally, those consultations would produce documents giving substantive meaning to the ILO's labor rights under the agreement applicable to that country and those trade sectors. Those interpretations should account for pre-existing country reports to the ILO[259] and consider the particularities of the trade sectors in question, the applicable cultures, and sociopolitical approaches to trade and labor.

The objective here is to respect national systems, not to harmonize labor standards. In that regard, the United States could report on its exclusive representative model while another country could just as legitimately report on a minority representative model. The United States could report on a minimum age of fifteen, while another could report on a minimum age of sixteen. The idea is that negotiated labor standards would never dip below a country's pre-established standards at the ILO. Once the trade agreement entered into force, all trade parties would draw from those consultative reports to monitor and enforce the labor rights commitments under the agreement as decided through their consultations.[260]

Of course, by requiring trade partners to establish national consultative machinery, the U.S. government might be intruding further into its counterpart's policy space than it currently does. The implications of that intrusion for legitimacy and compliance could be enormous, particularly if the U.S. demands ultimately obstruct the trade agreement. Furthermore, consultations over labor rights could call for

---

chains. In addition to a select group of governments, the experts consisted of a group of workers and employers who work in global supply chains. Those workers and employers each elected their respective Chair and Vice-Chairs, which were announced at the beginning of the meeting and spoke on behalf of their constituencies. For the composition, the agenda, and the working methods, see ILO, 344th Sess., ILO Doc. GB.344/INS/18(Rev.1) (Apr. 1, 2022), https://www.ilo.org/wcmsp5/groups/public/—-ed_norm/—-relconf/documents/meetingdocument/wcms_839877.pdf [https://perma.cc/SEM3-3BC6].

259. The consultative parties will presumably only have access to reports produced within the framework of ratified conventions. Not all parties (including the United States) have ratified those conventions. Where countries have ratified the conventions associated with the ILO's fundamental rights, those reports should mark the compliance floor.

260. One concern is that the same type of employer capture that plagues the ILO's tripartite structure could equally tarnish the consultations in trade agreements. Representatives of facilities, like the ILO's employer representatives, have greater resources than many worker rights organizations. Because it is not necessarily their livelihoods at stake, they also have less skin in the game. By monitoring and enforcing the consultative mechanisms and substantive outcomes, the United States' market strength could center on ensuring good faith bargaining among trade-related actors to prevent corporate control. Its rewarding system could also motivate facilities to participate and engage in the consultative and enforcement processes.

policies that conflict with market access commitments under the trade agreement.[261]

There are, consequently, drawbacks to these iterative processes. One alternative, which I explore in separate work, is to have the United States formally participate with the ILO under U.S. trade agreements.[262] Instead of requiring the governments to set up consultative mechanisms with trade sector actors, the state parties would agree to authorize the ILO to organize and monitor those consultations. A prior agreement to formally participate with the ILO transpired when the United States and Cambodia needed a neutral authority to monitor and approve factory conditions under the United States–Cambodia Textile agreement.[263] That process would complement the ILO's formal mandate to supervise the implementation of international labor rights and its members' constitutional obligations to set up consultative machinery between workers and employers. In that case, the ILO and not the United States would work in counterpart territories to ensure participation.

However, the drawback of that alternative is that the ILO's restrictive tripartite structure could continue to exclude informal and otherwise untraditional sectors and civil society. If that occurred, trade policy could continue to skew in favor of the privileged few invited to the bargaining table, thus further concretizing the disadvantages imposed on the most vulnerable.

2. Monitoring and Enforcing International Labor Rights in Trade

Monitoring and enforcing a worker-centered trade policy should center on the outcome of the trade machinery discussed above. Notably, some U.S. procedures should remain the same. The administration should continue to offer various channels and hotlines for stakeholders to raise grievances and complaints under trade instruments.[264] Those opportunities allow the United States to become

261. Trade agreements contain a wide array of such commitments, from rules of origin to intellectual property to non-tariff barriers, negotiated by state parties through separate processes.

262. *See* LeClercq, *supra* note 197, at 150–54.

263. *See* Sandra Polaski, *Combining Global and Local Forces: The Case of Labor Rights in Cambodia*, 34 WORLD DEV. 919, 920–21 (2006).

264. I agree with others that the scope of such participation should be broadened beyond the labor chapter to include other policies regulated under trade agreements such as provisions related to rules of origin, digital trade, pharmaceuticals, and agriculture. *See, e.g.*, POLASKI ET AL., *supra* note 113, at 44–45 (arguing that future U.S. trade agreements must give workers and other stakeholders greater power over other policies in trade agreements).

aware of on-the-ground abuses that labor inspectors might otherwise miss. In the Silao case described above, workers used USMCA's hotline to anonymously report to the U.S. government about GM's interference with their votes to approve their collective bargaining agreement.[265] The workers spurred remedial action using the hotline without exposing themselves to potential retaliation.

Apart from pre-existing opportunities for public comments, the U.S. administration would need to revise its monitoring and reporting to align with the consultative machinery described above. The administration would retain discretion to accept petitions alleging unlawful conduct.

A second option is for the U.S. administration to, again, authorize the ILO to have a formal role in adjudication. Under that scenario, if the ILO determines that a counterpart government has failed to respect its commitments to the ILO's rights, the ILO would recommend that the United States take enforcement action under the trade agreement.

In either case, under a worker-centered trade policy, the U.S. administration would announce its investigations publicly and offer an opportunity for civil society engagement. It would also hold public hearings open to U.S. and foreign participants.[266]

If the U.S. administration decides to pull market access statewide through the general dispute settlement provisions, it would consider the foreign workers displaced or otherwise harmed by its decision. It could offer those workers technical and financial support, including skills training. Furthermore, just as the Rapid Response Mechanism permits the U.S. government to withdraw market preferences for specific facilities, the administration would adopt a mechanism permitting compliant facilities to enjoy market access and benefits even if the U.S. government terminates state-to-state benefits.

Concededly, this proposal is tentative. It undoubtedly overlooks interim processes, and I have deliberately left the timelines open.

---

265. *See* Press Release, Katherine Tai, USTR, Exec. Off. of the President, *United States Seeks Mexico's Review of Alleged Worker's Rights Denial at Auto Manufacturing Facility* (May 12, 2021), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/may/united-states-seeks-mexicos-review-alleged-workers-rights-denial-auto-manufacturing-facility-0 [https://perma.cc/NE5K-RWGK] (describing the actions that led to USTR's invocation of the Rapid Response Mechanism at GM).

266. *See generally* LeClercq, *supra* note 197. Just as the U.S. administration is not compelled to adapt to the comments it receives through national administration consultations, nor would it have to cede its enforcement discretion here. However, the hearings would offer insight into views on compliance and would provide opportunities for the U.S. government to clarify its approach to international labor rights.

The point is not to resolve all the procedural obstacles in this preliminary work—I relegate those details to the future. The point is to ensure that the U.S. administration processes investigations and enforcement rapidly, transparently, and fairly. As illustrated below, this proposal may also help the administration obtain congressional and domestic approval for its trade agreements and satisfy objectives to protect foreign workers.

C. The Ivory Coast: A Hypothetical Case Study

The Ivory Coast has not yet entered into a U.S. trade agreement but exports a significant volume of cocoa to the United States.[267] Given its labor rights challenges in the cocoa sector, the Ivory Coast makes for an interesting hypothetical case study on a worker-centered trade policy. Below, I argue that by including public and private actors in the Ivory Coast in each step of the process (negotiations, monitoring, and enforcement), the United States would better motivate that government and its facilities to support consultations and eventual substantive outcomes. The U.S. administration would strengthen its legitimacy and workers' rights in the process. As an added benefit, the administration could ensure that its trade negotiations are more palatable in Congress, where members are increasingly concerned about the labor conditions in trade partner countries.[268]

Under this scenario, the United States would begin consultations by requiring the Ivory Coast to adopt the consultative machinery discussed above. The negotiations text would expressly refer to this machinery and indicate that the agreement would not enter into force until its operation. The Ivory Coast government would then publish a call for participation and, if it wished, decide whether to restrict

267. *See* USTR, *Cote d'Ivoire*, OFF. OF THE USTR, https://ustr.gov/countries-regions/africa/west-africa/cote-divoire [https://perma.cc/YAP2-YSEV]. In November 2021, USTR met with trade representatives from the Ivory Coast to discuss their "commitment to strengthen the U.S. – Ivory Coast economic relationship" and the Biden administration's "vision for an inclusive, worker-centered trade policy" including its "commitment to deepening the U.S. trade relationship with Africa." *See* Press Release, Katherine Tai, USTR, Exec. Off. of the President, *Readout of Ambassador Katherine Tai's Meeting with Ivory Coast Minister of Trade and Industry Souleymane Diarrassouba* (Nov. 4, 2021), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/november/readout-ambassador-katherine-tais-meeting-ivory-coast-minister-trade-and-industry-souleymane [https://perma.cc/9D3E-JVDR].

268. *See, e.g.*, M. ANGELES VILLARREAL & IAN. F. FERGUSSON, CONG. RSCH. SERV., R44981, NAFTA AND THE UNITED STATES-MEXICO-CANADA AGREEMENT (USMCA) 1 (Mar. 2, 2020) (describing labor rights enforceability in Mexico as a "key" issue for Congress in regard to USMCA negotiations).

participation to representatives or individuals. Once those consultations began, the Ivory Coast workers, employers, administrative officials, and applicable members of civil society would negotiate the interpretation of the ILO's fundamental labor rights in the country's trade sectors.

That machinery sounds straightforward but will prove challenging. The ILO has repeatedly expressed concerns that the Ivory Coast's current labor legislation imposes overly severe requirements on unions and employer associations, rendering it difficult for workers and employers to organize.[269] Trade negotiations with the United States would thus require the Ivory Coast to address and remedy its legal obstacles to freely associate if it hopes to access the U.S. market. The Ivory Coast may decide that compliance costs—i.e., allowing labor unions to form without interference or agreeing to establish a consultative machinery—outweigh the benefits of U.S. market access. After all, even without a trade agreement, U.S. tariffs are among the lowest in the world.[270] If so, negotiations would stall, but Congress and the administration could rest assured knowing that the United States was not doing business in outwardly exploitative countries.

If the Ivory Coast government complies, its experiences with employer and worker representatives under the trade machinery could inspire the government to reassess its labor law legislation more broadly, as urged by the ILO.[271] Further, that machinery would enable the Ivory Coast government to consult and improve upon its labor-rights obligations under the ILO for workers in trade sectors. I will use the government's implementation of the ILO's child labor rights instruments as an illustration. It shows how my proposed consultation machinery could assist the administration in securing approval to enter into trade agreements and how sectorial bargaining could improve de jure and de facto rights protections in trade partner countries.

When the Ivory Coast ratified the ILO's conventions on child labor in 2003, it decided, after holding national consultations with its workers and employers, to prohibit the employment of children

269. *See generally* ILO, 2021 REPORT ON THE APPLICATION OF INTERNATIONAL LABOUR STANDARDS (2021).

270. *See* WORLD BANK, TARIFF RATE, APPLIED, WEIGHTED MEAN, ALL PRODUCTS (%), https://data.worldbank.org/indicator/TM.TAX.MRCH.WM.AR.ZS [https://perma.cc/HJ37-S4FW].

271. *See* ILO, *Direct Request (CEACR): Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) - Côte d'Ivoire* (2021), https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:4003491,103023 [https://perma.cc/4QWN-5XH3].

younger than fourteen.[272] That prohibition appears on its face to violate the ILO's child labor standard, which prescribes a minimum age of fifteen.[273]

Under current trade procedures, the U.S. administration risks negotiating purely off the ILO's fifteen-year minimum age standard or its own minimum age determinations. In that case, it might erroneously fault the Ivory Coast for allowing fourteen-year-olds to work. U.S. unions, employers, and congressional members could protest the trade negotiations owing to misplaced concerns over fourteen-year-old workers. The United States could ultimately punish the Ivory Coast for minimum age laws that the ILO finds acceptable under its participatory fundamental labor rights.

However, recall that the ILO's labor standards are flexible. After consulting with national worker and employer representatives, the ILO's child labor instruments permit governments to elect the younger age of fourteen after self-identifying as "insufficiently developed" economically.[274] The Ivory Coast's decision following consultations to allow children aged fourteen to work, as expressly allowed under the ILO's conventions, is thus lawful under the ILO's process-oriented labor rights. Instead of expressing concern over the minimum age, the ILO's supervisory bodies have drawn attention to "the high number of children" engaged in hazardous work in rural areas, including cocoa plantations. U.S. trade negotiators may have never reached this critical trade topic if they terminated negotiations over a faulty presumption of unlawful minimum ages.[275]

Under my proposal, the U.S. administration would instead bolster the ILO's supervisory efforts while also accomplishing its trade objectives. The Ivory Coast government would have the opportunity

---

272. *See* ILO, *Direct Request (CEACR): Minimum Age Convention, 1973 (No. 138) - Côte d'Ivoire* (2009), https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:2294908,103023 [https://perma.cc/6R8L-YMEF] (noting "the information supplied by the Government to the effect that this age was specified with the agreement of the social partners, inasmuch as the economy and educational institutions are not sufficiently developed in the country . . . .").

273. Minimum Age Convention art. 2(3), *adopted* June 19, 1976, 15 I.L.M. 1288 ("The minimum age specified in pursuance of paragraph 1 of this Article shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years.").

274. *Id.* art. 2(4) ("[A] Member whose economy and educational facilities are insufficiently developed may, after consultation with the organisations of employers and workers concerned, where such exist, initially specify a minimum age of 14 years.").

275. ILO, *Observation (CEACR): Minimum Age Convention, 1973 (No. 138) - Côte d'Ivoire* (2019), https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:3950109,103023 [https://perma.cc/YCB6-438B] ("Children in rural areas mainly work on family farms, in plantations . . . .").

to improve its labor rights beyond what it has reported to the ILO on a narrower, sectoral basis.

Suppose that the Ivory Coast government, back in 2003, could not secure the political will or domestic support (from corporations) to agree upon a fifteen-year minimum age for all workers. Had the U.S. administration demanded that the Ivory Coast raise its minimum age to fifteen in order to prompt negotiations, the Ivory Coast may have committed to doing so without assessing the practicality of revising its labor legislation. Alternatively, it may have publicly questioned why the United States was demanding a minimum age in plantations that the United States does not guarantee in its agricultural sector.

Alternatively, by concentrating solely on trade-based sectors and by offering the Ivory Coast the space and opportunity to decide how to approach the ILO's minimum age rights through domestic consultations, the Ivory Coast could be better positioned to raise its commitments to the ILO incrementally. It could do so by raising the minimum age of plantation workers from fourteen to fifteen years[276] and eighteen years for hazardous work. It could also accept technical assistance from the United States under the agreement to enhance the capacity of its labor inspectorate. Securing more pragmatic commitments to the ILO's labor rights would, in turn, assist the U.S. administration's efforts to influence compliance by the Ivory Coast government and factories. It could also assist the U.S. government in securing congressional approval for its trade agreement.

Of course, the Ivory Coast might still face significant domestic resistance from plantations and other trade sector employers. Why should trade sectors have to provide for *higher*, and potentially more costly, labor rights protections than agreed upon at the national level? Why raise minimum ages, or refrain from interfering with union formation, which could place trade sectors at a disadvantage compared to non-trade sectors in the country that are free to stick to the bare minimums? These questions highlight why a worker-centered trade policy is crucial in labor rights governance. While the ILO's assistance programs and reputational enforcement mechanisms may prove insufficient to galvanize improvements in worker protections, the U.S. market may be more economically-enticing. Otherwise reluctant domestic employers may decide that the benefits of market access (which, even with marginal U.S. tariff benefits, nevertheless represent new market

276. Notably, the standards reported to the ILO and deemed acceptable under the ILO's flexibility provisions, such as allowance for a fourteen-year minimum age, constitute the floor. Consultations could not dip below that floor, even if agreed upon by all parties, because that agreement would violate the government's international obligations before the ILO.

opportunities and a competitive leg up against domestic competitors) outweigh the perceived costs of worker rights protections.

If negotiations progress and the agreement enters into force, the U.S. administration would require the Ivory Coast government to establish a grievance system whereby workers, employers, and civil society could raise issues concerning the labor rights criteria. They could do so by filing formal complaints or submitting grievances anonymously.

The U.S. administration would also require ongoing, perhaps annual meetings with the Ivory Coast public and private actors to assess the substantive determinations of the ILO's labor rights in the trade agreement. Those determinations would be codified in government-to-government reports annexed to the trade agreement and not in the agreement itself. Consequently, should annual consultations reveal problems with the initial determinations, the parties should be able to amend those determinations in a more simplified and rapid process than typical trade agreement renegotiations.[277]

Finally, under this scenario, the United States would establish its own consultative machinery to decide on and monitor the labor rights in sectors within the United States that export into and compete with the Ivory Coast. The Biden administration claims to have taken steps in this direction by offering workers "a seat at the table as the Biden Administration develops new policies that promote equitable growth . . . ."[278] The administration already consults with corporations.[279] The only difference, therefore, would be that the administration would consult with those opposing sides *jointly at the same time*. Those consultations would contribute to greater transparency on the United States' side, particularly when balancing lobbying efforts between labor and capital. It might also enable the U.S. administration, like the Ivory Coast, to offer workers in its trade sectors higher labor rights than provided under current draconian labor legislation. They would also offer civil society and workers and employers in the United

277. Here, again, the Ivory Coast could not offer weaker labor rights than offered through its ILO reporting, so while consultations could risk lowering standards from their initial determinations, they could not dip below the ILO's floor.

278. *See, e.g.*, Press Release, Katherine Tai, USTR, Exec. Off. of the President, *Fact Sheet: 2021 President's Trade Agenda and 2020 Annual Report* (Mar. 2021), https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2021/march/fact-sheet-2021-trade-agenda-and-2020-annual-report [https://perma.cc/CQV6-28KU].

279. Longstanding criticism of U.S. trade policy accuses various administrations of corporate capture. *See, e.g.*, Rodrik, *supra* note 40, at 86–87 (2018) (offering evidence that shows that the most significant trade lobbyists during Trans-Pacific Partnership Agreement negotiations included "corporations and industry associations").

States currently excluded from the trade table an avenue of communication and redress.

A worker-centered trade policy capable of influencing compliance with pragmatic labor rights lies within reach. If the Biden administration reforms its procedures in line with the ILO's participatory model described above, it could leverage the U.S. market to make violations more costly, thus fortifying compliance and legitimizing the ILO's supervisory functions. Enforcement could preserve the vertical negotiations between state and non-state actors while broadening the national base to include members of civil society and sectors otherwise excluded from the international platform.

Through those consultations, American and counterpart workers and employers would participate in and socialize international labor rights. The horizontal negotiations between states and the supervision of rights decided upon through consultations could generate labor rights across agreements. State enforcement would be more predictable, legitimate, and ultimately more effective—benefitting the Biden administration's pro-worker agenda and garnering further support from the labor movement.

Whether or not a U.S. administration is willing to adopt such drastic reforms remains a separate question. It stands to benefit from a worker-centered trade policy, not only because raising labor standards will protect U.S. workers and businesses from cheap imports but also because its purported values concerning worker welfare are important. I am not implying that trade agreements are appropriate for solving all the world's humanitarian problems. They are, after all, commercial treaties signed by states. However, there is space and opportunity to afford counterparts the domestic regulatory space to raise labor standards practically and equitably. The administration would benefit from the legitimacy associated with more iterative procedures and the potentially strengthened compliance to which participation and perceptions of legitimacy contribute.

If the administration is not prepared to adopt those reforms, its interests would be better served if it dropped its "worker-centered" rhetoric and its incorporation of the ILO's labor rights altogether. It should instead link its market access to U.S. labor norms. Doing so would satisfy U.S. trade objectives to harmonize labor standards as production costs versus the current muddled system of interpreting the ILO's ambiguous rights. Trade partners and firms would be better positioned to predict enforcement action. Moreover, discomfort over overt U.S. standards and control could eventually motivate developing countries to finally agree to a formal link between the WTO and ILO to regulate the intersection of labor and trade on the multilateral platform.

CONCLUSION

A reconceptualized worker-centered trade policy could profoundly advantage trade partners, vulnerable workers, and commercial relationships. The U.S. administration—aided by its market size—plays a critical role in garnering the political will and resources to comply with international labor rights. Its trade policy and processes could redress the distributional effects of trade in the United States and abroad. It could do so by inviting a wide array of private actors to consult over trade policy and integrating sanctions into the ILO's enforcement of international labor rights.

Nevertheless, as currently conceptualized and administered, the Biden administration's "worker-centered" trade policy risks undermining compliance with labor rights in counterpart countries. Rather than galvanize participation with international labor rights commitments, the administration's negotiated labor text and procedures merely concretize power asymmetries within and outside the United States. They also undermine the ILO's consultative processes and confuse the body of labor rights norms enforced under trade agreements. The only clear winner under its current "worker-centered" trade policy is the United States and the powerful private actors currently included in U.S. trade policymaking—all of which are immune from compliance issues in foreign countries.

This Article urges the administration and scholars to reconceptualize a worker-centered trade policy capable of protecting workers in trade sectors and along global supply chains. If the administration truly intends to garner compliance with international rights in practical and equitable ways, it must foreground participatory processes and consultations with foreign decision-makers and their trade-sector private actors. Doing so would enable transnational legal processes to construct trade-related labor norms. It would also help to protect the women and men who produce, manufacture, and provide services in trade that benefit our markets and consumption.