

Trade Policing

Kathleen Claussen*

At the core of U.S. economic governance, there is a novel and under-noticed phenomenon that challenges longstanding frameworks of international law and corporate compliance. This practice, which this Article terms the new “trade policing,” has extraordinary reach. Recent regulatory makeovers and pathbreaking statutes empower our trade agencies to target, for the first time, companies, rather than foreign governments, as used to be their purview. Trade police now pursue companies wherever they may be in the world, not just for violating U.S. law but also for violating foreign law in areas as diverse as labor rights and environmental protections. Such a regime may sound untenable, defying basic principles of jurisdictional authority. But new corporate trade policing is increasingly entrenched in international trade law. This repurposing of our trade enforcement system has the power to transform dramatically the global commercial system, the bargains it manages, the procedures applicable to it, and the rights and obligations of all involved.

Drawing on a diverse set of agency communications, new legislation, and interviews with government officials, this Article surfaces this subtle but critical pivot in our cross-border commercial governance. It maps the institutional ascent of this revealed practice and argues that the practice was the product of disillusionment with the intellectual pedigrees of conventional trade law and developed in response to calls for more effective tools to combat vast corporate wealth and economic marginalization.

The Article then evaluates trade policing in light of the progressive aims that policymakers have set for it, taking into account the many constituencies on whom the burdens fall unevenly. Through numerous examples across different regulatory policies, the Article shows not only that trade policing is happening, but also that it matters. This excavation exposes how our trade police do not operate like other forms of law enforcement or bureaucracy. Rather, trade policing occurs in considerable shadow and lacks hallmarks traditionally associated with administrative law. Still more troubling is that tactics like those in the U.S. arsenal bear close resemblance to the practices of authoritarian governments that seek to provoke acquiescence without process. The Article’s assessment prescribes lessons for the several disciplines that trade policing touches, including for the way scholars and lawmakers conceive of which bodies of law, tools, and actors are best suited to manage international corporate behavior.

Taken together, the Article makes four contributions. First, it identifies and illustrates the rise of the new trade policing. Second, it unpacks the distinct features of this novel corporate targeting and draws conclusions about its functions for the way we think about compliance with a wide range of public policies. Third, the Article offers a guarded defense of this complex work by our foreign commercial bureaucrats and analyzes the implications for trade law, administrative procedure, and governance. Finally, the Article demonstrates that, as a corporate accountability system, trade policing has leapfrogged efforts by fields with similar aims, and the policing tools we have so far are just the tip of the iceberg.

* Professor of Law, Georgetown University Law Center. My thanks to Henrique Choer Moraes, Julie Cohen, Dan Esty, Michael Gadbaw, Anna Gelpern, Nicolas Lamp, Sergio Puig, Weijia Rao, Bob Thompson, and Michael Waibel for their comments on earlier iterations, and to Elena Chachko, Harlan Cohen, Dan Esty, Rob Howse, Tim Meyer, Stratos Pahis, Kish Parella, Johannes Reich, Álvaro Santos, Greg Shaffer, David Super, Pierre-Hugues Verdier, Mark Wu, and David Zaring for their thoughtful comments and conversations informing this project. This project profited greatly from helpful feedback given by colleagues at Northwestern Pritzker School of Law while I was a visiting professor in Spring 2022, and from participants in workshops at Georgetown University Law Center, Brooklyn Law School, the University of Vienna, and the University of Zurich, where I benefitted from the financial and research-based support of a fellowship awarded by the Swiss Institute for Advanced Study.

TABLE OF CONTENTS

INTRODUCTION	26
I. THE RISE OF THE NEW TRADE POLICING	33
A. <i>The Old Way</i>	34
B. <i>The Path to the Corporation</i>	36
C. <i>Multidimensional Pivoting</i>	40
II. ENFORCEMENT DESIGNS	43
A. <i>Sustainability</i>	44
B. <i>Rights</i>	47
C. <i>Security</i>	49
D. <i>Intelligence</i>	51
III. NORMATIVE ACCOUNTING(S)	53
A. <i>Virtues and Vices Among Commercial Constituencies</i>	55
B. <i>Process Stakes</i>	60
IV. IMPLICATIONS & EXTENSIONS	64
A. <i>Doctrinal Orientations</i>	66
1. <i>Firm Footing</i>	66
2. <i>Repurposing</i>	69
B. <i>Corporate Governance</i>	72
C. <i>Disciplinary Convergence</i>	74
CONCLUSION	77

INTRODUCTION

A novel form of law enforcement is on the rise. The “trade police,” as this Article calls them, are the front-line bureaucrats who enforce the laws surrounding global business.¹ Their efforts determine whether billions of dollars of goods and services enter or exit the United States, and, in the last five years, lawmakers have overhauled their functions dramatically. This Article identifies a new form of trade policing at the core of commercial governance—a practice that not only upends conventional notions of trade law but also has striking implications for the basic tenets of administrative procedure, corporate governance, and jurisdictional authority.

1. “Trade police” is not a term used by scholars or practitioners before now. One author referred, in 1996, to the World Trade Organization (“WTO”) as “trade police”—a very different deployment than the one I develop here. Thomas J. Dillon, Jr., *The World Trade Organization: A New Legal Order for World Trade*, 16 MICH. J. INT’L L. 349, 370 (1996) (discussing two review processes within the WTO in this way). In January 2023, the Wall Street Journal featured an article by its lead economics correspondent Greg Ip. Greg Ip, *Who Is Going to Police the New World Trading System?*, WALL ST. J. (Jan. 14, 2023), <https://www.wsj.com/articles/world-trade-organization-sidelined-11673629991> [<https://perma.cc/7JYZ-CMNF>]. As I argue in this Article, Ip asks the wrong question for this moment: The question is not who is going to police the system; rather, it is whether the existing police have changed their targets.

Trade police of some form have been around since the nation's founding, though they are not often in the news. There is no U.S. trade police force, at least not one with that label. The closest one gets to a uniformed officer in the trade space is a U.S. Customs and Border Protection ("Customs") official at a border crossing.² But the modern trade law enforcement system is robust. In fact, our trade enforcers comprise a substantial part of our commercial bureaucracy.³

What little attention has been paid to trade policing among scholars has focused on government officials who guard against dangers posed by the aggressive economic policies of foreign governments. Unlike the Customs staff concerned about illicit materials in your suitcase, these investigators and prosecutors protect U.S. industries from discriminatory regulatory measures by trading partners, failures by other governments to meet international standards, and foreign legislative initiatives that may be harmful to the global commons.⁴ They monitor the activities of other countries to determine whether those other

2. U.S. Customs and Border Protection has three types of officers apart from its "agents" who guard borders by horse, bike, or boat: agricultural specialists, air interdiction and aviation enforcement, and marine interdiction officers. *Customs and Border Protection (CBP)*, U.S. DEP'T OF HOMELAND SEC., <https://www.dhs.gov/employee-resources/customs-and-border-protection-cbp> [<https://perma.cc/GB46-TK82>] (last updated Feb. 3, 2023).

3. One observer concluded already in 1984 that trade bureaucrats can be found in "almost every department." James A. Peyser, *Executive Organization and International Trade*, 2 INT'L TAX & BUS. L. 138, 139 (1984). Within those departments, nearly all have some sort of enforcement role. In addition to Customs, both Commerce and Treasury are tasked by statute with international economic execution and compliance. For example, the Commerce Department enforces trade remedies as set out in 19 U.S.C. ch. 4. *See also Role of the Treasury*, U.S. DEP'T OF THE TREASURY, <https://home.treasury.gov/about/general-information/role-of-the-treasury> [<https://perma.cc/QVZ8-PCW7>] (describing Treasury's role in enforcing sanctions and monitoring financial threats to the U.S. economy). Treasury also plays a role in customs collection and in overseeing the Internal Revenue Service. The State Department and U.S. Trade Representative are also key actors in the U.S. trade administrative state, as discussed further below. The U.S. Trade Representative has a "monitoring and enforcement" office responsible for supervising foreign government compliance with international trade agreements. *See Office of the U.S. Trade Representative (Organization Structure)*, OFFICE OF THE U.S. TRADE REP., <https://ustr.gov/sites/default/files/USTR%20Org%20Chart%20Office%20only%20website%20PDF%203.30.10.pdf> [<https://perma.cc/D9DU-P7LE>]. In addition to these "traditional" trade players, other departments have important functions in trade law and policy development and execution, such as the Department of Agriculture (policing agricultural issues), the Food and Drug Administration (ensuring that food safety standards are met), the Department of Labor (monitoring compliance with international labor law as codified in trade agreements). *See SHAYERAH ILIAS AKHTAR*, CONG. RSCH. SERV., IF11016, U.S. TRADE POLICY FUNCTIONS: WHO DOES WHAT (2018). Looking even deeper, we can identify foreign commerce monitoring and enforcement in the Department of the Interior, Department of Defense, Department of Energy, and still other agencies. *See Thomas R. Graham*, *The Reorganization of Trade Policy-making: Prospects and Problems*, 13 CORNELL INT'L L.J. 221, 228 n.38 (1980). Even the Federal Emergency Management Agency took on new trade law enforcement during the COVID-19 pandemic. *See Information Update About the Export Allocation Rule on Medical Supplies and Equipment for COVID-19*, FED. EMERGENCY MGMT. AGENCY (July 1, 2021), <https://www.fema.gov/fact-sheet/fema-implementation-allocation-order-exports-scarce-ppe-and-notice-exemptions> [<https://perma.cc/6ZYG-4993>].

4. In the U.S. system, this work is carried out by the Office of the U.S. Trade Representative. *Enforcement*, OFFICE OF THE U.S. TRADE REP., <https://ustr.gov/issue-areas/enforcement/monitoring-and-enforcement-actions> [<https://perma.cc/U33E-9PDY>] (last visited Nov. 11, 2023). USTR decides when to bring a case against another country and under what conditions. These cases or dispute settlement actions have occurred primarily at the WTO. *See Dispute Settlement*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm [<https://perma.cc/N3DD-CDC7>] (last visited Nov. 11, 2023).

countries have violated international trade law and caused injury to the United States—or at least, that used to be their role.

Today, our trade police still patrol, but no longer are they focused solely on the activities of foreign authorities. This Article chronicles the ascendance of a new trade policing where *companies* are the object of enforcement action. The new trade policing regime is a corporate accountability system. Private actors are under the microscope of a broad swath of innovative deployments of government action: detainment of goods, financial penalties, export constraints, extensive reporting requirements, and import bans.

Any turn to a more forceful regulatory framework is noteworthy, though not exceptional. The new trade policing, however, is in a category of its own. It disrupts the foundations of the doctrinal communities into which it might fit: regulatory compliance, foreign relations, and the law of cross-border commerce, among them. For example, trade's corporate policing in some ways resembles familiar compliance frames, but it also upsets conceptual distinctions of public law, especially when it comes to its transnational dimension.

While I use the label “trade policing,” and our trade agencies are doing this work, this enforcement looks nothing like ordinary trade law. It differs in two major respects. First, our trade law comprises a set of shared rules to which countries have agreed regarding their treatment of goods and services. Enforcement under those rules involves dispute settlement among governments. Yet, the laws of the new trade policing downplay state-to-state dispute settlement for actions against private actors of the type carried out by local police, prosecutors, and judges.⁵ To some degree, trade officials subordinate diplomacy for corporate detainment and deterrence. Second, private actors are subject to the enforcement powers of U.S. trade police in subject areas that many would not consider to fall within the principal margins of trade law. These areas include environmental sustainability, labor, human rights, and national security, among others. These recent enforcement practices have unmoored trade law from its intergovernmental and economic underpinnings.

Trade policing's extraterritoriality also sets it apart from the work of everyday regulatory monitoring agencies, including trade monitoring agencies.⁶ Trade police have jurisdiction not just over companies operating at home but also those abroad, including companies with no apparent jurisdictional nexus to the United States. Trade police go after companies, wherever they are in the world, on an individualized basis. To be sure, debates over the prescriptive

5. Both Congress and the executive have developed these tools. *See infra* Part II.

6. A slender literature, led by Rory van Loo, opens this conversation on the domestic side. Rory van Loo, *Regulatory Monitors: Policing Firms in the Compliance Era*, 119 COLUM. L. REV. 369, 384 (2019) (describing how the administrative state includes significant monitoring).

reach of federal regulations are familiar in other settings,⁷ even if new to the trade administrative state, but where trade policing goes beyond both domestic and transnational regulatory applications is with respect to which law it is enforcing. In an untested and unprecedented change, U.S. foreign commercial officials are administering not only U.S. law against cross-border companies, but also *local law* in countries where those companies operate.

Imagine if, up until now, the state of Florida had two main enforcement activities: (1) policing actors carrying out activities within Florida with respect to Florida law, and (2) monitoring and suing other U.S. states where those states were breaching agreements they had with Florida—agreements concerning shared water rights, perhaps. Then suppose that one day, Florida started policing not just Florida companies, and not just the states of Georgia and Alabama, but also companies operating in those states alone. Imagine if Florida regulators stopped all Coca-Cola products from entering the state of Florida because they thought Coca-Cola, based in Atlanta, was violating state law—not a Florida state law but rather a *Georgia* state law. Even leaving aside the inter-state commerce issues, this hypothetical may sound non-sensical. But this exercise, extrapolated to a transnational plane, is what trade police do. Officials sitting in the Executive Office of the President of the United States can prevent exports to the United States of goods from factories in Mexico, for example, where those bureaucrats believe a company has violated Mexican law.⁸ Here, nationality and location—two fundamental principles of both transnational procedure and foreign relations law—matter less.

The new corporate trade policing is not just a scholarly construct or characterization. Policymakers celebrate this shift. Ambassador Katherine Tai, the U.S. Trade Representative and lead Cabinet official for the United States on cross-border commerce, has spoken publicly about her decision to use our trade police to pursue corporate accountability objectives: “A point of emphasis for me . . . is the importance of corporate accountability in our trade policy. We need to hold corporate actors accountable.”⁹ This is radical language for trade

7. See Gerald L. Neuman, *Extraterritoriality and the Interest of the United States in Regulating Its Own*, 99 CORNELL L. REV. 1441, 1448–56 (2014) (reviewing a few of the many legal dimensions of the federal government’s regulation of harmful conduct of its own officials and its own nationals outside the borders of the United States); Anthony J. Colangelo, *What Is Extraterritorial Jurisdiction?*, 99 CORNELL L. REV. 1303, 1303–04 (2014) (referring to the conceptual and doctrinal hydra of extraterritoriality including queries regarding the geographic scope of regulations). Colangelo observes that “extraterritorial jurisdiction” only “connotes the exercise of jurisdiction, or legal power, outside territorial borders” but relates both to prescriptive jurisdiction to regulate conduct and to adjudicative jurisdiction. *Id.*

8. This example is laid out in Part II.A.

9. Katherine Tai, U.S. Trade Rep., Remarks at the 2022 United Steelworkers Constitutional Convention (Aug. 10, 2022), <https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2022/august/remarks-ambassador-katherine-tai-2022-united-steelworkers-constitutional-convention> [https://perma.cc/K3QY-WRUY].

observers—a clear departure from what trade police used to do and from what the law has told them to do.¹⁰ This approach is a firm-centered trade policy.¹¹

This transformation has few analogues. While officials regulate corporate cross-border activity in this way in other fields, such as finance, they have not done so in trade.¹² Various institutional questions surface: Ought these agencies carry out this type of work? Are they prepared to do so? This study expounds a broader research agenda on agency competence and the administrability of repositioning from a governance frame to a regulatory enforcement one.

By providing both a theoretical and empirical account of trade policing, this Article offers a revised framework for understanding cross-border economic law and policy with instruments at its core that challenge the structure, norms, and purpose of the work of trade agencies. Drawing from a diverse group of sources including agency materials, speeches, and interviews with government officials, this Article illuminates how the new trade policing has taken shape. Upon opening the architectural aperture, trade law's normative lodestar fades to the backdrop. This raises a question as to what such a precision exercise means for trade law's durability and its values. Efforts to optimize trade law for the demands of the global economy become not just about the reconfiguration of old, familiar legal institutions but also about the emergence and configuration of new ones. Trade policing's new look may not only respond to the disillusionment that prompted its cultivation, but it may also reinvent the field.

The Article's functional appraisal illuminates another layer of trade policing: its unusual disjuncture from bedrock tenets of administrative law. Trade

10. See, e.g., 19 U.S.C. §§ 2412–20 (laying out enforcement and monitoring instructions for USTR including investigations into policies and practices of other countries, supervising the implementation of measures taken by other countries, and requiring a report to Congress on the acts, policies, and practices of other countries that the executive branch is monitoring for possible adjudicative action); 19 U.S.C. § 4404 (requiring a report from USTR on intellectual property enforcement actions against other countries from the preceding year); 19 U.S.C. § 4402 (concerning the enforcement of laws by seizure of illicit trafficking of goods and services); 19 U.S.C. § 4319 (requiring a report on the effectiveness of financial collection measures carried out by Customs).

11. This is a play on words of the “worker-centered trade policy” that is the core of the Biden Administration's trade policy. See Press Release, Katherine Tai, U.S. Trade Rep., 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/DC3U-JRDN]; Office of the U.S. Trade Rep., *What Is a Worker-Centered Trade Policy?*, YOUTUBE (July 14, 2021), <https://www.youtube.com/watch?v=rj9uTLQBstY>; see also Kathleen Claussen, *The Worker-Centered Trade Policy: From Trump to Biden* (Dec. 15, 2021) (transcript available in 2022 EUR. INSTITUTE Y.B. 253).

12. I discuss some of these comparisons in Part IV.A. Beyond international economic contexts, see generally Margaret K. Lewis, *When Foreign Is Criminal*, 55 VA. J. INT'L L. 625 (2015); Aaron D. Simowitz, *Legislating Transnational Jurisdiction*, 57 VA. J. INT'L L. 325 (2018). An exception in trade is agricultural and food safety. When it comes to crops, plants, and animal health, countries have long agreed to monitor one another's practices to a significant degree and to stop goods at the border that put their populations in jeopardy. See generally JOANNE SCOTT, *THE WTO AGREEMENT ON SANITARY AND PHYTOSANITARY MEASURES: A COMMENTARY* (2009) (explaining the international trade rules on these matters). As I describe further below, the new corporate trade policing brings other areas of trade regulation closer to this practice.

police generally benefit from procedural shields that other agencies lack.¹³ Like domestic regulatory monitors, they are largely unobservable and unreviewable, perhaps even more so, given their cross-border nature. Agencies carry out this monitoring and enforcement without traditional Administrative Procedure Act constraints, for one. The trade policing experiment exposes the limitations of administrative law in a space of new and evolving regulatory frameworks. Out-of-the-box enforcement models such as this call into question administrative law's role in testing and challenging the legitimacy of state action. Surprisingly, however, whereas much of the concern in trade policy surrounds the aggrandizement of executive authority,¹⁴ the new corporate trade policing is a bi-branch exercise. This Article explains how, in the United States, trade police have accrued most of this power through congressional delegation. As a consequence, the development and legal entrenchment of these tools make them ripe for long-term use and difficult to reverse.

Though the aim of this Article is to supplement an incomplete academic account about the workings of the cross-border commercial system, the province and influence of trade policing are not so limited. Importantly, this institutional review underscores another layer to trade policing: disciplinary convergence. Other fields have sought for some time to constrain corporate behavior. Organizations have developed multiple movements in this regard and these niche areas are today so established that they have their own labels and organizations: business and human rights (“BHR”), corporate social responsibility (“CSR”), corporate due diligence schemes, among others.¹⁵ The appearance of environmental, social, and governance (“ESG”) investment strategy in practice and theory has further fueled these initiatives.¹⁶ This Article argues that the lines between traditional trade law and these nongovernmental organization (“NGO”) and private sector movements have begun to blur. Trade policing adds to the toolbox of familiar corporate accountability initiatives, and it does so with hard law sanctions. The transnational regulatory agenda for good

13. See *infra* Part III.

14. See, e.g., Tori Smith, *Four Areas for Congress to Exercise Trade Policy Oversight*, AM. ACTION F. (Jan. 19, 2023), <https://www.americanactionforum.org/insight/four-areas-for-congress-to-exercise-trade-policy-oversight> [<https://perma.cc/8C2D-UXNT>]; Kathleen Claussen & Tim Meyer, *The President's (and USTR's) Trade Agreement Authority: From Fisheries to IPEF*, LAWFARE (July 18, 2022), <https://www.lawfaremedia.org/article/presidents-and-ustrs-trade-agreement-authority-fisheries-ipef> [<https://perma.cc/PS6J-DCDG>].

15. See *infra* Part IV.D. While attempts to enhance such regulation in the United States are ongoing, these fields have influenced some national legislation, most often in Europe. See, e.g., *The New German Supply Chain Due Diligence Act (LkSG) – What Needs to Be Done*, RÖDL & PARTNER (Jan. 2, 2023), <https://www.roedl.com/insights/supply-chain-act-due-diligence-obligations> [<https://perma.cc/5NB3-ZNTU>] (explaining the recent German law intended to enhance corporate social responsibility). Space does not permit a full airing of these movements and their lineages, but I pick up a few more below.

16. Each of these, and especially CSR and ESG, are at the center of a much broader dialogue on management and investment that I need not recite here. This Article draws linkages between those debates.

business behavior is also now materializing through trade tools, rather than soft codes of conduct—and what we have seen so far is likely the tip of the iceberg.

The balance of this Article is as follows. Part I traces the history and evolution of trade policing. As the story recounted here reveals, no single motivation appears to have driven the development of new laws and institutions to do this work. I locate the origins of trade policing's corporate turn in expansive political compromise, institutional experimentation, and a corporate power narrative.

Part II documents the designs and subject areas where the new trade policing has emerged in the last five years—and with some urgency. New forms of trade policing are regularly added to the enforcement toolkit. The tools discussed in this Article are a few among many legal designs now under consideration or implemented in the United States, with similar programs emerging in other countries. Part II offers a descriptive review of these trade policing tools and their recent uses and shows that they have grown in scope and power. This Part reflects on interviews with stakeholders and situates trade policing at the center of our foreign commercial framework.

Part III turns to the normative payoffs implicit in this transformation. In the end, the Article offers a conditional defense of trade policing's corporate turn. Bringing together many strands under one "trade policing" vision helps identify what sort of administrative law reform may be required to sustain the rewards of this move. The Article argues that policymakers would benefit from closer attention to the cross-cutting due process issues that corporate trade policing implicates rather than engage in retail-level reforms.

Finally, Part IV picks up the unfinished business. It begins by explaining how the move to corporate trade policing reorients the conceptual distinctions that separate trade law from its sibling fields. Perhaps surprisingly, given its commercial focus, trade law was only indirectly focused on individual corporations—until now.¹⁷ The new trade policing challenges fundamental principles of trade law: its interstate nature, territorialism, and reciprocity. Unexpectedly, it may also save trade law. Corporate trade policing as a policy choice deflects from intractable ideological debates that have paralyzed trade policymaking. It cuts through unabating conversations built on the classic dichotomy of liberalization versus protectionism and, in so doing, gives trade law renewed purpose. On the other hand, the codification of the new trade policing arguably reflects not just a distinct approach to trade, but one that belongs to another set of disciplines entirely. This Part then considers how trade policing requires companies to revisit familiar corporate governance principles.

17. This is a strange omission in the growing meaningful literature on transnational corporate engagement which otherwise explores a variety of roles for the corporation in foreign relations and international law. See, e.g., sources cited *infra* note 168.

As is clear from the themes that it highlights, this work is situated at the intersection of several different areas of theory and practice. Connecting these lines of thought sheds light on difficult questions as to which bodies of law, tools, and actors are best suited to manage corporate behavior in the global economy.

I. THE RISE OF THE NEW TRADE POLICING

Trade policing has changed considerably since its inception in the mid-twentieth century. This Part looks at the conditions engendering trade policing's corporate turn. It begins by providing an overview of conventional ideas of what Article I of the U.S. Constitution calls the regulation of "commerce with foreign nations." The delicate and reciprocal arrangement among governments has not been able to withstand the many pressures of recent economic upheaval. Demands for a trade law that was more aggressive with respect to non-traditional trade issues gave way to an expansion of what trade tools could achieve. In the United States, like elsewhere, the executive branch has sought to (re)build a trade law system that was responsive to its distributional effects, corrective of marginalization, and accommodating of domestic priorities.

This combination of expanding trade's purview to new areas of social, environmental, and security policy alongside growing skepticism about neoliberalization resulted in a reimagining of what U.S. officials could and should do. Other countries are beginning to follow suit. The culmination of this effort has been a pivot away from the old trade policing to a focus on the corporation.

In turning attention to ground-level activity, this Part departs from traditional trade law discourse that is overly concerned with what scholars see as an ideological crossroads at which policymakers must choose between economic liberalization and protectionism.¹⁸ This scholarship, despite its value in highlighting important inconsistencies in the present political moment, misses the fundamental shift that this Article identifies. That work focuses on what scholars see as problems of content or approach rather than of orientation or target. Debates over trade law's substance remain important, but the current state of play presupposes its expansive reach and seeks to push still farther.

18. There are countless examples of this debate; I limit myself to a small set of less subtle commentaries from recent months. Henry M.J. Tonks, *Biden Is Reviving a Lost Democratic Industrial Policy Playbook*, WASH. POST (Nov. 7, 2022), <https://www.washingtonpost.com/made-by-history/2022/11/07/biden-atari-democrats-japan-china/> [<https://perma.cc/P7R5-57TL>]; Aurelia Glass & Karla Walter, *How Biden's American-Style Industrial Policy Will Create Quality Jobs*, CTR. FOR AM. PROGRESS (Oct. 27, 2022), <https://www.americanprogress.org/article/how-bidens-american-style-industrial-policy-will-create-quality-jobs> [<https://perma.cc/4AVS-8B74>]; Gary Clyde Hufbauer, Megan Hogan & Yilin Wang, *For Inflation Relief, the United States Should Look to Trade Liberalization*, PETERSON INST. FOR INT'L ECON. (Mar. 2022), <https://www.piie.com/publications/policy-briefs/inflation-relief-united-states-should-look-trade-liberalization> [<https://perma.cc/UBH9-JCKB>].

A further aim of this Article is to develop a positive theory of trade policing to examine why and how these tools emerged as the foremost tools of cross-border economic activity since 2018. Disillusion with the mechanics of longstanding trade law institutions is one of several justifications for this transformation. This disenchantment with the trade law system coincided with a marked substantive expansion of trade treaties.¹⁹ Negotiators developed norms for governments to follow across a wide range of issues, from climate to labor to supply chain management. These public policy problems, however, do not always lend themselves readily to conventional trade law logic or treatment. Policymakers now perceive the anterior model of trade governance—the government-to-government rulebook and its dispute settlement system—to be less suitable for addressing sustainability and security rules, prompting more creative thought and efforts to break prior molds.²⁰ This Part traces how the rise of the new trade policing is explained in part by struggles to solve a mismatch between existing tools and new policy aims.

A. *The Old Way*

Understanding how this rebalancing of the relationship between governments and firms occurred requires some familiarity with the workings of twentieth century trade law. The central enforcement paradigm in trade law for the last 70 years has been one through which governments police other governments' legislative and regulatory authority to hold them accountable when they breach the rules of the road.²¹ The premise of this system is that countries, which hereafter I will refer to as "states" as is customary in international law, commit to shared rules in which they promise to reduce barriers to trade, to carry out certain domestic checks and balances, and to engage in collective action. Where they differ about the legality of each other's policies, they agree to settle disputes through international arbitration.²² All states enjoy the same

19. See, e.g., Simon Lester, *The Role of the International Trade Regime in Global Governance*, 16 UCLA J. INT'L L. & FOREIGN AFF. 209, 211, 221–38 (2011) (providing an overview of the expansion of trade agreements).

20. See, e.g., *Hearing on the President's 2022 Trade Policy Agenda Before the S. Comm. on Fin.*, 117th Cong. (2022) (testimony of Katherine Tai, U.S. Trade Rep.) (“[D]espite our enforcement efforts, many of our existing trade tools were crafted decades ago. In some cases, they do not adequately address the challenges posed by today’s economy. We are reviewing our existing trade tools and will work with Congress to develop new tools as needed.”); *Tai Calls for New Tools, Joint Action in Tackling Overcapacity*, INSIDE TRADE (Nov. 2, 2021), <https://insidetrade.com/daily-news/tai-calls-new-tools-joint-action-tackling-overcapacity> [https://perma.cc/MTS5-X45K]; David Lawder, *U.S. Trade Chief: New Legal Tools Needed to Combat Future China Threats*, REUTERS (May 13, 2021), <https://www.reuters.com/world/us/us-trade-chief-tai-says-time-is-essence-china-trade-review-2021-05-13> [https://perma.cc/JT7T-7NWQ].

21. See Robert Howse & Joanna Langille, *Continuity and Change in the World Trade Organization: Pluralism Past, Present, and Future*, 117 AM. J. INT'L L. 1, 3 (2023) (commenting that the WTO is often viewed as having taken a position on the proper normative relationship between private rights and public law and thus pushed for a particular comprehensive doctrine to be imposed on its member states).

22. See Steve Charnovitz, *What Is International Economic Law?*, 14 J. INT'L ECON. L. 3, 3–7 (2011).

legal rights: the ability to negotiate with, monitor, and enforce the rules against other trading partners. Governments are the interlocutors.

The drafters of the U.S. Constitution relied upon similar framing. The Constitution empowers Congress “to regulate Commerce with foreign Nations.”²³ Commentators tend to abbreviate this phrase as “regulation of foreign commerce.”²⁴ But referring to just “regulation of foreign commerce” elides the cross-border interaction the drafters intended, and, more important for this study, it glosses over the fact that the text refers to commerce with other “nations.”²⁵

The role of firms in this legal structure has been to provide input within domestic systems. Companies operate in the spaces created for them by states. Those spaces are informed by corporate lobbying.²⁶ While companies have been heavily present in state-to-state litigation through their behind-the-scenes involvement with their governments, states retain control of the rules at both the international level and the local level.

Taken together, the relationship between the firm and the state in conventional trade law has two steps. First, the United States and its trading partners conclude a system that commits governments to particular liberalizing mandates.²⁷ Second, the system relies on those governments to impose regulatory changes on their companies. Step one is that states agree to rules. Step two is that states then ensure that their domestic law is consistent with those rules.

Trade policing’s two-step system in the twentieth-century is relatively straightforward. There are no patrol persons on the streets of foreign states, but rather most governments have a trade bureaucracy, however large or small, to keep abreast of what other governments are doing. Bureaucrats monitor and confront trading partners. For the United States, that has meant that the State Department and, more recently, the Office of the U.S. Trade Representative (“USTR”) monitor and review the legislative and regulatory actions of U.S.

23. U.S. CONST. art. I, § 8, cl. 3.

24. See, e.g., Cameron Silverberg, *Trading Power: Tariffs and the Nondelegation Doctrine*, 73 STAN. L. REV. 1289, 1289 (2021); Michael A. Zuckerman, *The Offshoring of American Government*, 94 CORNELL L. REV. 165, 167 (2008); Lawrence M. Reich, *Foreign Policy or Foreign Commerce?: WTO Accessions and the U.S. Separation of Powers*, 86 GEO. L.J. 751, 751 (1998).

25. Colangelo has carried out some research on the founders’ intended meanings. See Colangelo, *supra* note 7, at 1304.

26. This advocacy occurs through formal and informal channels. See, e.g., *Enforcement*, OFFICE OF THE U.S. TRADE REP., <https://ustr.gov/issue-areas/enforcement> [<https://perma.cc/Y2BE-TG7W>] (last visited Nov. 11, 2023) (explaining the process through which firms may apply for relief through Commerce Department enforcement); Jeheung Ryu & Randall W. Stone, *Plaintiffs by Proxy: A Firm-Level Approach to WTO Dispute Resolution*, 13 REV. INT’L ORG. 273, 275 (2018) (describing firm lobbying of USTR, among many other articles doing the same). Howse and Langille argue that multinational corporations have asserted themselves as stakeholders in international trade negotiations by lobbying their own governments and others. Howse & Langille, *supra* note 21, at 24. Jagdish Bhagwati argued in 2007 that “corporate lobbies . . . ha[ve] distorted and deformed” the WTO. JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION 183 (2007).

27. See Harlan Grant Cohen, *What Is International Trade Law For?*, 113 AM. J. INT’L L. 326, 326–28 (2019).

trading partners.²⁸ If the USTR staff identify a policy that is harmful to U.S. interests and that appears to violate a U.S. trade agreement, they will confront the trading partner and possibly seek adjudication.²⁹

Thus, the U.S. government has, since this system's creation, actively monitored foreign state actions in the public interest. Although formally the government raises a breach of the agreement, it is acting, like law enforcement, on behalf of its constituents against the injuring party. These bureaucrats are both enforcers and prosecutors at once.³⁰ Equally, other governments bring cases against the United States when the federal government or a U.S. state takes action that others believe breaches a trade treaty.³¹ They have their own qualified trade police trained to do the same.

As this overview demonstrates, for many decades, trade policing has involved government tracking of measures by other states to ensure their compliance with treaties. The goal of this form of trade policing is consistent with the overall structure and composition of trade law. By policing and prosecuting breaches, states endeavor to shape the behavior of their trading partners. The intended result of a finding of breach is for the errant state to remove or change the violative law or regulation, bringing it into conformity with internationally agreed-upon rules.³² But the shine of this heralded structure has faded, paving the way for the emergence of a new form of trade policing.

B. *The Path to the Corporation*

The move away from full reliance on state-to-state trade policing is, in some respects, a manifestation of larger debates on globalization, and is attributable, therefore, to a wide range of interconnected factors.³³ Constructing a positive

28. See STEPHEN COHEN, *THE MAKING OF UNITED STATES INTERNATIONAL ECONOMIC POLICY: PRINCIPLES, PROBLEMS, AND PROPOSALS FOR REFORM* 46 (1988); Kathleen Claussen, *Trade Administration*, 107 VA. L. REV. 845, 876–77 (2021) (describing the shift in this role from State to USTR).

29. *Enforcement*, OFFICE OF THE U.S. TRADE REP., *supra* note 26. The website speaks in these very terms: “USTR leads the U.S. Government monitoring of foreign government compliance with trade agreements to which the United States is a party and pursues enforcement using bilateral engagement, dispute settlement procedures, and the full range of U.S. trade laws when appropriate.” *Id.*

30. Lawmakers in the United States increasingly call for more trade “enforcement,” though enforcement occurs by peer states commencing dispute settlement for breach of an international agreement since there is no international trade prosecutor. For more on how enforcement is central to lawmakers’ demands, see Kathleen Claussen, *Arguing About Trade Law Beyond the Courtroom*, in *TALKING INTERNATIONAL LAW* 298, 298–315 (Ian Johnstone & Steven Ratner eds., 2021).

31. See *Dispute Settlement*, WORLD TRADE ORG., *supra* note 4.

32. For a detailed description of state-to-state dispute settlement practices, remedies, and compliance, see, for example, Rachel Brewster & Adam Chilton, *Supplying Compliance: Why and When the US Complies with WTO Rulings*, 39 YALE J. INT’L L. 201 (2014); William J. Davey, *Compliance Problems in WTO Dispute Settlement*, 42 CORNELL INT’L L.J. 119, 119–28 (2009); Bruce Wilson, *Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date*, 10 J. INT’L ECON. L. 397 (2007).

33. Nicolas Lamp and Anthea Roberts survey these debates in a comprehensive way, and so I will not rehearse them here. See generally NICOLAS LAMP & ANTHEA ROBERTS, *SIX FACES OF GLOBALIZATION: WHO WINS, WHO LOSES, AND WHY IT MATTERS* (2021).

theory for the new trade policing requires a degree of fastidiousness and a close examination of critical junctures in economic governance. This Article narrows down the path to corporate targeting to three key principles: expansive political compromise between U.S. political actors, institutional experimentation, and a corporate power narrative among the public.

The prior Part provided a high-level summary of how state rules govern cross-border commerce, but a closer look yields more complexity. First, trade law and policy have grown beyond the entrenchment and dominance of major trade liberalizing principles related to tariffs and economic policies. Political compromises made by conservative and liberal lawmakers, particularly in the United States, resulted in the expansion of trade law to cover a wide range of subjects not previously considered to be part of its corps.³⁴ This expansion is the result of reform demands of the multilateral trading system as the scope and reach of globalization came under political fire beginning in the early 1990s.³⁵ Responding to demands from civil society, trade negotiators drafted rules intended to avoid a “race to the bottom” by requiring states to maintain laws that would regulate additional fields of public law, such as environmental protection, labor rights, and intellectual property, among others.³⁶ Thus, by the early 2000s, it was relatively common to include requirements in trade agreements that each party would adopt and maintain standards in these areas.³⁷ Harmonization was part of the goal, though not entirely for freedom of movement of goods, but rather in the interest of raising standards to include threshold protections in the interest of human and environmental rights, good governance, and diplomacy. One can see this change in U.S. legislation where the U.S. Congress lays out the subject areas of importance for free trade agreements. The 2015 Trade Promotion Authority legislation, for example, covers twenty-one issue areas in the negotiating objectives ranging from “trade in goods” to “anti-corruption.”³⁸

34. Jeffrey Dunoff identified some of the same trends as they began. See Jeffrey L. Dunoff, “Trade and”: *Recent Developments in Trade Policy and Scholarship—And Their Surprising Political Implications*, 17 *Nw. J. INT’L L. & BUS.* 759, 762 (1997).

35. For a helpful overview of these criticisms, see DOUGLAS A. IRWIN, *FREE TRADE UNDER FIRE: FIFTH EDITION* (2020).

36. See, e.g., Lester, *supra* note 19, at 211, 221–38.

37. In those agreements, states committed not just to write domestic law in the requisite way but also to ensure that private actors operating on their territories complied with those laws. For example, in U.S. free trade agreements, both the United States and its trading partners agree not only to adopting and maintaining intellectual property protections in their domestic law but also to ensuring their full application and effective enforcement. See, e.g., United States-Mexico-Canada Agreement ch. 20, Nov. 30, 2018, 107 Stat. 2116 [hereinafter USMCA]. Free trade agreements moved the needle from constraining protectionist commercial legislation and regulation to also promising that the law on the books would be properly applied, including in these additional areas. See, e.g., *id.* art. 20.5.

38. Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pub. L. No. 114–26, § 102, 129 Stat. 320 (codified at 19 U.S.C. §§ 4021–4210). USTR likewise indicates that it is monitoring agreements for compliance on topics as diverse as financial services to tomatoes. See, e.g., OFFICE OF THE U.S. TRADE REP., 2022 TRADE AGENDA AND 2021 ANNUAL REPORT 31–109 (2022).

With the rules' expanded trans-substantivity, trade policing became increasingly fraught. The same state-to-state enforcement principles still applied. Just as in the commercial space, to the extent a trading partner was dissatisfied with the other's implementation of environmental rules or labor protections, it could commence arbitration against that state.³⁹ But tests of this regime to hold governments accountable for their governance failures revealed cracks in the system that precipitated its steep decline.⁴⁰ Most commentators attribute this degeneration to populist leadership that was bent on emphasizing the weaknesses in prior applications of the new rules.⁴¹ International negotiations to advance trade integration have likewise struggled to maintain popular support for increased liberalization, even in service of social, environmental, and security aims.⁴² Thus, many policymakers reached the conclusion that the political compromises that led to substantive broadening of trade law ought not stop there. Trade-plus areas required new tools to address the problems that those areas presented—and in these spaces, firms became easy targets.

Unsurprisingly, institutional broadening followed the substantive stretch. The codification of these so-called trade-plus areas demanded engagement across the administrative state.⁴³ The gradual growth in coverage across fields led to institutional experimentation among trade agencies in the United States

39. This is true in the WTO but even more so in free trade agreements where these commitments dominate. See Geraldo Vidigal, *Regional Trade Adjudication and the Rise of Sustainability Disputes: Korea–Labor Commitments and Ukraine–Wood Export Bans*, 116 AM. J. INT'L L. 567, 567–68 (2022).

40. See, e.g., Patrick Low, *The WTO in Crisis: Closing the Gap Between Conversation and Action or Shutting Down the Conversation?*, 21 WORLD TRADE REV. 274, 289 (2022) (arguing that the WTO is experiencing a crisis of irrelevance); Thomas J. Schoenbaum & Daniel C.K. Chow, *The Perils of Economic Nationalism and a Proposed Path to Trade Harmony*, 30 STAN. L. & POL'Y REV. 115, 117 n.8 (2019) (noting that industry members also share this view by quoting Ambassador Rufus Yerxa, former Deputy U.S. Trade Representative and Deputy Director General of the WTO, as saying, "The Trump administration pretty much signaled it is throwing out the rule book on trade"); Manfred Elsig et al., *Trump Is Fighting an Open War on Trade. His Stealth War on Trade May Be Even More Important*, WASH. POST (Sept. 27, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/09/27/trump-is-fighting-an-open-war-on-trade-his-stealth-war-on-trade-may-be-even-more-important> [<https://perma.cc/FP4J-W7PK>] (claiming that U.S. trade policies are harming the WTO).

41. See, e.g., Zachary Karabell, *Trump's Creative Destruction of the International Order*, FOREIGN POL'Y (June 11, 2018), <https://foreignpolicy.com/2018/06/11/trumps-creative-destruction-of-the-international-order> [<https://perma.cc/KT8H-GWUW>] (arguing that populist policies were destroying the international trade system); Nicolas Lamp, *How Should We Think About the Winners and Losers from Globalization? Three Narratives and Their Implications for the Redesign of International Economic Agreements*, 30 EUR. J. INT'L L. 1259, 1260–61 (2019) (describing trends in attribution).

42. See, e.g., The New York Times Editorial Board, *Global Trade After the Failure of the Doha Round*, N.Y. TIMES (Jan. 1, 2016), <https://www.nytimes.com/2016/01/01/opinion/global-trade-after-the-failure-of-the-doha-round.html> [<https://perma.cc/46ZD-KDYV>] (describing the failed multilateral negotiations at the Doha Round negotiations of the WTO). Ultimately, these factors would contribute to the teetering status of the international trade adjudication system. See Simon Lester, *Ending the WTO Dispute Settlement Crisis: Where to from Here?*, INT'L INST. FOR SUSTAINABLE DEV. (Mar. 2, 2022), <https://www.iisd.org/articles/united-states-must-propose-solutions-end-wto-dispute-settlement-crisis> [<https://perma.cc/M79M-WDR4>]; Terrence P. Stewart, *Dispute Settlement Reform at the WTO — What Needs to Precede Negotiations?*, WASH. INT'L TRADE ASS'N BLOG (Feb. 14, 2022), <https://www.wita.org/blogs/dispute-settlement-reform-wto> [<https://perma.cc/5RHL-YL4D>].

43. See Claussen, *supra* note 28, at 881–88.

and abroad.⁴⁴ At first, governments sought to develop tools that worked within the state-to-state paradigm, putting pressure on states to improve their work.⁴⁵ But those attempts failed, especially in the shadow of increased public demand.

Trade policing's corporate turn has been further enabled by calls from civil society and signals from voters seeking better outcomes from trade law. These appeals sought a more active response to the growth in corporate power and an insistence to correct historical legacies that made the rich richer.⁴⁶ The old trade policing was insufficient to meet these demands. Instead, the trade law system would have to reinvent itself as a "force for good."⁴⁷ It became even clearer, in light of these pressures, that managing global economic governance could not be done through states pressuring other states alone.

U.S. lawmakers have maintained that firms are the real actors of concern, not states.⁴⁸ Nicolas Lamp and Anthea Roberts describe this line of thinking as a "corporate power narrative."⁴⁹ The corporate power narrative sees corporations as the main beneficiaries from globalization.⁵⁰ It comes as no surprise that in many instances firms are indeed more impactful than states, and therefore may be more apposite targets for foreign state action.⁵¹

Finally, a growing distrust of other states among policymakers facilitated a new approach.⁵² These policymakers believe other governments are not best positioned to solve twenty-first century problems, either because the governments lack the capacity or they lack the willingness to enforce domestic law against multinational firms operating in their territory. These are local

44. See Dunoff, *supra* note 34, at 760.

45. See, e.g., Report of the Panel of Experts, *Panel of Experts Proceeding Constituted Under Article 13.15 of the EU-Korea Free Trade Agreement* (Jan. 20, 2021); Panel Report, *In the Matter of Guatemala—Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR* (June 14, 2017) [hereinafter *In the Matter of Guatemala*].

46. See generally Timothy Meyer, *Free Trade, Fair Trade, and Selective Enforcement*, 118 COLUM. L. REV. 491 (2018) (collecting views); Richard H. Steinberg, *The Rise and Decline of a Liberal International Order, in IS THE INTERNATIONAL LEGAL ORDER UNRAVELING?* 37 (David Sloss ed., 2022).

47. See, e.g., *Hearing on the President's 2022 Trade Policy Agenda Before the H. Ways & Means Comm.*, 117th Cong. (2022) (testimony of Katherine Tai, U.S. Trade Rep.).

48. *Tai: IPEF Dispute Settlement Part of Ongoing Revolution, Likely to Include Penalties*, INSIDE TRADE (June 10, 2022), <https://insidetrade.com/daily-news/tai-ipef-dispute-settlement-part-ongoing-evolution-likely-include-penalties> [<https://perma.cc/75J6-23DW>].

49. See LAMP & ROBERTS, *supra* note 33, at 98.

50. *Id.*

51. A rich literature addresses corporate power (pun intended, though the subject is not to be taken lightly). For recent popular and scholarly highlights, see Trade Talks, *Why a Notorious Banana Company Spared Workers in Costa Rica* (July 26, 2022), <https://tradetalkspodcast.com/podcast/164-why-a-notorious-banana-company-spared-workers-in-costa-rica> [<https://perma.cc/TVJ3-C777>] (giving some indication of how corporations fill the void left by states and are more powerful engines of governance); Jay Butler, *Corporations as Semi-States*, 57 COLUM. J. TRANSNAT'L L. 221, 229 (2019) (giving same indication).

52. See, e.g., *US-China Trade War*, PETERSON INST. FOR INT'L ECON., <https://www.piie.com/research/trade-investment/us-china-trade-war> [<https://perma.cc/6RTW-VRXC>] (last visited Nov. 11, 2023) (referring to "mutual distrust" between the United States and China); Yukon Huang, *The U.S.-China Trade War Has Become a Cold War*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Sept. 16, 2021), <https://carnegieendowment.org/2021/09/16/u.s.-china-trade-war-has-become-cold-war-pub-85352> [<https://perma.cc/GWC9-ZTQ5>] (describing the same).

enforcement failures in some instances and informational asymmetries in others.⁵³ With a shift to corporate trade policing, lawmakers waste no time trying to cajole states to try to police multinational companies. No longer are governments so fixated on policy change; now they go straight to the companies to force *them* to change their behavior. Trade policing shows that the Biden Administration's commitment to multilateralism must be qualified: Through this approach, the United States can support multilateralism by encouraging other states to join them in blaming firms, rather than governance failures in the states themselves.⁵⁴

As trade expanded to cover more subject areas, and demands for better enforcement of those commitments increased, a lively market for new approaches led to a rethinking of what trade tools might achieve.

C. *Multidimensional Pivoting*

The move toward the corporation came on subtly, but it was abrupt to observers who were concentrated on the absence of major trade programming.⁵⁵ The tools described in Part II first appeared as superficial blips on a hazy radar—innovations with uncertain lifespans but not game-changers. Yet, as more such tools appeared, the game changed somewhat unexpectedly. It was not until the summer of 2022 that the lead U.S. trade policymakers acknowledged the transformation they had quietly begun to put in place. Speaking to the Washington International Trade Association on June 6, 2022, U.S. Trade Representative Katherine Tai commented on her aims:

You see this evolution of our dispute settlement mechanism that . . . is looking at holding accountable not just the other country, but also what is happening within the economic ecosystem and whether or

53. Some of these issues arose in the case between the United States and Guatemala in which the United States accused Guatemala of failing to effectively enforce its labor laws. *In the Matter of Guatemala*, *supra* note 45.

54. USTR Ambassador Katherine Tai has made this remark repeatedly. *See, e.g.*, Remarks by Ambassador Katherine Tai at the Roosevelt Institute's Progressive Industrial Policy Conference, OFFICE OF THE U.S. TRADE REP. (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/FA4W-K7R7>]. There is a concerted effort by U.S. trade police to work together with willing partners toward these goals. *See, e.g.*, Press Release, Office of the U.S. Trade Rep., United States and Japan Launch Task Force to Promote Human Rights and International Labor Standards in Supply Chains (Jan. 6, 2023), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/january/united-states-and-japan-launch-task-force-promote-human-rights-and-international-labor-standards> [<https://perma.cc/BV2N-LBTC>].

55. *See, e.g.*, William Alan Reinsch, *The End of Neoliberalism?*, CTR. FOR STRATEGIC & INT'L STUD. (Jan. 3, 2023), <https://www.csis.org/analysis/end-neoliberalism> [<https://perma.cc/MJN7-XMGA>]; Clark Packard, *U.S. Can't Afford Another Decade Without New Free Trade Agreements*, CATO INST. (Dec. 20, 2022), <https://www.cato.org/blog/us-cant-afford-another-decade-without-new-free-trade-agreements> [<https://perma.cc/DF5M-R8V7>]; Anshu Siripurapu & Noah Berman, *Is Industrial Policy Making a Comeback?*, COUNCIL ON FOREIGN RELS. (Nov. 18, 2022), <https://www.cfr.org/backgrounder/industrial-policy-making-comeback> [<https://perma.cc/QH86-2T3A>].

not the participants, [companies or facilities operating in Mexico] . . . are abiding by the requirements and expectations of the agreement itself

We have started to evolve away from a traditional settlement mechanism to thinking about new ways of holding the different participants in the trade agreement accountable for creating integrity in the promises that are made and in the vision that's incorporated into the agreement.⁵⁶

Ambassador Tai and other U.S. policymakers have embraced trade policing with a corporate accountability frame as the future direction for trade law. On January 24, 2023, Under Secretary of State for Economic Growth, Energy, and the Environment Jose Fernandez made a similar statement: "Our [new trade] agreements, I would argue, try to establish a new global code of conduct. A corporate code of conduct where states work together on supply chains, where they work to deter corruption."⁵⁷ In an interview procured for this Article, another U.S. government official put it this way: "[W]e used to divide the world into private space and government space. Now, we have new targets because the objectives have shifted. You can see these changes in the regulatory system. We used to say that [certain efforts] fell to the private sector, now they are fully integrated in the public sector."⁵⁸

To achieve this, U.S. policymakers have had to manipulate notions of trade law along two theoretical dimensions, both of which flip the traditional state-to-state trade law paradigm on its head. Within trade disciplines, these conceptual moves are major cartographic shifts. Although the map of global governance has not changed, its features have begun to reconfigure themselves.

First, to make this pivot, the trade law topography had to be rearranged. States were once at the center, and other actors, such as corporations and civil society, operated at the periphery of the U.S. trade law system. The centrality of states has been dwarfed by the growing impact and significance of the firm in the global economy. Today, the altered compass points to firms at the center, rather than as mere bystanders—or lobbyists—in trade agreements and domestic trade law. Previously, pressure for corporate accountability was applied by NGOs, where it was applied at all. The new trade police are in-sourcing this work.

56. U.S. Trade Representative Tai on Indo-Pacific Economic Framework, C-SPAN (June 6, 2022) (video at 16:18), <https://www.c-span.org/video/?520750-1/us-trade-representative-tai-indo-pacific-economic-framework> [<https://perma.cc/J6R8-TT4M>].

57. Hannah Monicken, *Fernandez: Administration Looking to Complete IPEF, APEP This Year*, INSIDE TRADE (Jan. 24, 2023), <https://insidetrade.com/daily-news/fernandez-administration-looking-complete-ipef-apep-year> [<https://perma.cc/LU4Y-UBGM>].

58. Zoom Interview with Government Official, U.S. Dep't of Just. (Feb. 8, 2022) (on file with author).

The second mapping move rearranges borders. The new trade policing is strangely cosmopolitan. It seeks out corporate bad actors wherever they may be. Whereas one of the fundamental premises of trade law is the avoidance of divergence in treatment between foreign and domestic actors, this shift eliminates the distinction between “inside” and “outside.”⁵⁹ The traditional approach articulated in trade treaties is for parties to agree to norms at the international level that they would then enforce on companies domestically. A lack of partner willingness served as a constraint on what states could achieve away from home. Their borders limited states’ reach: What was abroad was the jurisdiction of other governments, and what occurred in the homeland was policed by the local government. But now, states, led by the United States, are beginning to act directly on companies at home *and* abroad. Borders are, to some degree, erased by the indiscriminate application of such tools. In a categorical rejection of trade’s foundational discrimination principles, territoriality and likewise nationality, matter less.

Each of these changes are alterations to (1) the forms, (2) the fora, and (3) the forces of conventional trade law. The form has shifted from institutions created by trade treaties to domestic agencies. The forum has moved from the United States to abroad. The remedial measures are no longer a random collection of suspended tariff concessions imposed by one government on another but rather sanctions on companies or even individual factories, as the next Part explains.

To be sure, some longstanding parts of trade law have been firm-centric for some time. Companies pay tariffs, and they can be the subject of administrative proceedings for their violations of domestic trade law. But those actions against individual companies reflect the transnational two-step: States have agreed to certain parameters in which to develop and enforce their domestic law. Customs rules, tariffs, trade remedies, such as antidumping and countervailing duties, and regulatory barriers to entry are all policed by states according to international agreements. These are firm-centric tools at the domestic level; these bodies of law target specific firms both at the identification-of-misconduct stage and in the remedy stage.

The transformation that this Article captures, however, is that of eliminating step one of trade’s traditional two-step. The new trade policing does not rely on reciprocal agreements among states to maintain standards, or on state-to-state dispute settlement. Firm-centrism is the only step. Moreover, it does so without any of the administrative or domestic law protections that accompany the application of the two-step tools like in the repertoire of customs authorities and trade remedies administrators.

59. See, e.g., JOOST PAUWELYN ET AL., *INTERNATIONAL TRADE LAW* ch. 1 (3d ed. 2016); RAJ BHALA, *INTERNATIONAL TRADE LAW: AN INTERDISCIPLINARY, NON-WESTERN TEXTBOOK* xxxvi (4th ed. 2015).

The other important distinction between the longstanding domestic firm-centric tools and the under-noticed trend this Article unpacks is the concentration on non-economic wrongs. As previewed above, the new trade policing is not about pursuing companies that are not paying their tariffs. Rather, trade police monitor companies that are acting inconsistently with trade's recently embraced social, environmental, and security aims. Examples of these tools, laid out in the following Part, cover collective bargaining rights, deforestation, protection of natural resources, forced labor, national security, animal welfare, and supply chain resilience.

II. ENFORCEMENT DESIGNS

Thus far, this Article has shown that changes in perceptions of trade over the past decade and the limited success of longstanding tools have laid the groundwork for the ascendance of the new corporate trade policing as an approach to solving recently discovered "trade law problems." This Part provides a first look, through a set of case studies and interviews, at the role that trade police now play in cross-border commerce. I review their critical design choices, the penalties they impose, and their yields. The United States is no doubt the leader in this pivotal project, so I focus on U.S. examples.

The evidence indicates that these tools come in different legal packages. Some are the product of statutes, others find their legal foundations in regulations, and remarkably still others are rooted in treaties. Regardless of vehicle, through these provisions, trade police exercise their powers when they identify violations of either (1) another state's domestic law, or (2) violations of U.S. law. Some of these efforts appear to try to replicate domestic enforcement instruments.⁶⁰ Once a violation is identified, the trade police typically subject companies to one of two primary sanctions: detainment or tax.

Trade policing has a colorful kaleidoscope of manifestations. I categorize them according to the goals that policymakers have set for them. I study tools designed to meet environmental and social sustainability goals, to address human rights and corporate governance failures, and to protect national security prerogatives. Finally, I turn to new blueprints in trade policing that are designed to collect corporate intelligence. As seen in the use of these tools, trade law is sweeping in other areas of law, including contract law, labor law, environmental law, investment law, private international law, corporate law, procurement law, property law, and antitrust law. Given this broad reach,

60. Oona Hathaway & Scott Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 *YALE L.J.* 252 (2011) (discussing similar trends).

commentators have questioned whether this system of trade law enforcement can be properly considered trade law at all.⁶¹

A. Sustainability

The types of new tools in trade policing that most exemplify trade policing's corporate turn are those related to sustainability, both environmental and social.⁶² These are tools that U.S. negotiators first developed—and have recently implemented and deployed—to ensure that companies are abiding by environmental and labor laws where they operate. Such instruments enable U.S. bureaucrats to stop goods at the border that fail to meet these requirements. A good starting point for this analysis is the United States-Mexico-Canada Agreement (“USMCA”).⁶³

In many respects, the USMCA is a typical trade agreement. It primarily governs the liberalization of tariffs on goods and regulatory measures on services within North America. But in its 2019 revision, the United States added a mechanism that has nothing to do with traditional trade topics like tariffs on cars or harmonized regulation of intellectual property. Rather, it concerns collective bargaining rights. It is called the Facility-Specific Rapid-Response Labor Mechanism (“RRM”).⁶⁴

Now part of U.S. law, the RRM permits U.S. trade agencies to detain goods at the border if those goods come from a factory that is denying workers their collective bargaining rights.⁶⁵ For example, U.S. Customs can stop cars manufactured in Mexico at the Texas border and hold them there until the problematic labor issue at the General Motors factory from which they came is resolved to U.S. trade officials' satisfaction;⁶⁶ and Customs has done just that. General Motors was the first company targeted by this tool.⁶⁷

Consider another scenario: Workers at a French glass manufacturer's facility in northern Mexico organize a collective bargaining vote, but someone tampers

61. Ricardo Ramírez Hernández, *T-MEC: “Me Acabo de Enterar” [USMCA: “I Just Found Out”]*, EL UNIVERSAL (Dec. 16, 2019), <https://www.eluniversal.com.mx/opinion/ricardo-ramirez-hernandez/t-mec-me-acabo-de-enterar> [<https://perma.cc/5PFX-XMTV>] (arguing that the USMCA is a labor agreement rather than a trade agreement).

62. For a useful overview of the sustainability imperative now considered a trade value, see David A. Lubin & Daniel C. Esty, *The Sustainability Imperative*, 88 HARV. BUS. REV. 2 (May 2010). As applied in trade agreements, see GERALDO VIDIGAL & KATHLEEN CLAUSSEN, *THE SUSTAINABILITY REVOLUTION IN TRADE AGREEMENTS* (2024).

63. USMCA, *supra* note 37.

64. *Id.* at annex 31-A.

65. The tool works in both directions: Mexico could bring the same action against companies in the United States. *See id.*

66. *Id.* at art. 31-A.4(3).

67. David Lawder, Daina Beth Solomon & David Shepardson, *U.S. and Mexico Target GM Labor ‘Violations,’ Testing New Trade Deal*, REUTERS (May 12, 2021), <https://www.reuters.com/business/autos-transportation/us-asks-mexico-review-gm-plant-labor-allegations-test-new-trade-deal-2021-05-12> [<https://perma.cc/C9LC-7FXN>].

with the ballots and interferes with the outcome. Under ordinary circumstances, the aggrieved workers could file a complaint with the Mexican Ministry of Labor or pursue a remedy in the Mexican courts for this violation of Mexican labor law.⁶⁸ If this were to happen repeatedly, international labor organizations might highlight the problem, urging action by local or national government officials. But through the new trade policing tools, in the days following the disorderly vote, staff from USTR can issue an order that could effectively halt work at the factory until the union voting exercise is redone.⁶⁹ By intervening and detaining the glass at the U.S. border, the U.S. trade officials enforce Mexican labor law at the French factory. Even where the company does not export to the United States, the U.S. trade police may intervene.⁷⁰

The RRM creates a diagonal exercise: U.S. officials act as monitors, judge, and jury over the Mexican worksite's violations of the workers' collective bargaining rights. Interfering with collective bargaining rights is a violation of Mexican labor law. In effect, the United States is enforcing Mexican labor law through its intervention. Mexico has little role to play in this exercise. USTR notifies Mexico of its planned actions but, upon delivering such notice, U.S. officials may immediately detain goods made at that facility, putting pressure on the company to make amends. This tool also empowers U.S. trade police to suspend indefinitely preferential tariff treatment for the goods made at that worksite if the matter is not swiftly resolved.⁷¹

The point of the RRM is clear: It puts compliance responsibility not on the government but on companies. In this respect, the RRM alters the premise of its predecessor agreement, the North American Free Trade Agreement ("NAFTA"), which permitted one country to commence arbitration against another for the latter's failure to enforce certain labor laws. Under the USMCA,

68. Ley Federal del Trabajo [LFT] art. 48, Diario Oficial de la Federación [DOF], últimas reformas DOF 12-06-2015 (Mex.).

69. This example is based on an October 2022 action. See *U.S. Declines Labor Probe at Saint-Gobain in Mexico, Applauds New Union Win*, REUTERS (Oct. 27, 2022), <https://www.reuters.com/markets/us/us-declines-labor-probe-saint-gobain-mexico-applauds-new-union-win-2022-10-27> [https://perma.cc/5LGZ-Z73Y]. In that instance, the issue was resolved without work stoppage. In other instances, work may continue but sales may be halted or compromised. See, e.g., Press Release, Office of the U.S. Trade Rep., United States Announces Successful Resolution of Rapid Response Labor Mechanism Matter at Manufacturas VU Automotive Components Facility in Mexico (Sept. 14, 2022), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/september/united-states-announces-successful-resolution-rapid-response-labor-mechanism-matter-manufacturas-vu> [https://perma.cc/C8Q2-WMSW].

70. In the situation involving the Grupo México mining company, the minerals extracted at the relevant mine were not exported to the United States, but the USTR pursued action nonetheless. *México Anuncia Que el Conflicto en la Mina San Martín en Sombrerete, Zacatecas, Está Fuera del Ámbito de Aplicación del Mecanismo Laboral de Respuesta Rápida del T-MEC y Se Resolvió en Instancias Judiciales Mexicanas* [Mexico Announces That the Conflict at the San Martín Mine in Sombrerete, Zacatecas, Is Beyond the Scope of Application of the Rapid Response Labor Mechanism in the USMCA and Will Be Resolved in the Mexican Judiciary] GOBIERNO DE MÉXICO (Aug. 1, 2023), <https://www.gob.mx/se/prensa/mexico-anuncia-que-el-conflicto-en-la-mina-san-martin-en-sombrerete-zacatecas-esta-fuera-del-ambito-de-aplicacion-del-mecanismo-laboral> [https://perma.cc/4JUG-RKZN] (commenting that the mine does not export to the United States).

71. See USMCA, *supra* note 37, art. 31-A.10(2).

a country can skip extended diplomacy or international dispute and go straight to corporate compliance and accountability, bringing action against a company rather than against the Mexican government, as would have been the case under the NAFTA.⁷²

Trade police also cut deals. USTR has entered into remediation agreements with individual companies according to which the company will take steps outlined in the plan under government supervision. In the summer of 2021, USTR entered into such an agreement with a Mexican factory and its U.S. parent company regarding the workers' rights situation at the factory.⁷³ The agreement obligated the company to meet certain benchmarks for it to be able to export to the United States again.

The Forestry Annex of the United States-Peru Trade Promotion Agreement ("PTPA") is a similar tool. The PTPA Implementation Act empowers U.S. trade police to take action against timber producers and exporters operating in Peru that fail to comply with Peruvian environmental laws surrounding logging.⁷⁴ U.S. officials may detain shipments, and even deny entry to the shipment or enterprise that is the subject of the verification, and related products, for up to three years, or until the United States-Peru Timber Committee determines that the company in question has complied with all applicable laws, regulations, and other measures of Peru governing the harvest of and trade in timber products, whichever is shorter.⁷⁵ The statute also creates an Interagency Committee on Trade in Timber Products from Peru to monitor Peru and its companies' actions in this respect.⁷⁶ Although operational as of 2009, the United States did

72. State-to-state dispute settlement is preserved under the USMCA but has not been activated formally as of the time of writing for any disputes under the labor chapter. A 1999 agreement with Cambodia also included targeted factory-level monitoring for labor abuses. Participating factories were inspected six times per year for their compliance with international law standards. Agreement Relating to Trade in Cotton, Wool, Man-Made Fiber, Non-Cotton Vegetable Fiber and Silk Blend Textiles and Textile Products, Cambodia-U.S., Dec. 10, 1999, 64 Fed. Reg. 70217, <https://www.govinfo.gov/content/pkg/FR-1999-12-16/html/99-32626.htm> [<https://perma.cc/JL4N-XMDS>]. But the Cambodia agreement was sectoral and incentive-based, much like trade preference programs. If the U.S. government determined that the Cambodian garment industry "substantially compl[ied]" with agreed labor laws, it could exceptionally increase Cambodia's textile quotas. The RRM's trade policing relies on sticks, not carrots, and targets individual worksites.

73. David Shepardson & David Lawder, *U.S. Reaches Deal with Mexican Auto Parts Factory in USMCA Labor Complaint*, REUTERS (Aug. 10, 2021), <https://www.reuters.com/business/us-reaches-deal-with-mexican-auto-parts-subsidiary-tridonex-2021-08-10> [<https://perma.cc/2U8H-5JVZ>] (describing deal between USTR and Cardone).

74. United States-Peru Trade Promotion Agreement Implementation Act, Pub. L. No. 110-138, 121 Stat. 1455 (2007).

75. *Id.*, § 501.

76. *Id.*

not invoke this tool until 2017.⁷⁷ It has activated the tool again against logging companies in 2019, 2020, and 2022.⁷⁸

Finally, a forthcoming tool, developed by the U.S. Department of Commerce, polices individual fisheries that export fish to the United States based on their protection of marine mammals.⁷⁹ Going beyond the Peru timber rule, the fish import rule covers all fish products destined for the United States—at least, those that arrive above the sea. This rule, expected to take effect on January 1, 2024, treats every fishery in the world individually, unlike other regulations regarding marine mammal protection.⁸⁰ Trade police evaluate the fishery's compliance with the foreign regulations set by the state in which it operates and compare that level of protection with what measures providing an equivalent or comparable level of protection would require in the United States.⁸¹ As this law reaches its next stage, it may upend the framework for natural resource protection and environmental issues in trade.

B. Rights

Trade police have also pursued companies through targeted bans on entry or exit. Some of these statutory and regulatory measures are premised on human rights concerns, and others on security concerns.

In contrast to the worksite-specific tools, these instruments have long pedigrees. One U.S. human rights tool dates back to the Tariff Act of 1930⁸²—whereupon the United States prohibits the import of any product that was mined, produced, or manufactured wholly or in part by forced labor.⁸³ The

77. Press Release, Office of the U.S. Trade Rep., USTR Announces Unprecedented Action to Block Illegal Timber Imports from Peru (Oct. 19, 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/october/ustr-announces-unprecedented-action> [<https://perma.cc/6W9H-A2M8>].

78. Press Release, Office of the U.S. Trade Rep., USTR Announces Enforcement Action to Block Illegal Timber Imports from Peru (Oct. 19, 2023), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/october/ustr-announces-enforcement-action-block-illegal-timber-imports-peru> [<https://perma.cc/AC2R-ML7G>]; U.S. Extends Import Ban on 'Illegally Harvested' Peruvian Timber, INSIDE TRADE (July 27, 2022), <https://insidetrade.com/trade/us-extends-import-ban-'illegally-harvested'-peruvian-timber> [<https://perma.cc/K4G2-3G4M>].

79. Fish and Fish Product Import Provisions of the Marine Mammal Protection Act, 81 Fed. Reg. 54389 (Aug. 15, 2016) (codified at 15 C.F.R. 902, 50 C.F.R. 216); Modification of Deadlines Under the Fish and Fish Product Import Provisions of the Marine Mammal Protection Act, 87 Fed. Reg. 63955 (Oct. 21, 2022) (codified at 50 C.F.R. 216).

80. *List of Foreign Fisheries*, NAT'L OCEANIC AND ATMOSPHERIC ADMIN., <https://www.fisheries.noaa.gov/foreign/international-affairs/list-foreign-fisheries> (last visited Nov. 11, 2023) ("Exempt fisheries are fisheries that have no known or a remote likelihood of marine mammal bycatch and are exempt from instituting a regulatory program.")

81. See Fish and Fish Product Import Provisions, *supra* note 79; Rob Williams et al., *U.S. Seafood Import Restriction Presents Opportunity and Risk*, 354 SCIENCE 1372, 1372 (2016).

82. Tariff Act of 1930, 19 U.S.C. ch. 4 (1930).

83. 19 U.S.C. § 1307. The central concern at the time of the law's passage was not humanitarianism but rather competition: Lawmakers did not want domestic producers to have to compete with foreign producers using unpaid labor. CHRISTOPHER A. CASEY, CONG. RSCH. SERV., IF11360, SECTION 307 AND IMPORTS PRODUCED BY FORCED LABOR 1 (2023). Although the prior Section discussed labor rights, and especially the right to unionize, as part of a turn toward social sustainability, this Section treats trade policing tools

forced labor ban works through an order issued by U.S. Customs called a withhold release order (“WRO”).⁸⁴ Those orders are specific to an individual company where forced labor is suspected.⁸⁵

From 1930 to 2016, Customs rarely issued WROs. On only about 10 occasions did Customs deny entry to merchandise.⁸⁶ Those tables turned when a legislative amendment eliminated a constraint on enforcement of the original law.⁸⁷ Since then, Customs has issued 37 WROs.⁸⁸ It has also sought more funding to reinforce its trade police for active international human rights law enforcement. But the more important development in trade’s forced labor policing occurred in 2021, when Congress passed the Uyghur Forced Labor Prevention Act (“UFLPA”).⁸⁹

The UFLPA is designed to address growing concerns about human rights abuses in the Xinjiang province of China, particularly connected to the textiles industry.⁹⁰ The UFLPA reflects a far more aggressive and company-demanding posture in the regulation of human rights abuses abroad than its predecessor law. Among other features, the UFLPA creates a rebuttable presumption that goods produced or manufactured in Xinjiang or by certain entities with ties to the region are made with forced labor unless Customs determines otherwise.⁹¹ Further, and as mandated by the Act, an interagency task force has specified a list of entities whose merchandise is subject to the rebuttable presumption.⁹²

These many restrictions have prompted extensive discussion within the bar about how to advise importers on compliance with the complicated law given the prevalence of long and winding supply chains across multiple sectors.⁹³ The

combatting forced labor apart just as several governments do. Forced labor or “modern slavery” as it is known in some jurisdictions is undoubtedly a major human rights concern distinct in multiple respects from labor-related provisions that have become a fixture in trade agreements.

84. *Forced Labor*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/trade/forced-labor> [https://perma.cc/J864-7AJL] (last visited Nov. 11, 2023).

85. Some are also sector-based. See, e.g., Geneva Sands, *US Suspends Tobacco Imports from Malawi over Forced Labor Allegations*, CNN (Nov. 1, 2019), <https://www.cnn.com/2019/11/01/politics/malawi-child-labor-allegations-tobacco/index.html> [https://perma.cc/K9FZ-4R54] (describing the CBP WRO concerning tobacco products from Malawi).

86. CASEY, *supra* note 83, at 1 (noting that between 1930 and the mid-1980s there were approximately 60 to 75 instances in which U.S. Customs considered the application of Section 307). Of those instances, merchandise was denied entry at least 10 times. Then again in the 1990s, Customs issued 27 WROs against manufacturers in China. *Id.*

87. Trade Facilitation and Trade Enforcement Act, Pub. L. No. 114-125, 130 Stat. 122 (2016).

88. CASEY, *supra* note 83, at 1.

89. Ana Swanson, Catie Edmondson & Edward Wong, *U.S. Effort to Combat Forced Labor Targets Corporate China Ties*, N.Y. TIMES (Dec. 23, 2021), <https://www.nytimes.com/2021/12/23/us/politics/china-uyghurs-forced-labor.html> [https://perma.cc/HCA8-RBUK].

90. Uyghur Forced Labor Prevention Act, Pub. L. No. 117-78, 135 Stat. 1525 (2021).

91. Kristen Eichensehr, *United States Pressures China over Human Rights Abuses*, 116 AM. J. INT’L L. 433, 435 (2022).

92. Notice on the Addition of Entities to the Uyghur Forced Labor Prevention Act Entity List, 87 Fed. Reg. 47777 (Aug. 4, 2022).

93. See John Foote, *The Abiding Strangeness of the UFLPA*, FORCED LABOR & TRADE (Nov. 11, 2022), <https://forcedlabortrade.substack.com/p/the-abiding-strangeness-of-the-uflpa> [https://perma.cc/

takeaway is that Congress and the Biden Administration have doubled down on company-specific enforcement of human rights abuses in a targeted and rigorous way through these recent legal changes. U.S. trade agencies are enforcing international human rights law—policing rights abuses abroad—using these instruments.

C. Security

Like forced labor bans, export controls have a long history in the trade toolkit.⁹⁴ Since the nation's earliest days, the U.S. Congress has maintained a program of export controls.⁹⁵ Congress sets out the general parameters and authority for the imposition of controls and defers to the executive on their specific application to individual companies in appropriate circumstances.

The exponential growth in the use of export controls into areas beyond those with clear military applications, however, is recent.⁹⁶ Beginning in 2018, Congress and the executive branch have substantially revamped the export control regime. Much U.S. legislative reform has focused on thinking more broadly about foundational and emerging technologies that merit protection. The newer controls take a much broader view of goods that ought to be controlled. For example, in October 2022, the U.S. Department of Commerce announced two rules intended to restrict China's ability to "obtain advanced computing chips, develop and maintain supercomputers, and manufacture advanced semiconductors."⁹⁷ These rules expand the reach of "dual-use" controls to include chips that are regularly used in military and non-military contexts. The rules also extend U.S. export control jurisdiction to foreign-produced items that are the "direct product" of certain controlled U.S. technology. Apart from

CJ87-89SP]; *Two Minutes in Trade – What is the Strategy to Ending Forced Labor?*, SANDLER, TRAVIS & ROSENBERG, P.A. (Sept. 26, 2022), <https://www.strtrade.com/trade-news-resources/str-trade-report/podcast/two-minutes-in-trade-what-is-the-strategy-to-ending-forced-labor> (last visited Nov. 11, 2023).

94. See, e.g., Homer E. Moyer, Jr. & Linda A. Mabry, *Export Controls as Instruments of Foreign Policy: The History, Legal Issues, and Policy Lessons of Three Recent Cases*, 15 LAW & POL'Y INT'L BUS. 1 (1983).

95. See Harold Hongju Koh & John Choon Yoo, *Dollar Diplomacy/Dollar Defense: The Fabric of Economics and National Security Law*, 26 INT'L LAW. 715, 731–36 (1992); Brett Fortnam, *BIS to Enhance Enforcement Procedures on Export Controls*, INSIDE TRADE (2022), <https://insidetrade.com/daily-news/bis-enhance-enforcement-procedures-export-controls> [<https://perma.cc/GC2W-E4DX>]; DOUGLAS A. IRWIN, *CLASHING OVER COMMERCE: A HISTORY OF US TRADE POLICY* (2017).

96. Further, there is some overlap in their use. Now, export controls are also readily used to combat human rights violations. See, e.g., *Changji Esquel Textile Co. Ltd. v. Raimondo*, No. 21–1798 (D.D.C. Nov. 4, 2021); Nathaniel M. Rickard, *Lawsuit Against Use of Export Controls to Respond to Forced Labor Demonstrates the Importance of this New Federal Agency Policy Tool*, PICARD KENTZ & ROWE LLP (Sept. 28, 2021), <https://pkrlp.com/news-insights/lawsuit-against-use-of-export-controls-to-respond-to-forced-labor-demonstrates-the-importance-of-this-new-federal-agency-policy-tool> [<https://perma.cc/7HKV-7JPH>].

97. *Public Information on Export Controls Imposed on Advanced Computing and Semiconductor Manufacturing Items to the People's Republic of China*, BUREAU OF INDUS. & SEC., U.S. DEP'T OF COM., <https://www.bis.doc.gov/index.php/about-bis/newsroom/2082> [<https://perma.cc/7GZL-QNV7>] (last visited Nov. 11, 2023). Other examples could qualify here beyond export controls, such as the provisions of the 2022 U.S. Inflation Reduction Act that seek to reduce reliance on products from China. Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818 (2022). Space does not permit a full review of such measures here.

these already firm-centric enhancements, exemption from these rules requires acquiring a license that will be judged company by company. Taken together, the inflated use of its entity list, the far-reaching product lists, and the license process indicate that the U.S. government has greatly enhanced its corporate trade policing authority.

Moreover, the justifications for the extensive use of export controls have likewise expanded.⁹⁸ The company-specific exercise is driven in this instance by a spacious reconstruction of economic security and its importance not just to U.S. economic prowess but as a means to work with likeminded allies to limit the threat posed by China's economic growth.⁹⁹ Here, U.S. officials are enforcing U.S. law to safeguard U.S. innovation in response to an identified threat posed by foreign actors. A principal ramification of this extensive use, both for export controls and export bans, is increased pressure on companies in both circumstances to know their supply chains all the way down—inbound and outbound.¹⁰⁰

Other security-premised moves in the last five years also reflect this paradigm shift. A new outbound investment screening mechanism proposed by the Biden Administration seeks to control company offshoring, broadly defined, for security reasons.¹⁰¹ Rather than force behavioral changes from China, the Administration will police company behavior. Increased controls on foreign-owned companies like TikTok and Huawei are motivated by the same interests, even if not yet express parts of trade agreements.¹⁰²

98. See, e.g., Jon Bateman, *Biden is Now All-In on Taking Out China*, FOREIGN POL'Y (Oct. 12, 2022), <https://foreignpolicy.com/2022/10/12/biden-china-semiconductor-chips-exports-decouple> [https://perma.cc/W2CH-32LA].

99. See generally Sujai Shivakumar et al., *Toward a New Multilateral Export Control Regime*, CTR. FOR STRATEGIC & INT'L STUD. (Jan. 10, 2023), <https://www.csis.org/analysis/toward-new-multilateral-export-control-regime> [https://perma.cc/AK5E-YBXW].

100. Madeline Halpert, *Pascrell, Blumenauer Press Tesla on Trade Compliance, Xinjiang Expansion*, INSIDE TRADE (Jan. 20, 2022), <https://insidetrade.com/daily-news/pascrell-blumenauer-press-tesla-trade-compliance-xinjiang-expansion> [https://perma.cc/CEF8-AT9H].

101. Exec. Order No. 14105, 88 Fed. Reg. 54867 (Aug. 9, 2023).

102. See generally Anupam Chander, *Trump v. TikTok*, 55 VAND. J. TRANSNAT'L L. 1145 (2022). The USMCA seeks to constrain engagement of Canada and Mexico with China through innovative clauses that do not yet go quite this far, but they may be within reach in future agreements. See generally Geraldo Vidigal, *A Really Big Button That Doesn't Do Anything? The Anti-NME Clause in US Trade Agreements Between Law and Geoeconomics*, 23 J. INT'L ECON. L. 45 (2020) (describing the clause). I do not include financial sanctions in this list, though they have similar parallels in their recent expansion. Sanctions turned toward private parties many years ago. Since the Russian invasion of Ukraine, they have taken on unparalleled expansions toward private third parties. See Antony J. Blinken, *United States Imposes Additional Sanctions and Export Controls on Russia in Coordination with International Partners*, U.S. DEP'T OF STATE (May 19, 2023), <https://www.state.gov/united-states-imposes-additional-sanctions-and-export-controls-on-russia-in-coordination-with-international-partners> [https://perma.cc/B6D4-UFVQ]. But, again, we are not yet at a place of widespread agreement on sanctions administration through economic agreements as with some of these other examples. Desirée LeClercq links the USTR's exercise of the USMCA RRM to the Treasury Department's Office of Foreign Assets Control's increased justification of economic sanctions on human rights as part of a trend to enforce human rights issues abroad. See generally Desirée LeClercq, *Rights-Based Sanctions Procedures*, 75 ADMIN. L. REV. 105 (2023).

D. Intelligence

A further tool in the trade policing toolkit has nothing to do with stopping products at the border or collecting a fee. Rather, it involves imposing extensive reporting requirements on specific companies. This trade policing technique has become of interest as governments have sought more information from companies about their foreign activities, especially with respect to those companies' source materials and their foreign collaborators. This demand for corporate intelligence has grown substantially in recent years. At home, the U.S. government now mandates broad swaths of information from multinational companies in exchange for market access, and other governments have followed suit.¹⁰³ Not reporting all the details of the company's supply chain as requested may subject the company to elimination from preferential programs or access to the national market.¹⁰⁴

Intelligence-gathering through informational reporting is a major feature of several legal initiatives. For instance, foreign procurement law requires extensive reporting to participate in trade preference programs of the U.S. government.¹⁰⁵ The Buy America program now demands that companies provide detailed information about all the inputs in their supply chains to be eligible for federal government purchasing.¹⁰⁶ The same is true in customs law, where reporting on supply chains is a condition for entry.¹⁰⁷ The UFLPA mentioned above obligates companies doing business with inputs from China to submit information about their collaborators and partners.¹⁰⁸ These tools mandate the production of detailed information if businesses want to be part of a U.S. foreign commercial program or be able to import their goods into the United States. Export controls, where information must be provided to get a license

103. See, e.g., *Commission Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive*, COM (2022) 71 final (Feb. 23, 2022) (requiring additional reporting by companies in their supply chain management).

104. Financial institutions have long required companies to make certain disclosures in their corporate filings. I am referring throughout this Part instead to information that is shared with agencies acting not in an oversight capacity.

105. See *Fact Sheet: Biden-Harris Administration Issues Proposed Buy American Rule, Advancing the President's Commitment to Ensuring the Future of America Is Made in America by All of America's Workers*, THE WHITE HOUSE (July 28, 2021) [hereinafter *Fact Sheet: Proposed Buy American Rule*], <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/28/fact-sheet-biden-harris-administration-issues-proposed-buy-american-rule-advancing-the-presidents-commitment-to-ensuring-the-future-of-america-is-made-in-america-by-all-of-americas> [https://perma.cc/8CDV-MUTA] (describing new reporting requirements featured in a notice of proposed rulemaking).

106. *Id.*; @OMBPress, TWITTER (July 29, 2022, 10:16 AM), <https://twitter.com/OMBPress/status/1553021721757745154> [https://perma.cc/4D2S-8QP6].

107. For companies to avoid seizure of their goods at the border, they must provide extensive information for review. U.S. Customs and Border Protection is still developing guidance on the implementation of this Act. See *UFLPA Operational Guidance for Importers*, U.S. CUSTOMS & BORDER PROT. (June 13, 2022), <https://www.cbp.gov/document/guidance/uflpa-operational-guidance-importers> [https://perma.cc/CG54-8JCJ].

108. See *id.*

to export, and the national security tariffs exclusions, where companies seek reduced tariff treatment by providing extensive information about their work and product, have a similar effect, albeit in a less systematic way.¹⁰⁹

Across several agencies, the U.S. foreign commerce bureaucracy is now in the business of collecting cross-border private sector intelligence. As one policymaker put it: “we need to understand U.S. tech leadership. . . . The best place to get that information is from industry.”¹¹⁰ But this firm-centric intelligence is also in service of forward-looking policy adjustments to the government’s monitoring and to its enforcement capacity. In other instances, reporting may provide transparency on critical infrastructure vulnerabilities and insights into adversary exploitation of that infrastructure. Reported information could be used to inform not just economic but also military decisionmaking. It could lead to additional enforcement actions against third parties known to be violating U.S. criminal law.

Information collection and processing are not new concepts and key agencies already do this work as a matter of course.¹¹¹ In the foreign commercial policy-making area, however, firm reporting has become far more extensive, onerous, and consequential than it used to be in a very short period.

Tools like the RRM, the forestry rules, the fish import regulation, forced labor bans, export control restrictions, and supply chain reporting obligations are just the tip of the iceberg. This is the future of trade law.¹¹²

Other governments are now considering comparable tools.¹¹³ Out of concern for the environmentally problematic harvesting of palm oil, Switzerland now

109. Ashley Deeks & Andrew Hayashi, *Tax Law as Foreign Policy*, 170 U. PA. L. REV. 275, 281–301 (2022).

110. Kate O’Keeffe, *U.S. Approves Nearly All Tech Exports to China, Data Shows*, WALL ST. J. (Aug. 16, 2022), <https://www.wsj.com/articles/u-s-approves-nearly-all-tech-exports-to-china-data-shows-11660596886> [https://perma.cc/M56E-474R].

111. See, e.g., *Fact Sheet: Proposed Buy American Rule*, supra note 105; U.S. CUSTOMS & BORDER PROT., supra note 107; Ellen Nakashima, *White House Wants Transparency on American Investment in China*, WASH. POST (July 13, 2022), <https://www.washingtonpost.com/national-security/2022/07/13/china-investment-transparency> [https://perma.cc/A3UM-BSZ8].

112. Comments by Former Government Official at University of Virginia School of Law Conference Governed by Chatham House Rule (Feb. 17, 2022) (remarking that these trends will continue and that export controls and foreign investment screening will likely appear in future trade agreements). See also Anu Bradford & Adam S. Chilton, *Regulating Antitrust Through Trade Agreements*, 84 ANTITRUST L.J. 103, 103 (2021).

113. See, e.g., European Commission Press Release IP/22/5415, *Commission Moves to Ban Products Made with Forced Labour on the EU Market* (Sept. 14, 2022); Zoom Interview with Foreign Government Official from a G7 Economy (June 29, 2022) (commenting that their government intends to pursue a rapid response mechanism for social sustainability purposes); Jasmin Malik Chua, *Is Canada About to Get Another Forced Labor Law?*, SOURCING J. (Jan. 27, 2023), <https://sourcingjournal.com/topics/labor/canada-forced-labor-law-s-211-xinjiang-turkmenistan-arentfox-sourcemap-412083> [https://perma.cc/W6JL-ZY57]. For example, the EU-Mercosur Association Agreement employs a similar mechanism related to the fulfillment of animal welfare standards. Trade Agreement, E.U.-Mercosur, Annex 2-A, ¶ 5(l), June 28, 2019.

requires all vegetable oils and their derivatives to be traded according to the “laws, policies and practices aiming at protecting primary forests, peatlands, and related ecosystems, halting deforestation, peat drainage and fire clearing in land preparation, reducing air and water pollution, and respecting rights of local and Indigenous communities and workers.”¹¹⁴ Swiss authorities are empowered to withhold permission for certain palm oil imports to enter Switzerland where those imports fail to comply with what Swiss law considers to be the requisite sustainability certification schemes.¹¹⁵

The European Union is developing its Carbon Border Adjustment Mechanism, a Due Diligence Directive, and a Deforestation Regulation, all of which seek to combat problems similar to those identified above. And still other models are likely to follow, with a cascade effect around the world.¹¹⁶ These tools do not yet have the full reach or teeth of the U.S. examples, but they are just starting to emerge.¹¹⁷

III. NORMATIVE ACCOUNTING(S)

One of the most important contributions of the shift to a new form of trade policing is its innovation. These are not off-the-shelf trade moves; rather, they reflect bespoke out-of-the-box thinking on cross-border economic and social policy. But is this sort of precision in law enforcement all good?

This Part begins a conversation about the new trade policing’s positive and negative effects, all of which are relative to the many constituencies it impacts. A central question is whether trade policing is achieving the goals advertised such as protecting more workers, safeguarding environmental harms, or enhancing protections for national security. The shift to direct corporate engagement and enforcement has been widely heralded by commentators and civil society for its progressiveness.¹¹⁸ This Part considers under what circumstances trade

114. Comprehensive Economic Partnership Agreement, Indon.-Eur. Free Trade Ass’n States, arts. 8.10(2)(a), 8.10(2)(e), Dec. 16, 2018.

115. Advocates have called for more work on the ground in Indonesia and the creation of a road-map that would build up sustainability capacity. See, e.g., *Could the Palm Oil Arrangement Between Indonesia and Switzerland Offer Lessons for EU and Indonesia Free Trade Agreement Negotiations?*, FERN (Apr. 8, 2021), <https://www.fern.org/publications-insight/could-the-palm-oil-arrangement-between-indonesia-and-switzerland-offer-lessons-for-eu-and-indonesia-free-trade-agreement-negotiations-2323> [https://perma.cc/XM24-F9AX].

116. See James Harrison, *Trade Agreements and Sustainability: Exploring the Potential of Global Value Chain (GVC) Obligations*, 26 J. INT’L ECON. L. 199, 207–14 (2023) (listing examples including several EU measures).

117. The E.U. tools lack the reach and teeth of the U.S. models. For now, they remain unilateral tools with regular compliance obligations. While the European Union may become more aggressive in the near term, one major limitation on the Union’s ability to match the U.S. approach is funding and staff constraints and another is member state and Commission competencies.

118. See, e.g., Press Release, Rep. Jimmy Panetta, Congressman Panetta Releases Statement on the Deployment of USMCA Enforcement Measure (May 12, 2021), <https://panetta.house.gov/media/press-releases/congressman-panetta-releases-statement-deployment-usmca-enforcement-measure> [https://perma.

policing may be useful as a deterrent, at what expense, and when it may not.¹¹⁹ In so doing, the Article addresses the payoffs of this approach as compared to relying on conventional state-to-state policing to achieve the same outcomes. I also assess measures specific to the many affected communities.

Evaluating trade policing as a means by which to manage foreign commercial priorities is still more challenging in light of the diverse ways and contexts in which policing may be and has been deployed. By drawing a survey of applications together, this Article shows how the under-recognition of this trend hinders a comprehensive assessment of its success or failure. Yet it is possible to deduce how the *availability* of trade policing may have an impact on internal and external levers of decisionmaking and thus the influence this system is likely to exert.

The absence of ordinary regulatory frameworks in trade policing informs the Article's normative evaluation of this growing practice. This Article argues that corporate trade policing is only as good as the due process principles it embodies. Using trade agencies to police companies' compliance with foreign sustainability rules and security goals is not inherently wrong, but it becomes problematic particularly in two circumstances.

First, policing by trade agencies becomes unsustainable when it operates in a legal superstructure without administrative and democratic safeguards. Especially with a changing political landscape, these tools may be redirected to other efforts in which progressive advocates may wish to be assured of certain procedural safety measures. Paradoxically, given the backlash underlying the turn to corporate trade policing,¹²⁰ one unanticipated consequence of instituting trade policing may be to enhance corporate authority as firms pursue improved process.

Second, trade policing may be less desirable when it becomes a tool to achieve ends not possible at home. Some critics have pointed to initiatives by U.S. trade police in which they have demanded that companies working abroad abide by rules not applicable in the United States. This sort of implementation of trade policing risks undermining democratic principles and creates

cc/2RDU-B64U] (celebrating the use of the RRM); *Wyden Statement on USTR's Action to Block Illegal Timber Imports from Peru*, U.S. SENATE COMM. ON FIN. (July 26, 2019), <https://www.finance.senate.gov/ranking-members-news/wyden-statement-on-ustrs-action-to-block-illegal-timber-imports-from-peru> [https://perma.cc/N3XS-YFFT] (praising the USTR's use of the tool).

119. Andrew Brady Spalding argues that deterrence theory, rooted in law and economics, is prevalent in law enforcement, but "the rise of international commerce presents a challenge it cannot meet." Andrew Brady Spalding, *Restorative Justice for Multinational Corporations*, 76 OHIO ST. L.J. 357, 357 (2015).

120. For example, the U.S. Chamber of Commerce has commented that the government's definitions of its standards in the RRM are too broad and "encourage specious and unfounded allegations," and that the proposed guidelines are insufficient in protecting the interests of corporations that are implicated. Statement of the U.S. Chamber of Com., Interagency Labor Committee for Monitoring and Enforcement Procedural Guidelines for Petitions Pursuant to USMCA (Aug. 14, 2020), <https://www.regulations.gov/comment/USTR-2020-0028-0009> [https://perma.cc/B8PK-YFJ4].

unnecessary hypocrisy. Further, by requiring threshold commitments by companies as informed by values that U.S. officials select, trade policing may be seen as taking a page out of the playbook of authoritarian governments, such as China, that coerce companies to take extralegal actions through non-transparent processes,¹²¹ only here they do so often in pursuit of progressive aims. This Part questions whether the corporate accountability goals, and their openness to manipulation, outweigh the government's deployment of such an approach.

Ultimately, this Article offers a guarded defense of the corporate pivot. The Article identifies conditions that could help sustain its positive features and responds to early criticisms.

A. *Virtues and Vices Among Commercial Constituencies*

The turn to trade policing presumes that the established approaches to trade law enforcement have been insufficient to accommodate social or environmental sustainability and security priorities.¹²² As this Part shows, the story is complicated. For the same reason that states adopted trade policing in the first place, these moves have been at least somewhat effective in their early days in achieving a range of progressive aims in a time-efficient and direct manner.¹²³ No longer do states need to rely on other states and wait for them to achieve trade-related aims. Given the substantive content of this early use of trade policing, this is a win for progressive policy, perhaps even for those companies that share the values of the governments imposing these restrictions, and for security hawks.¹²⁴ Trade policing has merit as a reasonable and valuable

121. See, e.g., Julia Ya Qin, *Forced Technology Transfer and the US-China Trade War: Implications for International Economic Law*, 22 J. INT'L ECON. L. 743, 748 (2019) (describing the means through which China coerces companies using forced technology transfer); Anupam Chander, *Trump Grants TikTok a Reprieve But His Ban Threat Should Be Permanently Retired*, WASH. POST (Aug. 4, 2020), <https://www.washingtonpost.com/opinions/2020/08/04/trump-grants-tiktok-reprieve-his-ban-threat-should-be-permanently-retired/> [<https://perma.cc/9XYX-H5YY>] (referring to a tech cold war and pointing to China's coercive action against U.S. companies and foreign executives in retaliation for U.S. actions); MARCIN SZCZEPÁŃSKI, EUR. PARL. RSCH. SERV., PE 738.219, CHINA'S ECONOMIC COERCION: EVOLUTION, CHARACTERISTICS AND COUNTERMEASURES (2022);Carolynn Look, *Foreign Firms Increasingly Targeted by Chinese Coercion, Study Says*, BLOOMBERG (Aug. 25, 2022), <https://www.bloomberg.com/news/articles/2022-08-25/europe-inc-ever-more-vulnerable-to-chinese-coercion-study-says> [<https://perma.cc/5RJY-V2JZ>]; Bonnie S. Glaser, *Time for Collective Pushback Against China's Economic Coercion*, CTR. FOR STRATEGIC & INT'L STUD. (Jan. 13, 2021), <https://www.csis.org/analysis/time-collective-pushback-against-chinas-economic-coercion> [<https://perma.cc/8Q4M-DMAT>].

122. The "retreat of the state" paradigm, well known to the political economy literature since the 1990s, has long implied a mutual exclusivity between liberalization and a state active in public policies. See generally SUSAN STRANGE, *THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY* (1996). Trade policing confronts that tension and seeks to work around it, even if not acknowledging that as its purpose.

123. See, e.g., *Wyden Statement*, *supra* note 118; Press Release, Office of the U.S. Trade Rep., United States Announces Successful Resolution of Rapid Response Mechanism Labor Matter at Mexican Airline (Oct. 30, 2023).

124. See Kasey Wang, *Why Institutional Investors Support ESG Issues*, 22 U.C. DAVIS BUS. L.J. 129, 141–46 (2021); Max M. Schanzbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 392–97 (2020).

approach. But ending the analysis there would provide an incomplete picture of the impact and effects of corporate targeting. The preliminary evidence also suggests some unexpected shortcomings and obstacles.

While these initiatives to date show promising results for at least some actors and some goals, the new trade policing also creates burdens on many actors that do not arise in the old trade policing. For the multinational corporation, the new trade policing poses a direct threat to its market access. The penalties for not complying are severe in many instances. Responding to trade policing may necessitate shifting logistics, re-evaluating labor and the company's organization and management, and addressing interruptions to production and newly prohibited sales. Companies must engage in extensive internal information collection above and beyond the heavy burdens they face under domestic corporate regulations. They must peer into their operations and business partner communities to report as required by law.¹²⁵ These are not novel transaction costs that companies face, but they are exacerbated through these new regulatory moves and actors.

The result of trade policing's unpredictability is that firms may simply move production, and not in the directions that may be intended by trade policing tools. For example, major exporting firms could move overseas to avoid constraints posed by export control entity lists.¹²⁶ Companies may also shift their lobbying structures to seek bargains with agencies on the "front end" rather than leave their negotiations to moments in which they are targeted. They can also anticipate higher legal representation bills necessitated by trade policing.¹²⁷

This new construction also underscores the fragility of trade's political economy. It requires structuring private relationships in such a way as to avoid business penalties on the basis of place and the sales partners with which a company associates. The bargaining power of the industry is more dispersed. Trade policymaking becomes less about carrots, and these sticks have extended reach. The long arm of trade policing alters the calculus on which many have relied.

This pivot has important implications for many more actors, including Congress, as the lead branch of the U.S. government on trade matters.¹²⁸ Although Congress has supported the use of, and in some instances created, these tools, those concerned with the balance of power between the executive and Congress on these matters have highlighted the risk of executive

125. Former Deputy U.S. Trade Representative in the Trump Administration C.J. Mahoney has emphasized this as a primary objective of trade policy. See *USMCA in Review, with C.J. Mahoney, Former Deputy U.S. Trade Representative*, WILEY PODCAST (Sept. 7, 2022), <https://soundcloud.com/wileypodcast/usmca-in-review-with-cj-mahoney-former-deputy-us-trade-representative>.

126. See O'Keeffe, *supra* note 110.

127. Interview with Law Firm Partner, in Washington, D.C. (Oct. 11, 2022) (commenting that the firm now has many clients concerned with these issues).

128. U.S. CONST. art. I, § 8, cl. 3.

overstep.¹²⁹ For example, in an early use of the RRM, USTR departed from the statute and instead pursued its own path with the U.S. parent company of the targeted Mexican factory. USTR entered into an agreement with the U.S. parent,¹³⁰ arguably outside USTR's mandate or legal capacity. These extra-legal activities raised doubts for the Mexican government as to whether the tool was ultimately in its own best interests, as well.¹³¹

The transformation to trade policing likewise unsettles our former vision of the role of the foreign affairs bureaucracy in the United States, and likely in other places as well. Writing in 2005, Anne-Marie Slaughter argued that regulators were the nation's new diplomats because regulators were increasingly active in the international space.¹³² Now, our foreign-facing bureaucrats are themselves law enforcers. One can trace this shift in the budgets and hiring practices of the relevant agencies.¹³³ Undertaking these new activities has required additional staffing and funding, which Congress has largely supported.¹³⁴ Doing this work creates more challenges to the everyday administration of trade law from the inside. Staff operate these tools with little guidance.¹³⁵ Trade agencies must grapple with the nuances of global supply chains to achieve the goals set for them by Congress.

The implications surrounding this move are not limited to U.S. actors. For international trade organizations, the shift in trade policing is one of concern. The foundations of the World Trade Organization ("WTO") and its supporting organizations rest on state-to-state engagement and rules developed and shared by those states. States' increasing reliance on these statutory instruments upsets the dominance of the state role at the WTO and displaces the WTO's Dispute Settlement System. The new trade policing typically substitutes unilateral action or sometimes domestic courts in these spaces, risking international de-judicialization. At a time when the WTO is already concerned with its own

129. See generally Kathleen Claussen, *A First Look at the New Labor Provisions in the USMCA Protocol of Amendment*, INT'L ECON. L. & POL'Y BLOG (Dec. 12, 2019).

130. Shepardson & Lawder, *supra* note 73.

131. Lilia Gonzalez, *México No Permitirá que se Demanden Hechos Laborales Anteriores al T-MEC: SE [México Will Not Allow Labor Claims Before the USMCA: Secretary of the Economy]* EL ECONOMISTA (Aug. 12, 2021), <https://www.economista.com.mx/empresas/Mexico-no-permitira-que-se-demanden-hechos-laborales-antteriores-al-T-MEC-SE-20210812-0007.html> [<https://perma.cc/7TXJ-DHUF>].

132. See ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 36 (2005).

133. See Chad P. Bown & Kathleen Claussen, *The Rapid Response Labor Mechanism of the USMCA*, 23 *WORLD TRADE REV.* (forthcoming 2024) [hereinafter Bown & Claussen, *The Rapid Response Labor Mechanism*] (noting changes in appropriations); Chad P. Bown & Kathleen Claussen, *Corporate Accountability by Treaty: The New North American Rapid Response Labor Mechanism*, 118 *AM. J. INT'L L.* (forthcoming 2024) [hereinafter Bown & Claussen, *Corporate Accountability by Treaty*].

134. DEP'T OF HOMELAND SEC., U.S. CUSTOMS AND BORDER PROTECTION: BUDGET OVERVIEW 10 (2023) https://www.dhs.gov/sites/default/files/2022-03/U.S.%20Customs%20and%20Border%20Protection_Remediated.pdf [<https://perma.cc/9RT5-ZN25>].

135. See Matina Stevis-Gridneff, *At Europe's Largest Port, Russia Sanctions Meet Their Toughest Test*, N.Y. TIMES (July 8, 2022), <https://www.nytimes.com/2022/07/08/world/europe/russia-eu-sanctions-rotterdam.html> [<https://perma.cc/PYX9-BMGV>].

relevance, trade policing may aggravate this sense of marginalization.¹³⁶ Unless the WTO and other like organizations are able to adapt and even reinvent themselves in service of this operation, they may not be well equipped to sustain this change of target.

Like others, trading-partner governments may see both positive and negative outcomes. On the positive side, these sorts of arrangements, when administered by the United States or any government outside one's own, may let the home government off the hook for what would otherwise be construed as a domestic enforcement failure. The new trade policing could de-escalate rising tensions with otherwise cooperative partner states. Even so, that cooperation may last only as long as other governments share the views of the United States. U.S. officials step in and foreign governments need not fear the fallout of not doing so. Likewise, foreign governments can take refuge in U.S. assistance. Where they lack capacity or political will to take action against local or multinational corporations, the United States can pick up the slack. However, some foreign governments have interpreted these moves as infringing on their sovereignty, interfering with their regulatory agendas, or otherwise aggravating bilateral relationships.¹³⁷ The European Union, in its development of similar policing tools, especially its "anti-coercion" instrument, notes that it is designed to "de-escalate and induce discontinuation of coercive measures through dialogue," though it seeks to achieve that outcome through the imposition of aggressive trade restrictions like increased customs duties and import or export licenses.¹³⁸ Commentators have cautioned against the risks of using these in the context of economic warfare.¹³⁹ This hyperbolic language may strengthen opposition to interventionist measures. Reaching agreement on the mechanisms by which to achieve even shared goals may be more difficult than currently anticipated. Yet, if the move to firm-based trade policy can break the logjam between developed and developing countries on the future of certain large-scale social

136. See, e.g., Maia Wilson, *Think Tank: Trade Policy's Paradigm Shift Sidelines WTO*, BORDERLEX (Jan. 24, 2023), <https://borderlex.net/2023/01/24/think-tank-trade-policys-paradigm-shift-sidelines-wto> [<https://perma.cc/H2SD-WQVM>].

137. Interview with a Foreign Government Official from a Western Hemisphere Country (Sept. 26, 2022) (commenting that sovereignty is a concern in its trading relationship with the United States). This concern is not unique to the new trade policing. Rather, it is similar to that raised by some trade-plus WTO cases, where the importing state is dictating which regulations the exporting states should adopt by conditioning their imports on such regulations—only now the pressure is put on the company directly on a unilateral or bilateral basis.

138. Press Release, Council of Europe, Trade: Political Agreement on the Anti-Coercion Instrument (Mar. 28, 2023).

139. See Chien-Huei Wu, *The EU's Proposed Anti-Coercion Instrument: Legality and Effectiveness*, 57 J. WORLD TRADE 297, 303–08 (2023); see also Kathleen McNamara, *The Politics of European Industrial Policy: How a Post-Neoliberal Shift Is Transforming the European Union* *3 (unpublished manuscript) (on file with the author).

and economic policies by creating a common antagonist, that would constitute a momentous breakthrough in global relations.¹⁴⁰

For civil society, the new trade policing enhances access to lawmaking in unexpected ways. While not all of these tools are public-facing, those that create new avenues for nongovernmental organizations to engage the government on trade-plus matters, such as in the areas of environment and labor. Through the North American Commission on Environmental Cooperation, rechartered in 2020, and the USMCA Implementation Act, for example, NGOs can petition the United States to intervene where a company operating in Mexico or Canada has contributed to environmental harms.¹⁴¹ But trade policing may also create clashes among progressive causes. In the forced labor context, not all workers' groups and related NGOs are aligned in seeking relief from the U.S. government, for instance. Some have advocated for more regulatory engagement opportunities while others fear that further process will inhibit the forward progress they have made in recent years.¹⁴² Likewise, in the exercise of these tools in Mexico, some community groups have recounted how U.S. actions at individual factories may have resolved one local problem while creating another. Gang activity and community hostilities are rumored to have increased with this foreign intervention.¹⁴³

At its core, trade policing is about cost shifting. What we do not yet know is who among these constituencies is best situated to do this work. Answering that question requires greater introspection on a tool-by-tool basis as to precisely what trade policing seeks to achieve. There, not all constituencies see the practice the same way. For instance, where the goal is corporate sustainability, the conventional wisdom is that sustainability ought to be regulated like other industrial polluting, that is, by the firm.¹⁴⁴ In contrast, some scholars have advocated treating the problem as a public good and shifting responsibility to the government.¹⁴⁵ In trade, informational asymmetries qualify the risks and rewards of such an approach. At present, policymakers have gone all-in on trade policing without these evaluations.

140. Nicolas Lamp raised this prospect with me; I thank him for the point.

141. Agreement on Environmental Cooperation, U.S.-Mex.-Can., art. 11, Dec. 18, 2018, 80 Stat. 271; USMCA Implementation Act § 813(d), Pub. L. No. 116–113, 134 Stat. 11 (2020).

142. See Comments, Participants in Trade and Labor Working Group Hosted by Kathleen Claussen and John Foote (Nov. 15, 2021) (unattributed).

143. Interview with Trade Law Scholar, in Houston, Tex. (Sept. 6, 2021).

144. See Wendy E. Wagner, *Imagining Corporate Sustainability as a Public Good Rather Than a Corporate Bad*, 46 WAKE FOREST L. REV. 561, 562–63, 577 (2011) (describing how governments ought to be first movers in information collection regarding corporate sustainability rather than relying on corporations to self-police).

145. *Id.* at 562.

B. Process Stakes

The divergences in benefits and disadvantages of the new trade policing across many constituencies are unsurprising. Even where the aims of such goals are shared, the burdens fall unevenly. Given these many layers, we may not be able to identify a single institutional framework for achieving those goals. We can, however, evaluate the structure brought to light in Part II against common notions of legitimacy.¹⁴⁶ We can consider whether this approach is sound when viewed through a lens that reflects basic process and power principles.

In what follows, this Section describes three rule-of-law dimensions on which this new trade policing presents concerns. First, this Section considers whether trade policing risks exhibiting neocolonial tendencies with the vast dominance and the legal muscle imposed by the United States and other powerful states. Second, this Section reviews trade policing through an administrative law lens and asks whether conventional safeguards of overreach are in place. As unpacked here, the fact that trade agencies are charged with this work has two important legal consequences in U.S. law. First, they benefit from procedural shields that other agencies do not; and second, although government agencies regulate companies all the time, their extraterritorial reach is almost never this robust, either in jurisdiction or in substance. The third rule-of-law dimension relates to this latter point and asks whether the new trade policing operates consistently within standard jurisdictional constraints.

Concern over the exercise of power by the United States and other developed countries through these tools is expressed as neocolonial criticism.¹⁴⁷ Although these tools may appear reciprocal on paper, they are often only actionable in one direction. For instance, no other economy has a forced labor mechanism like the United States does; many states could not afford to do so. Similarly, the RRM may realistically only be operated by the United States against companies working outside the United States, even if this includes U.S. companies.¹⁴⁸ There are few opportunities for developing countries to insist upon measures in their domestic law at the risk of retaliation by the United States. Unlike the multilateral system with procedural mechanisms that permit democratic

146. I do not take up an economic assessment to evaluate whether trade policing is redistributive or wealth-producing, or a political science assessment as to whether it produces better governance. Sociologists may also wish to evaluate its invisible impacts on communities. This Article identifies the phenomenon and calls on colleagues to pick up these other pressing research needs.

147. See, e.g., E. Tendayi Achiume & Devon W. Carbado, *Critical Race Theory Meets Third World Approaches to International Law*, 67 UCLA L. REV. 1462, 1474 (2021) (“Neocolonial assertions of the international legal system implicate development doctrines, international economic law, international humanitarian law, and domestic legal regimes.”); Chantal Thomas, *Race as a Technology of Global Economic Governance*, 67 UCLA L. REV. 1860, 1878 (2021) (“[T]his ideology reproduced and echoed earlier narratives of the civilization standard.”).

148. USMCA, *supra* note 37, annex A.2, n.2 (carving out a narrow set of labor situations in the United States that could be subject to review).

participation, these are imbalanced tools that permit advanced and wealthy states to pursue compliance on their own terms.

Trade policing tools are also a means to achieve internationally what domestic politics do not permit at home. The labor-focused tools and those with a national security premise can and have been deployed to require more of companies outside the United States than those inside, simply because those laws are not politically feasible on U.S. soil.¹⁴⁹ These may change depending on the administration in the White House, but in these experimental years, the tools apply a set of requirements asymmetrically. Some observers have considered whether governments in the future might deploy like tools to achieve other types of goals such as climate change goals, and then to have trading partners of the United States impose them on U.S. companies.¹⁵⁰ While speculative, these proposals fuel the ongoing conversation about the negative potential of trade law's corporate turn.

By reframing not just the goals of trade law but also the goals of its targets, trade policing endeavors to weave a new public narrative, responsive perhaps to the calls for a trade policy that works for the middle class.¹⁵¹ If these efforts were to shift the public narrative, they will have done so in singular ways. Consider the “one-off” nature of trade policing, as compared to broad programmatic reform. Likewise, rather than subjecting major state programs to public debate, trade policing is discrete and does not require, or benefit from, public deliberation.¹⁵² Depoliticizing trade in this way is a double-edged sword. While shielding trade policy from hardened criticism, it suffers from more limited transparency.¹⁵³ Trade policing's public acceptance turns, at least in part, on whether the public sees trade as a national economic program or as an international social and political program.¹⁵⁴ Given these limitations, it is too early to

149. See, e.g., Desirée LeClercq, *Biden's Worker-Centered Trade Policy: Whose Workers?*, INT'L ECON. L. & POL'Y BLOG (May 16, 2021), <https://ielp.worldtradelaw.net/2021/05/bidens-worker-centered-trade-policy-whose-workers.html> [<https://perma.cc/9P82-AQ9X>].

150. Interview with Foreign Government Official, *supra* note 137.

151. See Jennifer Hillman & Alex Tippett, *Biden's Trade Policy for the Middle Class Takes Shape—And It Begins in Europe*, COUNCIL ON FOREIGN RELS. (June 18, 2021), <https://www.cfr.org/blog/bidens-trade-policy-middle-class-takes-shape-and-it-begins-europe> [<https://perma.cc/87V5-K7CW>]; Orit Frenkel, *A Trade Policy for the Middle Class*, THE HILL (Dec. 20, 2020), <https://thehill.com/opinion/finance/530549-a-trade-policy-for-the-middle-class> [<https://perma.cc/D6S3-C4YR>].

152. At best, and for only some modifications, the agencies may notice their changes and seek comment. See, e.g., Notice of Public Hearing on the Use of Forced Labor in the People's Republic of China and Measures to Prevent the Importation of Goods Produced, Mined, or Manufactured, Wholly or in Part, With Forced Labor in the People's Republic of China Into the United States, 87 Fed. Reg. 15448 (Mar. 18, 2022).

153. See Richard Vanderford, *U.S. Forced Labor Crackdown Is Tough, But Opaque*, WALL ST. J. (Feb. 16, 2023), <https://www.wsj.com/articles/u-s-forced-labor-crackdown-is-tough-but-opaque-a463d6e7> [<https://perma.cc/4DGF-QUS4>] (“[T]he campaign is an opaque one, with little detailed data on which companies or sectors are being targeted . . . the effort so far remains relatively mysterious to observers both in academia and industry.”).

154. See Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 CAL. L. REV. 583, 585 (2019).

tell whether the institutional shift will effectuate a shift in public appraisals of trade policy.

Apart from the power dynamics and public narratives, observers and companies have raised criticisms about companies' inability to respond when the government's treatment is, in the view of those advocates, unwarranted.¹⁵⁵ This is a one-way ratchet with firms on the receiving end, without the traditional administrative processes to contest government action. In some instances, companies are not informed about the precise problem identified by the United States.¹⁵⁶ There is no written complaint, no standard procedure, no transparency requirement, and limited information about agency selection criteria—requirements that are now the baseline in administrative law.¹⁵⁷ These anomalies in trade policing resonate more with covert and critical national security tools than with economic regulation.

None of the aforementioned tools benefits from clear judicial review. Some provide loosely defined pathways to the courtroom while others do not.¹⁵⁸ But trade policing may inevitably bring more disputes to the courthouse doorstep. Although these are not typical cases that come before the U.S. Court of International Trade, a shift to firms at the center of trade enforcement could mean more scrutiny by the courts of the government's treatment of those firms.

Firms have already sought judicial solutions when aggrieved in trade policing, some ongoing at the time of writing.¹⁵⁹ One query, however, is whether the new trade policing ought to be the purview of domestic courts. Apart from overburdening the courts, these matters lack the statutory and regulatory firmaments to which courts are accustomed.¹⁶⁰ As suggested above, few of these

155. See John Foote, *Can the U.S. End Supply Chain Links to Forced Uighur Labor?*, LAWFARE (Feb. 2, 2021), <https://www.lawfaremedia.org/article/can-us-end-supply-chain-links-forced-uighur-labor> [<https://perma.cc/L9WD-4HCF>].

156. Interview with Law Firm Partner, *supra* note 127 (commenting that companies have not been informed of the issues at the locations in question).

157. I have described these difficulties in earlier works. See Claussen, *A First Look*, *supra* note 129; Claussen, *Trade Administration*, *supra* note 28; Bown & Claussen, *The Rapid Response Labor Mechanism*, *supra* note 133; Bown & Claussen, *Corporate Accountability by Treaty*, *supra* note 133. Companies have raised these to USTR in their public comments. See also Statement of the U.S. Chamber of Com., *supra* note 120; Vanderford, *supra* note 153 ("There is an 'iterative process' of figuring out how the law ends up being enforced.") (quoting former government official).

158. One case concerning a forced labor order challenged U.S. Customs' denial under an arbitrary and capricious standard. Complaint at 5, *Virtus Nutrition LLC v. United States*, 606 F. Supp. 3d 1360 (Ct. Int'l Trade 2022) (No. 21-165). Another sought review of an export control matter by way of a constitutional claim. Complaint at 7, *Changji Esquel Textile Co. v. Raimondo*, 573 F. Supp. 3d 104 (D.D.C. 2021) (No. 21-1798).

159. As this Article was going to print, two new cases were filed in the Court of International Trade, squarely challenging aspects of the forced labor statutory regime. *Int'l Rts. Advocs. v. Mayorkas* (Ct. Int'l Trade 2023) (No. 23-165) (challenging inaction by CBP under Section 307 of the Tariff Act of 1930); *Nine-star Tech. v. United States* (Ct. Int'l Trade 2023) (No. 23-182) (challenging the application of the Uyghur Forced Labor Prevention Act).

160. A Westlaw search confirms that the forced labor and export control laws appear in fewer than 100 cases.

tools are the province of administrative law frameworks, despite falling very much at the interface between state institutions and private actors. They offer little to fulfill administrative law's fundamental role in testing and challenging the legitimacy of state action. From this perspective, trade policing runs counter to internationally recognized due process principles of reason-giving, transparency, participation, and review.¹⁶¹ In the absence of these protections and especially without a guarantee of review, the new trade policing puts considerable pressure on *ex-ante* institutional design choices.

Another of the primary criticisms of the new trade policing is that it surpasses established notions of territoriality.¹⁶² Unlike some of the corporate regulatory systems maintained by the U.S. government, these tools often rely on a very light jurisdictional hook. As illustrated in Part II, they allow the United States to police companies operating entirely outside the United States. While the penalty is often enforced at the border, the goods need not reach the border for the United States to intervene. These firms may not ship to the United States, and may operate wholly outside the United States, but they are still subject to possible enforcement. The United States has full access to firms without any trade or territorial association.

Not all tools in the new policing toolkit suffer from the same territorial or jurisdictional issues. Complicating this matter is that some of these tools are the product of trading partner consent; that is, some states permit the United States to carry out these activities on their territories by agreeing to them in trade agreements.¹⁶³ But trade policing regularly muddles the lines between domestic and international authority and jurisdiction. It demands that companies operating abroad change their practices to be consistent with U.S. or foreign law, superseding the trade two-step.

For the same reasons, these tools are not subject to review in the ordinary international trade dispute settlement systems such as the WTO. Because governments are not challenging the actions of another government, their actions do not fall within the mandate of the WTO.¹⁶⁴

161. See Richard B. Stewart, *The Normative Dimensions and Performance of Global Administrative Law*, 13 *ICON* 499, 500 (2015) (noting these characteristics as those central to administrative law).

162. In this respect, trade policing reinforces what Nico Krisch has seen as a "fundamental transformation" in the understanding of jurisdiction and territoriality in international law. Krisch importantly captures this moment as one in which policymakers have normalized regulation with few traditional territorial links. Nico Krisch, *Jurisdiction Unbound: (Extra)territorial Regulation as Global Governance*, 33 *EUR. J. INT'L L.* 481, 482 (2022).

163. The USMCA and the U.S.-Peru trade agreement are two key examples, although some have argued that U.S. trading partners had little choice but to accept the tools proposed by the United States given the economic power of the United States in these negotiations. Bown & Claussen, *Corporate Accountability by Treaty*, *supra* note 133 (collecting comments).

164. One could imagine a WTO dispute brought by a government on behalf of its affected companies, but the likelihood of such a case is very low given the political pressures surrounding corporate trade policing and the targeted nature of the tool (affecting only a small handful of companies at any given time). Some may also fall within exceptions to liability.

A final and related objection to trade policing is a concern about privity. U.S. officials have heralded these tools as a way to hold “participants in the trade agreement accountable.”¹⁶⁵ But there is a missing link: Companies are not parties to trade agreements. Where these tools are premised on agreements, they are agreements between states, and not contracts or deals to which companies have agreed. Companies are not parties to any contract with the state that would implicate their liability on these terms. The best argument for overcoming a privity defense is that these companies have chosen to operate on the territory of a government that has agreed to those terms, that is, to the United States stepping in and enforcing local law. Under that reasoning, however, such an arrangement could, foreseeably, give rise to an international investment law claim against the host state for its unfair treatment or its failure to provide protection promised to the investor upon the initiation of the investment.¹⁶⁶

The legitimacy of the new trade policing would be enhanced by lawmakers paying greater attention to building in some basic rule-of-law protections and more controlled or legally reasoned jurisdictional guidance. A less progressive government may find other uses that work against the present agenda. Now is the time to find a way forward for trade policing to work toward meaningful outcomes in a way that is administratively workable.

IV. IMPLICATIONS & EXTENSIONS

The stakes of trade policing continue to grow. A critical examination of trade policing is of pressing importance as the U.S. Congress, agencies, courts, and legal scholars debate alternative forms of trade governance and institutional frameworks for trade lawmaking.¹⁶⁷ This Article reveals how trade policing is furthering progressive initiatives with broad impact and how these efforts force difficult choices. For a field that relies on stability and predictability to avoid a global economic crisis, trade policing creates real and considerable risks for many actors while also offering flexibility for governments to achieve sustainability and security goals. This difficulty raises the question of whether it is

165. C-SPAN, *supra* note 56 (video at 16:18).

166. One could envision a claim of full protection and security under an international investment agreement, including those that contain the trade policing tools themselves. *See, e.g.*, Trade Promotion Agreement, U.S.-Peru, art. 10.5, Apr. 12, 2006, 121 Stat. 1455.

167. *See, e.g.*, William Reinsch, *An Inflection Point in US Trade Policy*, E. ASIA F. (Jan. 22, 2023), <https://www.eastasiaforum.org/2023/01/22/an-inflection-point-in-us-trade-policy> [https://perma.cc/5S4R-7LED] (highlighting a crossroads in the “worker-centered trade policy”); Yuka Hayashi, *Biden Administration’s Big Manufacturing Push Could Transform Global Trade*, WALL ST. J. (Jan. 12, 2023), <https://www.wsj.com/articles/biden-manufacturing-global-trade-11673382060> [https://perma.cc/4S2Y-QM4V] (noting how the Biden Administration is pushing trade institutions away from their traditional mandates); Steven Overly, *6 Big Trade Predictions for 2023*, POLITICO (Jan. 3, 2023), <https://www.politico.com/newsletters/weekly-trade/2023/01/03/6-big-trade-predictions-for-2023-00076040> [https://perma.cc/J7LJ-6TLB] (discussing the ongoing ideological divisions).

possible to develop trade policing in a way that manages circumventions that may occur when the motivating values underlying trade law's corporate turn falter.

Policymakers should not have to choose between the dangers of impracticable or interventionist approaches and the important public policy aims of sustainability and security. Piecing together these principled objections alongside trade policing's reception among many constituencies, this Article has sought to provide a foundation for a future in which a revised institutional architecture with clearly delineated procedures and opportunities to be heard can support this regime.

The ascent of the firm as a cross-border target for economic agencies has remarkable doctrinal and disciplinary repercussions, particularly for corporate governance and for trade law. The two fields' adherence to formulaic paradigms has prevented greater cross-pollination between them. If successful, trade policing will force a change in corporate behavior and those modifications may promote and enhance environmental protection, human rights, security, and other important public policy goals. Achieving these goals would be an asset not just to progressive advocates, but likely beyond. Incorporating firsthand input from company representatives, this Article describes how companies have responded to this attention, including in ways that may have a net positive benefit for those affected. But there are tradeoffs. Among them are certain unanticipated social impacts on local communities, as well as challenges for the international compliance landscape and a need to work through complex corporate governance questions. Companies face costs from trade policing, as is its intent, and shareholders have rights and obligations that need to be managed. Trade policing becomes one further thread in the tapestry of law governing the relationship between companies and their stakeholders.

Trade policing of the private sector subordinates other modes of commercial law in significant respects. The previous Parts showed the extent of the new trade policing as a regulatory scheme, as an enforcement exercise, as an instrument of foreign policy, and as a corporate accountability mechanism. This is a powerful approach to global economic governance promoting labor rights, supporting environmental protection, and safeguarding national security by forcing change in private sector behavior across borders. The implications for these many areas with diverse stakeholders, as well as the public pressure that has provoked this raising of the trade policy floor, make clear that this shift will be challenging to reverse.

There are doctrinal, sociolegal, and epistemic lessons to be gleaned, and then there is a long list of analytical work yet to be done. Seeing trade policing at the legal core of cross-border regulation ought to prompt scholars and practitioners to reevaluate existing paradigms and the norms shared or contested across several fields. This Part analyzes the early takeaways and examines

the fallout of the new phenomenon for ongoing structural debates within and beyond trade.

What is most striking is how the transformation of trade law to the policing of firms is influencing other bodies of law ancillary to it or even distant from it. Trade policing demands interdisciplinary treatment to be fully understood and appreciated. This Part concludes by taking up these disciplinary effects and provides a foundation for additional research.

A. Doctrinal Orientations

Within trade, this shift exposes open questions about what counts as trade law and whether this practice presages a new body of law with unique features, including features that engage administrative law practices in new ways. This review of trade policing elucidates an omission in the study of trade law: its discomfort with the corporation.

1. Firm Footing

Recent studies have examined how corporations are “keepers of international law” and how firms play a role in enhancing the effectiveness of international law rules.¹⁶⁸ These important works have excavated many of the contours of the relationship between states and markets.¹⁶⁹ They have paid considerable attention to the ways in which companies contribute to international law generally, but they devote little ink to understanding how firms are *treated* by these diverse areas of law, least not in trade. That study is largely taken for granted.

Economists and political scientists long ago made the turn to firm-centered scholarship in these spaces.¹⁷⁰ Legal scholarship, on the other hand, has lagged in its attention. Surprisingly, given its commercial aims, there has been limited sustained attention or theorization on the relationship between corporations and international economic law. That sort of review is crucial to tracing the place of the corporation in the area that would appear to be the natural resting place for firm activity.¹⁷¹ There is no clear through-line on the place of

168. See Kishanthi Parella, *International Law in the Boardroom*, 108 CORNELL L. REV. 839, 839 (2023) (arguing that international law relies too heavily on a state pathway); Julian Arato, *The Elastic Corporate Form in International Law*, 62 VA. J. INT'L L. 383, 394–97 (2022) (describing how international law grapples with corporate law); Melissa J. Durkee, *Interpretive Entrepreneurs*, 107 VA. L. REV. 431, 460–77 (2021) (arguing that corporations are developing the law by interpreting it); Jay Butler, *The Corporate Keepers of International Law*, 114 AM. J. INT'L L. 189, 191–92 (2020) (describing how corporations decide to comply with international law).

169. See Harlan Grant Cohen, *Nations and Markets*, 23 J. INT'L ECON. L. 793 (2020).

170. The political science literature has done far more with the firm. See generally In Song Kim & Iain Osgood, *Firms in Trade and Trade Politics*, 22 ANN. REV. POL. SCI. 399 (2019). The same is true in economics. See generally Andrew B. Bernard, J. Bradford Jensen, Stephen J. Redding & Peter K. Schott, *Firms in International Trade*, 21 J. ECON. PERSPS. 105 (2007).

171. This perhaps raises the question as to what unifies these areas into a coherent field. See Charnovitz, *supra* note 22, at 3–7 (discussing the many strands of the field).

companies in trade law. Rather, the channels through which companies engage with states have been heavily circumscribed. As this Part recounts, different subfields apply different forms of legal agency or personality toward firms, depending on their origins and inheritances.

Puzzlingly, throughout trade's sibling fields, the private sector has a much clearer role, even if its theorization is still a work in progress. In these areas, states turn to firms to advance their foreign policy goals—not necessarily because of something those private actors did, although that is sometimes the case, but also as a means of influencing state behavior. The firm is the key player in trade's sister fields of international investment law, international finance, and international tax. Firms have a myriad of parts to play in this collaboration. They are targets for compliance, partners in market-related movements, agents in supply chain recalibrations, intermediaries to get states and other major foreign actors to make similar choices, and sources of information.

Investment law is the field most closely related to trade law, yet it operates under a very different set of principles. In investment law, states have empowered corporations to bring actions against states.¹⁷² The rules are designed to encourage foreign direct investment, but their teeth are in the dispute settlement provisions permitting aggrieved investors to sue states where the state is responsible for harming, unfairly, the investor's investment. The corporation is at the center, and the decisions that have emerged in international investment law have had an impact on the way states construct and interpret private law.

Likewise, the private actor is at the center of rules on international finance and regulation.¹⁷³ States long ago recognized that cross-border business requires a framework for monitoring and policing corporations. As Chris Brummer has described, "international financial regulation . . . is a unique species of cross-border cooperation bolstered by reputational, market, and institutional mechanisms [which make it] more coercive than . . . predicted."¹⁷⁴ Unlike international trade and monetary affairs, where global coordination is directed through formal international organizations, international financial law arises through inter-agency institutions.¹⁷⁵ As a result, much of that policing and litigation

172. For a detailed history of the practice and its dynamics, see TAYLOR ST. JOHN, *THE RISE OF INVESTOR-STATE ARBITRATION: POLITICS, LAW, AND UNINTENDED CONSEQUENCES* (2018); NICOLÁS M. PERRONE, *INVESTMENT TREATIES AND THE LEGAL IMAGINATION* (2021).

173. See Hal S. Scott, *International Finance: Rule Choices for Global Financial Markets*, in *RESEARCH HANDBOOK IN INTERNATIONAL ECONOMIC LAW* 361 (Alan O. Sykes & Andrew T. Guzman eds., 2006).

174. Chris Brummer, *How International Financial Works (and How it Doesn't)*, 99 *GEO. L.J.* 257, 257 (2011); see also Scott, *International Finance*, *supra* note 173, at 363 (describing how these regimes were "mainly the purview of national governments").

175. See Chris Brummer, *Why Soft Law Dominates International Finance—And Not Trade*, 13 *J. INT'L ECON. L.* 623, 623 (2010) (setting out this distinction in the fields).

occurs in domestic courts with a considerable role for national regulators to police the transactions and operations of cross-border firms.

While governments coordinate rules to some extent in international tax law, that too is a body of law closely related to trade law but distinct in its targets and principles.¹⁷⁶ Reuven Avi-Yonah discusses the three core aims of international tax law: administrability, efficiency, and equity.¹⁷⁷ These values reflect a body of law intended to coordinate among domestic authorities and focus on equitable distribution of wealth on the basis of the costs and revenues of production. In contrast with trade law, the firm is the principal target in that enterprise, and those powers are developed and exercised without much international intervention.¹⁷⁸

In trade law, the law that regulates the cross-border flow of goods and services by primarily private firms, the firm—and its rights and obligations—has been somewhat of an afterthought. The corporation sits uncomfortably in trade law. Part of this discomfort comes from the fact that the academy struggles with how to think about the transnational corporation beyond the business transaction. Many law school curricula and syllabi treat trade law apart, to the detriment of its private law engagements. Schools relegate discussions of the firm to the international business transactions textbook and not to the big public course on international trade.¹⁷⁹

This discussion is not merely to suggest some sort of trade exceptionalism among neighboring fields. What it highlights, however, is that while other areas of international economic law have shifted attention and continued to evolve in recent decades, accommodating and revisiting the legal personality and agency of the firm, the state-firm relationship in trade law has remained relatively constant until now. In these other areas, scholars have begun to unearth how those bodies of law have altered the structure and nature of private law and corporate governance. This study demonstrates that the same work is needed here where the corporation has become the centerpiece, and where trade agencies have moved trade law's work closer to its sibling fields.

176. See Ruth Mason, *The Transformation of International Tax*, 114 AM. J. INT'L L. 353, 353–55 (2020) (arguing that the tax treaty framework had dominated the international tax regime until 2008, when governments sought to close corporate tax loopholes through other means).

177. See Reuven Avi-Yonah, *International Taxation, Globalization, and the Economic Digital Divide*, 26 J. INT'L ECON. L. 101 (2023).

178. Some trade scholars have proposed opportunities for new cooperative narratives within trade and tax law between states and firms. See, e.g., Cohen, *supra* note 27, at 341–42 (citing Timothy Meyer & Frank J. Garcia, *Restoring Trade's Social Contract*, 116 MICH. L. REV. ONLINE 78, 93–100 (2018)); Thomas Streinz, *Re-Embedding Liberalism: Introducing "Passporting Fees" for Free Trade*, in WORLD TRADE AND INVESTMENT LAW REIMAGINED: A PROGRESSIVE AGENDA FOR AN INCLUSIVE GLOBALIZATION 225 (Álvaro Santos et al. eds., 2019).

179. Compare PAUWELYN ET AL., *supra* note 59, with DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, *INTERNATIONAL BUSINESS TRANSACTIONS* (5th ed. 2022).

2. Repurposing

Trade policing also challenges bedrock tenets of trade law: its interstate nature, its territorialism, and its reciprocity. The presumption that these qualities comprise the basics of trade law dates back to its original consideration as a field of law. But over time, that assumption has been challenged by those who raise questions about its distributional costs and its effectiveness to achieve twenty-first century policy aims. The basic socioeconomic terrain has shifted. In response, policymakers have begun to ask whether states matter, or whether companies do; whether borders matter, or whether actions do; and whether we can sustain a trade law system without a clear sense of the sources and limits of corporate power. In a multidimensional policy area such as trade, it may be that the traditional boundaries that limit alternative models need to be relaxed.

The new trade policing presents at least five lessons for trade law scholarship, doctrine, and practice: a recalibration of paradigms; a rethinking of trade law as a shared vision among states; a re-examination of the two-step; a reconfiguration of trade's guiding metaphors and activities; and a research agenda for the trade administrative state.

First is a recalibration of trade law's guiding and conflicting paradigms—the tug-of-war between free trade and protectionist measures has informed international trade law since its modern inception in the first half of the twentieth century. This well-established delineation is an outdated and misdirected frame.¹⁸⁰ The new trade policing of corporate firms does not fit obviously in either of these models. Some scholars still assume that one can compartmentalize into these spheres of free trade and protectionism, and they criticize recent U.S. administrations for their choices along these dimensions.¹⁸¹ While these positions may be analytically convenient, they are not suitable for the increasingly blurred lines created by recent innovations.

A more accurate structural depiction is one that sees a corresponding corporate paradigm or, more to the point, that does not take ideological division as its frame. Most commentators have sought to work within the existing divided paradigm and to redesign trade law within the transnational two-step. The new trade policing breaks the paradigm; rather than working within the two-step, it sidesteps.

The move away from conventional trade policing does not signal that state-created rules have no place in commercial spaces; governments have not entirely

180. This dichotomy has governed most of the policy and scholarly debates over the last century. See Tonks, *supra* note 18; Glass & Walter, *supra* note 18; Hufbauer, Hogan & Wang, *supra* note 18; Koh & Yoo, *supra* note 95, 750–56 (describing the controversy between protectionism and free trade); Note, *The Trade Act of 1971: A Fundamental Change in United States Foreign Trade Policy*, 80 YALE L.J. 1418, 1419 (1971). However, given the dominance of a liberalization ideology in modern trade law, the conflict in the twenty-first century is one between opening markets and ensuring social welfare.

181. See discussion and sources cited *supra* note 18.

jettisoned conventional trade policing. But what was once the normative lodestar is now the normative backdrop. When one frames trade law as a public international law system, it obscures the place of the firm altogether, even though those actors have loomed large in global markets throughout capitalist systems. Trade's corporate policing reorients the players and their perspectives from looking up and out among states to looking down and around to firms. In fact, this pivot could revitalize trade law in a way that brings together states toward a revised common mission.

An additional and related effect of this corporate accountability shift is the decline of the intermediary state. As discussed above, like other areas of public international law, the conventional formulation of trade law is that states enforce the laws in their own states and when they do not, they may be held accountable in international dispute settlement. But unlike other areas, states have a more purposeful and underexplored role: as intermediaries. The intermediary role is vital to the transnational two-step bargains of trade law. With the new trade policing, however, the intermediate reliance on another state is eliminated.

Although not unique, trade policing's removal of the intermediary state puts trade into a minority category of subfields of international law. Cutting out states as middlemen might reduce uncertainty,¹⁸² though that has not been the case in trade policing largely due to states' non-transparent application of these newfound authorities. Direct action against firms may have eliminated the vagueness about whether the intermediate state would act, but there is still a lingering question as to whether the initiating state will select an individual firm or product as its target.

To the extent that international law accommodates trade policing, this acceptance could represent some degree of support, beyond that found in other parts of foreign relations, for an international minimum standard of process. Trade policing forces lawmakers and scholars to ask: Do we have the same expectations of international law institutions that we have of domestic institutions in the world's democracies? If so, what are the implications in international law for this acknowledgment? Trade policing, which dodges public international law goalposts, may have the unforeseen effect of enhancing some of its fundamental tenets.

Trade policing also calls into question another fundamental touchstone of modern trade law: the level playing field.¹⁸³ It is not that the level playing field

182. See generally KATHRYN JUDGE, DIRECT: THE RISE OF THE MIDDLEMAN ECONOMY AND THE POWER OF GOING TO THE SOURCE 212–13 (2022) (describing how direct exchange reduces uncertainty).

183. See Matilda Gillis, *Let's Play?: An Examination of the 'Level Playing Field' in EU Free Trade Agreements*, 55 J. WORLD TRADE 715, 715–16 (2022).

has lost its salience in the trade policy conversation.¹⁸⁴ It remains a justification for sweeping state action in congressional debates and public-facing rhetoric.¹⁸⁵ But that is a state-to-state metaphor designed to equalize conditions in markets. It does not readily consider the unique positioning of individual market players. When trade policymakers speak of the importance of corporate accountability in trade law, they draw on metaphors related to integrity and values. They speak about how this approach to governance will produce a race to the top.¹⁸⁶

Similarly, the new trade policing diminishes the importance of one of the cornerstones of international trade law and policy: regulatory harmonization. A longstanding aim of trade law has been to standardize national practices to ensure that licensing, permitting, and technical standards are eliminated or coordinated in the interest of promoting business flows. Harmonization is not always a priority where trade policing dominates trade decisionmaking. In its stead, trade policing demands a commitment to certain fundamental norms of corporate accountability, and then enforces those commitments through new means. Rather than eliminating the need for harmonization, trade policing commands next-level harmonization in the form of shared enforcement. With its corporate targets, regulatory harmonization efforts are largely secondary to trade policing's most important behavioral aims. On the other hand, trade policing's success could contribute to greater fragmentation among international actors and increased reliance on bilateral or regional instruments, given the difficulties of implementing these tools at the multilateral level.

As is famously said, and despite the framing of our law, firms trade, not states.¹⁸⁷ In this respect, our legal priors do not fit well within the realities of modern international commerce. The new trade policing has carved out a new, more imaginative, and more creative path—one not anticipated or foreseen by the primary trade actors and commentators. Recognizing the new trade policing provides a fresh frontier for trade research. Indeed, when one views trade lawmaking as an enforcement exercise over corporate behavior instead of one

184. See, e.g., Editorial Board, *The EU and US Must Find Common Ground on Subsidies*, FIN. TIMES (Jan. 22, 2023), <https://www.ft.com/content/a6220fd9-f15b-45e0-add6-3690af0d50d8> [<https://perma.cc/G3NP-KNSS>] (arguing that the European Union also needs to ensure a level playing field within its own internal market); Press Release, H. Comm. on Ways & Means, *Americans Deserve a Level Playing Field Through USMCA Enforcement* (May 25, 2022), <https://waysandmeans.house.gov/americans-deserve-a-level-playing-field-through-usmca-enforcement> [<https://perma.cc/SG68-439Y>]; Press Release, Sherrrod Brown, U.S. Senator, *Brown's 'Leveling the Playing Field 2.0' Act Moves Closer to Becoming Law* (Feb. 9, 2022), <https://www.brown.senate.gov/newsroom/press/release/browns-leveling-playing-field-act-closer-becoming-law> [<https://perma.cc/T5C5-XTHN>].

185. See Kathleen Claussen & Wendy Li, *Who Owns Trade Policy? An Empirical Study of Trade Law Language* (unpublished manuscript) (on file with author).

186. C-SPAN, *supra* note 56 (video at 16:18).

187. See, e.g., Andreas Moxnes, Karen Helene Ulltveit-Moe & Andrew Bernard, *Firms Trade, Not Countries*, VOXEU CEPR (Nov. 15, 2013), <https://cepr.org/voxeu/columns/firms-trade-not-countries> [<https://perma.cc/A6MY-ZCGS>].

driven primarily by cooperation and conflict between nations, the disciplinary challenges quickly crystallize.

B. Corporate Governance

This Article also adds to a body of corporate governance scholarship that promotes principles of responsibility and sustainability.¹⁸⁸ While those conversations occur largely in the context of ESG, they underscore experiences that inform what is happening in trade.¹⁸⁹ Trade's corporate accountability turn expands the space for interaction with domestic corporate regulators. This is particularly true when trade policing acts as a constraint on firm behavior, and where it, like ESG, is best understood as a response to social demand—not just for revised trade narratives, but for corporate accountability more broadly. Regardless of whether trade policing strengthens corporate accountability or further tilts the plane toward corporate favoritism, it will increase pressure on corporate law and governance to develop internal disciplines and processes to sort the various interests of stakeholders in this new terrain. There is rich ground for cultivation and collaboration among corporate law and trade law scholars.¹⁹⁰

Two early harvest takeaways for corporate governance matters surface: a reconsideration of trade's theory of the firm, and the amplification of transnational disclosure and compliance concerns.¹⁹¹ Trade policing inserts new regulatory actors in places where they did not previously operate. It adds uncertainty to businesses engaged in complex cross-border deals, disrupting well understood contract theory about deal costs and deal planning. These moves suggest that perhaps the cross-border movement of goods is approaching the

188. See, e.g., Christopher M. Bruner, *Corporate Governance Reform and the Sustainability Imperative*, 131 YALE L.J. 1217, 1241–50 (2022). I speak of corporate governance as described by Katelouzou and Zumbansen: “a shorthand for the regulatory framework that governs the relationships between investors and managers and how a company is being run.” Dionysia Katelouzou & Peer C. Zumbansen, *The Transnationalization of Corporate Governance: Law, Institutional Arrangements & Corporate Power*, 38 ARIZ. J. INT'L & COMP. L. 1, 2 (2021).

189. See David Simon et al., *Real ESG Enforcement Mechanisms: Restrictions on Imports of Goods Made with Forced or Child Labor*, FOLEY & LARDNER LLP (Dec. 19, 2022), <https://www.foley.com/en/insights/publications/2022/12/real-esg-enforcement-mechanisms-restrictions> [https://perma.cc/U28P-Q4KZ]; Michael Kapoor, *EU's ESG Reporting Standards Move Ahead While Global Rules Lag*, BLOOMBERG TAX (Dec. 30, 2022), <https://news.bloombergtax.com/financial-accounting/eus-esg-reporting-standards-move-ahead-while-global-rules-lag> [https://perma.cc/94MX-9PUU].

190. I leave for another day additional systemic questions about whether trade policing creates complications for corporate governance, such as whether it creates a trilemma with shareholders. These are critical questions that require more intradisciplinary collaboration.

191. This is a play on words, of course, on the economic concept of theory of the firm, which is home to a vast literature in law and economics. See generally FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF THE FIRM* (1991); Henry N. Butler, *The Contractual Theory of the Firm*, 11 GEO. MASON L. REV. 99 (1989); Ronald M. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305 (1983); Steven N.S. Cheung, *The Contractual Theory of the Firm*, 26 J.L. ECON. 1 (1983). Here I refer not to the nature of the firm but rather to how trade law has treated the firm.

cross-border movement of capital.¹⁹² It situates trade law closer to what I call uninterrupted corporate regulation, unlike its sibling fields. Recalibrating the state-firm relationship under the auspices of trade law also brings us back to where this Article began. Trade policing also distorts typical public law distinctions: The focus on corporate accountability prioritizes not private law as in contract, nor public law as in property, but rather the law and policy of another state.

Through corporate accountability agreements, trade policing dislocates extraterritorial contracts, interfering with private law's expanded public presence.¹⁹³ By not taking account of agreements that a firm may have with suppliers and other entities, these extraterritorial interventions challenge our domestic conceptions of private law. While parties in complex contracts such as those implicated here can engage in an exchange of costs when public regulations may so require, other bodies of law, like antitrust, operate a much different framework: one with extensive precedent, clear published guidance, and at a predictable time and circumstance.¹⁹⁴ By contrast, there is relatively little guidance for firms subject to trade policing, and it changes rapidly. Accordingly, the realignments posed by trade police force questions about the interactions between private and public decisionmaking. These public choices shape the direction of private activity in spaces previously unseen.¹⁹⁵

Trade policing also has meaning for observers of the rise of a compliance era among federal agencies. Not only does trade policing add a transnational layer to those studies, but it also challenges their assumptions. The work of the trade police is neither first-level compliance, whereby companies must abide by statutes or conventions, nor is it second-level compliance, whereby they must act consistently with adjudicatory decisions.¹⁹⁶ The new trade policing

192. See Anna Gelpern, *Common Capital: A Thought Experiment in Cross-Border Resolution*, 49 TEX. INT'L L.J. 355, 355 (2014) (discussing how the problem of international bank failure requires new forms of regulation); Kevin E. Davis & Anna Gelpern, *Peer-to-Peer Financing for Development: Regulating the Intermediaries*, 42 N.Y.U. J. INT'L L. & POL. 1209, 1257–61 (2009) (proposing new forms of regulation in international finance).

193. Interview with Company Representative, in Washington, D.C. (Sept. 5, 2022) (commenting that the interventions by U.S. trade officials have interrupted the supply chain in the auto sector).

194. See *Premerger Notification and the Merger Review Process*, FED. TRADE COMM'N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/premerger-notification-merger-review> [<https://perma.cc/WQ32-Y9P7>] (last visited Nov. 11, 2023).

195. Henry Hart and Albert Sacks laid out this Janus-faced relationship in their influential work. Henry M. Hart & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (1958), reprinted in THE CANON OF AMERICAN LEGAL THOUGHT 241, 261 (David Kennedy & William W. Fisher III eds., 2006).

196. These same concepts of compliance extend to international law, where they are constructed largely around state behavior, but they apply and extend to private actors where the law reaches them: compliance with international treaties such as in international criminal law, or compliance with adjudicatory decisions such as in international investment law or international courts. See, e.g., Brewster & Chilton, *supra* note 32 (examining second-order compliance in trade, namely U.S. compliance with WTO Dispute Settlement Body reports).

might be properly characterized as “third-order compliance”: compliance with domestic principles enforced by states against individuals elsewhere in the world.

Third-order compliance is a blind spot for domestic and international law. Unlike transnational regulatory networks, some of which have been carefully unearthed by the global administrative law school, among others,¹⁹⁷ trade policing involves a different style of activity. Thinking of policing as compliance generates additional process questions that international legal scholarship confronts less frequently: questions of legal personality and legal agency. The answers may depend on the design of the tool, the agreement (if any) between the states involved, and, where applicable, the agreement between the state taking action and the firm itself, among others.

Lastly, any readjustment of trade law’s theory of the firm would not be complete without further scrutiny of the association between capital and labor. In some of these policing instruments, worker protection is paramount, and this principle serves as the basis for government action against a worksite. These tools expand trade law’s theory of the firm to encompass access to workers and labor rights beyond the usual corporate governance repertoire. Through this sort of government-forced engagement with workers, governments risk interfering in statutorily protected relationships between corporate management and the workers.¹⁹⁸

Seen through the broad lens of corporate governance, trade policing has become another thread among many in the legal tapestry with an impact on the powers of and protections for corporations and their stakeholders.

C. *Disciplinary Convergence*

One of the several uncelebrated achievements of trade policing is its realization of longstanding goals from other fields of law. Multiple legal subfields developed in an effort to impose greater responsibility on

197. See Benedict Kingsbury, Nico Krisch & Richard Stewart, *The Emergence of Global Administrative Law*, 68 *LAW & CONTEMP. PROBS.* 15, 15–20 (2005); Sabino Cassese, *Global Administrative Law: The State of the Art*, 13 *ICON* 465, 465–68 (2015).

198. Multiple strands of scholarly work are implicated by this discussion, including law and economics, the regulation of capital markets, and more recently, management literature on networks and value chains. These works include, but are certainly not limited to: Robert Phillips & Craig B. Caldwell, *Value Chain Responsibility: A Farewell to Arm’s Length*, 110 *BUS. & SOC’Y REV.* 345 (2005); Daniel R. Fischel, *Labor Markets and Labor Law Compared with Capital Markets and Corporate Law*, 51 *U. CHI. L. REV.* 1061 (1984); Richard A. Posner, *Some Economics of Labor Law*, 51 *U. CHI. L. REV.* 988 (1984).

companies for social wrongs: BHR,¹⁹⁹ CSR,²⁰⁰ responsible business conduct codes (“RBC”),²⁰¹ ESG,²⁰² corporate due diligence schemes,²⁰³ and still more.²⁰⁴ Some of these have led to codified projects, such as the Organization for Economic Cooperation and Development Guidelines for Multinational Enterprises, which cover several key areas of business responsibility, including human rights, labor rights, environment, bribery, consumer interests, and taxation.²⁰⁵ In particular, thanks to the widespread, albeit mixed, debate about ESG, the need to address environmental issues and economic distribution concerns has taken on heightened exigency. That movement has drawn attention to the contributing role that corporations play in these contexts. It has called for corporations to incorporate these concerns into their business practices.

These efforts have culminated in national legislation across a range of jurisdictions imposing reporting and compliance requirements on companies operating domestically and adding compliance costs.²⁰⁶ States have sought increasingly to extend the reach of such laws.²⁰⁷ And while the United States has long been known for its ability to reach companies through a loose nexus for their major wrongs, not even U.S. law has been able to affect the change that many of these advocates have sought.²⁰⁸ The result has been that legal

199. See generally John G. Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT’L L. 819 (2007) (outlining the field). A legal academic journal on the subject, published by Cambridge University Press, launched in 2016. See Surya Deva et al., *Editorial*, 1 BUS. & HUM. RTS. J. 1 (2016).

200. See, e.g., Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV. 77, 78 (2002); Joe “Chip” Pitts III, *Corporate Social Responsibility: Current Status and Future Evolution*, 6 RUTGERS J.L. & PUB. POL’Y 334, 343 (2009); Bin Jiang, *Implementing Supplier Codes of Conduct in Global Supply Chains: Process Explanations from Theoretic and Empirical Perspectives*, 85 J. BUS. ETHICS 77, 88 (2008).

201. See generally *National Action Plan on Responsible Business Conduct*, U.S. DEP’T OF STATE, <https://www.state.gov/responsible-business-conduct-national-action-plan> [<https://perma.cc/59ED-KCPK>] (last visited Nov. 11, 2023); OECD, *RESPONSIBLE BUSINESS CONDUCT FOR INSTITUTIONAL INVESTORS: KEY CONSIDERATIONS FOR DUE DILIGENCE UNDER THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES* (2017) <https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf> [<https://perma.cc/VU6Y-CVJE>].

202. See Elizabeth Pollman, *The Making and Meaning of ESG* 1 (Eur. Corp. Governance Inst. – Law, Working Paper No. 659, 2022) (“ESG as an acronym for ‘environmental, social, governance’ is a common denominator of the discourse using the term, but a deeper examination reveals that little beyond that understanding is fixed.”); Amanda M. Rose, *A Response to Calls for SEC-Mandated ESG Disclosure*, 98 WASH. U.L. REV. 1821, 1822 (2021) (noting that “[t]he acronym ‘ESG’ is used as shorthand for a dizzyingly broad array of ‘environmental,’ ‘social,’ and ‘governance’ topics affecting business”).

203. See Guido Ferrarini, *Sustainable Governance and Corporate Due Diligence: The Shifting Balance Between Soft Law and Hard Law*, in THE PALGRAVE HANDBOOK OF ESG AND CORPORATE GOVERNANCE 41 (Paulo Câmara & Filipe Morais eds., 2022).

204. See *Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012*, Pub. L. No. 112-208, 126 Stat. 1496.

205. OECD, *OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES* (2011).

206. Summary of the Rep. of the Working Group on Bus. & Hum. Rts. to the General Assembly, U.N. Doc. A/73/163 (Oct. 2018).

207. *Id.*

208. See Nahla Davies, *Are US Businesses Falling Behind on Human Rights Due Diligence?*, BUS. & HUM. RTS. RSCH. CTR. (Feb. 17, 2022), <https://www.business-humanrights.org/en/blog/are-us-businesses->

initiatives to create binding obligations on companies and to require them to adopt certain human rights have made few tangible advances.²⁰⁹

Today's trade policing covers much of the conceptual territory long sought by CSR, RBC, ESG, and BHR actors—in unexpected ways. It is not that those movements penetrated the trade policy world. Rather, they have somewhat met in the middle as state actors have sought new avenues for change beyond the compliance of their trading partners. No doubt, these movements continue to have differing logics.²¹⁰ But it is clear that while those other fields have sought to devise their own treaties or embed their principles primarily into international investment law,²¹¹ trade law held untapped potential.

Similarly, these efforts have contributed to a marked change in the discourse surrounding trade and its aims. For example, a review of congressional and popular language demonstrates that a human rights vocabulary has emerged in trade policy.²¹² Civil society has noticed. Organizations now speak not about the need for these tools but rather their efficacy. They praise their deployment and pursue still more.²¹³

Through the new corporate trade policing, trade law now occupies a space more akin to what advocates of BHR, CSR, ESG, RBC, and still other movements have sought. This disciplinary convergence, however, is only as durable as its progressive aims. It is a fusion of unlikely bedfellows—an unexpected intersection among fields that, until recently, largely saw themselves as somewhat antithetical to one another.²¹⁴ Trade law now offers a framework for state action toward companies as a means of maintaining the norms advanced by these other agenda.

falling-behind-on-human-rights-due-diligence [https://perma.cc/7ALY-PAVU].

209. See *Most Businesses Failing on Human Rights Due Diligence, Major Ranking Shows*, WORLD BENCHMARKING ALL. (Nov. 11, 2020), <https://www.worldbenchmarkingalliance.org/news/most-businesses-failing-on-human-rights-due-diligence-major-ranking-shows> [https://perma.cc/XTD2-VCAB].

210. For example, John Ruggie's work is more victim-focused than these trade policing tools intend to be. See Stéphane Brabant, Anna Kirk & Jonathan Proust, *States, Sanctions and Soft Law: An Analysis of Differing Approaches to Business and Human Rights Frameworks*, in *NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW* 383, 403 (Todd Weiler & Freya Baetens eds., 2011).

211. *Id.* at 405 (noting efforts to insert BHR principles into international investment treaties).

212. *Hearing to Consider the Pending Nomination of Jayme Ray White, of Washington, to be Deputy United States Representative with the Rank of Ambassador Before the S. Fin. Comm.*, 117th Cong. (2021) (responses of Jayme White to questions for the record); *Hearing to Consider the Pending Nomination of Sarah Bianchi, of Virginia, to be Deputy United States Representative with the Rank of Ambassador Before the S. Fin. Comm.*, 117th Cong. (2021) (responses of Sarah Bianchi to questions for the record).

213. Comments, Participants in Trade and Labor Working Group, *supra* note 142.

214. @NadiaBernaz, TWITTER (Sept. 6, 2021, 6:36 AM), <https://twitter.com/NadiaBernaz/status/1434827864088719365> [https://perma.cc/G736-4JL4].

CONCLUSION

While corporations and corporate interest groups previously maintained their greatest agency as advocates for specific choices in trade policy,²¹⁵ this Article has shown that is no longer the dominant direction of engagement. Firms have taken center stage in much of U.S. foreign commerce policymaking as governments increasingly turn their attention to the inner workings and performance of these companies in the global marketplace. Global value chains have generated novel sources of power. Frustration with trends in trade liberalization and strongly held views that traditional trade policing cannot countervail what many see as the negative effects of liberalization fuel this move. By going after companies, governments can generate immediate and concrete results.

As a result of the complexities created by the new trade policing, our cross-border commercial governance machine now faces an existential challenge in defining its own scope, significance, and durability: Does it seek to resuscitate the struggling, longstanding equipment, or does it embrace the new technology? The reluctance to countenance a shift in thinking is nurtured in part by the fact that the old trade policing of states is so well-established in our intellectual inheritance in trade law. Prior work ultimately pays insufficient attention to whom trade tools are targeting and what that means not just for the law of cross-border commerce, but for the ways we think about the trade administrative state and how this exercise ought to work.

Within trade practice and scholarship, the new trade policing holds promise for loosening tricky ideological and intergovernmental deadlocks. By turning attention to company rather than state conduct, trade policing pushes the needle away from ideological touchpoints and politicized interventions. It could likewise steer commentators away from liberalization myopia to resolve the longstanding logjam between developed and developing countries on how to achieve shared public policy aims without disadvantaging poorer economies. However, these improvements come at a cost, especially when those policy values and priorities do not align with the values of partners or when they are implemented in ways that engender neocolonialist critique. Further, international law enthusiasts may rightly fear the marginalization of international courts and organizations. These are unsettling deficiencies in the roll-out of this new practice that demand greater contemplation.

This study also has prompted a review of the connective tissue between trade norms and the corporation, and for the institutional complexities of

215. GREGORY SHAFFER, *DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION* 3 (2003) (“WTO law thereby becomes ‘harder’ law through which private actors exercise influence in its shadow.”).

transnational public authority when it comes to corporate accountability. It provides an interdisciplinary agenda for thinking about notions of corporate governance, social responsibility, and transnational commerce in the service of progressive and security-related aims. That agenda includes caveats about the pitfalls of opening the aperture in such a way that the enterprise becomes an instrument for bad rather than good. Such a fusion of these seemingly incongruous fields has the power to transform the global commercial system, the bargains it manages, the procedures applicable to it, and the rights and obligations of all involved. Indeed, it already has.

Many projects remain. Perhaps most importantly, policymakers should focus additional attention on adding transparent processes to the gears. Trade police may help avoid path dependence and inflexibility that the strict state-to-state system entails. They can create elasticity in what has been a rigid and formal process. But a sound organizational design is crucial to a healthy system of checks and balances on government action. In its experimental present, trade policing has vast implications for markets in short- and long-term ways. Plus, questions about who ought to decide these issues may soon be litigated in U.S. courts, forcing a reconsideration of the principal norms and the newfound toolkit.²¹⁶ It is crucial to focus on legitimacy. This project begins that effort, but finding the appropriate balance will remain a work-in-progress.

216. See, e.g., *Ninestar Tech. v. United States* (Ct. Int'l Trade 2023) (No. 23-182); *Int'l Rts. Advocs. v. Mayorkas* (Ct. Int'l Trade 2023) (No. 23-165).