

## How International Labor Law Is Actually Enforced and Why It Matters

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*This Article identifies increasing reliance on the International Labour Organization's ("ILO") system for standard-setting and supervision within a wide array of labor rights enforcement routes that lie outside the organization. These findings prompt the re-thinking of international labor law enforcement. Rather than maintaining the conventional dichotomy between the ILO's traditional enforcement (often criticized as ineffective) and external mechanisms (frequently regarded as a problematic compromise due to their departure from the ILO's international labor standards), it is possible to envision an emerging and increasingly effective middle ground. According to this view, the ILO, in practice, harnesses external actors to enforce its norms, underpinned by its normative authority and expertise, through which it can shape norms of acceptable conduct in global labor markets. By influencing the mutual expectations among actors in this way, ILO standards serve as a constraint on the design of external regimes. Spotlighting these emerging processes and developing ways to enhance these existing connections between the ILO and external actors can thus expand our current toolkit for enforcing international labor law. More generally, the ILO's experience can apply to other international organizations in achieving greater coherence across numerous transnational enforcement regimes and their harmonization with treaty objectives.*

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## INTRODUCTION

How do international organizations, such as the International Labour Organization (“ILO”), enforce international norms? In the absence of government-like coercive enforcement capacities, the enforcement of public international law has long challenged international organizations.<sup>1</sup> The relatively weak enforcement power of international organizations presents a particularly acute problem in international labor law, with the ILO considered especially toothless for its struggle to effectively enforce its conventions.<sup>2</sup> Therefore, in practice, the enforcement of international treaty obligations falls to a wide array of public and private actors, including national organs and multinational corporations external to the relevant treaty bodies entrusted with this task. When thinking about the enforcement of international labor law, one rarely considers the ILO’s longstanding supervisory system—the organization’s internal enforcement mechanism that monitors and promotes member states’ compliance with international labor standards.<sup>3</sup> Instead, entities look to the assistance of other actors,

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1. See, e.g., Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 71 U. CHI. L. REV. 469, 489–91 (2005).

2. The International Labour Organization’s (“ILO”) supervisory system cannot actively enforce its decisions upon states. For an overview of the ILO’s enforcement mechanisms, see *Applying and Promoting International Labour Standards*, INT’L LAB. ORG. [ILO], <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/lang-en/index.htm> [<https://perma.cc/A7JG-F793>]. For a discussion on the resultant challenges of enforceability, see discussion *infra* notes 23–39. As to the difficulties in enforcing international labor laws on companies within states, see, for example, Paul Marginson, *Governing Work and Employment Relations in an Internationalized Economy: The Institutional Challenge*, 69 INDUS. & LAB. RELS. REV. 1033, 1033–37 (2016).

3. The term “international labor law” can be defined as “the body of international legal norms which regulates issues concerning work.” Franz Christian Ebert & Claire La Hovary, *Labour Law, International*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Anne Peters & Rüdiger Wolfrum eds., 2013), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e957> [<https://perma.cc/T332-HTC9>]. As Ebert and La Hovary further explain, the ILO is the “principal international institution charged with developing international labour law.” *Id.* However, the scope of international labor law both extends beyond and falls short of the ILO’s framework: It includes labor-related treaties and customary international law not governed by the ILO, while some ILO conventions address matters that do not fall strictly within the definition of international labor law. See *id.* Correspondingly,

those seen as capable of leveraging powerful market incentives, and even sanctions, towards their enforcement. Today, enforcement is thought to occur primarily through trade arrangements, corporate social responsibility initiatives, social certification schemes, domestic and regional courts, and supply chain transparency regulations.<sup>4</sup>

The current reality of decentralized enforcement jeopardizes the collective action function at the heart of many international organizations.<sup>5</sup> This is because overcoming collective action problems requires a certain level of cooperation whereby actors “[conform] to generally accepted standards of behavior.”<sup>6</sup> Collective action can only work when all countries comply with the same norms, and in the same way.<sup>7</sup> But when numerous actors external to the international organization seek to perform the enforcement function—as is often the case today<sup>8</sup>—this raises real concerns about the divergence of norms between different enforcement schemes. That is, the involvement of external actors in enforcement exacerbates the well-known problem of actors enforcing international norms according to their own particular objectives,<sup>9</sup> and by doing

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“international labor standards” can be understood as “legal instruments drawn up by the ILO’s constituents . . . and setting out basic principles and rights at work. They are either Conventions or Protocols, which are legally binding international treaties that may be ratified by member states, or Recommendations, which serve as non-binding guidelines.” *International Labour Standards*, ILO, <https://www.ilo.org/international-labour-standards#intro> [<https://perma.cc/R5MM-SXQQ>]. In practice, the term “international labor law” often “denotes the exercise of the ILO’s centenary old mandate to set, promote, supervise, and review [international labor standards].” Katerina Tsotroudi & Jordi Agustí Panareda, *The ILO’s Dialogical Standards-Based Approach to International Labour Law*, in *THE ROLES OF INTERNATIONAL LAW IN DEVELOPMENT* 110, 112 (Siobhán McInerney-Lankford & Robert McCorquodale eds., 2023).

4. See discussion *infra* notes 40–50.

5. Eyal Benvenisti, *The WHO—Destined to Fail?: Political Cooperation and the COVID-19 Pandemic*, 114 *AM. J. INT’L L.* 588, 589–90 (2020); Eyal Benvenisti, *Power and Passion in International Organizations: A Call to Rethink the Law* 11–20 (Univ. of Cambridge Faculty of Law, Research Paper No. 30/2023, 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4613909](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4613909) [<https://perma.cc/9YCD-8ZWW>] [hereinafter Benvenisti, *Power and Passion in International Organizations*]; see also discussion *infra* notes 14–22.

6. Robert O. Keohane, *Reciprocity in International Relations*, 40 *INT’L ORG.* 1, 4 (1986).

7. *Id.* at 6–12. In the context of collective action more generally, see MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 173 (2d ed. 1971); ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 55–69 (1984).

8. Kenneth W. Abbott et al., *Orchestration: Global Governance Through Intermediaries*, in *INTERNATIONAL ORGANIZATIONS AS ORCHESTRATORS* 3, 4 (Kenneth W. Abbott et al. eds., 2015); LILIANA B. ANDONOVA, *GOVERNANCE ENTREPRENEURS: INTERNATIONAL ORGANIZATIONS AND THE RISE OF GLOBAL PUBLIC-PRIVATE PARTNERSHIPS* 2 (2017).

9. See, e.g., Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 *EUR. J. INT’L L.* 815, 843 (2002); Andrew T.F. Lang, *Reflecting on ‘Linkage’: Cognitive and Institutional Change in the International Trading System*, 70 *MOD. L. REV.* 523, 530–36 (2007) (reviewing existing arguments); Jason Beckett, *Fragmentation, Openness and Hegemony: Adjudication and the WTO*, in *INTERNATIONAL ECONOMIC LAW AND NATIONAL AUTONOMY* 44, 44 (Meredith K. Lewis & Susy Frankel eds., 2011).

so, it undermines the ability of the treaty regime to facilitate common behavior around the cooperative arrangement.<sup>10</sup> In practice, one of the greatest obstacles standing in the way of international organizations facilitating collective action is the need to agree upon and enforce the same rules for all, especially in cases such as labor regulation, where the policy choices can be broad.<sup>11</sup> Consequently, with the proliferation of external enforcement of international law, the mere separation of these efforts from the norms and procedures of the treaty regime has put the cooperation function performed by international organizations at additional risk.

Although the problem of decentralized, incoherent enforcement remains a significant concern, a closer look at recent developments in the specific field of international labor law sheds new light on how this challenge is evolving, and on emerging pathways toward greater coherence. This Article observes an emerging practice of increasing reliance on the ILO's system for standard-setting and supervision—its norms, interpretations, and monitoring activities—within the wide array of enforcement routes that are external to the ILO. Legally speaking, international labor standards often do not apply in these circumstances to the conduct of many of the regulated actors, including companies, “home” states, and non-ratifying states.<sup>12</sup> Yet, even when not legally required or coercively enforced by international law, the various norms and requirements of the ILO's international labor standards system are becoming increasingly influential as the adopted standard that guides actors' behavior. In today's interconnected global market economy, transnational actors want to know that everyone else also plays by the rules. And, as shown here, relevant actors increasingly recognize the ILO's system of labor standards as the legitimate benchmark for the assessment of “external” enforcement mechanisms. By embedding the social norms of acceptable conduct in global labor markets, these standards will naturally influence actors' expectations from one another in this field. Accordingly, the conduct of both countries and companies is increasingly being evaluated and judged, via a wide range of enforcement regimes, spanning from social clauses in trade agreements to companies' codes of conduct, according to international labor standards.

This emerging practice can be significant for international labor law due to its potential to create more harmony across the numerous enforcement regimes in this field. Rather than the common dichotomy between the ILO's traditional enforcement, which is often criticized as ineffective, and external mechanisms which are often seen as a problematic compromise due to their

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10. ANDONOVA, *supra* note 8, at 11–12.

11. Benvenisti, *Power and Passion in International Organizations*, *supra* note 5, at 21.

12. BOB HEPPLER, *LABOUR LAWS AND GLOBAL TRADE* 4 (2005).

divergence from the ILO's system of international labor standards, we can start thinking of an increasingly effective middle ground. According to this view, the ILO relies, in practice, on other actors to enforce its norms. It does so rather effectively through its normative influence, authority, and expertise, through which the ILO embodies the understanding of the appropriate behavior in global labor markets. By shaping actors' mutual expectations—what they expect from others and what they believe others expect from them—ILO standards act as a constraint on the design of these regimes. In that sense, these social perceptions regarding the acceptable standard of behavior create, to a certain extent, a link that ties the ILO to other enforcement schemes and contributes to greater coherence in this field.

By advancing a more nuanced representation of the enforcement practices in international labor law, these new insights have the potential to open pathways for a genuine improvement in this enforcement regime. This identified influence that the ILO exerts over actors' beliefs and expectations will feed into their various interactions, and accordingly shape their reactions to others' behaviors, whether in the form of penalties or rewards.<sup>13</sup> And thus, spotlighting and enhancing these emerging processes can expand the current toolkit for the enforcement of international labor law. This Article offers some initial guidelines on how this enhancement could be achieved. It draws on economic and socio-legal literature to explore how the law can shape social norms, and highlights factors that can advance a positive feedback loop between law and society in which social perceptions of acceptable behavior are increasingly aligned with the internationally recognized legal requirements as defined and interpreted by the ILO.

While the field of international labor law grounds this exploration of the emerging enforcement processes and ways to enhance them, the enforcement insights gained can generally apply to other international organizations and enforcement trends across international regimes. The processes identified around the shifting perceptions on compliance, and the ways these processes could be enhanced, can help align different enforcement regimes in circumstances other than labor standards. In an increasingly interconnected global society, the need for an authoritative benchmark that actors and regimes across the board can rely upon is equally relevant to other fields of regulation. This is particularly true with transnational regimes also marred by collective action problems, such as environmental protection, or regimes characterized by a crowded landscape of compliance activities outside the treaty regime, such as

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13. On the role of rewards and penalties as mechanisms for promoting state compliance with international law, see generally Anne van Aaken & Betül Simsek, *Rewarding in International Law*, 115 AM. J. INT'L L. 195 (2021).

international human rights. In that sense, the ILO's experience showcases a particular understanding of how international organizations can harness the enforcement capacities of a wide range of influential actors and initiatives in a way that is more coherent and aligned with the public interest.

The structure of this Article is as follows: Part I frames the discussion by positioning the enforcement challenge as one of fostering coherence in labor practices, in accordance with the internationally accepted cooperative regime established by the ILO. It concludes that neither the ILO's traditional enforcement nor external initiatives perform this task well enough, but that more coherence might be achieved if we could effectively tie these regimes back to the ILO. Part II presents the study's empirical findings that there are, in fact, increasing synergies between the two enforcement regimes, reflecting a growing perception of the ILO's international labor standards system as the appropriate standard of behavior for actors and initiatives across the globe. Building upon these findings, Part III highlights ways to enhance the productive relationships between the two, for enforcement that is both more effective and more harmonized. The final Part offers concluding remarks and future implications. Drawing on the case study of labor law, it highlights how, even in today's diffuse and decentralized governance sphere, international law can remain central—shaping expectations, guiding transnational efforts, and providing a foundation for more effective, legitimate, and harmonized enforcement practices.

## I. ENFORCING INTERNATIONAL LABOR LAW: A CHALLENGE OF HARMONIZATION

The enforcement of international labor law centers around the well-known collective action problem between states in the globalized economy:<sup>14</sup> While countries may prefer to ensure the minimum level of protection required by international labor law, their need to compete over trade and investments can create powerful short-term pressures to refrain from promoting or enforcing labor standards.<sup>15</sup> The ILO, however, can address this problem and incentivize states to cooperate and comply with a globally agreed-upon set of rights. Through its tripartite structure, comprising governments, employers, and workers, the ILO sets, supervises, and promotes the application of international labor standards.<sup>16</sup> When states assume that other countries will behave according to the same common standards, they then benefit from following those

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14. Maayan Menashe, *The Race to the Bottom Revisited: International Labour Law, Global Trade and Evolutionary Game Theory*, 40 OXFORD J. LEGAL STUD. 53, 56–59 (2020).

15. *Id.* at 59–69.

16. See ILO, RULES OF THE GAME: AN INTRODUCTION TO THE STANDARDS-RELATED WORK OF THE INTERNATIONAL LABOUR ORGANIZATION 7, 17–30, 105–118 (4th ed. 2019).

standards as well, as they can then enjoy the long-term economic advantages associated with higher labor standards without competing countries undercutting them.<sup>17</sup> After all, the ILO was initially created to prevent a “race to the bottom” by facilitating international cooperation on global labor standards.<sup>18</sup>

The harmonizing effect—everyone complying with the same norms, in the same way—is crucial to addressing this collective action problem.<sup>19</sup> As famously stated in the ILO Constitution, “the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries.”<sup>20</sup> This notion of “humane conditions” serves a key function here, as it highlights the need for a certain set of common standards of behavior that all countries expect from each other as the basis for this cooperative arrangement. As will be further explored in this Article, these “humane” standards of behavior—the common norms that countries agreed to and coordinate around to prevent a race to the bottom—should be seen (and are, in fact, increasingly seen) as the internationally accepted standards prescribed, interpreted, and monitored by the ILO.

Enforcement operations constitute a critical component of the ILO’s role in facilitating such a cooperative regime around common norms.<sup>21</sup> Indeed, game-theoretical analysis shows that this regime can only work when countries assume that others are actually complying with the set of norms upon which they collectively agreed. Moreover, even after achieving cooperation, theory predicts that states continue to constantly face strong incentives to defect. The combination of these two factors means that cooperation can only be achieved with robust and reliable monitoring and enforcement activities.<sup>22</sup> The success of this regime thus relies on the ILO’s ability to enforce labor standards on countries. The ILO cannot simply enforce any type of “good” or “efficient” labor standards, but rather specifically the communally agreed-upon norms within the cooperative regime facilitated by the ILO.

How then is international labor law enforced? In the most straightforward sense, the official mechanisms of the ILO’s long-standing supervisory system enforce international labor standards. States are obliged to periodically report

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17. Menashe, *supra* note 14, at 69–79.

18. KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 27–28 (1st ed. 1957).

19. Menashe, *supra* note 14, at 63–64, 72–73.

20. ILO Constitution pmb. The ILO Constitution was incorporated into Part XIII of the Treaty of Versailles. See Treaty of Peace between the Allied and Associated Powers and Germany pt. XIII, § 1, June 28, 1919, 2 U.S.T. 43, 225 Consol. T. S. 188.

21. On the importance of effective enforcement more generally for addressing collective action problems, see OLSON, *supra* note 7, at 15. For an overview on the importance of addressing collective action problems in social contexts, see generally RUSSELL HARDIN, *COLLECTIVE ACTION* (3rd ed. 1993); Elinor Ostrom, *Analyzing Collective Action*, 41 *AGRIC. ECON.* 155 (2010).

22. Menashe, *supra* note 14, at 73–74.

on measures taken to implement the ILO conventions they have ratified.<sup>23</sup> The Committee of Experts on the Application of Conventions and Recommendations assesses these reports, which the Conference Committee on the Application of Standards (a political, tripartite organ) then examines. The mechanisms available within these procedures include, among others, the publication of country reports; discussions in the wide forum of all ILO member states; “observations” recorded on serious and persistent violations; “direct requests” to governments for further information; recommendations to governments on action needed and follow-up on progress made; and the continuous involvement of the country’s workers’ and employers’ organizations.<sup>24</sup> “Special” procedures also exist for specific instances of non-observance of conventions,<sup>25</sup> namely the “complaints”<sup>26</sup> and “representations”<sup>27</sup> procedures. Complaints can escalate by establishing a “Commission of Inquiry,” a tripartite body that will consider the alleged violation and issue recommendations to the relevant government.<sup>28</sup> If the violation persists, the final option is to utilize Article 33, whereby the Governing Body recommends that member states’ delegations take “such action as it may deem wise and expedient to secure compliance therewith.”<sup>29</sup> This provision opens up the path to impose sanctions on non-complying countries and, as such, “lies very much at the hard end of the spectrum of measures open to an international organization in such cases.”<sup>30</sup>

While the ILO’s supervisory system has received its share of appreciation,<sup>31</sup> this state-centric, “hard law” enforcement model has also been criticized as ineffective. The difficulty is that the ILO, as an international organization, inevitably does not possess the power to coercively enforce its laws the way that

23. See ILO Constitution arts. 19, ¶¶ 5(e), 6(d), 22, 23. For an overview of these obligations, see ILO, HANDBOOK OF PROCEDURES RELATING TO INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS 22–34 (2019) [hereinafter ILO, HANDBOOK].

24. For an overview, see ILO, HANDBOOK, *supra* note 23, at 35–41; Maupain, *The Settlement of Disputes Within the International Labour Office*, 2 J. INT’L ECON. L. 273, 276–77 (1999); ERIC GRAVEL & CHLOÉ CHARBONNEAU-JOBIN, THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS: ITS DYNAMIC AND IMPACT 7–17 (2003).

25. For an overview, see ILO, HANDBOOK, *supra* note 23, at 48–53; Maupain, *supra* note 24, at 278–79.

26. ILO Constitution art. 26.

27. *Id.* art. 24.

28. *Id.* arts. 26–29.

29. *Id.* art. 33.

30. Philip Alston & James Heenan, *Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work?*, 36 N.Y.U. J. INT’L L. & POL. 101, 118 (2004).

31. See, e.g., Lee Sweptson, *The International Labour Organization and International Human Rights System*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 339, 346, 351 (Scott Sheeran & Nigel Rodley eds., 2013); Bernd Waas, *How to Improve Monitoring and Enforcement of International Labour Standards?*, in INTERNATIONAL LABOUR ORGANIZATION AND GLOBAL SOCIAL GOVERNANCE 79, 80, 84, 93 (Tarja Halonen & Ulla Liukkonen eds., 2021) [hereinafter ILO and GLOB. SOC. GOVERNANCE].

domestic legal enforcement mechanisms do.<sup>32</sup> Although Article 33 facilitates the imposition of hard sanctions, this almost never happens and would still rely on member states to implement.<sup>33</sup> Langille argues that in practice, the supervisory system's enforcement mechanisms function as a "soft law system" of "moral persuasion and, at most, public shaming."<sup>34</sup> While such a "cooperative approach" for labor rights enforcement does have its merits,<sup>35</sup> this de facto dependence on the voluntary action of the supervised states is also the "most frequent criticism of the supervisory mechanisms."<sup>36</sup> The ILO is often described in this respect as "toothless."<sup>37</sup> The limits of the ILO's enforcement capabilities are particularly problematic in the context of the collective action problem in global labor regulation and the need to ensure coherence across labor practices. As in other collective action scenarios, preventing actors from "defecting" from the cooperative behavior essentially requires enforcing upon them something that conflicts with their immediate interests. Langille thus argues that preventing a "race to the bottom" in international labor regulation would necessitate binding and enforceable laws, which the ILO simply does not possess.<sup>38</sup> In that sense, "the ILO and its international labor law have been handed an impossible assignment."<sup>39</sup>

In light of the limitations of the ILO's enforcement capabilities, international labor law has been heavily relying on parallel enforcement routes "external" to the ILO's supervisory system. Today, the ILO is no longer considered "as the sole and central agent but rather as part of an ensemble"<sup>40</sup> or a "spider's web of hard and soft transnational regulation"<sup>41</sup> that is "spread over many institutions,

32. As stressed by Langille, "it is not about any real enforcement power. The ILO has never 'enforced' anything." Brian A. Langille, *Core Labour Rights—The True Story (Reply to Alston)*, 16 EUR. J. INT'L L. 409, 423 (2005).

33. Measures under Article 33 were only adopted three times, in response to forced labor in Myanmar in 2000, in response to violations of freedom of association in Belarus in 2023, and in response to forced labor and violations of freedom of association in Myanmar. See ILO, 88th Sess., Resolution Concerning the Measures Recommended by the Governing Body Under Article 33 of the ILO Constitution on the Subject of Myanmar (June 14, 2000); ILO, 111th Sess., Resolution Concerning the Measures Recommended by the Governing Body Under Article 33 of the ILO Constitution on the Subject of Belarus (June 12, 2023); ILO, 113th Sess., Resolution Concerning the Measures Recommended by the Governing Body Under Article 33 of the ILO Constitution on the Subject of Myanmar (June 5, 2025).

34. Langille, *supra* note 32, at 413.

35. Steve Charnovitz, *The Lost History of the ILO's Trade Sanctions*, in ILO100—LAW FOR SOCIAL JUSTICE 217, 254–56 (George P. Politakis, Tomi Kohiyama & Thomas Lieby eds., 2019).

36. HEPPLÉ, *supra* note 12, at 54.

37. For a recent overview, see Desirée LeClercq, *Outsourcing Enforcement*, 62 VA. J. INT'L L. 271, 275 (2022).

38. Brian A. Langille, *What Is International Labor Law For?*, 3 L. & ETHICS HUM. RTS. 48, 60–63 (2009).

39. *Id.* at 63.

40. Ruth Dukes, Judy Fudge & Guy Mundlak, *Labour Law in the 100 Years of the International Labour Review*, 160 INT'L LAB. REV. 66, 73–74 (2021).

41. HEPPLÉ, *supra* note 12, at 3.

covering various legal fields, types of instruments and heuristic techniques.”<sup>42</sup> The enforcement of international labor law increasingly tends to focus on the numerous actions taken by influential countries, as well as various private and public-private regulatory schemes. These include social clauses in trade agreements and in the Generalized System of Preferences schemes;<sup>43</sup> transnational private regulations, such as corporate social responsibility and social certification initiatives;<sup>44</sup> and regulations on global supply chain transparency, among other actions.<sup>45</sup> Some of these enforcement actions are directly delegated by the ILO to the enforcing actors;<sup>46</sup> some are done in cooperation with the ILO;<sup>47</sup> and some are done entirely by external actors, such as companies’ unilateral codes of conduct<sup>48</sup> or states’ domestic legislation with cross-border enforcement mechanisms.<sup>49</sup> The rationale is that the transnational actors engaged in these schemes are supposedly more capable than the ILO of coercively enforcing the required behavior against violators. Typically, this is done by leveraging powerful market incentives towards enforcement—in other words, by providing additional market access to those who are following the appropriate norms of behavior, or by reducing market access to actors who are not “playing by the rules.”<sup>50</sup>

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42. Dukes, Fudge & Mundlak, *supra* note 40, at 76.

43. See, e.g., HEPPLER, *supra* note 12, at 89–128.

44. See, e.g., Kevin Kolben, *Dialogic Labor Regulation in the Global Supply Chain*, 36 MICH. J. INT’L L. 425, 429–40 (2015).

45. See, e.g., Galit A. Sarfaty, *Shining Light on Global Supply Chains*, 56 HARV. J. INT’L L. 419, 419 (2015).

46. This is the case, for example, with the enforcement arrangements of the ILO’s Maritime Labour Convention regime. See LeClercq, *supra* note 37, at 274–75, 283–91.

47. For example, the Better Work Program is run by the ILO and the International Finance Corporation, in cooperation with trade unions, businesses, and governments. See *Governance, BETTER WORK*, <https://betterwork.org/governance/> [<https://perma.cc/J3QD-NRBG>]. The Accord on Fire and Building Safety in Bangladesh is governed by a Steering Committee with representatives from companies, trade unions, and the ILO. See *About, ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH*, <https://bangladeshaccord.org/about> [<https://perma.cc/V4CE-L6AH>]. The ILO is also cooperating with different United Nations (“U.N.”) bodies in enforcement schemes such as the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises on Responsible Business Conduct and the U.N. Global Compact. See *Collaboration and Partnerships with International Organizations*, ILO, <https://www.ilo.org/resource/article/collaboration-and-partnerships-international-organizations> [<https://perma.cc/3LLA-GNL8>].

48. See generally Maayan Menashe, *Private Actors as Transnational Regulators: The Case of Freedom of Association*, 49 INDUS. L.J. 1 (2020) (examining, among other things, H&M’s corporate social responsibility code of conduct).

49. For example, the United Kingdom’s Modern Slavery Act 2015 requires certain commercial organizations to publish an annual statement describing the steps they take to ensure that modern slavery is not taking place in their business and supply chains. Modern Slavery Act 2015, c. 30, § 54 (U.K.).

50. There are initiatives, for example, that provide market access to businesses who comply to a certain extent with international labor standards. This is the case with the Better Factories Cambodia program and its successor, the Better Work program. See Kolben, *supra* note 44,

These external enforcement mechanisms, however, are also problematic when considered through the lens of the collective action problem. Non-ILO enforcement schemes, just like the ILO's traditional enforcement mechanisms, face difficulties in ensuring the required level of harmonization of behavior. Reliance on external actors raises concerns that enforcement will be carried out in a way that reflects the actors' particular interests.<sup>51</sup> In these circumstances, the divergence in enforcement is by itself problematic, regardless of the content of the particular norms that are enforced by these actors. Even if these enforcement decisions might seem, in isolation, to be a beneficial intervention, the mere fact of separation from the ILO's traditional supervisory system raises serious concerns because the enforcement by different actors creates "parallel systems of international rights enforcement."<sup>52</sup> This can severely hinder the coordinating element of international enforcement mechanisms, which is crucial to collective action in global labor markets.

In practice, the numerous enforcement regimes vastly vary from one another, and thus naturally also differ from the "traditional concept of international labour law centred on and formulated by the ILO."<sup>53</sup> Monitoring schemes in private codes of conduct are incredibly diverse and vary in quality.<sup>54</sup> The choice of normative standards depends on companies' marketing and branding priorities,<sup>55</sup> and companies lack the incentive to ensure the required level of coherence between schemes.<sup>56</sup> Research has also found that private codes differ in the degree to which they align with international labor law norms.<sup>57</sup> When it comes to labor standards in trade agreements, they, too, run the risk of

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at 451–56; Arianna Rossi, *Better Work: Harnessing Incentives and Influencing Policy to Strengthen Labour Standards Compliance in Global Production Networks*, 8 CAMBRIDGE J. REGIONS ECON. & SOC'Y 505, 505 (2015). A similar example is the regime established in the aftermath of the collapse of the Rana Plaza building. See Anne Trebilcock, *The Rana Plaza Disaster Seven Years On: Transnational Experiments and Perhaps a New Treaty?*, 159 INT'L LAB. REV. 545, 547–48 (2020).

51. On private companies' biased enforcement, see, for example, RICHARD M. LOCKE, *THE PROMISE AND LIMITS OF PRIVATE POWER: PROMOTING LABOR STANDARDS IN A GLOBAL ECONOMY* 24 (2013); TIM BARTLEY, *RULES WITHOUT RIGHTS: LAND, LABOR, AND PRIVATE AUTHORITY IN THE GLOBAL ECONOMY* 3 (2018). On governments' biases, see, for example, LeClercq, *supra* note 37, at 306.

52. Ruben Zandvliet & Paul van der Heijden, *The Rapprochement of ILO Standards and CSR Mechanisms: Towards a Positive Understanding of the "Privatization" of International Labour Standards*, in *GLOBAL GOVERNANCE OF LABOUR RIGHTS: ASSESSING THE EFFECTIVENESS OF TRANSNATIONAL PUBLIC AND PRIVATE POLICY INITIATIVES* 170, 171 (Axel Marx et al. eds., 2015).

53. Yifeng Chen, *Proliferation of Transnational Labour Standards: The Role of the ILO*, in *ILO AND GLOB. SOC. GOVERNANCE*, *supra* note 31, at 97, 102–14.

54. Richard M. Locke et al., *Beyond Corporate Codes of Conduct: Work Organization and Labour Standards at Nike's Suppliers*, 146 INT'L LAB. REV. 21, 23 (2007).

55. FRANCIS MAUPAIN, *THE FUTURE OF THE INTERNATIONAL LABOUR ORGANIZATION IN THE GLOBAL ECONOMY* 221 (2013).

56. Francis Maupain, *Is the ILO Effective in Upholding Workers' Rights?: Reflections on the Myanmar Experience*, in *LABOUR RIGHTS AS HUMAN RIGHTS* 85, 138 (Philip Alston ed., 2005).

57. See generally Menashe, *supra* note 48.

applying international labor standards inconsistently across agreements given their highly decentralized context.<sup>58</sup>

While external enforcement regimes are at risk of diverging from internationally accepted international labor laws, existing research has suggested numerous solutions, all stressing the need for these schemes to draw more strongly from ILO standards, including the ILO's interpretation of these standards.<sup>59</sup> For example, in the area of trade agreements, scholars have pointed to the risk of separate dispute settlement panels enforcing ILO standards differently and have suggested formalizing some method for these expert panels to engage or consult with the ILO.<sup>60</sup> A similar worry was expressed by Philip Alston about the way in which numerous regulatory schemes outside of the ILO interpret and enforce the ILO's core labor standards.<sup>61</sup> He accordingly stresses the need for "anchoring the principles firmly in the standards developed within the convention regime."<sup>62</sup> Likewise, in relation to private enforcement schemes, Ulla Liukkunen argues that the "question of effective incorporation of core labour standards into transnational sets of labour standards created by various non-state actors has become increasingly central" and stresses the need to "firmly anchor" the ILO's standards, voice, and authority within these regulatory contexts.<sup>63</sup> Antonio Garcia-Muñoz Alhambra, Beryl Ter Haar, and Attila Kun suggest an even more explicit role for the ILO in facilitating the monitoring of transnational private instruments of multinational corporations in a way that fits with, and complements, its regular supervisory activities.<sup>64</sup> And, in the context of enforcement that is "outsourced" to nation states, Desirée LeClercq argues that such delegation of authority allows states to "unilaterally interpret and apply international norms based on domestic laws and priorities,"<sup>65</sup> leading

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58. Jordi Agustí-Panareda et al., *ILO Labour Standards and Trade Agreements: A Case for Consistency*, 36 COMPAR. LAB. L. & POL'Y J. 347, 348 (2015).

59. Chen argues in this regard that the "[p]roliferation of labour standards has brought many challenges to the door of the ILO. The ILO should endeavour to reinstate itself as a central institution for economic and social theories as well as for labour standards . . . . It is important for the ILO to perform a legal-diplomatic role in promoting convergence of normative understandings about labour, economy and society among different institutions." Chen, *supra* note 53, at 116.

60. George Politakis, *The Recognition of Occupational Safety and Health as a Fundamental Principle and Right at Work*, 72 INT'L & COMPAR. L.Q. 213, 230–31 (2023); Marco Bronckers & Giovanni Gruni, *Taking the Enforcement of Labour Standards in the EU's Free Trade Agreements Seriously*, 56 COMMON MKT. L. REV. 1591, 1611–13 (2019).

61. Philip Alston, 'Core Labour Standards' and the Transformation of the International Labour Rights Regime, 15 EUR. J. INT'L L. 457, 495–510 (2004).

62. *Id.* at 521.

63. Ulla Liukkunen, *The ILO and Transformation of Labour Law*, in ILO AND GLOB. SOC. GOVERNANCE, *supra* note 31, at 17, 30.

64. Antonio Garcia-Muñoz Alhambra, Beryl Ter Haar & Attila Kun, *Harnessing Public Institutions for Labour Law Enforcement*, 17 INT'L ORGS. L. REV. 233, 233 (2020).

65. LeClercq, *supra* note 37, at 306.

to the need for international organizations such as the ILO to “reclaim ownership over international law.”<sup>66</sup> She proposes the creation of adjudicative bodies within international organizations that are capable of issuing mandatory enforcement directives to the enforcing states.<sup>67</sup>

The discussion thus far indicates that the enforcement of international labor law can be seen as a dichotomy. On the one hand, there are the ILO’s traditional enforcement procedures, which are criticized as ineffective. On the other hand, there are numerous external mechanisms that have more material enforcement capacities but diverge from the ILO’s accepted system of international labor standards and therefore do not guarantee harmonization of behavior, a task that stands at the heart of effective enforcement in this field. But what also emerges from this discussion is a hope in the form of tying enforcement instruments to the work of the ILO to promote more coherence across regimes and harmonization with ILO objectives. These types of solutions reflect a more pragmatic approach that acknowledges the need to reconcile the tensions between the two enforcement regimes. As Kevin Kolben recognized, “transnational labor regulation is not an either/or, state/non-state proposition. Indeed, there are opportunities to strategically utilize private and public regulatory regimes to dialogically and complementarily work together towards the same ends.”<sup>68</sup> And so it seems that more harmonized enforcement could be achieved if ILO and external enforcement regimes could be better linked. This Article now moves on to look more closely at the relationship between the two.

## II. THE SHIFTING PERCEPTIONS ON APPROPRIATE BEHAVIOR IN GLOBAL LABOR MARKETS

This Part argues that there is, in fact, increasing reliance on the ILO’s system for standard-setting and supervision within a wide array of enforcement routes that are external to the ILO. The following analysis focuses on four broad categories of external actors: multinational corporations (through private codes and multistakeholder initiatives), intergovernmental and United Nations (“U.N.”) bodies (through transnational governance frameworks), states (via domestic policies with cross-border mechanisms and trade and regulatory regimes), and domestic and regional courts. In recent decades, these actors increasingly regard the ILO’s comprehensive system of international labor standards and its supervisory activities as embodying the appropriate standard against which the labor

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66. *Id.* at 307.

67. *Id.* at 307–08.

68. Kolben, *supra* note 44, at 440.

practices of countries and companies are evaluated.<sup>69</sup> In that sense, these societal perceptions on what constitutes the acceptable standards of behavior create a link that ties external enforcement regimes back to the ILO. Arguably, it is these perceptions that influence how, and which, labor standards will be enforced within transnational enforcement regimes. The more the ILO's norms, interpretations, and institutions are considered as reflecting the required standard, the more they will be relied upon as the relevant normative source to guide the enforcement of external regimes. These perceptions effectively narrow the gap between the numerous external enforcement regimes, thereby promoting coherence.

From a strict legal point of view, the actors designing these non-ILO enforcement actions are seemingly free to decide the precise standards they wish to draw on for their different schemes. This is the result of the regulatory gap operating in these transnational settings, and the fact that international labor law is often non-binding on these actors. Countries are not bound by an ILO convention that they have not ratified, and several host countries of multinational corporations have, in fact, not ratified important ILO conventions.<sup>70</sup> As for the home countries of these companies, they are generally not responsible for labor rights violations occurring beyond their borders.<sup>71</sup> Private companies themselves are naturally not bound by these international commitments.<sup>72</sup>

However, this regulatory void does not mean that actors have complete freedom in the way they go about enforcement. Arguably, the prevailing social perceptions on the global level influence these decisions. Perceptions of the appropriate behavior determine what actors expect from others and what they believe that others expect from them.<sup>73</sup> These expectations will inevitably influence their behavior, feeding into their social interactions and shaping both the way they behave and the way they respond to the behaviors of others.<sup>74</sup>

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69. Following Finnemore and Sikkink, these international norms on labor market regulation can be seen as reflecting "notions about appropriate or desirable behavior" in the global community. Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 895–97 (1998). The different actors pursuing each of the numerous enforcement schemes can be described as "norm entrepreneurs," who advocate to convince others to embrace new narratives on appropriate behavior. *See id.*

70. See, for example, a list of up-to-date ratification levels of the ILO's eleven fundamental instruments: *Ratifications of Fundamental Conventions by Number of Ratifications*, ILO, [https://normlex.ilo.org/dyn/nrmlx\\_en/f?p=1000:10011:::P10011\\_DISPLAY\\_BY:2](https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:10011:::P10011_DISPLAY_BY:2) [<https://perma.cc/9EBS-9A6K>].

71. Gary Gereffi & Frederick Mayer, *Globalization and the Demand for Governance*, in THE NEW OFFSHORING OF JOBS AND GLOBAL DEVELOPMENT 39, 47 (Gary Gereffi ed., 2006).

72. See, e.g., John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM J. INT'L L. 819, 832–33 (2007).

73. ELINOR OSTROM, UNDERSTANDING INSTITUTIONAL DIVERSITY 5 (2005).

74. Elinor Ostrom's models, for example, have been influential in the way they shed light on how different societal rules structure actors' interactions, including "[t]he opportunities and

Accordingly, expectations regarding labor market behavior will have a role in the design of the numerous enforcement schemes. While they are seemingly voluntary, the content of these schemes cannot be completely detached from the constraints posed by societal expectations. Take, for example, corporate social responsibility codes of conduct used by companies. If the prevailing perception is that international labor standards are merely “beyond compliance” (that is, voluntary behavior over and above minimum legal requirements), companies will then be free to choose between two equally legitimate business strategies: a long-term and higher-productivity route that follows these standards, or a lower-cost and lower-productivity route that disregards them.<sup>75</sup> If, on the other hand, international labor standards are perceived as the required benchmark, leaving them out will undermine the legitimacy of the adopted regime in the sense of its ability to generate the anticipated reactions from the relevant stakeholders, such as the companies’ investors or consumers.

What is the prevailing perception then regarding the global standard of behavior in this field? While there are different potential standards on how global labor markets should be regulated, the ILO’s system of international labor standards is increasingly acquiring a preeminent position. The reach of international labor law extends, in practice, outside the strict legal sense and affects societal perceptions, expectations, and actions. Even when not legally applicable or enforced, the ILO’s standards are becoming increasingly influential as the social norm that guides actors’ behavior. In today’s interconnected global markets, actors cannot detach themselves from the practices and expectations that prevail at the transnational level. Transnational actors want to know that everyone else is “playing by the rules,” engaging in conduct they perceive as acceptable.<sup>76</sup> And it is the ILO’s definition of internationally accepted standards that is gradually becoming the authoritative benchmark upon which actors rely.<sup>77</sup>

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constraints individuals face in any particular situation, the information they obtain, the benefits they obtain or are excluded from, and how they reason about the situation.” *Id.* at 3. It derives from Ostrom’s models that the prevailing societal perception on this matter serves as an “exogenous factor” that affects “the types of actions that individuals can take, the benefits and costs of these actions and potential outcomes, and the likely outcomes achieved.” *Id.* at 15–16.

75. Simon Deakin & Richard Hobbs, *False Dawn for CSR? Shifts in Regulatory Policy and the Response of the Corporate and Financial Sectors in Britain*, 15 *CORP. GOVERNANCE: INT’L REV.* 68, 68–69 (2007).

76. Matilda Gillis, for example, argues that the European Union’s pursuit of a “level playing field” in its free trade agreements signals its shift from “free” to “fair” trade, underlined by an “apparent desire for what is perceived to be ‘fairness’ in the sense of fairness as reciprocity.” Matilda Gillis, *Let’s Play?: An Examination of the “Level Playing Field” in EU Free Trade Agreements*, 55 *J. WORLD TRADE* 715, 733 (2021).

77. Tsotroudi and Agustí Panareda, for example, note that international labor standards “constitute the concrete expression of a global tripartite consensus on a specific technical subject.” Tsotroudi & Agustí Panareda, *supra* note 3, at 116. Baccini and Koenig-Archibugi write that “[t]he conventions adopted by the ILO can certainly be seen as embodying global norms

Accordingly, the conduct of both countries and companies is increasingly being evaluated and judged according to the ILO's system of labor standards. The empirical analysis presented below shows not only that actors increasingly align with these standards, but that this is done because they perceive ILO standards as the acceptable standards of behavior that are expected on the global level.

Let us now consider how the standards of behavior have evolved in recent decades in global labor markets. One area where this shift is evident is in the societal expectations regarding the compliance of multinational corporations. While international labor law has traditionally been rooted in a "state-centered conception of responsibility,"<sup>78</sup> scholars note that "the evolution of a global labor governance regime is clearly taking place" here.<sup>79</sup> In this new regime, the ILO's core labor rights have "provided a clear normative orientation . . . toward a shared understanding of what constitutes decent corporate behavior with regard to global labor relations."<sup>80</sup> These standards have come to be "widely perceived as benchmarks for human rights in the global workplace."<sup>81</sup>

This shift is reflected in the major transnational frameworks that draw on ILO standards to guide the conduct of multinational corporations. The ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (hereinafter "MNE Declaration") states that it "constitutes an authoritative and universally applicable set of expectations concerning the behavior of all national and multinational enterprises."<sup>82</sup> Similarly, the U.N. Guiding Principles on Business and Human Rights claim to serve as "a global standard of expected conduct for all business enterprises;" as "the benchmarks against which other social actors assess the human rights impacts of business enterprises;" and "an authoritative focal point around which the expectations

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with universalistic scope and moral content." Leonardo Baccini & Mathias Koenig-Archibugi, *Why Do States Commit to International Labor Standards? Interdependent Ratification of Core ILO Conventions, 1948–2009*, 66 *WORLD POL.* 446, 454 (2014). Klabbers writes that due to the ILO's "epistemic authority," it can "influence the way people think about social justice." Jan Klabbers, *The Past and Future of Governance: Epistemic Authority and the ILO*, in *SOCIAL JUSTICE AND THE WORLD OF WORK: ESSAYS IN HONOUR OF FRANCIS MAUPAIN* 133, 139 (Brian A. Langille & Anne Trebilcock eds., 2023). He explains that "social justice is not an exact science, where the truth can be recognized and validated; instead, it depends on a meeting of the minds where those involved come to believe that some course of action is the right thing to do," a task at which, as he convincingly argues, the ILO has been very successful. *Id.*

78. Yossi Dahan, Hanna Lerner & Faina Milman-Sivan, *Shared Responsibility and the International Labour Organization*, 34 *MICH. J. INT'L L.* 675, 689–709 (2013).

79. Anke Hassel, *The Evolution of a Global Labor Governance Regime*, 21 *GOVERNANCE: INT'L J. POL'Y ADMIN. & INSTS.* 231, 248 (2008).

80. *Id.* at 244.

81. James J. Brudney, *Envisioning Enforcement of Freedom of Association Standards in Corporate Codes: A Journey for Sinbad or Sisyphus?*, 33 *COMP. LAB. L. & POL'Y J.* 555, 560 (2012).

82. ILO, *THE ILO MNE DECLARATION: WHAT'S IN IT FOR WORKERS?* 7 (2017), [https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40ed\\_dialogue/%40actrav/documents/publication/wcms\\_627351.pdf](https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40ed_dialogue/%40actrav/documents/publication/wcms_627351.pdf) [<https://perma.cc/EPC5-AZQZ>].

and actions of relevant stakeholders could converge.”<sup>83</sup> The Organisation for Economic Co-operation and Development (“OECD”) Guidelines for Multinational Enterprises “clarify the shared expectations for business conduct of the governments adhering to them and provide a point of reference for enterprises and for other stakeholders.”<sup>84</sup> And, the U.N. Global Compact provides guidance on “how a business is expected to operate,” while its goal is to “raise the ceiling—the expectations—on the social contract of business to communities.”<sup>85</sup>

Beyond these multistakeholder codes, even private corporate codes of conduct, which companies adopt voluntarily, have seen a shift towards more reliance on ILO standards in recent years.<sup>86</sup> In the past, the choice of particular labor issues in private codes tended to be “highly selective, and seem[ed] to depend on the size of the company, the industry sector and the importance of the issue to the company’s operations.”<sup>87</sup> These codes also refrained from including international labor standards.<sup>88</sup> For example, companies’ codes of conduct were more likely to emphasize minimal labor standards in the areas of wages, hours, and occupational safety and health, rather than workers’ rights to freedom of association and collective bargaining, which are perceived to lessen managerial control.<sup>89</sup> And even when codes of conduct applied ILO instruments and international labor standards, they “in many cases changed the meaning or intended protection” of these standards.<sup>90</sup> Today, while this may still be a concern, studies examining the content of contemporary private codes do find “more complete and more specific references to international labor law.”<sup>91</sup> These studies also note that “the work of the ILO is used to provide definitions, interpretations and factual determinations.”<sup>92</sup> In both multistakeholder and

83. U.N. General Assembly, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, at 3, 13, U.N. Doc. A/HRC/17/31 (2011).

84. Organisation for Economic Co-operation and Development [OECD], *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*, at 11 (Sept. 29, 2011), [https://www.oecd.org/en/publications/oecd-guidelines-for-multinational-enterprises\\_9789264115415-en.html](https://www.oecd.org/en/publications/oecd-guidelines-for-multinational-enterprises_9789264115415-en.html) [<https://perma.cc/PR2R-8Q5L>].

85. U.N. Global Compact, *UN Global Compact Strategy 2021–2023*, at 10–11 (Jan. 19, 2021), [https://ungc-communications-assets.s3.amazonaws.com/docs/about\\_the\\_gc/UN-GLOBAL-COMPACT-STRATEGY-2021-2023.pdf](https://ungc-communications-assets.s3.amazonaws.com/docs/about_the_gc/UN-GLOBAL-COMPACT-STRATEGY-2021-2023.pdf) [<https://perma.cc/E7C5-NTWQ>].

86. Zandvliet & van der Heijden, *supra* note 52, at 177, 188.

87. HEPPLER, *supra* note 12, at 73.

88. *Id.*

89. See Mark Anner, *Corporate Social Responsibility and Freedom of Association Rights: The Precarious Quest for Legitimacy and Control in Global Supply Chains*, 40 POL. & SOC’Y 609, 609 (2012) (examining 805 factory audits of a corporate-influenced corporate social responsibility program, the Fair Labor Association, between 2002 and 2010).

90. ILO, *Overview of Global Developments and Office Activities Concerning Codes of Conduct, Social Labelling and Other Private Sector Initiatives Addressing Labour Issues* ¶ 50, GB.273/WP/SDL/1 (1998).

91. *Id.*

92. Zandvliet & van der Heijden, *supra* note 52, at 177, 188.

private codes, the explicit reference to the ILO's international labor standards is arguably made in light of the legitimacy this provides to these instruments.<sup>93</sup>

The described evolution of societal expectations is also reflected in the gradual strengthening of enforcement actions that are directed towards private companies. Take, for example, the United States' border control policies. The Tariff Act of 1930 has historically prohibited the importation of goods produced using forced labor,<sup>94</sup> authorizing U.S. Customs and Border Protection to stop goods from particular producers, factories, or exporters who are found in violation.<sup>95</sup> However, this ban was almost never used due to an exemption allowing the entry of forced-labor goods if required to meet "consumptive demands."<sup>96</sup> In 2015, this exemption was repealed, leading to a huge upsurge in action taken against producers and importers.<sup>97</sup> Another recent example is the shift from the previous North American Free Trade Agreement between the United States, Mexico, and Canada to the current free trade agreement between these parties, the United States–Mexico–Canada Agreement ("USMCA"). The new trade agreement includes a unique dispute settlement mechanism between the United States and Mexico, and between Canada and Mexico, the Facility-Specific Rapid Response Labor Mechanism.<sup>98</sup> This mechanism allows a state party to enforce the internationally recognized rights of freedom of association and collective bargaining, at the facility level, against violating workplaces from another state party. According to this arrangement, complaints can be made against specific producers or suppliers for the infringement of these rights, and in cases of non-compliance, penalties can be imposed directly on these businesses.<sup>99</sup> Moreover, this shift is expected to continue in the same direction, and the United States has discussed extending this model to more labor rights and more countries.<sup>100</sup> A third example is the proposed Binding Treaty on Business

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93. Phillip Paiement & Sophie Melchers, *Finding International Law in Private Governance: How Codes of Conduct in the Apparel Industry Refer to International Instruments*, 27 IND. J. GLOB. LEGAL STUD. 303, 329–30 (2020).

94. 19 U.S.C. § 1307 (2016).

95. *Forced Labor*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/trade/forced-labor> [https://perma.cc/CRE7-3GY7].

96. Marley S. Weiss, *Human Trafficking and Forced Labor: A Primer*, 31 ABA J. LAB. & EMP. L. 1, 29 (2015).

97. ANASUYA SYAM, MEG ROGGENSACK & SARAH L. BESSELL, THE HUM. TRAFFICKING LEGAL CTR., *IMPORTING FREEDOM: USING THE U.S. TARIFF ACT TO COMBAT FORCED LABOR IN SUPPLY CHAINS* 26–30 (Martina E. Vandenburg ed., 2020), [https://htlegalcenter.org/wp-content/uploads/Importing-Freedom-Using-the-U.S.-Tariff-Act-to-Combat-Forced-Labor-in-Supply-Chains\\_FINAL.pdf](https://htlegalcenter.org/wp-content/uploads/Importing-Freedom-Using-the-U.S.-Tariff-Act-to-Combat-Forced-Labor-in-Supply-Chains_FINAL.pdf) [https://perma.cc/HG7J-N65Y].

98. United States–Mexico–Canada Agreement ch. 31, annexes A–B, Nov. 30, 2018, 19 U.S.C. §§ 4501–4732 [hereinafter USMCA].

99. *Id.*

100. Kathleen Claussen & Chad P. Bown, *Corporate Accountability by Treaty: The New North American Rapid Response Labor Mechanism*, 118 AM. J. INT'L L. 98, 117 (2024).

and Human Rights, which a U.N. Human Rights Council Inter-Governmental Working Group is currently developing. Among other provisions, the treaty establishes the direct legal liability of companies for violations of internationally recognized human and labor rights.<sup>101</sup>

Alongside companies, societal expectations from nation states are also evolving in this direction, with gradual uptake of states' obligations according to ILO standards. While states are not legally bound by ILO conventions they did not ratify, the ILO's 1998 Declaration on Fundamental Principles and Rights at Work declared the universal application of four "core" ILO principles and rights to all member states.<sup>102</sup> This Declaration, in its "affirmation of principles of universal and lasting importance," has "helped to consolidate the international consensus on the fundamental workers' rights that must be respected, promoted and realized regardless of whether a member State has ratified the relevant ILO Conventions."<sup>103</sup> In that sense it helped "crystallize a consensus on the 'rules of the game.'"<sup>104</sup> More recently, the obligations of nation states according to this Declaration has seen another upgrade, with the ILO expanding its list of "core labor standards."<sup>105</sup> While the ILO's Declaration has included four core labor standards since 1998, it added the additional principle of "a safe and healthy working environment" in 2022.<sup>106</sup> By doing so, the ILO's tripartite constituents established that all member states now have an obligation "to respect, to promote and to realize" a more comprehensive list of fundamental rights, "which are the subject of" a broader set of existing ILO conventions.<sup>107</sup> This change indicates yet again the shifting global expectations regarding states' obligations, moving states towards more alignment with the full spectrum of the ILO's corpus of international labor standards.<sup>108</sup>

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101. Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights [OEIGWG] Chairmanship, *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises* (Aug. 17, 2021), <https://www.ohchr.org/sites/default/files/LBI3rdDRAFT.pdf> [<https://perma.cc/XZM7-VPMF>].

102. International Labour Conference, *ILO Declaration on Fundamental Principles and Rights at Work* art. 2 (June 18, 1998) [hereinafter *ILO Declaration*].

103. Politakis, *supra* note 60, at 214–15.

104. MAUPAIN, *supra* note 55, at 53.

105. International Labour Conference, *Resolution on the Inclusion of a Safe and Healthy Working Environment in the ILO's Framework of Fundamental Principles and Rights at Work* (June 10, 2022).

106. *ILO Declaration*, *supra* note 101, art. 2(e).

107. *Id.* art. 2. On the various implications of this change, see generally Anne Trebilcock, *2022 Amendments to the ILO Declaration on Fundamental Principles and Rights at Work*, 62 INT'L LEGAL MATERIALS 605 (2023).

108. On the other hand, this amendment was accompanied by a savings clause, intended to ensure that this new status would not indirectly affect "the rights and obligations of Member States arising from existing trade and investment agreements." *ILO Declaration*, *supra* note 101, art. 4. As LeClercq explains, this means that while the ILO's other fundamental rights can be enforced through trade agreements that incorporate the ILO's Declaration, the newly

Moreover, this Declaration has had a significant effect on the normative influence of ILO standards outside the ILO, including in national and regional courts.<sup>109</sup> James Brudney, for example, examined domestic labor laws and practices in the Americas in the areas of child labor and freedom of association and identified an evolutionary process towards an increasing reliance on ILO norms.<sup>110</sup> Furthermore, this increase in influence went hand in hand with the growing reliance, outside the ILO, on the pronouncements of the ILO's supervisory system. This "jurisprudence" of the supervisory system, which is also not legally binding, nevertheless managed to serve as "a key point of reference" and to have an impact in national and regional courts, as well as in international institutions.<sup>111</sup>

The "evolution" in the European Court of Human Rights' case law on freedom of association exemplifies the described shift. As explained by K.D. Ewing and John Hendy, in a series of cases starting with *Demir v. Turkey*,<sup>112</sup> the court has departed from its case law from the 1970s and started to recognize the right to collective bargaining and the right to strike as protected under the European Convention on Human Rights.<sup>113</sup> Interestingly, this shift was done through the court's reliance on ILO standards, along with the European Social Charter, which was described by the authors as "a remarkable delegation to external standards and their dynamic application."<sup>114</sup> ILO standards applied regardless of a state's ratification of the relevant ILO convention, since these standards were seen, according to the court, as "a set of rules and principles that are accepted by the vast majority of States," reflecting a "common ground in modern societies" and a "reality that the Court cannot disregard."<sup>115</sup>

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recognized fundamental rights would not automatically be transposed in these extra-ILO instruments. This, in turn, risks a fragmentation of their enforcement across regimes. *See generally* Desirée LeClercq, *Occupational Safety and Health as a New Fundamental Labour Right: Opportunities and Challenges*, 20 INT'L LABOR BRIEF, Aug. 2022, at 1, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4161060](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4161060) [<https://perma.cc/6XAR-JVCH>]. Indeed, this reminds us that the path to coherence is a slow and uneven one.

109. Claire La Hovary, *The ILO's Supervisory Bodies' "Soft Law Jurisprudence,"* in RESEARCH HANDBOOK ON TRANSNATIONAL LABOUR LAW 316, 324 (Adelle Blackett & Anne Trebilcock eds., 2015) [hereinafter RESEARCH HANDBOOK].

110. James J. Brudney, *The Internationalization of Sources of Labor Law*, 39 U. PA. J. INT'L L. 1, 1 (2017).

111. Claire La Hovary, *Showdown at the ILO? A Historical Perspective on the Employers' Group's 2012 Challenge to the Right to Strike*, 42 INDUS. L.J. 338, 365 (2016); *see also* Francis Maupain, *The ILO Regular Supervisory System: A Model in Crisis?*, 10 INT'L ORGS. L. REV. 117, 124–28 (2013).

112. *Demir v. Turkey*, App. No. 34503/97, ¶ 157 (Nov. 12, 2008), <https://hudoc.echr.coe.int/fre?i=001-89558> [<https://perma.cc/2672-LERX>].

113. K.D. Ewing & John Hendy, *The Dramatic Implications of Demir and Baykara*, 39 INDUS. L.J., 2, 5–19 (2010).

114. *Id.* at 7.

115. *Id.* at 8–9 (citing *Demir*, *supra* note 112, at ¶¶ 76, 86).

The jurisprudence of the Inter-American Court of Human Rights serves as another prime example of the current normative status of ILO norms. In its Advisory Opinion from 2021, the court was asked about the scope of state obligations in relation to freedom of association, collective bargaining, and the right to strike under the inter-American system for human rights protection, which includes the American Convention on Human Rights and other international treaties addressing human rights protection in the Americas.<sup>116</sup> In answering this question, the court held that “human rights treaties are living instruments,” requiring an “evolutionary interpretation” according to changing times, and that their interpretations are to be “defined in light of international corpus juris.”<sup>117</sup> In this regard, the Court emphasized that “there can be no question that the principles, rights and obligations contained . . . [in international labor law] contribute decisively to setting the scope of the American Convention.”<sup>118</sup> The Court added that it will consider:

most particularly, the conventions, recommendations, and other relevant instruments, as well as opinions and recommendations from the ILO Committee on Freedom of Association and Committee of Experts on the Application of Conventions and Recommendations, to develop a harmonious interpretation of international obligations established under these conventions.<sup>119</sup>

We see here that international labor law—and in particular how it is understood within the ILO—is viewed as the authoritative source for what is required of states’ behavior under these non-ILO treaties, and that this is justified exactly to support a harmonious understanding of states’ obligations in this regulatory area. In practice, this advisory opinion provided comprehensive and detailed guidelines on the content of freedom of association, collective bargaining, and the right to strike, while drawing on ILO instruments, specifically the recommendations of the ILO’s supervisory bodies.<sup>120</sup> And so, while these ILO recommendations are not binding within the ILO system, they have now been used “to determine the content” of legally binding treaties,<sup>121</sup> and of arrangements for which states are obligated to adopt “mechanisms for guaranteeing” and “specific measures for the[ir] effective exercise.”<sup>122</sup>

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116. Right to Freedom of Association, Right to Collective Bargaining and Right to Strike, and their Relation to Other Rights, with a Gender Perspective, Advisory Opinion OC-27/21, Inter-Am. Ct. H.R. (ser. A) No. 27, 1–3 (5 May 2021).

117. *Id.* at 48–51.

118. *Id.* at 52.

119. *Id.* at 52.

120. *Id.* at 74–105.

121. *Id.* at 49.

122. *Id.* at 73. On the binding effects of the advisory opinions issued by this court, see Walter Arévalo Ramírez & Andrés Rousset Siri, *Compliance with Advisory Opinions in the Inter-American Human Rights System*, 117 AM. J. INT’L L. UNBOUND 298, 299 (2023). On the other

These shifting expectations from nation states are also reflected in the incorporation of labor standards in trade agreements. In the past, trade-labor conditionality began with the U.S. and European Union (“EU”) Generalized System of Preferences programs, which grant preferential market access to eligible developing countries that meet certain conditions, including compliance with international labor standards. Yet these programs were initially criticized as being both modest in their requirements as well as being enforced according to political considerations.<sup>123</sup> Later on, bilateral and regional trade agreements started to include international labor standards, and these have shown some improvement.<sup>124</sup> These arrangements gradually became more robust, in both the number of labor provisions included across different arrangements and in terms of their reference to ILO standards in particular.<sup>125</sup> The European Union’s approach to labor-trade conditionality “has evolved significantly over time” in terms of content and legal scrutiny.<sup>126</sup> Its recent “new generation” agreements all include a rather comprehensive set of labor provisions, including an obligation to uphold the ILO’s core labor conventions.<sup>127</sup> These provisions “have achieved

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hand, the Mexican Supreme Court recently decided that these advisory opinions are not binding for Mexico. See Suprema Corte de Justicia de la Nación Press Release No. 207/2024, *Las opiniones consultivas de la corte interamericana de derechos humanos no son vinculantes para las personas juzgadoras mexicanas, pero gozan de relevancia jurídica* [The Advisory Opinions of the Inter-American Court of Human Rights Are Not Binding on Mexican Judges, but They Do Have Legal Relevance] (June 17, 2024), <https://www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=7882> [https://perma.cc/S4AK-XHCS].

123. Lance A. Compa & Jeffrey S. Vogt, *Labor Rights in the Generalized System of Preferences: 20-Year Review*, 22 COMP. LAB. L. & POL’Y J. 199, 234–35, 237 (2001); Kevin Kolben, *Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes*, 48 HARV. J. INT’L L. 203, 215 (2007); Paula C. Albertson & Lance Compa, *Labour Rights and Trade Agreements in the Americas*, in RESEARCH HANDBOOK, *supra* note 109, at 474, 475–76.

124. Albertson & Compa, *supra* note 123, at 477–78; James Harrison et al., *Labour Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission’s Reform Agenda*, 18 WORLD TRADE REV. 635, 638 (2019).

125. A study by Ebert and Posthuma from 2009, for example, shows “a steep rise of the number of trade agreements with conditional and promotional labour provisions during the past 20 years.” Franz C. Ebert & Anne Posthuma, *Labour Provisions in Trade Arrangements: Current Trends and Perspectives* 4–7 (ILO Int’l Inst. for Lab. Studs., Discussion Paper No. 978-92-9014-993-4, 2011), [https://www.researchgate.net/profile/Anne-Posthuma2/publication/263734653\\_Labour\\_provisions\\_in\\_trade\\_arrangements\\_current\\_trends\\_and\\_perspectives/links/54bd6f840cf218d4a16a28cc/Labour-provisions-in-trade-arrangements-current-trends-and-perspectives.pdf](https://www.researchgate.net/profile/Anne-Posthuma2/publication/263734653_Labour_provisions_in_trade_arrangements_current_trends_and_perspectives/links/54bd6f840cf218d4a16a28cc/Labour-provisions-in-trade-arrangements-current-trends-and-perspectives.pdf) [https://perma.cc/28K5-4ERB]. In terms of their normative content, the authors report that “[a]bout 60 percent of the labour provisions in trade agreements in force . . . had made specific reference to the ILO 1998 Declaration or to ILO Conventions.” *Id.* at 7.

126. Franz C. Ebert, *Labour Provisions in EU Trade Agreements: What Potential for Channelling Labour Standards-Related Capacity Building?*, 155 INT’L LAB. REV. 407, 409 (2016); see also Harrison et al., *supra* note 124, at 638–42.

127. Ebert, *supra* note 126, at 410.

the status of an ‘unobjectionable norm’ in EU trade agreements.”<sup>128</sup> Reference to ILO standards arguably provides “a veneer of multilateral respectability,” thus reducing the political costs of EU trade policies.<sup>129</sup> In the United States, a similar progressive evolution in labor provisions can be observed. They have shifted with time towards “internationally defined ILO core labor standards,” and their dispute settlements and enforcement measures have been enhanced.<sup>130</sup> Overall, these trade agreements “have taken an important step toward ensuring consistency by referring to—and hence incorporating the legal content of—ILO instruments.”<sup>131</sup> In the EU case, it was even suggested that the goal behind its “trade and sustainable development” chapters is “diffusing normative objectives of international labour and environment norms . . . to ‘shape the conceptions of the normal in world politics.’”<sup>132</sup> According to another interpretation, the intention here is “making global supply chains ‘more responsible,’” and to further this outcome, these chapters serve as “building blocks” for labor standards, even beyond the jurisdiction of the signatory states.<sup>133</sup>

Finally, the evolution in societal expectations from nation states is also apparent in a recent shift in the interpretation of labor rights commitments in trade agreements. The first interpretation of this kind occurred in 2017, in an arbitration between the United States and Guatemala regarding Guatemala’s compliance with the Dominican Republic–Central American Free Trade Agreement (“CAFTA–DR”). Although it was proven that Guatemala had failed to enforce its labor laws, the arbitral panel decided that this did not amount to a breach of the agreement as it was not proven that Guatemala’s failure to enforce occurred “in a manner affecting trade,” in the sense that it confers a competitive advantage.<sup>134</sup> This earlier interpretation can be compared to a more recent Panel Report from 2021 regarding the European Union–Korea

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128. Lore Van den Putte & Jan Orbie, *EU Bilateral Trade Agreements and the Surprising Rise of Labour Provisions*, 31 INT’L & COMPAR. LAB. L. & INDUS. RELS. 263, 278 (2015) (discussing the work of Finnemore & Sikkink, *supra* note 69, arguing that “norm entrepreneurs” successfully advocated for this new norm to emerge within the European Union (“EU”) trade policy and it has now been socialized and achieved a “taken-for-granted” quality).

129. MAUPAIN, *supra* note 55, at 197.

130. Álvaro Santos, *Reimagining Trade Agreements for Workers: Lessons from the USMCA*, 113 AJIL UNBOUND 407, 407 (2019); *see also* Albertson & Compa, *supra* note 123, at 475–89.

131. Agustí-Panareda et al., *supra* note 58, at 348.

132. Hoang Hai Ha, *The Social Dimension in EU Free Trade Agreements: ASEAN Perspectives*, 25 EUR. REV. 532, 533 (2017) (citation omitted).

133. Harrison et al., *supra* note 124, at 642.

134. In the Matter of Guatemala—Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA–DR, Final Report of the Panel, at 149–56 (Dominican Republic–Central America–United States Free Trade Agreement Panel, June 14, 2017), [https://www.trade.gov/sites/default/files/2020-09/Guatemala%20%E2%80%93%20Obligations%20Under%20Article%2016-2-1%28a%29%20of%20the%20CAFTA-DR%20%20June%2014%202017\\_1\\_0.pdf](https://www.trade.gov/sites/default/files/2020-09/Guatemala%20%E2%80%93%20Obligations%20Under%20Article%2016-2-1%28a%29%20of%20the%20CAFTA-DR%20%20June%2014%202017_1_0.pdf) [https://perma.cc/B3F5-JVSB].

Free Trade Agreement (“EU–Korea FTA”). In the latter case, the dispute resolution panel interpreted that the labor rights commitments under this agreement are not limited only to “trade-related aspects of labour.” Admittedly, this opposite conclusion is based to a large degree on the terms of the particular agreement, which provided that there could be exceptions to the “trade-related” limitation. Yet of note is that, in reaching this conclusion, the panel’s interpretation relied on the “broad aspiration that global trade should be carried out in a manner consistent with fundamental human rights and dignity.”<sup>135</sup> The panel also relied in this regard on the “universality” of the ILO’s “fundamental” principles and rights.<sup>136</sup>

This aspect of the EU–Korea FTA panel decision’s emphasis on the universality of international labor standards and their broad relevance to regulate global matters in the field of labor is interesting in the current context. It can serve as an indication, and even reinforcement, of the current global perceptions of state obligations in this area, and perhaps even more broadly at the international level. Indeed, such reinforcement has the potential to influence the understanding of state labor rights obligations beyond the current case,<sup>137</sup> thus further corroborating the perception that states are expected to conform with international labor standards. Interestingly, a broader understanding of state labor obligations in trade agreements has also diffused to the United States itself, which appears to have moved away from the more limited CAFTA–DR approach. The recent USMCA reduces this earlier threshold of “in a manner affecting trade,” in that it no longer requires that the labor rights violation confer a competitive advantage, but merely that there is a trade relation involved.<sup>138</sup>

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135. Jill Murray, Laurence Boisson de Chazournes & Jaemin Lee, Report of the Panel of Experts, Panel of Experts Proceeding Constituted under Article 13.15 of the EU–Korea Free Trade Agreement, at 77 (EU–Korea Free Trade Agreement Panel, Jan. 20, 2021), [https://www.worldtradelaw.net/document.php?id=fta/panel/korea-labourlawsandpractices\(ftaexpertpanel\).pdf&mode=download](https://www.worldtradelaw.net/document.php?id=fta/panel/korea-labourlawsandpractices(ftaexpertpanel).pdf&mode=download) [https://perma.cc/L2CD-EPLC] [hereinafter EU–Korea Expert Panel Report].

136. *Id.* at 61–79.

137. Novitz assesses that “the Expert Report arguably does offer us a vision of how [trade and sustainable development] chapters may be interpreted in future. It may impact on pressure for ratifications and potential for enforceability of norms under recently concluded FTAs.” Tonia Novitz, *Sustainable Labour Conditionality in EU Free Trade Agreements? Implications of the EU–Korea Expert Panel Report*, 47 EUR. L. REV. 3, 19 (2022). LeClercq similarly notes that “[t]he United States discourse should pay attention to this development.” Desirée LeClercq, *The Panel Report Under the EU–Korea Trade Agreement Concerning Labor Practices: What Are the Purposes of Trade Agreements as They Relate to the ILO’s Fundamental Labor Rights?*, INT’L ECON. L. & POL’Y BLOG (Feb. 8, 2021), <https://ielp.worldtradelaw.net/2021/02/guest-post-the-panel-report-under-the-eu-korea-trade-agreement-concerning-labor-practices-what-are-t> [https://perma.cc/6W4U-BTBT].

138. USMCA, *supra* note 98, art. 23(3)(1), n.4 (stating that, “For greater certainty, a failure is ‘in a manner affecting trade or investment between the Parties’ if it involves: (i) a person or industry that produces a good or supplies a service traded between the Parties or has an

Overall, while these developments on the international level are seemingly unrelated, their accumulated effect clearly indicates a gradual alignment in recent decades of a wide array of external enforcement schemes with ILO conventions, standards, and interpretations. These various developments arguably reflect the current and emerging global perceptions concerning transnational actors' behavior in the field of labor. Today, more than ever, international labor standards, even when not legally applicable, are considered to embody the standards of acceptable behavior, which is, in turn, reflected in actors' expectations from one another. These processes go a long way towards addressing the discussed harmonization problem of enforcement in the field. At the same time, we have seen that there naturally remain differences between enforcement schemes, which do not always fully adhere to an internationally accepted understanding of labor laws. The next Part will frame this emerging development in terms of the current and potential future paths for improved international labor law enforcement.

### III. ENHANCING THE ILO'S NORMATIVE INFLUENCE

This Part explores whether the increasing synergies that were found between the ILO's traditional enforcement and external initiatives, and the ILO's normative influence,<sup>139</sup> could be further enhanced. In particular, the empirical analysis has shown how international labor standards operate on other actors based on their normative authority as reflecting norms of appropriate behavior in global labor markets. This has allowed the ILO to remain relevant, even within external enforcement schemes that are not obliged by its norms.<sup>140</sup> By serving as the accepted benchmark, the ILO's system of international labor standards can interact at different levels with these transnational enforcement mechanisms in a manner that increasingly ensures greater alignment with its norms and objectives. This suggests room for improvement in enhancing the relationship and level of cooperation between the ILO and external actors and mechanisms. Accordingly, this Part outlines these productive interactions, highlighting both successful strategies already being used as well as potential strategies for consideration.

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investment in the territory of the Party that has failed to comply with this obligation; or (ii) a person or industry that produces a good or supplies a service that competes in the territory of a Party with a good or a service of another Party.”); see also Santos, *supra* note 130, at 408. This article also shifts the burden of proof, stating that for “purposes of dispute settlement, a panel shall presume that a failure is in a manner affecting trade or investment between the Parties, unless the responding Party demonstrates otherwise.” USMCA, *supra* note 98, art. 23(3)(1), n.4.

139. On the normative influence of the ILO as means of enforcement, see, for example, MAUPAIN, *supra* note 55, at 140; José E. Alvarez, *Frameworks for Understanding the ILO, in ILO@100: LAW FOR SOCIAL JUSTICE*, *supra* note 35, at 59, 70.

140. Zandvliet & Van der Heijden, *supra* note 52, at 177, 188.

### A. Socio-Legal Enforcement Dynamics

As emerged from the discussion above, transnational enforcement mechanisms that are external to the ILO can align with international labor standards when they directly draw on their norms. In addition, drawing on the ILO's supervision activities, such as the monitoring and interpretations of its supervisory system, can also contribute to greater alignment with ILO norms. The preceding examples demonstrate numerous ways in which multinational corporations, states, regional and domestic courts, and trade agreements, to name a few, can rely upon or be bound by the ILO and its legal instruments. When enforcement initiatives are grounded in legal norms and institutions, they gain legitimacy from the law's normative authority. This association encourages compliance with these initiatives by framing them as reflective of an authoritative guidance on acceptable behavior. In turn, the law also benefits, as such initiatives incentivize actors to comply with the law by including legal standards and rulings as compliance benchmarks, further reinforcing the law's relevance. As compliance increases, so does the perception of the law as a social norm, which prompts an ongoing circular process of mutual reinforcement between law and society,<sup>141</sup> where the societal perceptions on the acceptable standards of behavior increasingly align with the legal content of ILO instruments.

Law and economics scholars examining the relationship between legal and social norms have shown how the law can productively influence this positive feedback loop between law and society. Among them, Svetlana Borodina, Simon Deakin, and John Hamilton provide empirical evidence on how the rule of law emerges as a social norm. This was done through qualitative fieldwork that explores the changing attitudes to the legal system in the context of business relationships in Russia, investigating how the law is perceived by economic actors to contribute to an environment conducive to market-based economic activity.<sup>142</sup> Through this research, these authors address the contributing role of formal legal rules and public enforcement mechanisms in shaping prevailing societal norms. They argue that the public nature of laws and enforcement mechanisms, rather than purely private enforcement, appears to be linked to a norm of "strong reciprocity," in which individuals feel compelled to act in socially cooperative ways and to punish violations of this social norm, even when

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141. Young describes, from an evolutionary game theory perspective, the process through which social norms evolve and how norm shifts take place, explaining that the more a particular pattern of behavior gains prominence, the more other actors are incentivized to follow, leading to a "positive feedback loop between social and individual behaviors," which "reinforces the new way of doing things." H. Peyton Young, *The Evolution of Social Norms*, 7 ANN. REV. ECON. 359, 363 (2015).

142. Svetlana Borodina, Simon Deakin & John Hamilton, *The Rule of Law as an Emergent Social Norm: Evidence from Qualitative Research in Russia*, 15 LAW & DEV. REV. 1, 1-2 (2021) (discussing a domestic setting, but applied *mutatis mutandis* to an inter-state level).

doing so comes at a personal cost.<sup>143</sup> What is interesting here is the importance of the “public” aspect, not just the sanction. This is relevant to transnational legal processes that are “public” in character, even if not immediately enforced. Moreover, the authors explain that the legal system can contribute to “seeding such a norm in society” when it is perceived as legitimate, committed to due process, transparent, accountable, and fair.<sup>144</sup>

These insights on how the legal system ensures its social influence are consistent with conclusions derived from expressive theory. Research in this field describes how legal expressions can shape societal perceptions and behavior. This research stipulates that these expressive effects of the law are greater when the legal process is regarded as legitimate, in the sense of being perceived as “fair,” competent, or credible,<sup>145</sup> and when the legislator is perceived as representing majority preferences and opinions.<sup>146</sup> These expressive theories are in that sense grounded to a large extent on the nature of the law and on legal rules as a system that is democratically enacted. They suggest that because enacted legislation will typically reflect what constituents approve or disapprove, the law convincingly reveals information about public attitudes in society.<sup>147</sup> The implication for the present case is that the more the international legal process of labor regulation is regarded as truly representative of the present voices and actors of global labor markets, the more its inclusion within enforcement initiatives will fruitfully influence society.

These types of connections between law and societal forces are exemplified in the case of Better Work, a program aimed at improving the compliance of entities making up global supply chains with international and domestic labor laws. The ILO and the International Finance Corporation oversee this program in collaboration with various actors of the global society. Better Work provides apparel businesses with training and advisory services, and also provides companies with factory-level monitoring of labor standards conducted by the ILO.<sup>148</sup> This program reflects developments occurring on the border between law and global society, showcasing how the two can positively interact

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143. *Id.* at 12–13.

144. *Id.* at 12, 28.

145. Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1273–74 (2004); Richard H. McAdams & Janice Nadler, *Testing the Focal Point Theory of Legal Compliance: The Effect of Third-Party Expression in an Experimental Hawk/Dove Game*, 2 J. EMPIRICAL LEGAL STUD. 87, 118 (2005).

146. Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 374 (2000).

147. *Id.* at 358–59.

148. BETTER WORK, *AMPLIFYING IMPACT: BETTER WORK STRATEGY 2018–2022*, at 6–7, 12–13 (2017), [https://betterwork.org/wp-content/uploads/2020/01/Amplifying-Impact\\_Better-Work-Strategy-2018\\_2022.pdf](https://betterwork.org/wp-content/uploads/2020/01/Amplifying-Impact_Better-Work-Strategy-2018_2022.pdf) [<https://perma.cc/HJZ6-ERTA>].

in a mutually beneficial way. First, the program's leverage of societal influences proved highly successful as an enforcement mechanism for international labor law.<sup>149</sup> Yet, the legal system was not a passive component. The dominant role of the ILO and international labor law contributed to the "strategic framing" of this program, its credibility, and the perception of impartiality among its stakeholders.<sup>150</sup> The direct link with ILO standards ensured "a solid normative framework" and ensured that standards were applied consistently across countries and businesses.<sup>151</sup> Generally speaking, this engagement of the ILO with local actors and global brands was described as a "fostering of coordinated governance" that bridges the common gap between public and private governance initiatives.<sup>152</sup> Moreover, the program also demonstrates the assumption that when international law is embedded in society, it can better influence societal norms. In this case, the ILO's tripartite structure, comprising governments, workers, and employers' organizations, arguably contributed significantly to the program's success. It has led to meaningful engagement with local stakeholders at the national level while advancing these stakeholders' political will and commitment.<sup>153</sup>

This requirement of legitimizing transnational legal processes and serving the needs of society is generally attainable by involving ILO institutions in enforcement initiatives. Indeed, the ILO's tripartite structure has been described as "providing additional authority to the Organization's decisions by taking into account a plurality of positions and stakeholders. Certainly, it is widely portrayed as having provided legitimacy to the actions of the ILO."<sup>154</sup> That said, the representative legitimacy of the ILO itself has also been questioned in recent decades.<sup>155</sup> In light of changes in the contemporary world of work, such as declining unionization, the ILO's constituents cannot truly represent the fragmented and diverse interests of all capital and labor.<sup>156</sup> It is in this light that the ILO has started to open up to civil society organizations, accepting that "it should be possible to involve non-tripartite constituents appropriately in the Organization's work;" yet, this is only "on the basis of clearly demonstrated

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149. Anne Posthuma & Arianna Rossi, *Coordinated Governance in Global Value Chains: Supranational Dynamics and the Role of the International Labour Organization*, 22 *NEW POL. ECON.* 186, 195–96 (2017).

150. Paul Alois, *Lessons for Effective Governance: An Examination of the Better Work Program*, 24 *GLOB. GOVERNANCE* 139, 153 (2018).

151. Posthuma & Rossi, *supra* note 149, at 196.

152. *Id.* at 198.

153. Rossi, *supra* note 50, at 509.

154. Claire La Hovary, *A Challenging Ménage À Trois? Tripartism in the International Labour Organization*, 12 *INT'L ORGS. L. REV.* 204, 206 (2015).

155. Tonia Novitz, *Past and Future Work at the International Labour Organization: Labour as a Fictitious Commodity, Countermovement and Sustainability*, 17 *INT'L ORGS. L. REV.* 10, 36 (2020).

156. La Hovary, *supra* note 154, at 220–23.

advantage and well-defined roles.”<sup>157</sup> The ILO’s International Programme on the Elimination of Child Labour (“IPEC”) demonstrates this approach, as well as its potential to increase the legitimacy and representativeness of enforcement initiatives. Lars Thomann describes how non-governmental organizations (“NGOs”) are given a role within the IPEC to locally implement specific action plans. This includes activities such as direct action, education, institutional development, policy development, support services, and awareness-raising campaigns.<sup>158</sup> As child labor occurs mostly in the informal economy, he describes how the ILO’s inclusion of NGOs is crucial here from a practical point of view, enabling the organization to gain access to and engage directly within local contexts and sectors that are otherwise difficult for employers’ and workers’ organizations to reach.<sup>159</sup> Yet, the role of these NGOs is limited to the operational level, rather than the policy-making level at the ILO. Thomann therefore concludes that the further inclusion of NGOs in the work of the ILO can address the representational gaps in various sectors and “serve to increase the legitimacy of the international labour rights system.”<sup>160</sup>

### B. *Influencing Through the Content of the Norms*

To increase the law’s influence over these societal perceptions, the content of the international labor standards included in transnational enforcement mechanisms is another important matter to consider. As discussed, when these initiatives include narrow labor rights commitments, this in practice reflects, and thus promotes, a minimalist perception of the required behavior. On the other hand, as the ILO’s legal standards and instruments acquire a dominant role within these initiatives, these processes will increasingly promote a perception that these legal standards are the required benchmark for behavior.

Understandably, the content of the norms will inevitably be affected by the procedures set for their interpretation, including adjudication procedures and, more generally, the process for determining compliance with initiatives. Accordingly, these aforementioned procedures would benefit from the inclusion of mechanisms that strengthen their relationship with the ILO’s international labor standards. Ideally, they would also resort to the full body of decisions and interpretations of the ILO’s supervisory systems. One example is the ILO’s MNE Declaration, which provides enterprises with direct guidance on workplace

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157. ILO Director-General, *Towards the ILO Centenary: Realities, Renewal and Tripartite Commitment* (2013), at 18; see also La Hovary, *supra* note 154, at 223–26.

158. Lars Thomann, *The ILO, Tripartism, and NGOs: Do Too Many Cooks Really Spoil the Broth?*, in *CIVIL SOCIETY PARTICIPATION IN EUROPEAN AND GLOBAL GOVERNANCE: A CURE FOR THE DEMOCRATIC DEFICIT?* 71, 80–81 (Jens Steffek, Claudia Kissling & Patrizia Nanz eds., 2008).

159. *Id.* at 81.

160. *Id.* at 90–91.

practice. The Declaration establishes an interpretation procedure for disputes concerning its application,<sup>161</sup> and explicitly states that it “should in no way duplicate or conflict with existing national or ILO procedures” and that “questions regarding international labour Conventions and Recommendations should be examined through the various procedures provided for in . . . the Constitution of the ILO.”<sup>162</sup> Another example is the national mechanism established in Bangladesh, following the expiry of the Accord on Fire and Building Safety that was set in response to the 2013 Rana Plaza disaster. As Anne Trebilcock explains, this national framework consists of two main components: the government-run Remediation Coordination Cell under the Ministry of Labour and Employment’s Department of Inspection for Factories and Establishments (“DIFE”), and the privately operated Ready-Made Garment Sustainability Council. Together, these entities assumed responsibility for the Accord’s roles in inspection, remediation, training, and handling complaints.<sup>163</sup> Among the different features of this arrangement are several collaborations with the ILO, including by operating the Better Work Bangladesh program, which, as with the other Better Work programs, facilitates market-based incentives for compliance with international labor standards. Notably, under this arrangement, the ILO will be able to utilize the work of the supervisory system to provide guidance to the DIFE.<sup>164</sup> These two examples demonstrate the potential to establish formal pathways for incorporating the ILO’s detailed guidelines and interpretations of broader international labor standards, even when they are not originally applicable.

Additional steps in this direction can be seen in the adjudication processes established in recent trade agreements. The labor chapter of the USMCA, for instance, provides an explicit role for the ILO in the implementation of the chapter, and authorizes the parties in this regard to “establish cooperative arrangements with the ILO or other international and regional organizations to draw on their expertise and resources.”<sup>165</sup> And, indeed, the parties have requested, for example, that the ILO undertake an observation mission in a General Motors plant in Mexico, as part of their remediation procedure under the USMCA’s Rapid Response Labor Mechanism. The ILO, in this case, participates as an observer during a vote to confirm a collective bargaining agreement. In particular, it has the mandate to “follow its practices and procedures”

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161. The purpose of the procedure “is to interpret the provisions of the Declaration when needed to resolve a disagreement on their meaning, arising from an actual situation, between parties to whom the Declaration is commended.” ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, at 26 (2022).

162. *Id.*

163. Trebilcock, *supra* note 50, at 549.

164. *Id.* at 549–50. Moreover, the ILO was invited to act as the independent chair of the Accord, a role that “speaks directly to the so-called magisterial function of the ILO as a moral authority in the field of labour rights.” Posthuma & Rossi, *supra* note 149, at 197.

165. USMCA, *supra* note 98, art. 23(12).

as it examines whether workers' rights to freedom of association and collective bargaining are respected in this process.<sup>166</sup>

Another example relating to the design of adjudication processes concerns the recent trade agreements of the European Union. These agreements include a dedicated dispute settlement mechanism for their "trade and sustainable development" chapters. This arrangement refers to government consultations in the first instance and, in cases of disagreements, the establishment of a Panel of Experts.<sup>167</sup> In practice, such a panel has only been established in the context of the aforementioned EU–Korea FTA. The panel's decision is relevant for the current discussion, given the links it creates with ILO standards and its supervisory system. In its decision, the panel not only decided that the trade agreement establishes binding legal obligations "to respecting, promoting and realising the principles concerning the fundamental rights,"<sup>168</sup> but also specifically referred in its decision to the body of general principles of the ILO's Committee on Freedom of Association as a "persuasive and authoritative" source which should be drawn on "with appropriate weight."<sup>169</sup> This example further highlights a compelling case that appears to reinforce the expectation for countries to comply with the interpretations of the ILO's supervisory system. Potentially, future adjudicative mechanisms could more explicitly make specific arrangements concerning the use of these standards by including more detailed and direct provisions to that effect in the relevant chapters of trade agreements.

Finally, recent domestic regulations on supply chain transparency obligations<sup>170</sup> also illustrate how decisions regarding the content of norms can shape social perceptions of accepted behavior. Transparency arrangements regulating the conduct of companies could potentially promote a societal perception around the need to comply with international labor law. This would occur if companies were required to justify their behavior according to internationally accepted labor standards. Then, the visibility given to such a narrative through reporting obligations would send a strong message to other actors in global society. Indeed, "[t]he very process of identifying, describing, and

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166. ILO *Observation Mission Announcement in Mexico*, ILO (July 30, 2021), [https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_815723/lang--en/index.htm](https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_815723/lang--en/index.htm) [https://perma.cc/KCT7-DU2Q].

167. Harrison et al., *supra* note 124, at 640.

168. EU–Korea Expert Panel Report, *supra* note 135, at 122.

169. *Id.* at 115, 117.

170. One example of supply chain transparency legislation is that employed as part of domestic anti-trafficking policies. These are defined by Tamar Barkay et al. as "laws that require some corporations to publicly disclose their actions to address human trafficking or, more broadly, modern slavery. As such, transparency legislation aims to induce corporations to act against severe forms of labor-market exploitation in their supply chains by enhancing market-based forms of supply chain governance." Tamar Barkay et al., *Anti-trafficking Chains: Analyzing the Impact of Transparency Legislation in the UK Construction Sector*, 49 L. & SOC. INQUIRY 2152, 2152–53 (2024).

controlling human rights practices helps the diffusion of the human rights discourse through global and local levels.<sup>171</sup> The problem is that these transparency regulations also hold the risk of institutionalizing noncompliance. This is because “emphasizing the prevalence of violations might promote disorder and further violations.”<sup>172</sup> Indeed, “most pieces of transparency legislation simply require that companies report on efforts they are taking.”<sup>173</sup> The United Kingdom’s Modern Slavery Act, for example, requires certain businesses to report on the steps that they take to combat human trafficking,<sup>174</sup> but it also suffices to produce “a statement that the organisation has taken no such steps.”<sup>175</sup> Such legislation promotes the framing of international labor law as standards “beyond compliance,” which actors are not obliged to follow as long as this is reported. In practice, research found that the Act did not lead to substantial change in levels of compliance among companies<sup>176</sup> and that companies’ reports often fail to provide meaningful insights on their compliance measures.<sup>177</sup> Such negative visibility thus reinforces a social norm of inaction. Moreover, it has been noted that the fact that the Act does not impose penalties on businesses for non-disclosure, especially compared to the harsh penalties imposed on individual perpetrators, “might send a confusing message.”<sup>178</sup> This conveys lower expectations for corporate compliance, reinforcing a contrasting social perception. It has also been noted that the Act’s focus exclusively on forced labor, noticeably not including all of the ILO’s core conventions, “creates the impression that this is the only matter where business conduct should be regulated.”<sup>179</sup> Taking into account the broader effects of such transparency arrangements on corporate social norms highlights the need to design stronger measures that clearly communicate companies’ obligations to adhere to international labor standards. By signaling well-defined social expectations for corporate behavior, such measures could significantly enhance their impact.

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171. Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L. J. 621, 697 (2004).

172. *Id.*

173. GENEVIEVE LeBARON, *COMBATTING MODERN SLAVERY: WHY LABOUR GOVERNANCE IS FAILING AND WHAT WE CAN DO ABOUT IT* 26 (2020).

174. Modern Slavery Act 2015, c. 30, § 54(1), 54(4)(a) (U.K.).

175. *Id.* § 54(4)(b).

176. Genevieve LeBaron & Andreas Rühmkorf, *Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance*, 8 GLOB. POL’Y 15, 16 (2017).

177. Virginia Mantouvalou, *The UK Modern Slavery Act 2015 Three Years On*, 81 MOD. L. REV. 1017, 1042–43 (2018).

178. *Id.* at 1019.

179. *Id.* at 1040.

### C. *Shaping the Global Narrative Through Transnational Legal Processes*

Transnational legal processes can also directly shape a perception of international labor standards as the appropriate standard of behavior. A first route would be to openly communicate this type of narrative within enforcement initiatives. This can happen through different types of measures that show the international community how the “game is being played.” Such measures can both consolidate and promote the emergent social norm around the acceptable standard of behavior in global labor markets. Take, for example, the Responsible Supply Chains in Asia, a joint project of the ILO, the European Union, and the OECD, aimed at promoting respect for human rights and labor and environmental standards by enhancing market access opportunities for complying businesses. The project relies on “internationally agreed principles and guidelines on corporate responsibility,” including the ILO’s aforementioned MNE Declaration.<sup>180</sup> Its approach is to rely on these international instruments as the “reference points for responsible business,” to “build a shared understanding of what is expected of responsible businesses.”<sup>181</sup> Notably, the project includes features that actively promote a social narrative framing international labor standards as the accepted “rules of the game.” One of these features is research that maps prevailing good practices in this field. The project aims in this regard to “build a common knowledge base to record and analyze current practices in business and formulate and distribute models of good practice to industry, unions and government.”<sup>182</sup> Another relevant feature is its policy advocacy. Under this area of activity, the project aims to “foster coordination and collaboration to harness the benefits of [foreign direct investment] and MNE operations for the creation of more and better jobs. This dialogue with relevant Ministries and other stakeholders is crucial to building the right policy framework to support responsible business conduct.”<sup>183</sup> The project also emphasizes outreach activities to improve businesses’ awareness and understanding of responsible behavior, disseminate best practices, and provide practical examples.<sup>184</sup>

The monitoring activities of labor rights commitments are another way in which the transnational legal process can be used to reinforce the perception that adherence to international labor standards constitutes the expected

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180. *EU, ILO, OECD Project: Responsible Supply Chains in Asia*, ILO, <https://www.ilo.org/projects-and-partnerships/projects/responsible-supply-chains-asia-0> [https://perma.cc/H4K4-QSQS].

181. *Responsible Supply Chains in Asia*, ILO, <http://www.ilo.org/asia/projects/rsca/lang--en/index.htm> [https://perma.cc/GS47-75YV].

182. *Responsible Supply Chains in Asia—Approach and Objectives*, ILO, [https://www.ilo.org/asia/projects/rsca/WCMS\\_734860/lang--en/index.htm](https://www.ilo.org/asia/projects/rsca/WCMS_734860/lang--en/index.htm) [https://perma.cc/H4K4-QSQS].

183. *Id.*

184. *Responsible Supply Chains in Asia: Terms of Reference: Communications and Visibility*, ILO, <https://www.ilo.org/media/69901/download> [https://perma.cc/3R6W-N2WF].

standards of behavior. Monitoring, more broadly, serves “an important function in cuing states to think harder about human rights violations.”<sup>185</sup> Accordingly, enforcement mechanisms can help shape perceptions in this direction when their monitoring procedures are aligned with internationally accepted labor law norms and the ILO’s supervisory system—rather than relying on a parallel or diluted interpretation of labor rights obligations.

Technical assistance is another way through which transnational legal processes can diffuse the desired narrative. Indeed, in recent years, the ILO’s technical assistance projects have emerged as a significant force in the enforcement of international labor standards.<sup>186</sup> In the context of their influence on global social norms, these projects can be understood as part of a “global cultural process” through which world society constructs actors’ preferences while pressuring states “to enact and implement world cultural principles.”<sup>187</sup> ILO technical assistance projects “are implemented through close cooperation between recipient countries, donors, and the ILO, which maintains a network of country offices worldwide.”<sup>188</sup> In that sense, they can be seen as a venue for “transgovernmental networks.” They facilitate socialization processes among states, and thus “provide a means for the transfer of regulatory ideas and policies” and promote regulatory convergence.<sup>189</sup> One concrete way technical assistance contributes to these narrative-shaping efforts is illustrated by the Responsible Supply Chains in Asia project. Training and technical assistance are major components of this project, drawing on the ILO’s technical expertise to support its aims and to guide governments, employers, and workers on employment and labor issues.<sup>190</sup> Similarly, technical assistance plays a key role in the U.S. government’s efforts to promote compliance with international labor standards around the world via numerous ongoing projects run by the Bureau of International Labor Affairs of its Department of Labor, including its recent M-POWER project.<sup>191</sup>

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185. Goodman & Jinks, *supra* note 171, at 694.

186. Maayan Menashe, *An Incentive-Compatible Enforcement Model for International Labor Law? Lessons from Qatar’s Forced Labor Case*, 44 COMP. LAB. L. & POL’Y J. 201, 205–12 (2024).

187. Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 1749, 1761 (2003).

188. *How the ILO Works*, ILO, <https://www.ilo.org/about-ilo/how-ilo-works> [<https://perma.cc/4WYY-GVRX>].

189. Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT’L L. 1, 52 (2002).

190. See *Responsible Supply Chains in Asia: Action Fact Sheet*, ILO, [https://www.ilo.org/wcmsp5/groups/public/--asia/--ro-bangkok/documents/publication/wcms\\_731537.pdf](https://www.ilo.org/wcmsp5/groups/public/--asia/--ro-bangkok/documents/publication/wcms_731537.pdf) [<https://perma.cc/XQ2S-AVAR>]; *M-POWER—Multilateral Partnership for Organizing, Worker Empowerment, and Rights*, U.S. DEP’T OF LABOR, <https://www.dol.gov/sites/dolgov/files/ILAB/508-M-POWER-02092022.pdf> [<https://perma.cc/ZJH9-JDFV>].

191. See U.S. DEP’T OF LABOR, *supra* note 190.

#### D. Mobilizing Third-Party Actors

Finally, it is also important to consider how transnational enforcement mechanisms engage with and mobilize third-party actors. Indeed, research on the emergence of laws as social norms emphasizes the importance of informal social sanctions imposed both by actors directly affected by the violations and by third parties who are not directly affected.<sup>192</sup> Accordingly, enforcement initiatives can empower societal actors and provide them with the “access” and structural opportunities to monitor the behavior of countries and companies; complain about violations; exert pressure on non-complying actors; and ultimately impose sanctions.<sup>193</sup> One way this type of sanctioning can be facilitated is by explicitly linking compliance with international labor standards to concrete penalties, such as trade or investment consequences. More broadly, however, when international labor standards are regarded by actors such as trade unions, NGOs, investors, and consumer advocacy groups as the authoritative benchmark for assessing compliance, they can indirectly shape a wide range of sanctions available to global society—even without an explicit link. When these standards carry strong normative authority, actors are more likely to adopt them voluntarily as the basis for identifying violations and, in turn, for imposing social or economic sanctions.

The formal integration of societal actors in transnational enforcement mechanisms is something that has been given considerable weight in the European Union’s recent “trade and sustainable development” regime. The European Union’s arrangement provides institutional mechanisms for civil society’s engagement in the promotion, monitoring, and enforcement of the labor provisions in its free trade agreements. This is based on the role given to Domestic Advisory Groups and the work of the joint Civil Society Forums.<sup>194</sup> It has been noted that providing a venue for regular meetings of trade unions and businesses from both sides of the trade agreement can contribute to a mutual learning process with respect to labor standards while also facilitating transnational activism movements for their enforcement.<sup>195</sup> An example of this can be found in the EU–Korea FTA dispute resolution, discussed above, where civil society actors had taken a role in identifying, alarming, and then pressuring the European Union to pursue the dispute resolution procedure against

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192. See, e.g., Ernst Fehr & Urs Fischbacher, *Third-Party Punishment and Social Norms*, 25 *EVOL. HUM. BEHAV.* 63, 63–64 (2004); Ernst Fehr, Urs Fischbacher & Simon Gächter, *Strong Reciprocity, Human Cooperation, and the Enforcement of Social Norms*, 13 *HUM. NAT.* 1, 2–3 (2002). In the present context, such unaffected third parties refer to actors who are not directly impacted by violations of workers’ labor rights but can contribute to enforcement through sanctioning measures, such as consumer boycotts against non-compliant companies.

193. Cf. Goodman & Jinks, *supra* note 171, at 693.

194. Van Den Putte & Orbie, *supra* note 128, at 269; Harrison et al., *supra* note 124, at 640.

195. Van Den Putte & Orbie, *supra* note 128, at 271.

Korea's violations of the agreement's labor provisions.<sup>196</sup> Over the long term, however, in order for such integration of societal actors to be meaningful, there is a need to ensure that actors are equipped with sufficient organizational and logistical capacities to perform their tasks. Concerns raised along these lines prompted the European Union to take steps to support domestic civil society groups within these arrangements by providing financial, technical, and logistical assistance.<sup>197</sup> Moreover, EU efforts in this regard are also tied to its actions as part of the currently ongoing Trade for Decent Work Project, a cooperation between the European Union and the ILO that aims to improve the application of ILO conventions in EU trading partners.<sup>198</sup> In this project, similar supportive measures are taken to strengthen the capacity of domestic governments, businesses, workers, and civil society to properly fulfill various reporting, monitoring, and promotion activities.<sup>199</sup>

When considering avenues for collaboration between the international legal system and societal actors, there are certain advantages to cooperating with business corporations in particular. Indeed, previous research on the enforcement of international labor standards has noted the potential influence that leading businesses can have on wider business practices. First, as noted by Galit Sarfaty, leading firms attain control and influence over their suppliers down the value chain.<sup>200</sup> They are therefore "better able to drive coordination, enforce agreements, transmit environmental and human rights norms, and conduct due diligence along their supply chains."<sup>201</sup> But beyond this vertical influence, leading firms can also contribute to the diffusion of social norms on a horizontal level, among other firms. Guy Mundlak and Issi Rosen-Zvi, in their study on codes of conduct regulating corporate social responsibility, identify "the development of a generally acceptable standard" within sectors.<sup>202</sup> As a possible explanation for this convergence, they hypothesize that industry-wide norms may emerge when "leaders in the industry set the tone."<sup>203</sup> They suggest this could occur through cooperation among leading firms, which "may,

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196. DEBORAH MARTENS ET AL., DOMESTIC ADVISORY GROUPS IN EU TRADE AGREEMENTS: STUCK AT THE BOTTOM OR MOVING UP THE LADDER 53–54 (2020); Novitz, *supra* note 137, at 11.

197. Harrison et al., *supra* note 124, at 644; European Commission, Non-paper of the Commission Services, Feedback and Way Forward on Improving the Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements, at 5 (Feb. 26, 2018).

198. *Trade for Decent Work Project*, ILO, [https://www.ilo.org/global/standards/WCMS\\_697996/lang-en/index.htm](https://www.ilo.org/global/standards/WCMS_697996/lang-en/index.htm) [https://perma.cc/2T5Q-LE9R].

199. *Id.*

200. Sarfaty, *supra* note 45, at 432.

201. *Id.*

202. Guy Mundlak & Issi Rosen-Zvi, *Signaling Virtue? A Comparison of Corporate Codes in the Fields of Labor and Environment*, 12 THEORETICAL INQUIRIES L. 603, 656 (2011).

203. *Id.*

in time, require others to join their benchmark,” or through external standard-setting agents capable of gathering a “critical mass” of subscribers around the prescribed benchmark.<sup>204</sup> This understanding found its manifestation, for example, in the design of the U.N. Global Compact, which envisioned “enlisting corporate assistance” in promoting its principles.<sup>205</sup> The idea was that companies will move towards international norms, “[b]ut equally important is the potential for generating positive social spillover effects, insofar as the adoption of good practices by major firms may exert an upward pull on the performance of local enterprises in the same sector.”<sup>206</sup>

## CONCLUSION

How then is international labor law enforced? While the ILO’s longstanding supervisory system was established to carry out this task and is widely recognized as the official body for enforcement, in practice, most enforcement activities today occur outside it, through a wide array of dispersed schemes run by numerous private and public external actors. This undoubtedly can be highly problematic, but it does not mean that the ILO, its norms, procedures, and supervisory system cannot continue to play a meaningful role. On the contrary, the ILO has become increasingly influential in shaping actors’ expectations as to what should be deemed the appropriate standard of behavior across different transnational enforcement schemes. In practice, it is the ILO’s comprehensive system of international labor standards and its supervisory system that are often drawn upon for this purpose, serving as the benchmark for assessing actors’ compliance and, accordingly, for granting them the benefits associated with such behavior.

Spotlighting these processes sheds new light on how international labor law enforcement operations occur in practice and how enforcement can be more effectively pursued. It highlights the need to examine and strengthen the links between these enforcement mechanisms and the ILO’s system of standard-setting and supervision. Supported by several examples of current leading labor regulatory efforts, this Article outlined several practical steps that could be taken. First, it pointed to the need to increase the quantity and robustness of enforcement initiatives that employ incentive-based mechanisms to enforce accepted international labor laws, as doing so contributes to a positive dynamic of mutual reinforcement between law and society. Second, the Article offered initial guidance on what this relationship between law and societal processes

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204. *Id.*

205. John Gerard Ruggie, *The United Nations and Globalization: Patterns and Limits of Institutional Adaptation*, 9 *GLOB. GOVERNANCE* 301, 310 (2003).

206. *Id.*

should look like for the purpose of enhancing the ILO's normative influence. It highlighted four factors that should be considered in the design of transnational enforcement mechanisms: the legitimacy and representativeness of legal processes that promote international labor standards; the need for strong alignment between the content of the norms embedded in transnational enforcement mechanisms and the ILO's standards and interpretations; the narratives these mechanisms promote regarding international labor standards as the appropriate standard of behavior; and the engagement and mobilization of third-party actors to monitor, enforce, and sanction violations of these standards.

Ultimately, these findings highlight a rather pragmatic enforcement approach that seeks to recognize the involvement of influential societal and domestic actors, while also preserving the central role of public international regimes. This approach acknowledges that in the contemporary global regulatory sphere, power is dispersed. The legal system, while playing a major role, inevitably operates within broader societal dynamics. The law interacts with society and influences it, but laws are ultimately dependent on society to be truly effective. In that sense, while the external enforcement of international labor law has rightfully raised real concerns about its divergence from the common norms of the treaty regime, the findings of this Article also reveal some prospects for these same processes to be steered towards enforcement that is both more effective and more harmonized. This discussion might well serve as the basis for exploring enforcement trends and strategies in other areas of international law.