RIGHTS-BASED SANCTIONS PROCEDURES

DESIRÉE LECLERCQ*

Federal agencies are increasingly interpreting international labor rights and imposing a wide array of economic and financial penalties, or "rights-based sanctions," under various laws and regulations. Congress recently vested the Office of the United States Trade Representative (USTR) with authority to impose targeted rights-based sanctions on foreign factories. USTR has begun administering its new authority with vigor. Policymakers and rights advocates hope that USTR's enforcement activities will strengthen the protection of workers abroad.

Hidden from view, and thus largely overlooked, are the exclusory procedures that agencies follow when they administer rights-based sanctions. The Treasury Department's Office of Financial Asset Control (OFAC) has investigated and enforced rights-based sanctions against governments and foreign targets under national security legislation for decades. Its programs show how exclusory procedures harm vulnerable communities and undermine rights protections. Yet, like OFAC, USTR investigates and decides enforcement actions behind closed doors and without always consulting regulated communities. Under its newfound authority, USTR also imposes financial penalties on foreign entities without offering advanced notice, a public hearing, or meaningful judicial review.

The Biden Administration has launched a "worker-centered" trade policy to protect workers abroad. If it hopes to achieve those cosmopolitan objectives, USTR's procedures must draw lessons from OFAC's harmful model. By reframing labor rights as participatory processes, this Article advances a framework for rights-based sanctions procedures capable of achieving the Administration's rights-based objectives.

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* Assistant Professor, Cornell ILR School & Associate Member of the Law Faculty, Cornell Law School. I would like to thank Lance Compa, Joy Gordon, Angela Cornell, Harlan Cohen, Inu Manak, Tonia Novitz, former federal and ILO colleagues, and participants at the Cornell ILR workshop, Richmond Junior Faculty Workshop, and the Cornell Law School workshop. I would also like to thank James Pezzullo for his exceptional research assistance, Suzanne Amy Cohen for her tireless efforts to help me navigate Cornell's library materials, and the fantastic editors at the *Administrative Law Review*. Any remaining errors are my own. Nothing in this Article is reflective of the views of any institution within which I have worked.

INTRODUCTION

By what procedures should the U.S. government use its economic power to protect American and foreign workers? Specifically, how should agencies use financial penalties and fines or the withdrawal of trade benefits—which this Article refers to as "rights-based sanctions"[1]—to

1. As further elaborated in Part II, the term "sanctions" has been subject to some debate in the literature. Some scholars treat the term narrowly and would likely exclude measures such as the withdrawal of trade preferences and the imposition of financial penalties under trade

enforce international labor rights abroad? This Article describes the emergence of rights-based sanctions in U.S. security and trade law and argues that current administrative procedures may undermine the very labor rights they purport to protect.

Until now, this discussion has remained hypothetical in the trade law context. For decades, rights advocates have complained that the Office of the United States Trade Representative (USTR) has refused to administer rights-based sanctions despite having legitimate reasons to do so.[2] A bevy of observers—from scholars to governments to advocates—have accused the U.S. government of undermining the voices and needs of local communities in targeted countries by neglecting commitments to protect them.[3]

Recent events in U.S. trade legislation have brought USTR's procedures to the fore. The United States–Mexico–Canada Agreement (USMCA),[4] a Trump-era trade agreement,[5] establishes a Factory-Specific Labor Rapid Response Mechanism (Rapid Response Mechanism).[6] That mechanism broadens USTR's enforcement authority[7] to target private foreign facilities and not just counterpart governments. Shortly after USMCA entered into force, USTR froze the

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agreements. This Article takes a broader approach, in keeping with the definition of the term "sanction" in the Administrative Procedure Act (APA) which includes the imposition of penalties and fines and revocations of certain licenses. *See* 5 U.S.C. § 551(10). That treatment also comports with the literature on trade and social rights that traditionally characterizes trade penalties as "sanctions." *See, e.g.*, KIMBERLY ANN ELLIOTT & RICHARD B. FREEMAN, CAN LABOR STANDARDS IMPROVE GLOBALIZATION? 78 (2003) (describing U.S. agency decisions to revoke unilateral trade benefits for worker rights criteria as "sanctions").

2. *See infra* Part II.C.

3. *See infra* Part II.

4. Agreement Between the United States of America, the United Mexican States, and Canada, June 1, 2020 [hereinafter USMCA], https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between.

5. For an analysis of President Trump's objectives in crafting the United States–Mexico–Canada Agreement (USMCA), see Desirée LeClercq, *The Disparate Treatment of Rights in U.S. Trade*, 90 FORDHAM L. REV. 1, 51–53 (2021) (describing how the Trump Administration sought to protect U.S. normative values under USMCA). For a critique of the Trump Administration's policy agenda, see Helen Hershkoff & Elizabeth M. Schneider, *Sex, Trump and Constitutional Change*, 34 CONST. COMMENT. 43 (2019).

6. *See* Protocol of Amendment to the Agreement Between the United States of America, the United Mexican States, and Canada, annex 31-A, Nov. 30, 2018 [hereinafter USMCA Protocol], https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Protocol-of-Amendments-to-the-United-States-Mexico-Canada-Agreement.pdf.

7. For a description of the Office of the United States Trade Representative's (USTR's) various authorities, including its "managerial role" in U.S. trade, see Kathleen Claussen, *Trade Administration*, 107 VA. L. REV. 845, 879–80 (2021).

unliquidated assets of several auto facilities in Mexico for allegedly violating international labor rights.[8]

USTR attributes its newfound enforcement vigor to the Biden Administration's new "worker-centered" trade policy.[9] Under that policy, USTR considers it "a moral imperative" to "fight for workers *overseas* . . . ."[10] The Biden Administration plans to expand the Rapid Response Mechanism model into trade agreements with other countries and regions.[11]

Policymakers and rights advocates celebrate the Administration's initiative. They presume that international labor rights are rules that can be agreed upon by trade partners and then objectively enforced. They consequently presuppose that agencies are capable of interpreting and enforcing international labor rights in other countries. That view has led to a myopic focus on the *imposition* of sanctions and overlooks the role of sanctions *procedures* in protecting foreign workers. Under those presumptions, federal agencies should enjoy the necessary discretion to interpret and enforce international labor rights without outside interference.

Contrary to prevailing wisdom, international labor rights are not rules to be enforced by powerful foreign governments such as the United States. They are, instead, processes that integrate and reflect the positions of public and private actors within and across countries.[12] The International Labor Organization (ILO) members, comprised of national representatives of governments, workers, and employers, deliberately designed international labor rights to account for legal pluralism and the uncertain outcomes of collective bargaining.[13]

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8. For a description of these early enforcement activities under the Biden Administration's new trade policy, see Desirée LeClercq, *A Worker-Centered Trade Policy*, 61 COLUM. J. TRANSNAT'L L. (forthcoming) (on file with author).

9. Katherine Tai, Ambassador, Office of the U.S. Trade Representative, Remarks at AFL-CIO Town Hall Outlining the Biden-Harris Administration's "Worker-Centered Trade Policy" (June 2021), https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2021/june/remarks-ambassador-katherine-tai-outlining-biden-harris-administrations-worker-centered-trade-policy.

10. *Id.*

11. *See* Brett Fortnam, *USTR: USMCA Rapid Response Tool Key to Future Trade Policy*, INSIDE U.S. TRADE (May 6, 2022, 5:08 PM), https://insidetrade.com/daily-news/ustr-usmca-rapid-response-tool-key-future-trade-policy (noting USTR's indication that the Factory-Specific Labor Rapid Response Mechanism (Rapid Response Mechanism) is "likely to be incorporated into U.S. trade policy moving forward").

12. *See* LeClercq, *supra* note 5, at 39 (describing the "process-oriented" nature of international labor rights). *See also infra* Part II.B.1.

13. Int'l Lab. Org. [ILO] Constitution pmbl. [hereinafter ILO Constitution].

For example, the ILO's convention on minimum wages provides no minimum wage value. Instead, it requires governments to determine the level of their minimum wages through "full consultation with representative [organizations] of employers and workers concerned . . . ."[14] Similarly, its conventions prohibiting child labor allow governments to designate, "after consultation with the [organizations] of employers and workers concerned," minimum working ages ranging from twelve to eighteen.[15] Decoupled from those consultative processes, the substantive details of international labor rights mean little more than bargaining topics intended to build off a floor of minimum universal standards.

Although the ILO is responsible for supervising the implementation of international labor rights worldwide, its institutional mandate prevents it from imposing punitive fines.[16] Rights advocates are optimistic that USTR's new agenda and early enforcement activities will complement, if not fortify, the ILO's supervisory regime. Their expectation is reasonable. USTR's early enforcement activities under USMCA in Mexico have led to positive improvements for Mexican workers under national legislation and at the facility level.[17]

Nevertheless, the long and torrid history of rights-based sanctions programs that U.S. agencies enforce outside the trade context is missing from the discourse. That enforcement has harmed rather than protected foreign communities. This Article draws attention to those programs to prompt a deliberate reconsideration of rights-based sanctions procedures in the trade and

14. Minimum Wage Fixing Convention, 1970, art. 4(2), June 3, 1970, 825 U.N.T.S. 77.

15. Minimum Age Convention, 1973 art. 2(4), June 6, 1973, 1015 U.N.T.S. 297. *Infra* note 269 and accompanying text.

16. *See generally* ILO Constitution, *supra* note 13, arts. 23–26; BOB HEPPLE, LABOUR LAWS AND GLOBAL TRADE 48–50 (2005) (explaining how the ILO's regular supervisory machinery offers non-binding recommendations, and that the ILO's only legally binding complaints mechanism, provided under article 26, is resolved through the International Court of Justice).

17. Those activities, including securing commitments to Mexican labor laws, have drastically improved Mexico's industrial relations policy. Prior to recent reforms in Mexico, employers could recognize fake labor unions. Those unions bargained "protection contracts" that were "signed between an employer and a union, often established by the employer, and even subject to criminal elements, without the participation of the workers, and even without their knowledge." *See* Int'l Lab. Org. [ILO], *Individual Case (CAS)-Discussion: 2015, Publication: 104th ILC Session (2015), Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)—Mexico* (2015), https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3241939. Since entering into trade discussions with the United States, Mexico has reformed its constitution and is further amending its labor laws to ensure that unions are independent and positioned to protect their worker members from government and employer interference and exploitation.

labor context. It urges policymakers, scholars, and practitioners to imagine how best to enforce rights such as labor while avoiding the humanitarian and regulatory costs incurred under prior U.S. sanctions programs.

This Article illustrates those costs by describing how the Treasury Department's Office of Foreign Asset Control (OFAC) has administered rights-based sanctions programs under emergency legislation. Since the 1990s,[18] OFAC has carried out those activities under state-to-state and targeted programs. A buried 2001 congressional commission report exposes early concerns by policymakers, U.S. businesses, and foreign entities about OFAC's administrative procedures.[19] That report documented significant harm imposed on entities and was published just months before the September 11, 2001 attacks.[20] Rather than consider the congressional commission's recommendations, overarching security threats compelled Congress to delegate even greater authority and discretion to agencies, including OFAC.[21] Since then, scholars have documented how OFAC's state-to-state and targeted sanctions programs have infringed upon fundamental rights and have imposed disproportionate costs on vulnerable populations in targeted countries.[22]

Granted, trade objectives differ from national security objectives. OFAC's mandate centers on protecting U.S. citizens and interests from existential threats. Consequently, risks of collateral damage to foreign populations are, at best, subsidiary concerns.[23] Under its worker-centered trade policy, by contrast, the Biden Administration's USTR purports to protect the well-

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18. *See infra* Part I (explaining how the Treasury Department's Office of Foreign Asset Control (OFAC) enforced human trafficking prohibitions, which are a fundamental labor right).

19. *See infra* Part I.C. *See* U.S. JUD. REV. COMM'N ON FOREIGN ASSET CONTROL, FINAL REPORT TO CONGRESS 32, 32 n.141 (2001) [hereinafter FINAL REPORT] (citing OFAC responses to its written questionnaire).

20. *See infra* Part I.C; FINAL REPORT, *supra* note 19.

21. Although the scholarship on OFAC's procedures and effects on foreign and American citizens is substantial, only a few authors have acknowledged the Commission report. Those pieces have looked narrowly at the Foreign Narcotics Kingpin Designation Act (the Kingpin Act) rather than on the implications for OFAC's administrative procedures more broadly. *See* Pub. L. 106-120, 113 Stat. 1606 (codified as amended at 21 U.S.C. §§ 1901–08). *See, e.g.*, David T. Duncan, "*Of Course This Will Hurt Business": Foreign Standing Under the Foreign Narcotics Kingpin Designation Act of 1999 and America's War on Drugs*, 37 GEO. WASH. INT'L L. REV. 969, 971 (2005) (examining the Kingpin Act and using the Commission's report to highlight the Kingpin Act's "particularly controversial provisions").

22. *See, e.g.*, Joy Gordon, *Crippling Iran: The U.N. Security Council and the Tactic of Deliberate Ambiguity*, 44 GEO. J. INT'L L. 973, 981, 1003 (2013) (arguing that U.S. targeted sanctions against "specific entities within the Iranian Government," "are harming the political opposition to the regime, as well as women and other vulnerable groups.").

23. *See infra* Part I.B.

being of U.S. and foreign workers.[24] The harms incurred under its exclusory and discretionary procedures abroad are of primary importance.

Despite their differences, OFAC and USTR's procedures exclude regulated communities' participation in rulemaking and adjudication. In the trade context, the exclusory nature of agency procedures is not necessarily intuitive. Trade agreements are, after all, treaties designed and agreed upon by sovereign governments. Those governments are aware of and consent to be bound by the commitments they willingly negotiate. Governments do not decide amongst themselves how to define and implement the international labor rights in U.S. trade agreements. Even if they sought to do so—which they do not—their efforts would violate the consultative nature of those rights.

To make those arguments and offer a path forward, this Article proceeds in four parts. Part I describes how rights-based sanctions emerged as a U.S. foreign policy tool. Focusing on OFAC's procedures, it explains how agencies enjoy significant discretion to exclude regulated communities from rulemaking and adjudication. And yet, the rights that OFAC enforces under national security legislation are opaque. By excluding regulated communities from deliberative processes, OFAC's state-to-state and targeted procedures impose unilateral definitions of those rights. Consequently, foreign communities may not have understood OFAC's rules, yet they bear the costs of violations.

Part II uses OFAC's procedures to create a typology of procedural defects applicable to USTR's rights-based sanctions procedures. Under that typology, both agencies promulgate rules concerning ambiguous labor rights while excluding regulated communities. They both decouple international labor rights from their consultative processes by deciding their enforcement activities and rationale behind closed doors. OFAC and USTR also adjudicate compliance with rights, while excluding foreign governments, workers, and employers from participating. As the political economy behind rights-based sanctions programs evolve to include the well-being of foreign workers, USTR's procedures must draw lessons from OFAC to understand how *not* to administer sanctions.

Drawing inspiration from global administrative law scholarship, Part III offers an administrative framework that foregrounds the participatory processes embedded in international labor rights. It synthesizes U.S. administrative and national labor laws to show how Congress seems to understand the link between participation, consultation, and compliance on the national level. Under the Administrative Procedure Act (APA), the bedrock of U.S. administrative law, Congress requires agencies to engage with regulated communities by, among other things, consulting with communities before promulgating rules and acting transparently during

24. *See infra* Part II.A.

adjudication.[25] Under the National Labor Relations Act (NLRA), Congress authorizes the National Labor Relations Board (NLRB) to enforce conditions of collective bargaining but requires the agency to offer participatory and transparent processes with workers and employers.[26] USTR may avoid those processes because of exemptions for foreign affairs matters. The resulting dichotomy between domestic-facing and foreign-facing administration has significant implications for rights-based sanctions.

Part IV advances a rights-based sanctions agenda for U.S. trade policy. USTR's recent pro-worker agenda creates an aperture in U.S. trade policy to reconceptualize its procedures. This Article concludes by urging policymakers to seize that opportunity.

I. THE GENEALOGY OF SOCIAL SANCTIONS PROGRAMS

U.S. agencies increasingly use their delegated sanctions authority to interpret and enforce international rights in other countries, including labor and human rights. Many scholars and policymakers[27] venerate that newfound authority.[28] As a result, some urge Congress to enhance sanctions programs even further to protect rights.[29]

Those efforts overlook significant and alarming precedents under U.S. sanctions programs. USMCA may offer the first targeted sanctions mechanism in U.S. trade legislation, but targeted sanctions to enforce rights

25. *See generally* Administrative Procedure Act, 5 U.S.C. §§ 551–59, 561–70a, 701–06.

26. *See infra* Part III.

27. For the views of labor leaders, see Press Release, American Economic Liberties Project, SNITIS and Rethink Trade Announce Filing of New USMCA 'Rapid Response Mechanism' Labor Case to Fight for Mexican Workers at Reynosa Panasonic Plants Denied Legitimate Union Representation (Apr. 18, 2022), https://www.economicliberties.us/press-release/snitis-and-rethink-trade-announce-filing-of-new-usmca-rapid-response-mechanism-labor-case-to-fight-for-mexican-workers-at-reynosa-panasonic-plants-denied-legitimate-union-r/. For early views of labor academics, see, for example, Sandra Polaski, Kimberly A. Nolan García & Michèle Rioux, *The USMCA: A "New Model" for Labor Governance in North America?*, *in* NAFTA 2.0: FROM THE FIRST NAFTA TO THE UNITED STATES-MEXICO-CANADA AGREEMENT 151 (Gilbert Gané & Michele Rioux eds., 2022) (noting how USMCA improves upon previous U.S. trade agreements by expanding the scope and rigor of enforcement).

28. *But see* Christoph Scherrer, *Novel Labour-related Clauses in a Trade Agreement: From NAFTA to USMCA*, 11 GLOB. LAB. J. 291, 297, 300 (2020) (noting some early critiques of the Rapid Response Mechanism and urging that "a final assessment must wait until" the "unprecedented" mechanisms are established and employed).

29. *See* SANDRA POLASKI, SARAH ANDERSON, JOHN CAVANAGH, KEVIN GALLAGHER, MANUEL PÉREZ-ROCHA & REBECCA RAY, HOW TRADE POLICY FAILED U.S. WORKERS – AND HOW TO FIX IT 31–33 (Institute for Policy Studies, 2020) (proposing a new labor "template" in trade agreements to "require specific improvements" in countries).

are a longstanding U.S. foreign policy tool. Since the 1990s, Congress and the President have authorized federal agencies to impose targeted sanctions on foreign entities to enforce labor rights, namely prohibitions against human trafficking.[30] However, they do not regulate agencies' procedures to administer those rights-based sanctions programs. Perhaps as a consequence, those programs suffer from a poor record of inconsistent implementation and human suffering.[31]

Using OFAC as an illustration, this Part describes how agencies self-regulate to equip themselves with significant discretion and autonomy to administer rights-based sanctions. Again, I am not suggesting that sanctions under trade agreements are the same as those under emergency legislation. Nevertheless, the administrative procedures underpinning trade and national security legislation resemble one another in important ways. Both allow agencies to interpret and enforce international rights behind closed doors. And neither follow the types of consultative processes inexorably tied to labor rights as interpreted and enforced on the global platform. The effects of OFAC's administrative procedures are thus relevant and helpful for discussions on improving workers' rights under USTR's worker-centered trade policy.

A. The National Security Origins of Sanctions

U.S. sanctions policies emerged in the early 20th century as a tool to cease and deter global hostilities.[32] Sanctions were an attractive alternative to the labor-intensive and violent tool of warfare—they could quickly injure offending countries and were easy to deploy "from behind a mahogany desk" safely situated in the United States.[33]

Public support for economic sanctions soon waned as the resulting human suffering became increasingly evident.[34] As early as World War I, feminists,

30. *See* NICHOLAS MULDER, THE ECONOMIC WEAPON 4 (2022) (describing the rise of economic sanctions in the United States).

31. *See infra* Part I.C.

32. *See* Thomas W. Milburn, *The Concept of Deterrence: Some Logical and Psychological Considerations*, 17 J. SOC. ISSUES 3, 6–7 (1961) (describing how the United States historically used threats of retaliation to deter hostilities and war).

33. *See* MULDER, *supra* note 30, at 6. *But see* Joy Gordon, *Unilateral Sanctions: Creating Chaos at Bargain Rates*, *in* UNILATERAL SANCTIONS IN INTERNATIONAL LAW 124 (Surya P Subedi QC ed., 2021) [hereinafter Gordon, *Unilateral Sanctions*]; Joy Gordon, *A Peaceful, Silent, Deadly Remedy: The Ethics of Economic Sanctions*, 13 ETHICS & INT'L AFFS. 123, 123–24 (describing the paradoxical terms used to describe economic sanctions—"they are 'peaceful' yet 'deadly,' they are 'potent' yet involve no force.").

34. *See* Ella Shagabutdinova & Jeffrey Berejikian, *Deploying Sanctions While Protecting Human*

humanitarian scholars, and policymakers "pursued an energetic campaign against the [sanction's] targeting of civilians."[35] Despite those efforts, "the infliction of pain from a distance" remained a relatively effortless policy that came "to dominate modern geopolitics"[36] in the United States.[37] During the interwar period, more women and children lost their lives to economic blockades than to aerial bombs and gas.[38] More recent newsfeeds have broadcast the suffering of women and children in Cuba—populations for which governments such as the United States have refused medical supplies, chlorinated water, and other critical goods and materials for decades.[39]

Although economic sanctions' collateral damage on vulnerable citizens has been well-documented, their direct effect on offending governments remains questionable.[40] The residual violence imposed horizontally between states and vertically towards state citizens fuels "a deepening skepticism as to the capacity" of those programs to deliver on their "promise of nonviolence."[41] Rather than revolt against offending governments, foreign citizens sometimes "rally around the flag" and offer their leaders greater public support.[42] More powerful countries, like Russia and China, retaliate with their own economic measures.[43] Given the disconnect between sanctions and deterring violative behavior, critics challenge whether sanctions are an effective foreign policy tool.[44]

Rights: Are Humanitarian "Smart" Sanctions Effective?, 6 J. HUM. RTS. 59, 59 (2007) (describing the "debate surrounding the use of economic sanctions as a non-violent method to compel compliance and to resolve disputes . . . .").

35. *See* MULDER, *supra* note 30, at 5.

36. *Id.* at 8, 13.

37. *See* Jesse Van Genugten, *Conscripting the Global Banking Sector: Assessing the Importance and Impact of Private Policing in the Enforcement of U.S. Economic Sanctions*, 18 BERKELEY BUS. L.J. 136, 156 (2021).

38. *See* MULDER, *supra* note 30, at 5.

39. *See* Gordon, *Unilateral Sanctions*, *supra* note 33, at 93–95.

40. *See* Shagabutdinova & Berejikian, *supra* note 34, at 60 ("[S]anctions almost never fully achieve their stated objectives, and they often fail completely, having little or [no] measurable impact on the behavior of the targeted government."); Van Genugten, *supra* note 37, at 157 (noting studies that show economic sanctions are effective in a minority of cases).

41. *See* Susanne Karstedt, *Democracy, Values, and Violence: Paradoxes, Tensions, and Comparative Advantages of Liberal Inclusion*, 605 ANNALS AM. ACAD. POL. & SOC. SCI. 50, 53 (2006).

42. *See* Shagabutdinova & Berejikian, *supra* note 34, at 60; Gregory Shaffer, *Governing the Interface of U.S.-China Trade Relations*, 115 AM. J. INT'L L. 622, 670 (2021) ("Coercive policies tend to rally populist, nationalist responses in support of authoritarian leaders.").

43. *See* Gordon, *Unilateral Sanctions*, *supra* note 33, at 89.

44. Shagabutdinova & Berejikian, *supra* note 34, at 60

U.S. policymakers have responded to that challenge by supplementing traditional state-to-state sanctions policies with new strategies.[45] One such strategy is to penalize and freeze the assets of *targeted* individuals and foreign entities.[46] While their objectives are similar, targeted sanctions differ from traditional sanctions because they attempt to impose costs narrowly to avoid collaterally damaging innocent citizens.[47]

To illustrate how federal agencies administer state-to-state and targeted sanctions programs, the following Sections describe OFAC's authority and activities under the International Emergency Economic Powers Act (IEEPA).[48] The IEEPA is one of the 117 emergency statutes under the National Emergencies Act.[49] It delegates "sweeping powers"[50] to the President to identify, through Executive Orders, various "unusual and extraordinary threat[s]"[51] to U.S. "national security, foreign policy, or economy."[52] The President may declare national emergencies and authorize OFAC to implement sanctions programs accordingly.[53] Congress has never interfered with or attempted to revoke a president's declaration.[54] On the contrary, as each emergency has transgressed, Congress has increased its deference to the Executive.[55]

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45. Anton Moiseienko, *Due Process and Unilateral Targeted Sanctions*, *in* RESEARCH HANDBOOK ON UNILATERAL AND EXTRATERRITORIAL SANCTIONS 406 (Charlotte Beaucillon ed., 2021) (discussing the history of unilateral sanctions programs); Joy Gordon, *Smart Sanctions Revisited*, 25 ETHICS & INT'L AFFS. 315, 318–20 (2011) [hereinafter Gordon, *Smart Sanctions Revisited*].

46. *See* Gordon, *Smart Sanctions Revisited*, *supra* note 45, at 315; Van Genugten, *supra* note 37, at 157. *See generally* Elena Chachko, *Administrative National Security*, 108 GEO. L.J. 1063, 1070–73 (2020) (describing and providing examples of how "U.S. foreign and security policy has become increasingly individualized in the past two decades.").

47. *See* Shagabutdinova & Berejikian, *supra* note 34, at 61; Moiseienko, *supra* note 45, at 406 (arguing that states adopted targeted sanctions as "an alternative to comprehensive economic sanctions, such as embargoes, which were perceived to cause excessive humanitarian hardship").

48. International Emergency Economic Powers Act (IEEPA), Pub. L. No. 95-223, 91 Stat. 1626 (1977) (codified as amended at 50 U.S.C. §§ 1701–08).

49. National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified as amended at 50 U.S.C. §§ 1601, 1621–22, 1631, 1641, 1651); *see* CHRISTOPHER A. CASEY, IAN F. FERGUSSON, DIANNE E. RENNACK & JENNIFER K. ELSEA, CONG. RSCH. SERV., R45618, THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE 2 (2020).

50. CASEY ET AL., *supra* note 49, at 11.

51. IEEPA, 50 U.S.C. § 1701.

52. *See* CASEY ET AL., *supra* note 49, at 13–15 (describing the IEEPA amendments after September 11); *see also* § 1701(a); § 1702(a) (2000 & Supp. V 2005).

53. *See* CASEY ET AL., *supra* note 49, at 1–2.

54. *Id.* at 1 ("Instead of retroactively judging an executive's extraordinary actions in a time of emergency, Congress enacted statutes authorizing the President to declare a state of emergency and make use of extraordinary delegated powers.").

55. *Id.* at 11, 13–15 (describing the IEEPA amendments after September 11).

B. The Office of Financial Asset Control (OFAC)

OFAC derives its authority from various laws and Executive Orders, including the IEEPA.[56] OFAC's sanctions programs are thus a historical outgrowth of sanctions programs that sought to "economically isolate their target as completely as possible."[57] Targets traditionally include "foreign countries and regimes, terrorists, international narcotics traffickers . . . and other threats to the national security, foreign policy or" other U.S. foreign policy and economic interests.[58] OFAC also designates "secondary" targets, often U.S. citizens and entities that continue to transact with primary targets.[59]

Between 1977 and 2020, U.S. presidents declared fifty-nine national emergencies under the IEEPA.[60] "As of January 2020, [the United States had thirty-two] active sanctions regimes."[61] OFAC's traditional sanctions programs have evolved from their initial security objectives. They now regulate and enforce rights[62] such as "human and civil rights abuses, slavery, denial of religious freedom, political repression, public corruption, and the undermining of democratic processes."[63] Between 2000 and 2022, eleven of OFAC's twenty-four sanctions programs tied human and political rights abuses to a national emergency declaration.[64]

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56. The Trading with the Enemy Act (TWEA) is also a principal statute that authorizes economic sanctions but is limited to wartime and preexisting declarations of authority. *See* Trading With the Enemy Act, ch. 106, 40 Stat. 411 (1917) (codified at 12 U.S.C. § 95 & 50 U.S.C. §§ 4301–41. For a history of TWEA's amendments and scope, see generally Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CALIF. L. REV. 1159 (1987).

57. *See* CASEY ET AL., *supra* note 49, at 17; Peter L. Fitzgerald, *"If Property Rights Were Treated Like Human Rights, They Could Never Get Away with This:" Blacklisting and Due Process in U.S. Economic Sanctions Programs*, 51 HASTINGS L.J. 73, 87 (1999) [hereinafter Fitzgerald, *Property Rights*].

58. *Office of Foreign Assets Control – Sanctions Programs and Information*, U.S. DEP'T OF TREASURY, https://home.treasury.gov/policy-issues/office-of-foreign-assets-control-sanctions-programs-and-information (last visited Feb. 7, 2023).

59. *See* Peter L. Fitzgerald, *Smarter Smart Sanctions*, 26 PENN. ST. INT'L L. REV. 37, 52 (2007) (describing secondary targets as those that "only incidentally dealt with or supported the real target of the program.").

60. *See* CASEY ET AL., *supra* note 49, at 17.

61. *See* Van Genugten, *supra* note 37 at 141.

62. *See* ANDREW BOYLE, CHECKING THE PRESIDENT'S SANCTIONS POWER: A PROPOSAL TO REFORM THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT 3 (2021) ("Despite IEEPA's requirement that a president must declare a national emergency that presents an 'unusual and extraordinary threat' before imposing sanctions, the law is used today as a routine foreign policy tool.").

63. *See* CASEY ET AL., *supra* note 49, at 21–22.

64. *See, e.g.*, Exec. Order No. 13,405, 71 Fed. Reg. 34,585 (June 19, 2006) (imposing sanctions

For example, the 2016 Global Magnitsky Human Rights Accountability Act (the Magnitsky Act) authorizes OFAC to impose economic sanctions and deny entry into the United States to any foreign person identified as engaging in human rights abuse.[65] On December 20, 2017, President Trump invoked the Magnitsky Act to issue an Executive Order finding that "the prevalence . . . of human rights abuse [had] reached such [a] scope and gravity that they threaten the stability of international political and economic systems."[66] The Executive Order concluded that those rights abuses "constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States."[67]

Beyond broad regulatory parameters, neither Congress nor the President regulates OFAC's procedures. Consequently, OFAC enjoys significant discretion to self-regulate. It offers public guidelines suggesting possible eligibility criteria, standards, designations, and penalties.[68] It promulgates its own rules without subjecting them to the APA's notice-and-comment procedures.[69] Nevertheless, OFAC's sanctions programs are "unique," and its "regulatory definitions and requirements are applied and interpreted independently of other sanctions programs."[70]

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because, among other reasons, the government and officials of Belarus committed "human rights abuses related to political repression, including detentions and disappearances . . . ."); OFF. OF FOREIGN ASSETS, DEP'T OF TREASURY, DEMOCRATIC REPUBLIC OF THE CONGO SANCTIONS PROGRAM (2016) (citing the country's "forced displacement, or attacks on schools, hospitals, religious sites, or locations where civilians are seeking refuge, or . . . conduct that would constitute a serious abuse or violation of human rights or a violation of international humanitarian law. . . ."). *See generally Sanctions Programs and Country Information*, DEP'T OF TREASURY, https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information (last visited Feb. 7, 2023); *Declared National Emergencies Under the National Emergencies Act*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-naional-emergencies-act (Dec. 12, 2022).

65. *See* Global Magnitsky Human Rights Accountability Act, Pub. L. No. 114-328, § 1263, 130 Stat. 2533, 2534 (codified as amended at 22 U.S.C. § 2656); Global Magnitsky Sanctions Regulations, 83 Fed. Reg. 30,541, 30,541 (June 29, 2018) (to be codified at 31 C.F.R. pt. 583).

66. Exec. Order No. 13,818, 82 Fed. Reg. 60,839, 60,839 (Dec. 20, 2017).

67. *Id.*

68. *See* BOYLE, *supra* note 62, at 8–10.

69. *See* Arthur Earl Bonfield, *Military and Foreign Affairs Function Rule-Making Under the APA*, 71 MICH. L. REV. 221, 264–65 (1972) (citing the U.S. Department of Treasury's response to a 1969 agency survey indicating that OFAC's rules "have a direct bearing on our relations with foreign countries" and should thus be excluded under the APA's foreign affairs exemption).

70. *See* FINAL REPORT, *supra* note 19 (citing OFAC responses to its written questionnaire). *See also* Fitzgerald, *Property Rights*, *supra* note 57, at 90–97 (reviewing OFAC's sanctions programs up to 1999, concluding that "[a]part from the Asian

In addition to rulemaking, OFAC carries out several adjudicative activities. It investigates foreign targets, freezes and blocks their assets, designates subjects, issues licenses (exceptions),[71] and imposes civil and criminal penalties on U.S. citizens and entities for violations of its sanctions programs. OFAC applies economic pressure on its sanctions targets by prohibiting U.S. corporations and citizens from transacting with them and "intimidating foreign persons from transacting with the targets."[72] If it decides that foreign companies or entities have "sufficient 'contacts' with the United States" or operate in U.S. dollars, "OFAC may determine that they are subject to U.S. jurisdiction," and thus, its sanctions programs.[73]

Neither OFAC's authorizing legislation nor self-regulation requires it to provide its targets any explanation or access to the evidence used against them.[74] The courts have generally held that OFAC is under no obligation to do so, given flight risks.[75] Under an amendment to the Patriot Act, OFAC may investigate and even block assets pending investigation.[76]

Those who violate the IEEPA sanctions programs face civil and criminal penalties.[77] Under the IEEPA, civil enforcement is a "strict liability regime"[78] under which OFAC can impose fines between $250,000 and upwards of billions of dollars.[79] When making that choice, OFAC has the discretion to consider aggravating factors such as evidence of "willful or reckless disregard" for OFAC regulations.[80] "Between 2010 and 2019, OFAC assessed nearly $4.9 billion in civil penalties. . . ."[81] Most the IEEPA sanctions programs require OFAC to provide pre-

sanctions, which were administered with a single common set of regulations, entirely new and separate regulations were created for each of these various sanctions programs.").

71. *See* BOYLE, *supra* note 62, at 9.

72. *Id.* at 8.

73. *Id.*

74. *Id.* at 9.

75. *See, e.g.*, Islamic Am. Relief Agency v. Unidentified FBI Agents, 394 F. Supp. 2d 34, 49–50 (D.D.C. 2005); Zevallos v. Obama, 10 F. Supp. 3d 111, 127–28 (D.D.C. 2014).

76. *See* BOYLE, *supra* note 62, at 9; Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Patriot Act), Pub. L. No. 107-56, § 106, 115 Stat. 272 (codified as amended in scattered sections of 8, 12, 15, 18, 20, 31, 42, 47, 49 & 50 U.S.C.).

77. *See* 50 U.S.C. § 1705.

78. *See* BOYLE, *supra* note 62, at 10; § 1705(a) ("It shall be unlawful for a person to violate, attempt to violate, conspire to violate, or cause a violation of any license, order, regulation, or prohibition issued under this chapter.").

79. *See* § 1705(b)(1)–(2).

80. *See* Van Genugten, *supra* note 37, at 153.

81. *Id.* at 138.

penalty notice and permit a written response but offer no legal platform to contest OFAC's decisions by a neutral third party.[82]

C. Criticism of OFAC's Procedures

In 1999, worried about OFAC's burgeoning and secretive activities, Congress convened an independent Judicial Review Commission on Foreign Asset Control (the Commission).[83] The Commission investigated gaps between OFAC's procedures and the APA's requirements. It held extensive hearings and interviews with OFAC representatives, U.S. businesses working locally and abroad, financial institutions, and U.S. citizens.[84] Its final report documents alarming deficits in OFAC's procedures, particularly in rulemaking and adjudication.[85] The Commission concluded that Congress should intervene and hold OFAC to some of the APA's rules and standards.[86]

Mere months after the Commission published its January 2001 report, terrorists flew planes into the World Trade Center, effectively burying the report under more pressing national security needs.[87] These Sections unearth that report and subsequent scholarly critiques of OFAC's administrative procedures.[88] Those critiques expose a tapestry of secretive agency activities and unpredictable enforcement actions that raise critical questions about OFAC's legitimacy, credibility, and authority.[89] Given the

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82. *See* Fitzgerald, *Property Rights*, *supra* note 57, at 133.

83. *See* 21 U.S.C. §§ 1901–1908; § 1908(a), (c) ("There is established a commission to be known as the 'Judicial Review Commission on Foreign Asset Control' . . . ."). The Commission's mandate was to examine and report on "whether there are reasonable opportunities under the current IEEPA regulatory regime and the Administrative Procedure[] Act for an erroneous blocking of assets or mistaken listing under IEEPA to be remedied . . . ." *See* FINAL REPORT, *supra* note 19, at 8–9.

84. *See* FINAL REPORT, *supra* note 19, at 1–3 (describing the Commission's mandate).

85. *Id.* at 2–3 (listing twelve urgent recommendations to Congress concerning OFAC's administrative procedures).

86. *Id.*

87. *See* BOYLE, *supra* note 62, at 12 (describing the "numerous sanctions" after September 11); Danielle Stampley, *Blocking Assets: Compromising Civil Rights to Protect National Security or Unconstitutional Infringement on Due Process and the Right to Hire an Attorney?*, 57 AM. U. L. REV. 683, 684–86 (2008) ("Since 2001 . . . [OFAC] has been responsible for substantially increasing the number of 'persons' listed on [sanctions orders].").

88. *See* Lance Compa & Jeffrey Vogt, *Labor Rights in the Generalized System of Preferences: A 20-Year Review*, 22 COMP. LAB. L. & POL'Y 199, 235 (2001) (arguing that USTR plays the role of prosecutor, judge, jury, and executioner).

89. *See, e.g.*, Fitzgerald, *Property Rights*, *supra* note 57, at 110–11 (arguing that OFAC's varied rules and procedures "make[] it more difficult for OFAC to administer the controls in a smooth, consistent, and efficient manner").

parallels between OFAC's and USTR's sanctions procedures, described in the next Part, the Administration should draw lessons from OFAC's procedural drawbacks to reimagine its worker-centered trade policy.

1. OFAC's Exclusory Rulemaking

In 2001, the Commission noted its alarm about OFAC's exclusory and secretive rulemaking procedures.[90] Commentators have since observed how OFAC's increasingly broad and confusing programs continue to exclude participants, effectively preventing regulated communities from engaging in and understanding OFAC's definitions and intentions.[91] Those drawbacks are particularly significant in the context of opaque rules concerning human and labor rights.

For instance, OFAC's sanctions programs include prohibitions against human trafficking.[92] The United States State Department defines the term broadly to encompass various forced labor activities.[93] By contrast, the ILO's supervisory bodies define the term narrowly as a "new form[] of forced labour . . . ."[94] That distinction is not (only) one of semantics. The U.S. government excludes activities such as forced marriage[95] that the ILO and other UN instruments include.[96] Furthermore, the ILO's forced labor instruments, which presumably cover human trafficking, permit governments to impose

90. *See* FINAL REPORT, *supra* note 19, at 116 (internal citations omitted).

91. *See* Fitzgerald, *Property Rights*, *supra* note 57, at 98. Fitzgerald's criticism mainly centers on OFAC's blacklisting programs but also recognizes that "[a] similar level of precision is sometimes found in the sanctions regulations themselves . . . ." *Id.* at 106.

92. *See, e.g.*, Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386 § 111, 114 Stat. 1464 (codified as amended at 28 U.S.C. 7101–14).

93. *See About Human Trafficking*, U.S. DEP'T OF STATE, https://www.state.gov/human trafficking-about-human-trafficking/#forms (last visited Feb. 7, 2023) (enumerating "forms of human trafficking" that covers forced labor and sex trafficking).

94. *See* Int'l Lab. Org. [ILO], *Giving Globalization a Human Face*, para 272, ILO 101/III/1B (2012), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meeting document/wcms_174846.pdf (providing that using a broad definition "has enabled the ILO supervisory bodies to address traditional practices of forced labour").

95. *See About Human Trafficking*, *supra* note 93 (noting that the U.S. government does not use ILO statistics that incorporate forced marriage because "[w]hile some instances of forced marriage may meet the international or U.S. legal definition of human trafficking, not all cases do.").

96. *See* Int'l Lab. Org. [ILO], *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, at 18 (2017), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents /publication/wcms_575479.pdf (discussing UN instruments that include forced marriage as slavery-like practices and including forced marriage statistics in its forced labor report).

penalties "in accordance with the basic principles of [their] legal system."[97] It is unclear whether OFAC affords such deference.[98]

OFAC's sanctions programs also turn on a vague reference to "human rights." The Magnitsky Act incorporates the definition of human rights used in the Foreign Assistance Act of 1961.[99] Rather than offer a precise definition, the 1961 Act applies to "a consistent pattern of gross violations of internationally recognized human rights, *including* torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges," and so on.[100] It is uncertain, therefore, whether that list is exhaustive or dynamic.[101] Despite that ambiguity, OFAC publicly designated 107 individuals and 105 entities within three years of Executive Order 13,818.[102]

2. OFAC's Exclusory Adjudications

The 2001 Commission, scholars, and policymakers have expressed a litany of concerns over OFAC's adjudication procedures.[103] Because OFAC conducts its procedures behind closed doors, critics accuse the agency of targeting individuals and entities "without any direct connection to any particular state or geography whatsoever."[104] OFAC's exclusory and uncertain enforcement activities have a "chilling effect" on businesses and investments[105] to such an extent that critics deem them a "financial death sentence."[106]

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97. *See* Int'l Lab. Org. [ILO], *Protocol of 2014 to the Forced Labour Convention, 1930*, art. 4(2), (May 28, 2014), https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-2014-forced-labour-convention-1930.

98. *See generally* FINAL REPORT, *supra* note 19, app. H (providing testimony from U.S. businesses and financial institutions concerning the effects of OFAC's unclear rules on their decisionmaking).

99. *See* Global Magnitsky Human Rights Accountability Act, Pub. L. No. 114-328, § 1262(2), 130 Stat. 2533, 2534 (codified as amended at 22 U.S.C. § 2656).

100. *See* Foreign Assistance Act of 1961, 22 U.S.C. § 2151n(a) (emphasis added).

101. *See* U.N. Off. of the High Comm'r for Hum. Rts., Human Rights Defenders: Protecting the Right to Defend Human Rights 2 (Apr. 2004), https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet29en.pdf (noting how rights advocates have lobbied for a broader spectrum of rights to be classified as human rights, such as the right to water, food, and housing and gender rights).

102. *See id.*; MICHAEL A. WEBER & EDWARD J. COLLINS-CHASE, CONG. RSCH. SERV., IF10576, THE GLOBAL MAGNITSKY HUMAN RIGHTS ACCOUNTABILITY ACT 1 (2020) (noting that OFAC made these designations between 2017 and 2020).

103. *See* BOYLE, *supra* note 62, at 15 (arguing that OFAC's sanctions programs "can have a dire humanitarian impact on populations that bear no blame for the conduct occasioning the sanctions and have no ability to effect changes that might lift the sanctions.").

104. *See* Fitzgerald, *Property Rights*, *supra* note 57, at 107.

105. *See* BOYLE, *supra* note 62, at 16.

106. *Id.* at 8.

When OFAC designates foreign governments, "private actors may then withdraw from the target country altogether, foregoing even those transactions that are permitted, such as the delivery of humanitarian goods."[107] Alberto Coll shows how OFAC's longstanding sanctions against Cuba influenced private international entities to cease operations in the country.[108] He argues that the withdrawal of international investments significantly affected Cuba's "public health, nutrition, education, culture, and even fundamental family rights."[109] The United Nations (UN) has criticized those sanctions programs for "hindering the realization of human rights in Cuba . . . ."[110] The humanitarian costs incurred by OFAC's sanctions procedures stand in stark contrast to the legislative objectives of Cuban sanctions programs, which purport to promote welfare in Cuba.[111] Meanwhile, "as these populations suffer, the actual targets—officials or other actors who are able to put in place the desired changes—are often insulated from the sanctions' full effects because they hold positions of relative power or privilege."[112]

As a result of the nebulous rights terminology coupled with high financial penalties, entities are reasonably worried about compliance. Scholars observe how that fright has led some institutions to engage in "overcompliance" with OFAC's rules to protect against unpredictable penalties.[113] Entities do so by adopting "a stricter stance and go[ing] beyond what is explicitly required to comply with the applicable laws and regulations."[114] Superficially, overcompliance with international rights such as labor standards may appear positive. However, in practice, that compliance raises concerns as to which rights are the

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107. Gordon, *Unilateral Sanctions*, *supra* note 33, at 88; *see* Fitzgerald, *Property Rights*, *supra* note 57, at 86 (stating that "[t]reating individuals and entities outside of an embargoed destination, who nevertheless act on its behalf, the same as the target itself simply reflects the U.S. Government's desire to make it more difficult . . . to avoid the effect of the controls.").

108. *See* Alberto R. Coll, *Harming Human Rights in the Name of Promoting Them: The Case of the Cuban Embargo*, 12 UCLA J. INT'L L. & FOREIGN AFFS. 199, 236–37 (2007) (describing the effects of the Cuban embargo legislation).

109. *Id.* at 237.

110. *Id.* at 238 (quoting Hum. Rts. Council, Implementation of General Assembly Resolution 60/251 of 15 Mar. 2006 Entitled "Human Rights Council," Situation of Human Rights in Cuba, U.N. Doc. A/HRC/4/12, at 5 (Jan. 26, 2007)).

111. *See id.* at 219 (citing Cuban Liberty and Democratic Solidarity Act of 1996, Pub. L. No. 104-114, §§ 205–206, 110 Stat. 785, 811–13 (codified as amended at 22 U.S.C. §§ 6065–66)).

112. *See* BOYLE, *supra* note 62, at 15.

113. *See* Emmanuel Breen, *Corporations and US Economic Sanctions: The Dangers of Overcompliance*, *in* RESEARCH HANDBOOK ON UNILATERAL AND EXTRATERRITORIAL SANCTIONS 256, 256–57 (Charlotte Beaucillon ed., 2021).

114. *Id.* at 256.

subject of such compliance—U.S. labor rights or international labor rights, which are far stronger.[115]

II. RIGHTS-BASED SANCTIONS IN U.S. TRADE AGREEMENTS

This Part pivots to an emerging area of rights-based sanctions—sanctions under USTR's trade authority—to depict worrisome procedural defects. Like OFAC, USTR increasingly interprets and enforces binding commitments to labor rights under U.S. legislation.[116] Its procedures to interpret, investigate, and enforce those rights track—in alarming ways—OFAC's exclusory procedures under emergency legislation. The implications of USTR's procedures are significant. The rights incorporated in U.S. trade agreements are linked to the ILO's labor standards, all of which are process-oriented.[117] By unilaterally interpreting those rights, USTR displaces the voices of workers and employers in other countries at the risk of obstructing the ILO's labor rights and the Biden Administration's pro-worker objectives.

It is worth addressing two caveats before explaining that system of classification and its implications for rights, and derivatively, the Biden Administration's objectives. First, a quick note on terminology is warranted. This Part considers USTR's activities to withdraw trade benefits, raise tariffs, impose quotas, or subject cases of noncompliance to an arbitral panel as sanctions activities. It does so because those activities intend to exert financial punishment on a foreign country or entity to deter labor rights violations in the same way that OFAC freezes and blocks assets to deter national security violations. My approach also reflects the APA's definition of "sanctions," which includes agencies' imposition of penalties and fines and revocations of specific licenses.[118]

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115. *See* LeClercq, *supra* note 5, at 36–38 (describing the ways in which U.S. labor laws fail to satisfy international labor standards). *See also* LeClercq, *supra* note 8 (describing the harms caused by USTR's enforcement in Mexico, in which the Mexican government and facilities in Mexico complied with the United States and not international labor norms).

116. *See* ANDRES B. SCHWARZENBERG, CONG. RSCH. SERV., IF11346, SECTION 301 OF THE TRADE ACT OF 1974 1–2 (2022) (providing that the USTR has the authority to enforce U.S. rights under trade agreements and noting recent USTR investigations under § 301 of the Trade Act of 1974).

117. *See* CATHLEEN D. CIMINO-ISAACS & M. ANGELES VILLARREAL, CONG. RSCH. SERV., IF10046, WORKER RIGHTS PROVISIONS IN FREE TRADE AGREEMENTS (FTAS) 1 (2020) (noting that most Free Trade Agreements, which the United States uses to promote core worker rights, refer to ILO commitments).

118. Administrative Procedure Act, 5 U.S.C. § 551(8) (defining "license" to include the revocation of permits, approvals, "or other form[s] of permission," which could, arguably, cover the revocation of lower tariff benefits).

Some scholars—most recently Nicholas Mulder and Anne Krueger—attempt to distinguish trade penalties from sanctions.[119] Krueger argues that trade measures, such as the withdrawal of trade benefits and tariff increases, focus on reducing the punished country's production output.[120] Mulder argues that measures like tariffs are "forms of legislation that shield a given economy or domestic industry from competition."[121] Those measures, they claim, differ from sanctions, which apply only to measures that exert some kind of force[122] over foreign actors "to change another country's behavior through the coercive power of economic hardship."[123]

Their classifications may offer critical insight into why USTR's burgeoning rights-based sanctions activities have received so little critical attention—scholars and observers dismiss those activities as irrelevant to the sanctions discourse. Many observers underappreciate USTR's growing role in using U.S. market access to coerce foreign governments and entities into compliance with international labor rights. They consequently overlook how USTR's exclusory procedures risk undermining the processes embedded in international labor rights and the implications of that risk for global governance.

Furthermore, while I classify trade penalties as sanctions, I am not implying that OFAC and USTR are carrying out the same rights-based programs. Again, OFAC administers its sanctions programs under national security legislation to protect the United States and its citizens from external threats. Its programs interpret and enforce nebulous rights, but those rights are not necessarily linked to the international platform. USTR's trade programs differ. U.S. trade agreements purport to protect workers on all sides of the agreement by linking trade commitments to the ILO's international labor rights. OFAC's procedures are nevertheless relevant because they demonstrate how exclusory rights-based sanctions confuse and frighten regulated communities and impose costs disproportionately borne by vulnerable foreign communities. Its history should inform more deliberative procedures in the trade context.

119. *See* MULDER, *supra* note 30, at 14; Anne O. Krueger, *How to Use Economic Sanctions Wisely*, PROJECT SYNDICATE (Mar. 24, 2022), https://www.project-syndicate.org/commentary/russia-sanctions-preventing-blowback-on-open-system-by-anne-o-krueger-2022-03?barrier=accesspaylog.

120. Krueger, *supra* note 119.

121. MULDER, *supra* note 30, at 14.

122. *Id.*

123. *See* Krueger, *supra* note 119.

A. Scope of USTR's Sanctions Programs

Under the United States Constitution, Congress has primary power over trade policy. Article I empowers Congress "to regulate commerce with foreign nations" and "to lay and collect taxes, duties, imposts, and excises."[124] Under Article II, the Constitution vests the President with the authority to negotiate and enter into agreements with foreign countries, including those dealing with trade and tariff policy.[125] The President and Congress have sought to share their respective trade and commerce authority under a procedure referred to as fast-track authority.[126] That authority, contained in a series of trade legislation, provides specific criteria that the Executive Branch must negotiate into trade agreements.[127]

The President authorizes USTR to lead the Administration's trade policy.[128] Although USTR monitors compliance with those provisions through an interagency process, it is ultimately responsible for designating trade partner countries for trade penalties.[129] Those penalties may include withdrawing trade benefits, imposing financial penalties, invoking an arbitral panel, or litigating at the World Trade Organization (WTO).[130]

Initially, USTR only investigated "traditional" trade matters, such as quotas and export restrictions. Since the 1990s,[131] and more recently under fast-track

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124. U.S. CONST. art. I, § 8.

125. *See id.* art. II, § 2 (giving the President the authority to conduct foreign affairs, including negotiating and entering into international agreements dealing with trade and tariff policy). However, the U.S. Constitution reserves for Congress the authority to regulate international commerce and to set and modify tariffs. *Id.* art. I, § 8.

126. Trade Act of 1974, Pub. L. No. 93-618, §§ 151–153, 88 Stat. 1978, 2001–08 (1975) (codified as amended at 19 U.S.C. §§ 2191–2193).

127. *See, e.g.*, id.

128. *See* Claussen, *supra* note 7, at 879–80 (describing USTR's "managerial" role in U.S. trade).

129. *Id.*

130. *Id.* at 882–83.

131. *See* Sandra Polaski, *The Strategy and Politics of Linking Trade and Labor Standards: An Overview of Issues and Approaches*, *in* HANDBOOK ON GLOBALISATION AND LABOUR STANDARDS 203–04 (Kimberly Elliott ed., 2022) (noting that although the North American Free Trade Agreement (NAFTA) was the first trade agreement to contain binding social rights commitments, U.S. trade rules linked the treatment of foreign workers to market access as early as the McKinley Tariff Act of 1890, which prohibited the entry of foreign goods made by convicts). *See* Act of Oct. 1, 1890 (McKinley Tariff Act), ch. 1244, 51 Stat. 567 (amended 1894). As Polaski notes, however, efforts to link trade and labor ebbed and flowed until the 1990s, when various geopolitical factors such as the Soviet Union's collapse, China's entry into "the global production system," and negotiations with Mexico, prompted more consistent lobbying efforts. *See also* DAVID VOGEL, TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY 8 (Harvard Univ. Press

authority, Congress and the President have broadened USTR's authority to monitor and enforce various rights[132] that "are scattered across many different areas of law."[133] Those areas include the ILO's international labor rights.[134]

USTR's expansion into labor rights is unsurprising. The free flow of goods, services, and capital rewards cheap production and, without regulation, may result in the proverbial "race to the bottom."[135] In this scenario, firms and factories reduce labor protections to maximize profit and reduce rents and overhead. U.S. labor unions have responded to the loss of good jobs and declining wages as factories move overseas by demanding that Congress leverage "trade sanctions as a means to protect jobs at home . . . ."[136]

The U.S. government faces tremendous political pressure to embed trade instruments with cost-evening social protections. Congressional members whose local voting constituencies are vulnerable to trade's effects on jobs and wages have much to gain from regulating labor conditions "regardless of ideology" on social rights.[137]

Through fast-track legislation, Congress directs the President to negotiate increasingly enforceable rights-based standards in trade agreements to ensure that export sectors in other countries comply with the same regulations as American companies. Under the Trade Act of 2002, Congress directed USTR to negotiate as "principal negotiating objectives" labor rights "to promote respect for core labor standards . . . ."[138] It specified that those objectives be treated "equally with respect to," among other things, "the ability to resort to dispute settlement under the applicable agreement."[139]

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ed., 1995) ("[T]hrough the 1920s the United States had enacted about a dozen federal laws that used trade restrictions to advance environmental objectives.").

132. Claussen, *supra* note 7, at 881.

133. *Id.*

134. *See* LeClercq, *supra* note 5, at 13–14 (explaining how U.S. trade agreements began to include environmental and labor provisions in the 1990s).

135. *See, e.g.*, ELLIOTT & FREEMAN, *supra* note 1, at 4 (noting longstanding fears that "globalization will bring a race to the bottom, whereby low labor standards in one country pressure other countries to lower their standards.").

136. *See* Anke Hassel, *The Evolution of a Global Labor Governance Regime*, 21 GOVERNANCE: INT'L J. POL'Y, ADMIN., & INSTS. 231, 238 (2008).

137. *See* Polaski, *supra* note 131, at 206; *see also* Alisa DiCaprio, *Are Labor Provisions Protectionist?: Evidence from Nine Labor-Augmented U.S. Trade Arrangements*, 26 COMP. LAB. L. & POL'Y. J. 1, 2 (2004).

138. Bipartisan Trade Promotion Authority Act of 2002, Pub. L. No. 107-210, § 2102(b)(11)(C), 116 Stat. 994 (codified as amended at 19 U.S.C. § 3802).

139. *Id.* § 2102(G). For a succinct description of the evolution of that trade legislation over time,

The following Sections describe USTR's procedures to interpret international labor rights and enforce them in counterparts. Those procedures have historically sought to use trade commitments to protect U.S. businesses and workers, not foreign communities. They consequently vest USTR with the necessary discretion to use labor rights as a tool to achieve national objectives without foreign interference. Owing to various push and pull factors, the Biden Administration's worker-centered trade policy now intends to protect foreign workers. Congress and the President must now revise USTR's procedures to advance their newly cosmopolitan labor rights objectives.[140]

B. USTR's Rights-Based Procedures

These Sections describe how USTR negotiates and enforces international labor rights under trade agreements. Under those procedures, USTR decides where, when, and how to impose sanctions in the name of international rights enforcement without always seeking foreign input.[141] USMCA's Rapid Response Mechanism further authorizes USTR to carry out those activities against suspected foreign facilities. Those procedures raise critical concerns now that the Administration has declared a worker-centered trade policy that purports to protect the foreign workers that USTR continues to exclude.

1. USTR's Exclusory Rulemaking Procedures

As Kathleen Claussen notes, "USTR controls trade lawmaking by writing rules, but its rulemaking exercises differ from those of other agencies."[142] USTR's rules are not set out in legislation but include "binding rules in agreements with foreign counterparts."[143] In late September 2018, the

see Lewis Karesh & Desirée LeClercq, *Labor Provisions in U.S. Free Trade Agreements Under Trade Promotion Authority*, *in* INTERNATIONAL LABOR AND EMPLOYMENT LAWS (Ute Krudewagen ed., 2020).

140. Press Release, Office of the U.S. Trade Representative, Readout of Ambassador Tai's Virtual Meeting with International Union Presidents, Secretaries General, and Representatives (June 1, 2021), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/june/readout-ambassador-tais-virtual-meeting-international-union-presidents-secretaries-general-and.

141. I recognize that USTR may hold consultations with foreign communities and often works with the Department of Labor and the State Department's local embassies to engage with various worker and employer communities in trade partner countries. My point here is not that those consultations never occur, but rather that USTR's procedures are silent as to whether those consultations must occur, thus leaving consultations to the discretion of the agency and the Administration's various objectives.

142. Claussen, *supra* note 7, at 881.

143. *Id.*

Trump Administration's USTR exposed its rulemaking procedure when it revealed, for the first time, the agreement text that USTR had been negotiating with Canada and Mexico behind closed doors for over a year.[144] The agency's refusal to share draft text with domestic or foreign stakeholders reflects longstanding USTR policy to avoid notice-and-comment, as Congress traditionally requires of agencies under the APA.[145]

USMCA's labor provisions, found in Chapter 23, add new and progressive protections for vulnerable workers.[146] Nevertheless, the text committing trade partners to international labor rights traces typical U.S. trade agreements. It commits the governments to "[l]abor [r]ights . . . as stated in the ILO Declaration on Rights at Work . . . ."[147]

Like OFAC's ambiguous references to "human rights" and "human trafficking," references to the ILO Declaration's rights raise significant interpretive issues.[148] The text of the Declaration does not define its "principles" and "fundamental rights."[149] Within the ILO, those textual ambiguities are negligible.[150] Under the ILO's supervisory processes, governments consult with their national workers and employers to give substantive meaning to the ILO's labor rights.[151] Outside of the ILO, the Declaration's terms and distinctions have significant implications.[152] Despite—or because of[153]—the Declaration's ambiguity, it has become

144. *See* Press Release, Office of the U.S. Trade Representative, Joint Statement from United States Trade Representative Robert Lighthizer and Canadian Foreign Affairs Minister Chrystia Freeland (Sept. 30, 2018), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/september/joint-statement-united-states.

145. *See, e.g.*, Claussen, *supra* note 7, at 906–07 (citing former USTR Ambassador Robert Lighthizer's testimony asserting that the APA's foreign affairs exclusion allows USTR to negotiate trade agreements without consulting even Congress).

146. For a discussion of how USMCA labor provisions advance specific protections for vulnerable workers, see LeClercq, *supra* note 5, at 25–26.

147. *See, e.g.*, USMCA, *supra* note 4, art. 23.3.1.

148. *See* Jordi Agusti-Panareda, Franz Christian Ebert & Desirée LeClercq, *ILO Labor Standards and Trade Agreements: A Case for Consistency*, 36 COMP. LAB. L. & POL'Y J. 347, 363–67 (2015).

149. *Id.* at 363–64 (describing the ambiguity surrounding those terms and the scholarly debate on how those terms should apply in the trade context).

150. *Id.* at 364 ("In the ILO's internal context, the indistinct legal content of the 1998 Declaration's principles does not pose a problem.").

151. *See id.*

152. *Id.* (arguing that governments' use of the Declaration's principles "may raise challenges when incorporated into labor provisions of trade agreements").

153. *See* LeClercq, *supra* note 8 (explaining why counterpart governments would find it more politically palatable to negotiate ambiguous commitments to international labor rights than concrete standards).

"standard practice" for governments to cite the 1998 Declaration in their trade agreements.[154]

2. USTR's Exclusory Adjudication Procedures

USTR's adjudication procedures differ depending on whether the target is a government or a facility. When USTR brings an enforcement action against a government, the proceedings are carried out before an independent panel of neutral experts.[155] In that sense, USTR's adjudications contain some basic procedural safeguards,[156] although they continue to exclude foreign communities.[157] By contrast, USTR investigates, deliberates over, and blocks facility assets under the Rapid Response Mechanism without offering advanced notice or administrative challenges.[158] In neither case—state-to-state or targeted facility—is USTR accountable for its administrative actions before an Administrative Law Judge (ALJ) or another tribunal.

I. Adjudication – State-to-State

USMCA, like previous trade agreements, provides a process for public submissions to raise complaints about labor practices and laws in trade partner countries.[159] Under state-to-state dispute settlement, only governments may bring complaints against other governments.[160] However, trade unions and civil society organizations have used the platform to draw attention to government practices and incentivize dispute settlement.[161] Their efforts have been mainly unsuccessful.

For instance, on March 23, 2021, a group of migrant women filed a petition under USMCA's labor chapter alleging that the U.S. government

154. *See* Int'l Lab. Org. [ILO], *Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements* 2 (2017) (noting that sixty-four percent of trade agreements with labor provisions incorporated the 1998 Declaration); Jeffrey S. Vogt, *Trade and Investment Arrangements and Labor Rights*, *in* CORPORATE RESPONSIBILITY FOR HUMAN RIGHTS IMPACTS 128 (Lara Blecher et al. eds., 2014) (noting that the requirement that trade partners comply with the 1998 Declaration "introduces some uncertainty about the full extent of the obligation.").

155. *See, e.g.*, USMCA, *supra* note 4, arts. 31.6–31.9.

156. *Id.* art. 31.11 (setting out procedural rules for panels, including opportunities for written submissions and oral statements).

157. *See generally id.* art. 31.9 (stipulating that the panel will be composed of three to five panelists selected from a pre-established roster).

158. *Id.* art. 31-A.

159. *Id.* art. 23.11.

160. *See, e.g.*, *id.* art. 31.6 (indicating that only a state Party may bring a dispute to panel).

161. *See* Polaski, *supra* note 131, at 210.

violated its commitments by allowing sex-based discrimination.[162] Their complaint reflected decades of grievances concerning the U.S. H-2A visas, which that group had filed under USMCA's precursor, the North America Free Trade Agreement (NAFTA).[163] Under NAFTA's labor side agreement, workers and women's rights advocates filed petitions with the Mexican National Administrative Office, but their grievances went unanswered.[164] Under USMCA's state-to-state mechanism, those women's and worker's groups have more recently submitted their petition to the Mexican government to persuade the government to advance a complaint against its powerful trade partner.[165] At the time of writing, the Mexican government had failed to do so formally.[166]

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162. *See* AMENDED PETITION ON LABOR LAW MATTERS ARISING IN THE UNITED STATES SUBMITTED TO THE LABOR POLICY AND INSTITUTIONAL RELATIONS UNIT THROUGH THE GENERAL DIRECTORATE OF INSTITUTIONAL RELATIONS IN THE SECRETARIAT OF LABOR AND SOCIAL WELFARE (STPS) 2, 10, 16, 30 (Mar. 23, 2021) [hereinafter, AMENDED PETITION ON LABOR LAW MATTERS], https://cdmigrante.org/wp-content/uploads/2021/03/USMCA-Amended-Peition-and-Appendices_March-23-2021_reduced.pdf.

163. *Id.* at 16 (describing a 2016 complaint brought under the NAFTA labor side agreement).

164. *See* Lance Compa, *Trump, Trade, and Trabajo: Renegotiating NAFTA's Labor Accord in a Fraught Political Climate*, 26 IND. J. GLOB. LEGAL STUD. 263, 270–73 (2019) [hereinafter Compa, *Trump, Trade, and Trabajo*].

165. There are, nevertheless, underappreciated benefits of those advocacy-driven enforcement efforts. Lance Compa has traced some of the benefits of cross-border advocacy and the effects of that advocacy on nudging the U.S. government toward ensuring greater protections for migrant workers. *See also* Lance Compa, *Migrant Workers in the United States: Connecting Domestic Law with International Labor Standards*, 92 CHI.-KENT L. REV. 211, 235–38 (2017) (noting various cases in which workers' and women's organizations in the United States and Mexico coordinated to pressure the U.S. government to afford migrant Mexican workers greater workplace protections). I respect Compa's observation that these types of cross-border procedures incentivize "trade unions, human rights organizations, and other civil society groups . . . to reach out to each other and find new ways of communication, collaboration, and solidarity." Compa, *Trump, Trade, and Trabajo supra* note 164, at 269. My point is that those organizations could not adjudicate their grievances, themselves, but were instead required to appeal to the other trade party (in those instances, Mexican government officials) to raise grievances with the U.S. government. Indeed, Compa notes that "*none* of the dozens of complaints filed by civil society advocates under the [NAFTA] labor accord ever advanced beyond the initial review stage and the step one consultation stage." *Id.* at 270 (emphasis in original).

166. *See* AMENDED PETITION ON LABOR LAW MATTERS, *supra* note 162, at 28 (recommending "that Mexico encourage the United States to make the following policy and regulatory changes . . . ."). Owing to USMCA trade pressure, the U.S. administration promulgated a new rule entitled "Temporary Agricultural Employment of H-2A Nonimmigrants in the United States," effective as of Nov. 14, 2022. *See* Thea Lee, *Advancing the Migrant Worker Protection of Goals of the*

Like the Mexican government, USTR equally enjoys "enormous discretion to act or not on violations of labor rights by trading partners."[167] The U.S. government has only brought one case to dispute settlement under the labor chapter.[168] That case began in 2008, when the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and Guatemalan trade unions filed a complaint with the U.S. government.[169] They alleged that Guatemala violated its labor rights commitments under the Central America Free Trade Agreement-Dominican Republic (CAFTA-DR).[170] It took the United States nine years to advance the complaint to dispute settlement.[171] Because USTR does not consult with the public or foreign stakeholders on whether to pursue claims or which appropriate forum would best serve the interests of workers,[172] it is unclear why USTR (eventually) accepted that petition while rejecting numerous other worker rights petitions.

Once a government accepts a petition and a panel is selected, the matter is handled by panelists drawn from a predetermined roster.[173] The panel may receive written and oral submissions, and the disputing parties may request a hearing.[174] If the panel opts for a hearing, it may (but is not required to) allow public attendance.[175] The adjudicators are not tied to governments and, thus, presumably enjoy greater neutrality in addressing allegations. Nevertheless, agencies retain significant discretion on how to litigate the case.[176] For instance, in the Guatemala case discussed above, USTR refused to submit evidence offered by trade unions and non-governmental organizations (NGOs) at the hearing and thus precluded its consideration.[177] It also refused to allow the trade unions who had filed the

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USMCA, U.S. DEP'T LAB. BLOG (Dec. 19, 2022), https://blog.dol.gov/2022/12/19/advancing-the-migrant-worker-protection-goals-of-the-usmca.

167. *See* Polaski, *supra* note 131, at 216.

168. For a description of that case from a trade scholar perspective, see Kathleen Claussen, *Reimagining Trade-Plus Compliance: The Labor Story*, 1 J. INT'L ECON. L. 25, 33–39 (2020).

169. *See* LANCE COMPA, JEFFREY VOGT & ERIC GOTTWALD, WRONG TURN FOR WORKERS' RIGHTS: THE U.S.-GUATEMALA CAFTA LABOR ARBITRATION RULING – AND WHAT TO DO ABOUT IT 5 (2018), https://laborrights.org/sites/default/files/publications/Wrong%20Turn%20for%20Workers%20Rights%20-%20March%202018.pdf.

170. *Id.* at 3.

171. *Id.*

172. *Id.*

173. USMCA, *supra* note 4, art. 31.9.

174. *Id.* arts. 31.11, 31.14, 31.15.

175. *Id.* art. 31.11(1).

176. *See* COMPA ET AL., *supra* note 169, at 5.

177. *See id.*

complaint to testify at the hearing[178] and refused to consult with the complaining organization about legal strategy.[179] Rights advocates would later refer to "fundamental flaw[s]" to explain USTR's loss despite voluminous evidence of labor rights abuses in Guatemala.[180]

II. Adjudication – Targeted Facilities

Owing to significant trade union and congressional pressure to strengthen its heavily criticized rights-based sanctions procedures, USTR added the Rapid Response Mechanism under a Protocol of amendment to USMCA.[181] That mechanism provides an additional dispute settlement mechanism to complement the state-to-state dispute settlement mechanism.[182] It allows parties to submit petitions against individual facilities in Mexico that allegedly infringe upon workers' freedom of association or collective bargaining rights.[183] Specifically, members of the public can file a petition or use a confidential hotline to report information regarding labor issues at those facilities.[184] The Interagency Labor Committee may invoke the Mechanism:

> [W]henever a Party (the "complainant Party") has a good faith basis belief that workers at a Covered Facility are being denied the right of free association and collective bargaining under laws necessary to fulfill the obligations of the other Party (the "respondent Party") under this Agreement (a "Denial of Rights").[185]

If USTR decides it has a "good faith basis" to believe that a facility infringes on workers' associational and bargaining rights, it may request the government of the allegedly malfeasant facility to review the working conditions.[186] Concurrently, and without a hearing or finding, the United States may "delay final settlement of customs accounts related to entries

178. *Id.* at 6 ("Neither representatives of victimized Guatemalan workers nor workers themselves (nor employers, for that matter) who might have been able to provide clarifications or additional information upon examination were able to participate.").

179. *Id.*

180. *Id.* at 5–6 (arguing that USTR's refusal to submit the evidence "precluded its consideration, since the scope of the Panel's mandate was limited to issues presented by the complaining government, not by third parties.").

181. *See* USMCA Protocol, *supra* note 6.

182. *Id.*

183. Under USMCA's Protocol of Amendment, the United States and Canada can each invoke the Rapid Response Mechanism against Mexican factories but cannot invoke the Mechanism against factories in each other's country. *Id.*

184. *Id.*

185. *Id.* art. 31-A.2.

186. USMCA, *supra* note 4, arts. 31-A.4.2, 31-B.4.2.

of goods from the" suspected factory.[187] Effectively, this provision allows USTR to impose immediate financial costs on facilities in Mexico while allegations remain outstanding.

Given that this mechanism exists only between the United States and Mexico,[188] perpetrators will almost necessarily consist of facilities in Mexico.[189] If Mexico declines to conduct the review, USTR may request the formation of a "Rapid Response Labor Panel."[190] Otherwise, Mexico must signal its willingness to investigate within forty-five days.[191]

On the heels of the Administration's announcement of its new worker-centered trade policy, USTR quickly initiated several enforcement actions against auto factories in Mexico.[192] Those enforcement activities starkly contrast with USTR's historical refusal to invoke state-to-state dispute settlement for labor rights. While USTR's enforcement actions arguably demonstrate the agency's newfound commitment to deter exploitative labor conditions, they also suggest that fair and transparent procedures are critical to perceptions of legitimacy and predictability.[193]

C. Criticism of USTR's Procedures

Scholars have long accused USTR of suffering from a "transparency problem."[194] Some accuse USTR of interest group capture and

187. *Id.* art. 31-A.4.3.

188. *See* USMCA Protocol, *supra* note 6, art. 31-A.1(4). Canada and Mexico have also agreed to a Rapid Response Mechanism. There is, however, no tripartite mechanism across the three parties.

189. For an explanation of why it is virtually impossible for stakeholders to invoke the Rapid Response Mechanism against U.S. factories, see Desirée LeClercq, *Biden's Worker-Centered Trade Policy: Whose Workers?*, INT'L ECON. L. & POL'Y BLOG (May 16, 2021) [hereinafter LeClercq, *Biden's Worker-Centered Trade Policy*], https://ielp.worldtradelaw.net/2021/05/bidens-worker-centered-trade-policy-whose-workers.html (pointing out that, due to restrictive language in USMCA's text, the Mechanism may only be used against "a covered facility under an enforced order of the National Labor Relations Board" which, in 2020, would have consisted of fewer than twelve to thirteen facilities). *See also* Aaron R. Hutman, *The USMCA's Rapid Response Mechanism for Labor Complaints: What to Expect Starting July 1, 2020*, GLOB. TRADE & SANCTIONS L. (July 1, 2020), https://www.globaltradeandsanctionslaw.com/the-usmca-rapid-response-mechanism-for-labor-complaints/ (arguing that only five U.S. facilities would have qualified between 2016 and 2020).

190. USMCA, *supra* note 4, arts. 31-A.4.2, 31-B.4.2.

191. *Id.* arts. 31-A.4.4, 31-B.4.4.

192. For a description and analysis of these early cases, see LeClercq, *supra* note 8.

193. For a detailed account of those enforcement activities and their reception, see *id.*

194. *See* Claussen, *supra* note 7, at 893; Polaski, *supra* note 131, at 216 (referring to the U.S. government's "enormous discretion" in deciding whether to act on labor violations under its trade agreements).

illegitimacy.[195] In the rights context, advocates have expressed disappointment with USTR's obscure enforcement decisions that result in the rejection of grievance petitions without explanation.[196] One labor and trade study reports that during the first decade after Congress added labor criteria to the Generalized System of Preferences (GSP), USTR accepted only forty-seven of the "more than 100 petitions" filed for review.[197] USTR declined to act on many petitions even after accepting them.[198]

USTR may decide not to accept a petition for review for many reasons. Critics assert that the discretion to accept petitions enables USTR to accept requests for review based on broader geopolitical interests in maintaining the trade benefits with specific beneficiary countries.[199] Competing national interests may also prevent USTR from accepting submissions, even when beneficiary countries have violated the eligibility criteria.

For instance, in monitoring labor rights in trade partner countries, USTR leads a Trade Policy Staff Committee, a committee of twenty different agencies, including the Department of State.[200] When petitions allege violations of the labor criteria, State Department personnel and labor reporting officers stationed in the relevant U.S. embassies or consulates offer information on labor practices and applicable laws.[201] The data from those investigations, and the various proposals submitted by bureaucrats, may serve to strengthen U.S. geopolitical interests unrelated to worker rights concerns.

Tellingly, the greater the economic and diplomatic partnership between the United States and the beneficiary country, the less the agency

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195. *See, e.g.*, Vogt, *supra* note 154, at 130 (arguing that "politics and power played a large role in [the changes sought by USTR in] defining the ambition of the [labor] changes sought, the specific terms of the agreement being somewhat less important.").

196. *See, e.g.*, *id.*

197. *See* ELLIOTT & FREEMAN, *supra* note 1, at 75–76.

198. Even "the Clinton Administration rejected [forty-four] percent ([eight] of [eighteen]) of the labor conditionality petitions it received"). *See id.* at 84 (describing how previous administrations have rejected petitions and have used those petitions to revoke benefits in even fewer cases—thirteen out of forty-seven reviewed . . . .).

199. *See generally* Compa & Vogt, *supra* note 88, at 204; Polaski, *supra* note 131, at 216 ("Evidence suggests that both the [United States] and [European Union] weigh broader geopolitical considerations in deciding whether to pursue a labor case. . . .").

200. *See Executive Branch Agencies on the Trade Policy Staff Committee and the Trade Policy Review Group*, OFF. OF U.S. TRADE REPRESENTATIVE, https://ustr.gov/about-us/executive-branch-agencies-trade-policy-staff-committee-and-trade-policy-review-group (last visited Feb. 7, 2023).

201. *See* BAMA ATHREYA, U.S. DEP'T LAB., COMPARATIVE CASE ANALYSIS OF THE IMPACTS OF TRADE-RELATED LABOR PROVISIONS ON SELECT US TRADE PREFERENCE RECIPIENT COUNTRIES 2–3 (2011).

has proven willing to launch an eligibility review under the labor criteria and risk that partnership.[202] A retired State Department official once confessed that "USTR would explicitly look for any loophole to deny petitions, including [by] . . . invoking wherever possible the excuse of 'insufficient information relevant to the statutory provision.'"[203]

Throughout the late 1980s and early 1990s, for instance, unions, churches, and human rights groups petitioned USTR to suspend GSP benefits to Guatemala under the labor criteria.[204] They submitted evidence of "detailed assassinations, arrests, and torture of trade union activists, repressive provisions of the Guatemalan Labor Code, and non-enforcement of worker protection laws" USTR denied four petitions for GSP review.[205] USTR rejected those petitions, arguing that "the government was 'taking steps' to afford worker rights" because it had introduced (although had not yet approved) stronger labor regulations.[206] It took a coalition of worker rights centers, allied unions, churches, and human rights groups to organize letter-writing campaigns to members of Congress and USTR "urging acceptance of the Guatemala petition and calling for public hearings."[207] USTR finally accepted the petition for review after receiving letters from more than "[one] hundred members of Congress" demanding for acceptance and review.[208]

In that case and others, USTR's procedures allowed it, alone, to decide whether "to intervene on behalf of aggrieved workers" rather than giving workers direct access to adjudication.[209] Worker organizations, particularly those in developing countries, have limited resources to collect evidence and file petitions. USTR's unpredictable decisions and reluctance to pursue grievances in the absence of non-labor, geopolitical ends deter the allocation of scarce resources to the agency's black-box processes.

In stark contrast to previous administrations, the Biden Administration has adopted a worker-centered trade policy to protect American and foreign workers. USTR has framed that policy as a "moral imperative" to protect

202. *See* Compa & Vogt, *supra* note 88, at 209.

203. *See* ATHREYA, *supra* note 201, at 2–3 (quoting HENRY J. FRUNDT, TRADE CONDITIONS AND LABOR RIGHTS: U.S. INITIATIVES, DOMINICAN AND CENTRAL AMERICA RESPONSES 56, 66 (1998) and citing interviews with State Department informants).

204. *See* Compa & Vogt, *supra* note 88, at 215–21.

205. *Id.* at 215.

206. *Id.* at 216 (arguing that "[a] more specious line of reasoning is hard to imagine").

207. *Id.*

208. ATHREYA, *supra* note 201, at 35.

209. Vogt, *supra* note 154, at 174 (reviewing trade and labor mechanisms and concluding that workers have no direct access to dispute settlement).

foreign workers overseas.[210] USTR's Ambassador Tai assures international trade unions that the policy "lifts wages, promotes worker empowerment, and generates economic security for workers around the globe."[211] The agency now relies, more than ever, on the cooperation of grassroots workers' organizations and coalitions to raise grievances concerning labor rights violations. The next Part advances an administrative framework to understand how USTR's sanctions procedures must adapt if it hopes to influence participation and compliance in other countries.[212]

III. A GLOBAL ADMINISTRATIVE LAW (GAL) FRAMEWORK FOR RIGHTS-BASED SANCTIONS

This Part offers a global administrative law (GAL) framework to understand how agencies should administer trade instruments that prescribe and enforce international labor rights. That framework foregrounds the democratic processes embedded in those rights rather than allowing U.S. agencies to define and enforce them, themselves, within diverse countries. By prescribing and enforcing consultation and not substantive outcomes, the United States would be better positioned to respect the innate pluralism enshrined in international labor rights while ensuring the regulatory safeguards it advances in national law.

The framework that follows centers on rights-based sanctions in U.S. trade policy. While that framework could, and arguably should, apply to OFAC's sanctions programs that purport to enforce labor rights such as human trafficking, I concede that OFAC's national security mandate may render such reform improbable. U.S. trade policy, on the other hand, is ripe for reform. The Biden Administration declares that its policy intends to strengthen labor rights on behalf of foreign workers.[213] Assuming that declaration to be true, the Administration must reconsider its approach to rights-based administration in trade.

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210. *See* Press Release, Office of the U.S. Trade Representative, Readout of Ambassador Tai's Virtual Roundtable with Senator Sharrod Brown and Ohio Workers (June 4, 2021), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/june/readout-ambassador-tais-virtual-roundtable-senator-sherrod-brown-and-ohio-workers ("We are committed to pursuing policies that help to lift wages, promote worker empowerment, and generate economic security for workers here at home and around the globe.").

211. Press Release, Office of the U.S. Trade Representative, Readout of Ambassador Tai's Virtual Meeting with International Union Presidents, Secretaries General, and Representatives (June 1, 2021), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/june/readout-ambassador-tais-virtual-meeting-international-union-presidents-secretaries-general-and.

212. *Id.*

213. See Tai, *supra* note 9.

More concretely, a U.S. trade policy that cares about the well-being of workers in other countries must be prepared to listen to them.[214] Under the APA and NLRA, Congress seems to understand that agency consultations with regulated communities throughout the administrative processes fortify compliance and legitimacy.[215] Currently, the APA exempts USTR from domestic procedural requirements because of the nature of its foreign activities.[216] Consequently, no law or regulation requires U.S. agencies to consult with foreign populations over U.S. trade policy. Contrary to domestic agencies, USTR defines and enforces processed-based international labor rights without having to account for the views of regulated foreign communities such as counterpart governments and their worker and employer constituencies. USTR instead treats international labor rights as if they constitute clear and objective rules. Its closed-door, top-down approach to rights-based sanctions programs, as OFAC's experience suggests, may lead to confusion, distrust, and poor compliance.

Under a global approach to administrative rules and procedures, GAL scholars explore how various international transactions, rules, and regulatory bodies may offer greater predictability and trustworthiness. USTR's

214. AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD 36 (Jagdish Bhagwati & Hugh T. Patrick eds., 1990) ("The world trading regime should not be built on the assumption that any one player, no matter how dominant, can impose its own rules, unilaterally claiming social legitimacy for them."). As described in Part III, USTR's procedures depend on the participation with grassroots worker communities and advocates to monitor and report on compliance with those rights on the ground. They also depend on foreign governments to trust USTR's legitimacy and authority, both to incentivize obeyance and deter governments from challenging USTR's sanctions activities at the World Trade Organization (WTO). *See infra* Part III. For the latter point, see AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD, *supra* (dismissing U.S. social sanctions and advocating for governments to challenge its activities as illegal under the General Agreement on Tariffs and Trade (GATT)).

215. *See* Sidney A. Shapiro, *A Delegation Theory of the APA*, 10 ADMIN. L.J. AM. U. 89, 92 (1996) (describing the legislative history of U.S. administrative law with the acknowledgment that "the legitimacy of agency government depends on public acceptance of the administrative process."). While this Article examines perceptions of legitimacy and compliance across borders, it recognizes the rich literature examining the perception/compliance link in U.S. laws and practices. *See, e.g.*, Monica Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2071 (2017); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513, 513–14 (2003) (arguing that "police legitimacy has an important influence on public support for the police."); Thomas A. Loughran, Greg Pogarsky, Alex R. Piquero & Raymond Paternoster, *Re-Examining the Functional Form of the Certainty Effect in Deterrence Theory*, 29 JUST. Q. 712, 713 (2012) (describing the importance of predictability and probability in risk assessment that prefaces rule violations).

216. Administrative Procedure Act, 5 U.S.C. §§ 553(a)(1), 554(a)(4).

processes should draw inspiration from that approach. Counterintuitively, that approach would enable the United States to effectuate its rights-based sanctions objectives (to protect the working conditions of workers in trade sectors abroad) through a process that respects the ILO's democratic procedures. It could achieve that objective while transposing the core democratic features of the APA into its trade administration.

The following Sections describe how the APA's procedures, which govern domestic labor law administration, and the ILO's international labor procedures coalesce under coterminous participatory values. Despite having a textual exemption from engaging in those processes abroad, the U.S. government should nevertheless adopt those values in its rights-based trade programs.

A. The Core Participatory Features in U.S. Administrative and Labor Laws

This Section synthesizes the core participatory features in U.S. administrative and labor laws. It shows how Congress has long sought to avoid exclusory administration—at least domestically. After briefly describing how Congress has ensured that agencies interpret and enforce rules following democratic processes, this Section explains how a statutory exception in the APA allows agencies such as USTR to exclude regulated communities.[217]

1. Participation in Rulemaking

Under the APA, Congress requires agency engagement with regulated communities when "formulating, amending, or repealing a rule."[218] Under its informal rulemaking procedures, known as notice-and-comment, agencies must publish a notice of proposed rulemaking in the Federal Register indicating the time, place, and nature of the public rulemaking proceedings.[219] They must also specify the legal authority under which the rule is proposed.[220] Finally, they must identify the "terms or substance of the proposed rule or a description of the subjects and issues involved."[221] That procedure allows "interested persons" to participate "through submission of

217. *See* Oona Hathaway, *Presidential Power over International Law*, 119 YALE L.J. 140, 221 (2009) (arguing that the APA's foreign affairs exemption allows the U.S. government to promulgate international agreements without following notice-and-comment procedures).

218. § 551. Elsewhere, the APA defines the term "rule" incredibly broadly so as to encompass "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . ." § 551(4).

219. § 553(b)(1).

220. § 553(b)(2).

221. § 553(b)(3).

written data, views, or arguments with or without opportunity for oral presentation."[222] While public participation may take different forms, its objective is "to assure informed administrative action and adequate protection to private interests."[223] It also exposes agency rules "to the views of those who might be affected by their decisions."[224]

The benefits of agencies' inclusive rulemaking are well documented. Scholars accredit notice-and-comment procedures for "self-legitimating" agency rules[225] by protecting against bureaucratic pathologies and interest group capture.[226] Others have noted that the process creates "an inducement to respond to the articulated needs of those who provide input into the process."[227]

The opportunity for regulated communities to contest rules is particularly critical for labor rights. As Karl Klare has famously framed it, those rights and the laws that protect them serve as "a site of law-making activity."[228] That is, those rights are not the *ends* but rather the *means* through which participation and contestation across labor and capital might achieve societal acceptance and compliance.[229]

Reflecting that ideal, Congress enacted the NLRA to protect the conditions of collective bargaining.[230] In doing so, Congress refrained from regulating the substance of workplace rules. For instance, the NLRA is silent about wages, hours, personnel practices, seniority, or other matters that unions and companies may negotiate.[231] In regulating the process and not the substance, Congress facilitated worker agency and participation while

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222. *See* Bonfield, *supra* note 69, at 227.

223. *Id.* (citing U.S. DEP'T OF JUST., ATT'Y GEN.'S MANUAL ON THE ADMIN. PROC. ACT 31 (1947)).

224. *See* William West, *Administrative Rulemaking: An Old and Emerging Literature*, 65 PUB. ADMIN. REV. 655, 657 (2005).

225. *See* Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 GEO. WASH. L. REV. 1343, 1343 (2011) (discussing the virtues of notice-and-comment).

226. *See* Bonfield, *supra* note 69, at 222–23.

227. *Id.* at 223.

228. *See* Karl Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFRICAN J. HUM. RTS. 146, 147 (1998).

229. *See id.* at 157 ("Legal texts do not self-generate their meanings; they must be interpreted through legal work.").

230. *See* Kate Andrias, *Building Labor's Constitution*, 94 TEX. L. REV. 1591, 1597 (2016) (explaining that Congress enacted the National Labor Relations Act to protect, at least on some level, "the right of private-sector workers to choose to bargain collectively with their employers . . . .").

231. *See, e.g.*, Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50, 52 (1975). However, it is worth noting that different compositions of National Labor Relations Board (NLRB) members tend to come out on this question differently. *See, e.g.*, Trs. of Columbia Univ. in N.Y.C., 364 N.L.R.B. 90 (2016); NLRB v. City Disposal Sys. Inc., 465 U.S. 822 (1984).

centering its regulatory focus on equalizing bargaining conditions. That restrictive scope also helped to ensure that the NLRA's labor rules remain flexible and responsive to evolving political and societal ends.

In 2020, for instance, the Trump Administration's NLRB published its proposed rule concerning the classification of joint employers and independent contractors.[232] It eventually promulgated a final rule that created an employer-friendly standard rendering a broad scope of workers outside the NLRA's protections. Following public backlash, the Biden Administration's NLRB revisited the rule.[233] Critics of the NLRB regret the "flip-flop[ping]" of federal labor protections.[234] On the other hand, labor relations evolve. New employment sectors like gig work crop up, legal gaps become exposed, and political dynamics between worker and employer-side policymakers shift. The APA's notice-and-comment procedures keep the agency (relatively) transparent and inclusive in adapting to those changes. In doing so, the NLRB ensures a certain degree of credibility and public awareness of changing labor norms.

2. Participation in Adjudication

In addition to regulating agencies' informal rulemaking, Congress requires that agencies act transparently and inclusively when adjudicating regulations and rules.[235] The APA considers adjudication broadly to encompass non-rulemaking activities, including agency investigations, receipt of complaints, deliberations, and designations.[236] It requires that agencies carrying out those activities offer certain due process safeguards through advanced notice, public hearings,[237] and legal platforms to contest the agencies' findings and determinations.[238]

In adjudicating labor cases under the APA, the NLRB's procedures entail trial-like hearings before an ALJ.[239] During those hearings, the parties hear

232. 29 C.F.R. § 103 (2020).

233. *See* Standard for Determining Joint-Employer Status, 87 Fed. Reg. 54,641 (proposed Sept. 7, 2022) (to be codified at 29 C.F.R. pt. 130).

234. *See, e.g.*, R. Alexander Acosta, *Rebuilding the Board: An Argument for Structural Change, Over Policy Prescriptions, at the NLRB*, 5 FIU L. REV. 347, 349 (2010) (noting a "common criticism" that Board law "flip-flops," which ultimately "reduce[s] public and judicial confidence in the Board.").

235. 5 U.S.C. § 554.

236. § 551(7).

237. § 554(b)–(c).

238. *See* § 581.

239. *See Decide Cases*, NLRB., https://www.nlrb.gov/about-nlrb/what-we-do/decide-cases (last visited Feb. 7, 2023).

witness testimony and evidence used against them.[240] Those procedures are critical in labor cases, which typically turn on the facts: what employers said, how those statements may have affected workers, and whether specific actions and statements constitute "protected" activities, among other specific facts.[241] After considering all the evidence and testimony, the ALJ issues its initial decision, which the parties may appeal to the NLRB and an appropriate Court of Appeals.[242] Throughout the process, the parties have notice of the proceedings, are aware of and may challenge the evidence, and have a legal platform to contest the agency's determinations.[243]

3. The Foreign Affairs Exemption

As a federal agency, USTR is, in principle, bound to the APA's democratic features.[244] However, when Congress enacted the APA, lawmakers balanced procedural rules and protections with the President's authority to conduct foreign affairs.[245] Therefore, the APA contains a provision that expressly excludes rules involving "a military or foreign affairs function of the United States . . . ."[246] That exclusion "operates to exclude *entirely*, and *without qualification*, *all* rulemaking in the categories enumerated therein from *every* provision of" notice-and-comment procedures.[247] It also excludes the due process requirements described above for adjudication that involves foreign affairs functions.[248]

The APA contains no definition of the term "foreign affairs function."[249] As a result, agencies like OFAC and USTR invoke that exception to administer their rights-based sanctions unilaterally, without engagement

240. *See id.*

241. *See Employer/Union Rights and Obligations*, NLRB, https://www.nlrb.gov/about-nlrb/rights-we-protect/your-rights/employer-union-rights-and-obligations (last visited Feb. 7, 2023).

242. *See Decide Cases*, *supra* note 239.

243. For a description of the NLRB's procedures, including the investigation of charges, issuance of complaint, and hearings—all of which require notice and consultations, appeal to the Board and judicial review—see NLRB, STATEMENTS OF PROCEDURE – PART 101 (2020).

244. *See, e.g.*, *In re* Section 301 Cases, 570 F. Supp. 3d 1306, 1335–36 (Ct. Int'l Trade 2022) (holding that USTR is bound to the APA's notice-and-comment procedures).

245. For a description of the APA's foreign affairs legislative history, and how Congress sought to address competing policy tensions in foreign and domestic policymaking, see Bonfield, *supra* note 69, at 235–39.

246. Administrative Procedure Act, 5 U.S.C. § 553(a)(1).

247. *See* Bonfield, *supra* note 69, at 230–31.

248. *See* § 554(a)(4).

249. *See* Bonfield, *supra* note 69, at 240 (striving to accurately define "military function" through Webster's dictionary since the APA is silent on this definition).

with foreign communities. Congress and the courts have allowed those agencies to do so out of their recognition that basic foreign policy decisions are matters "specifically required by Executive Order to be kept secret"[250] and should proceed without outside interference.[251]

Owing to the foreign affairs exception, USTR is not compelled to engage with foreign governments or their workers, and employers in the same participatory manner as the NLRB engages with U.S. workers and employers.[252] The resulting dichotomy in domestic and foreign procedures has critical implications for interpreting and enforcing international labor rights abroad. USTR's procedures exclude foreign communities yet depend on those communities to report to USTR about labor behavior on the ground. They also exclude foreign governments yet depend on those governments and foreign facilities to adhere to USTR's demands.

B. The Core Participatory Features in International Labor Law

Given its nexus to USTR's enforcement activities, the ILO's system has critical implications for rights-based sanctions procedures. Established in 1919, the ILO's vast experience in influencing compliance with universal labor rights offers insights into U.S. rights-based sanctions administration. The following Sections explain how the ILO's governance system does so by strengthening the voices of workers and employers (internationally on the ILO's platform and nationally within countries) in rulemaking and adjudication procedures.

1. Participation in Rulemaking

As the UN agency responsible for identifying and monitoring international labor standards, the ILO is the only international organization whose mandate requires it to operate on a tripartite basis.[253] The ILO's international labor rights thus rest on negotiations between governments,

250. *Id.* at 260.

251. *See* Hathaway, *supra* note 217, at 230 (acknowledging the claim that "[t]he person representing the United States at the negotiating table must have the experience and respect of those across the table, and must have the power to negotiate an agreement that will not be amended and second-guessed.").

252. *See generally* NLRB, *supra* note 243.

253. *See* ILO Constitution, *supra* note 13, art. 3(1); Int'l Lab. Org. [ILO], *International Labour Standards on Tripartite Consultation*, https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/tripartite-consultation/lang--en/index.htm (last visited Feb. 7, 2023) [hereinafter *International Labour Standards on Tripartite Consultation*] ("The ILO is based on the principle of tripartism - dialogue and cooperation between governments, employers, and workers - in the formulation of standards and policies dealing with labour matters.").

employers, and workers to ensure "that they have broad support from all ILO constituents."[254] Within the ILO, those tripartite actors decide when international labor standards are needed, when they have become obsolete, and whether those standards should be binding treaties (ILO conventions) or nonbinding guidelines (ILO recommendations).[255] Furthermore, the government members enjoy the same voting power irrespective of financial contribution to the organization.[256] Unlike international institutions such as the International Monetary Fund[257] that govern under a system of "weighted voting,"[258] the ILO's governance puts large and powerful countries on equal footing with smaller, less developed countries.[259]

The ILO's tripartite members adopt international labor rights instruments through consensus.[260] These instruments establish a skeleton of minimum working conditions and standards for children, women, and men.[261] Those rights are indeterminate, designed to absorb the diverse industrial labor relations systems, levels of economic development, political ideologies, and cultural contexts of its equal membership.[262]

This point may strike some as counterintuitive. Many of the ILO's standards appear to prescribe objective regulations. While that perception is accurate, it is also incomplete.[263] Consider the ILO's conventions

254. *International Labour Standards on Tripartite Consultation*, *supra* note 253.

255. *See* INT'L LAB. ORG. [ILO], RULES OF THE GAME: AN INTRODUCTION TO THE STANDARDS-RELATED WORK OF THE INTERNATIONAL LABOUR ORGANIZATION 20–25 (4th ed. 2019) [hereinafter RULES OF THE GAME].

256. *See* ILO Constitution, *supra* note 13, art. 4(1).

257. *See* Int'l Monetary Fund [IMF], Articles of Agreement, art. 8, § 5(a)(ii) (granting government members "one [additional] vote for each part of its quota equivalent to one hundred thousand special drawing rights.").

258. *See* Ebere Osiekee, *Majority Voting Systems in the International Labour Organisation and the International Monetary Fund*, 33 INT'L & COMP. L.Q. 381, 397 (1984) (referring to the International Monetary Fund's (IMF's) voting procedures as a "weighted voting system").

259. For a comparison of the ILO and IMF governance systems, see *id.* at 383–99.

260. *See* RULES OF THE GAME, *supra* note 255, at 20 (noting that instruments must be adopted by a two-thirds majority across worker, employer, and government delegates).

261. *Cf.* Vogt, *supra* note 154, at 128–29 (referring to the ILO's labor rights as an "objective standard" while acknowledging ambiguities in the trade context).

262. *See* RULES OF THE GAME, *supra* note 255, at 22 (explaining how ILO labor standards "reflect the fact that countries have diverse cultural and historical backgrounds, legal systems and levels of economic development").

263. *Id.* (describing the various "flexibility clauses" in ILO labor instruments that permit ratifying states to narrow the scope of application; benefit from temporary exceptions; apply only certain provisions of a convention, or link degrees of compliance to their level of economic development).

prohibiting children under fifteen years of age from working.[264] Those conventions, while objective and calculable, also permit governments, after consultations with employers and workers, to create lists of hazardous work (in which children under the age of eighteen years are prohibited from working) and "light" work (in which children ages thirteen to fifteen years are allowed to work).[265] Governments may also specify if they consider themselves to be in the process of development.[266] If so, the ILO permits those developing countries to legislate a minimum age of twelve years to work in light work and fourteen years in non-hazardous work.[267] Governments may also "initially limit the scope of application" of labor protections.[268] Those specifications must all be carried out after consultations with national workers and employers. In sum, while the ILO's child labor conventions appear anchored to a fifteen-year minimum age, they tolerate the employment of children ranging from twelve to eighteen years, albeit restricted to specific sectors, following participatory processes.[269]

Governments communicate those relevant national determinations and light and hazardous work lists to the ILO via their reports under ratified conventions.[270] Those reports, and the various national lists and exceptions

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264. Int'l Lab. Org. [ILO], *International Labour Standards on Child Labour*, https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/child-labour/lang--en/index.htm (last visited Feb. 7, 2023).

265. *See* Minimum Age Convention, 1973, *supra* note 15, arts. 2(3), 3, 7; Worst Forms of Child Labour Convention, 1999 art. 4, June 17, 1999, 2133 U.N.T.S. 161.

266. Minimum Age Convention, 1973, *supra* note 15, art. 2(4) ("[A] Member whose economy and educational facilities are insufficiently developed may, after consultation with the organisations of employers and workers concerned, where such exist, initially specify a minimum age of 14 years.").

267. *Id.* arts. 2(4), 7(4).

268. *Id.* art. 5(1).

269. The child labor conventions are certainly not the only ILO fundamental labor rights subject to various flexibility devices. *See* RULES OF THE GAME, *supra* note 255, at 22 (explaining how the ILO's labor rights seek to balance universality with flexibility). Even the ILO's enabling rights allow certain space for national determinations. They allow governments to decide: whether to permit members of the armed forces and police to organize; how to work with national constituents to ensure "respect for the right to organise," and how to ensure the "voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment" through collective bargaining agreements. Convention Concerning Freedom of Association and Protection of the Right to Organize art. 9(1), July 9, 1948, 68 U.N.T.S. 881; Convention Concerning the Application of the Right to Organise and to Bargain Collectively arts. 3–4, July 1, 1949, 96 U.N.T.S. 1341.

270. *See* ILO Constitution, *supra* note 13, art. 22 ("Each of the Members agrees to make an annual report to the International Labour Office on the measures which it has taken to

determined through consultations, are not public.[271] Consequently, it is not always possible for USTR to independently base its monitoring and enforcement efforts on ILO-approved substantive rights within specific trade partner countries. The resulting information gap hampers USTR's administrative procedures, which currently offer no space for foreign workers and employers to contribute to the substantive labor rights that USTR enforces under trade agreements.[272]

2. Participation in Adjudication

The ILO enforces its conventions through participatory tripartite processes. Member governments must consult with national workers and employers to determine how to implement the ILO's labor rights in practice.[273] Governments must synthesize the results of those consultations in their reports to the ILO's supervisory bodies.[274] The ILO's supervisory bodies later monitor the government's compliance with its treaty obligations against the backdrop of those reports.[275] While those reports are not public, the government must submit them to its national workers and employers, which may (and often do) respond to the government's assertions.

The ILO's supervisory bodies use those reports to decide whether the government has implemented ratified conventions in law or practice.[276] When they find that governments have failed to comply with their labor rights commitments, the ILO may require the government to respond publicly during the ILO's annual labor conference.[277] That conference is composed of representatives of workers, governments, and employers, which collectively determine the next compliance steps.[278]

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give effect to the provisions of Conventions to which it is a party."); RULES OF THE GAME, *supra* note 255, at 18 ("Ratifying countries undertake to apply the Convention in national law and practice and to report on its application at regular intervals.").

271. *See* Int'l Lab. Org. [ILO], Handbook of Procedures Relating to International Labour Conventions and Recommendations 35, para. 61 (Centenary ed. 2019).

272. *See supra* Part II.B.

273. *See* ILO Constitution, *supra* note 13, art. 7; RULES OF THE GAME, *supra* note 255, at 18 (noting that ratifying governments, employers, and worker create and implement labor standards).

274. RULES OF THE GAME, *supra* note 255, at 106.

275. *Id.* at 106–07.

276. *Id.* at 107–09 (explaining that the ILO's regular supervisory process, which involves its Committee of Experts on the Application of Conventions and its Conference Committee on the Application of Standards, entails a review of governmental reports and supplemental information, a dialogue with the government on laws and practices, and potential discussion at the annual International Labor Conference).

277. *Id.* at 107.

278. *Id.*

C. Global Administrative (Labor) Law

This Section draws from GAL scholarship to sketch a new framework for rights-based sanctions administration in the trade context. It does so by emphasizing that the basic procedures that ensure rule predictability and legitimacy are echoed in U.S. administration and labor legislation, as well as in the ILO's constitutional mandate. USTR must adopt these same kinds of procedural guarantees in its administration of labor rights provisions while creating an aperture for broader foreign participation. That participation, carried out by government counterparts and their workers' and employers' representatives, would ensure clear rules that are practical and thus realizable. The resulting rules and enforcement should remain flexible enough to complement the ILO's tripartite approach. In that sense, USTR's procedures should incorporate and reinforce the ILO's global administrative procedures.

This Article is not the first to argue that governments must offer the same basic procedural guarantees in administering their international agreements.[279] GAL scholars have studied intersecting national and international legal orders for decades.[280] Benedict Kingsbury, Nico Krisch, and Richard Stewart argue that "domestic regulatory agencies act as part of the global administrative space: they take decisions on issues of foreign or global concern."[281] Administrative procedures such as rulemaking and

279. *See, e.g.*, Richard B. Stewart & Michelle Ratton Sanchez Badin, *The World Trade Organization: Multiple dimensions of Global Administrative Law*, 9 INT'L J. CONST. L. 556, 559 (2011) (arguing that, while Global Administrative Law (GAL) cannot solve all trade challenges, subjecting trade governance at the WTO to "GAL norms can promote its trade liberalization goals, ameliorate aspects of its legitimacy deficit, and relieve some of the current decisional overload . . . .").

280. *See, e.g.*, Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 21 (2005) (highlighting the differences between international administration, regional transactional and coordination agreements, and domestic regulatory action); Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 LAW & CONTEMP. PROBS. 63, 63 (2005) [hereinafter Stewart, *U.S. Administrative Law*] ("This Article examines the potential for drawing on U.S. administrative law in the development of a global administrative law to secure greater accountability for the growing exercise of regulatory authority by international or transnational governmental decisionmakers in a wide variety of fields."); Nico Krisch, *The Pluralism of Global Administrative Law*, 17 EUR. J. INT'L L. 247, 248 (2006) (addressing the challenges to creating accountability mechanisms in GAL); Sabino Cassese, *Global Administrative Law: The State of the Art*, 13 INT'L J. CONST. L. 465, 466 (2015) (describing the "rich literature on global administrative law" and its various subjects); Stewart & Ratton Sanchez Badin, *supra* note 279, at 557–58 (describing the rise in GAL literature); Harlan Grant Cohen, *Finding International Law, Part II: Our Fragmenting Legal Community*, 44 N.Y.U. J. INT'L L. & POL. 1049, 1084–89 (2012) (describing the emergence of GAL).

281. Kingsbury et al., *supra* note 280, at 21.

adjudication "are no longer exclusively domestic in character and have become significantly transnational, or global."[282] As such, agencies should be subject to standardized procedures, principles, and remedies under a regime of transparency, participation, and accountability. Those foundational principles, some GAL scholars advocate, should apply to public actors on the national and global levels.[283]

Scholars note that rethinking international engagement through a democratic process lens "is no easy task."[284] Conceptualizing the applicable communities, for instance, invites a host of questions. Some GAL scholars criticize the ILO's procedures for restricting the applicable community to formal associations of employers and workers[285] under a "'corporatist' model."[286] The ILO's narrow scope excludes other members of civil society, non-governmental organizations, and workers and employers in the informal economy.

I agree with those critiques. Harlan Cohen argues persuasively that legal communities should encompass people who informally and formally share an interest in the legal practice at hand.[287] The point is not, Cohen notes, to elicit agreement on everything but rather to "accept a set of common ground-rules for negotiation and contestation."[288]

The ILO's labor rights, while lacking the degree of community participation that globalization calls for, nevertheless foregrounds those types of engagement and contestation. The organization entices otherwise sovereign governments to participate in those democratic processes by carefully approaching the term "consultation." The ILO considers governments to have satisfied their consultation obligations so long as their administrative procedures allow local employers and workers "to assist the competent authority in taking a decision."[289] Consultations do not require that the parties agree or that governments are bound to any of the opinions expressed during consultations.[290] Governments must instead engage with those workers and employers "in good faith" and give demands "serious

282. *Id.* at 25.

283. *See* Valentina Valdi, *Global Administrative Law*, *in* RESEARCH HANDBOOK ON THE RULE OF LAW 324 (C. May & A. Winchester eds., 2018) ("In other words, if at the national level, administrative law subjects the exercise of public power to the rule of law, then GAL aims to do the same at the global level.").

284. *See* Cohen, *supra* note 280, at 1065.

285. *See, e.g.*, Stewart, *U.S. Administrative Law*, *supra* note 280, at 97.

286. *Id.* at 101.

287. *See* Cohen, *supra* note 280, at 1065.

288. *Id.* at 1066.

289. *See* Int'l Lab. Org. [ILO], TRIPARTITE CONSULTATION 20 (2000) [hereinafter TRIPARTITE CONSULTATION].

290. *Id.*

consideration . . . ."[291] Ultimately, governments retain their autonomy to decide public policy so long as they offer certain procedural rights.[292] Trade agreements further refine the spectrum of the community by stipulating to cover only specific trade sectors identified in the agreement.[293]

By extending consultative processes into the interpretation and adjudication procedures of its rights-based trade programs, USTR would benefit from the enhanced legitimacy of its actions. Consequently, the Biden Administration could better accomplish its global aspirations by inspiring trust and participation.

The Administration would also benefit on defensive grounds. The ILO has publicly drawn attention to how U.S. national and state laws violate international labor rights.[294] Yet, the United States, too, commits to adopting and implementing those rights under its trade agreements.[295] Most U.S. trade agreements are carried out with countries that lack the economic and political fortitude to take on such a powerful country. As the United States considers trade agreements with the European Union, that traditional power asymmetry in U.S. trade relationships may shift. The U.S. government would benefit under procedures that afford it and its workers and employers the opportunity to consult over the interpretations and adjudication of international labor rights under its trade agreements.

Thus, GAL offers a promising framework for rights-based sanctions procedures. To the extent that GAL scholars advocate for greater transnational participation—horizontal participation across states and vertical participation between international organizations, governments, workers, and employers[296]—in rulemaking and adjudication, the resulting regulatory regime would benefit. Opaque labor rules would become clearer, adjudication more predictable, and the process more legitimate—elements relevant to compliance.

Many trade and constitutional scholars resist applying GAL principles to trade law, which they view as an inherently executive function. Some caution that "foreign policy considerations might sometimes

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291. *Id.*

292. *See* INT'L LAB. ORG. [ILO], COMPILATION OF THE COMMITTEE ON FREEDOM OF ASSOCIATION 12 (6th ed. 2018), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_632659.pdf ("The ultimate responsibility for ensuring respect for the principles of freedom of association lies with the Government.").

293. For instance, the USMCA Parties agreed that "Priority Sector" refers to "a sector that produces manufactured goods, supplies services, or involves mining." *See* USMCA Protocol, *supra* note 6, art. 31-A.15.

294. *See* LeClercq, *supra* note 5, at 37–38 (describing the various ways that U.S. federal and state laws violate the ILO's international labor rights).

295. *See, e.g.*, USMCA, *supra* note 4, art. 23.3.1.

296. *See* Kingsbury et al., *supra* note 280, at 28.

make . . . [participatory] provisions difficult or unwise."[297] Others consider that "basic foreign policy decisions entrusted solely to the executive in discharge of its Constitutional role"[298] should proceed without public interference, let alone foreign interference.[299]

If competing interests and endless negotiations stall or impede federal agencies from executing foreign policy, those agencies could lose the necessary credibility and authority to execute their mandates successfully.[300] Procedures such as international rulemaking could transform trade negotiations and implementation into "a cumbersome and time-consuming process for concluding executive agreements [that] may serve as a disincentive to enter negotiations with the United States in the first place."[301]

As a former trade negotiator, I can attest to their point. My trade partners knew that I could execute my promises and threats at the negotiating table without requiring judicial or public permission. If negotiations—whether foreign policy or trade—become weighed down by competing interests and endless votes, agencies negotiating foreign policy matters risk losing credibility and authority.

That risk poses a challenge for negotiators; it is not a justification to retain full agency discretion. Under the APA, domestic agencies must frequently decide how and whether to implement comments or follow through on complaints. As for rulemaking within trade agreements, I have already explained how the agreement between states to commit to the ILO's indeterminate labor rights in the text does little to inform those rights. In other words, participatory processes to give those rights meaning in countries do not compromise USTR's rulemaking authority. The issue, therefore, is not whether USTR's negotiations authority would diminish but rather how to subsequently incorporate consultations into defining the meaning of the text.

Indeed, the United States has demonstrated a keen interest in harmonizing regulatory practices elsewhere in its trade agreements. As

297. *See* James O. Freedman, *Administrative Procedure and the Control of Foreign Direct Investment*, 119 U. PENN. L. REV. 1, 5 (1970).

298. *See, e.g.*, Milena Ship Mgmt. Co. v. Newcomb, 804 F. Supp. 846, 849 (1992) (describing the boundaries of judicial review under the APA).

299. *See* Hathaway, *supra* note 217, at 230 (acknowledging the claim that "[t]he person representing the United States at the negotiating table must have the experience and respect of those across the table, and must have the power to negotiate an agreement that will not be amended and second-guessed.").

300. *See* Curtis Bradley, *Article II Treaties and Signaling Theory*, *in* THE RESTATEMENT AND BEYOND 128 (Paul B. Stephan & Sarah H. Cleveland eds., 2020) (describing why it "will not ordinarily help a president in negotiations to indicate that he or she will be going to the Senate once the deal is concluded.").

301. *See* Hathaway, *supra* note 217, at 243.

the scope and binding nature of U.S. trade provisions have expanded and increased, so too has pressure within and outside the United States to codify applicable rules that ensure trade transparency and accountability.[302] Cohen recounts, for instance, how a WTO dispute settlement body in the Shrimp/Turtle case in 1998 admonished the United States for failing to offer "foreigners" avenues to participate in U.S. trade decisions.[303] Decades later, during the 2016 Trans-Pacific Partnership Agreement negotiations, U.S. trade negotiators drove efforts to include a stand-alone chapter on regulatory coherence.[304]

On the other hand, some GAL opponents raise credible concerns about "double colonization" that merit attention in the rights-based sanctions context.[305] Tracing the origins of the "twin ideals" of administrative law—democracy and the rule of law—that undergird regional and global administrative law efforts, Carol Harlow notes that these inherently Western values form not only administrative principles but constitutional principles and the political arrangements embedded within them.[306] Those key Western ideals now manifest in "many human rights texts"[307] and serve to protect entities such as NGOs that stand in for civil society when the latter "is non-existent or marginal . . ."[308] That process, she argues, reflects a system in which countries are colonized, first, when global administrative law absorbs those ideals as a principle background and, second, when the principles of the powerful are transplanted onto the weaker.[309]

Such GAL critics ask valid questions. Why should a GAL agenda seek to protect the interests of bodies such as NGOs or impose Western conceptions of participatory processes over national ideologies, laws, and silenced communities?[310] If we agree that administrative law is "largely a Western construct" that represents "an instrument for the control of public power,"[311] why would we assume that it would strengthen the legitimacy and bottom-up participation in the construction and

302. *See generally* Cohen, *supra* note 280, at 1085 (describing those pressures generally).

303. *Id.* at 1088.

304. For a description of these efforts and their implications, see Han-Wei Liu & Ching-Fu Lin, *Constitutional Traditions as Boundaries in Standardising Administrative Rulemaking Through Trade Agreements*, 71 INT'L & COMP. L. Q. 889, 890–95 (2022).

305. *See, e.g.*, Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EUR. J. INT'L L. 187, 209 (2006).

306. *Id.* at 190.

307. *Id.* at 191.

308. *Id.* at 204.

309. *Id.* at 209.

310. *Id.* at 204.

311. *Id.* at 207.

enforcement of labor rights globally? Recall that the point of this Article is to *avoid*—not adopt—such top-down governance.

Perhaps to avoid power imbalances, others advocate for a more limited extension of the APA into trade negotiations that would focus solely on U.S. procedures within the United States.[312] Oona Hathaway, for instance, laments that "affected interests have neither the information nor the access necessary to monitor international lawmaking."[313] She notes that owing to the APA's foreign affairs exception, "unlike in the domestic arena, there has never been any system in place to allow effective external oversight."[314] Hathaway proposes an international APA concept under the assumption that "a more open lawmaking process can give negotiators a better understanding of the needs and concerns of those who will be directly affected by the agreement."[315]

Hathaway's proposal would strengthen the current rights-based sanctions procedures by opening the discussion of rights to U.S. policymakers. Nevertheless, by restricting those procedures to national consultations, Hathaway's proposal reinforces the risk that the United States will impose its unilateral interpretations of international rights. It also leaves open the possibility for USTR to enforce international labor rights based not on merit but rather on other objectives, such as protectionism or extra-labor, geopolitical objectives.

The agency's residual discretion under Hathaway's middle-ground proposal stands in stark contrast with the nature of international labor rights, which, again, were designed by governments, workers, and employers on the multilateral platform to be processed through tripartite discussions. Even if USTR's procedures allowed for more robust consultations with American policymakers and interest groups, the results of those consultations would not necessarily address workers' unique needs and concerns elsewhere. Cross-border unions do not always take the same approach or have the same priorities. Unions and employers will not always take the same approach to international labor standards as workers and employers; for instance, those in the informal sectors that contribute to trade goods that are not represented at the trade policy table.[316] Consequently, consultations risk undermining international labor rights abroad by advancing incomplete priorities and values.

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312. *See* Hathaway, *supra* note 217.

313. *Id.* at 223–24, 242 (cautioning that reforms to procedures should be limited to "the domestic rulemaking process.").

314. *Id.* at 242.

315. *Id.* at 147.

316. *See* Desirée LeClercq, *Invisible Workers*, 116 AM. J. INT'L L. UNBOUND 107, 109–10 (2022) (describing the tensions that arise between unions and workers' organizations concerning trade matters).

The issue is how to embed pluralistic participation within rights-based sanctions under a common regulatory scheme. I propose that the United States accomplish this by negotiating the consultative processes within international labor rights rather than imposing the substance of those rights through sanctions programs. Doing so would thread the needle between current agency procedures dealing with foreign affairs, which permit agencies to make unilateral decisions behind closed doors, and the Administration's newfound objectives to influence its trade partners to respect international labor rights in their countries.

Specifically, the United States should continue to bind its trade partners to the ILO's fundamental labor rights, but instead of referring to a confusing ILO declaration, the text should stipulate to establishing appropriate trade-sector consultative machinery. Following a counterpart's establishment of that machinery, which this Article further describes in Part IV, USTR's monitoring and enforcement should center—like the ILO's supervision—on the substantive outcome of those national consultations between governments and trade-sector workers and employers.

For the most part, those procedures would balance the bottom-up consultations inexorably linked to the ILO's labor rights with the top-down enforcement linked to trade policy. Using the government's reports to the ILO as the minimum floor, they would also fortify compliance and enforcement of international labor rights by granting governments the opportunity to lift labor standards in trade sectors through market incentives.

Some might argue that the ILO's procedures simply map Western administrative principles onto global labor administration, as Carol Harlow worries. That may be true. The ILO's processes resemble the APA's notice-and-comment requirements insofar as they require public officials to submit preliminary rules to workers and employers "far enough in advance to formulate their own opinions."[317] The similarities between ILO consultation requirements and APA consultation requirements, while reflective of Western democratic values, render it palatable for the United States to modify its national trade procedures to align with the ILO's processes. Rather than feel pressured to adopt foreign or confusing procedures in an area—trade relations—long reserved to executive discretion, the United States would merely apply its preexisting democratic and participatory values to its right-based sanctions procedures.

And while this version of GAL—the incorporation of ILO consultative processes in the substantive enforcement of international labor rights—may come at a cost to countries that rebuke Western democratic ideals, the benefit to those countries may be more significant. Rights-based sanctions

317. *See* TRIPARTITE CONSULTATION, *supra* note 289, at 19.

procedures, as proposed, would allow those countries to decide the substance of their labor-rights commitments based on their national consultations. They would thus protect governments from U.S.-driven conceptions of labor rights or potential abuse of rights-based sanctions mechanisms. Recall that those same governments, as ILO members, support the ILO's consultative processes. They could have easily used their respective voting power to veto those procedures had the gains not been worth the power trade-offs.

The next Part advances a rights-based sanctions agenda. That agenda requires USTR and the ILO to formally coordinate in rights-based sanctions administration under a common regulatory scheme. Doing so would help ensure that USTR avoids the pitfalls of OFAC governance and compliance while fortifying international labor rights through trade.

IV. A RIGHTS-BASED SANCTIONS AGENDA

U.S. rights-based sanctions policy is having a transformative moment. Its objectives have broadened beyond U.S. security and now seek to protect workers' rights worldwide. To achieve that objective, USTR's rights-based procedures should take a GAL approach that borrows heavily from U.S. administrative procedures and ILO procedures, both of which require agencies to consult with regulated communities. USTR could accomplish those objectives by allowing counterparts and their employers and workers the opportunity to consult on the meaning and enforcement of labor rights commitments in their countries.

A. Early Indicators of USTR Reform

The Biden Administration's USTR has recently acknowledged that its rights-based negotiations do not always result in a meeting of the minds in trade.[318] That acknowledgment is rational; USTR's counterparts tend to violate the same international labor rights that they committed to during trade negotiations. The agency has consequently indicated that it is reconsidering its approach to rights-based sanctions procedures.

In 2021, USTR tasked the United States International Trade Commission (ITC) to investigate the distributional effects of trade in the United States. The study aimed to better "identify and measure the potential distributional effects of U.S. trade and trade policy on U.S. workers, by skill, wage and salary level, gender, race/ethnicity, age, and income level, especially as they affect under-represented and under-

318. *See Tai: Engagement, Not Dispute Settlement, Key to Durable Trade Policy*, INSIDE U.S. TRADE (Apr. 22, 2022, 4:01 PM), https://insidetrade.com/daily-news/tai-engagement-not-dispute-settlement-key-durable-trade-policy.

served communities."[319] Between March and May 2022, the ITC offered a platform for discussion among U.S. union members, marginalized and underrepresented workers, and the employer community.[320]

In addition to studying how U.S. trade policy affects workers in the United States, USTR Ambassador Tai has also suggested that the Administration needs to better understand how trade sanctions affect rights abroad. For instance, stakeholders recently lobbied USTR to include binding labor enforcement mechanisms in the draft Industrial Pacific Economic Framework agreement. Tai conceded that while those provisions secured "ironclad commitments on paper," they were not always effective at influencing compliance.[321] Instead, Tai argued that trade durability came hand-in-hand with "the engagement to have a meeting of the minds around those things that the parties want to do together."[322]

USTR's recent initiatives are a welcome development given the agency's historical unwillingness to engage with members of the public on trade policy. Those initiatives recognize that U.S. trade policy—liberal or protectionist—may disproportionately disadvantage women and underserved communities. Nevertheless, these steps do not go far enough to reconcile USTR's procedures with process-oriented international labor rights. Namely, USTR has not tried to strengthen worker voices or formalize consultative platforms in other countries. Nor has it launched studies to examine the distributional effects on underserved communities abroad.[323] These initiatives are critical to advancing an administrative framework for social sanctions.

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319. *Distributional Effects 332 Investigation: Distributional Effects of Trade and Trade Policy on U.S. Workers*, U.S. INT'L TRADE COMM'N, https://www.usitc.gov/research_and_analysis/ongoing/distributional_effects_332 (last visited Feb. 7, 2023).

320. The International Trade Commission released its final report in Oct. 2022. *See* U.S. INT'L TRADE COMM'N, PUB. NO. 5374, DISTRIBUTIONAL EFFECTS OF TRADE AND TRADE POLICY ON U.S. WORKERS (2022).

321. *See Tai: Engagement, Not Dispute Settlement, Key to Durable Trade Policy*, *supra* note 318.

322. *Id.*

323. In addition to the proposed reforms discussed in the next Section, USTR should launch a new study to complement its previous study to see how U.S. trade policy affects marginalized communities in counterpart countries. Rather than presume to anticipate the needs of foreign workers and underrepresented communities in trade partner countries, USTR should consult with and research those workers. For instance, it could study the effects on workers in countries where it has revoked trade benefits under the worker rights criterion. If this research indicates that workers are left worse off following the withdrawal of market access than during the trade relationship, USTR, the President, and Congress should consider how and whether U.S. trade policy should support foreign communities following the imposition of sanctions.

B. A Modest Proposal for New Text and Procedures

Congress and the Executive vest USTR with an enormous responsibility to investigate and enforce compliance with the ILO's international labor rights in countries and factories. USTR does not have access to the ILO's reporting system or depth of expertise. Nor should it. USTR is a trade agency, not an international supervisory body specializing in labor conditions.

If U.S. trade agreements continue to commit trade parties to the ILO's fundamental labor rights, USTR should formally partner with the ILO under its procedures. This Section explains how doing so would permit USTR to preserve its trade discretion and authority while allowing the ILO and consultative processes to do the heavy lifting.[324]

Notably, USTR has begun to participate informally with the ILO in monitoring and enforcing international labor rights under USMCA. However, unless and until that participation is institutional, it remains vulnerable to political interests in collaborating with international organizations. The Biden Administration has enhanced the participation of U.S. agencies on the global platform writ large. We should not assume that future U.S. administrations will appreciate the value of that participation.

Consequently, USTR's formal procedures should entail working with the ILO following the negotiation of international labor rights in U.S. trade agreements. Once the counterparts agree to include binding and sanctions-based commitments to the ILO's rights, the ILO should ensure that all governments have consultative mechanisms across trade-related sectors of workers and employers. The ILO should assist its member governments where those mechanisms are not already in place. Consider that those members must have such mechanisms by virtue of their membership in the organization, apart from their trade activities. The ILO's mandate includes offering assistance to its members to strengthen their constitutional responsibilities.[325]

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324. In a separate article, LeClercq, *Biden's Worker-Centered Trade Policy*, *supra* note 8, I advance an alternative proposal. Like this proposal, I strongly urge U.S. policymakers and negotiators to change the textual commitment to international labor rights. As mentioned, incorporation of the ILO's declaration is confusing and offers little implementation guidance or, relatedly, enforcement safeguards. Both proposals thus suggest including binding commitments to the ILO's fundamental labor rights and to consultative machinery in the relevant trade sectors, instead. Those national sectors of workers, employers, government officials, and other civil society actors will negotiate how to implement the ILO's labor rights given their ILO obligations, national needs, and legislation. The proposals diverge at that point. While this Article delegates authority to bargain and monitor those commitments to the ILO, my companion piece imagines how USTR would retain those functions. *See Id.*

325. *See* INT'L LAB. ORG. [ILO], DECLARATION ON FUNDAMENTAL PRINCIPLES AND

Such participation will not affect USTR's rulemaking authority. As it does now, USTR would be responsible for deciding what rules to include in its trade agreement based on trade legislation, congressional requirements, and executive priorities. This proposal merely recognizes that, by negotiating commitments to the ILO's labor rights, USTR is, in effect, negotiating consultative processes. By permitting the ILO and the various tripartite communities to participate in subsequent consultations, USTR's negotiated rules would simply reflect the legal nature of its incorporated standards.

The ILO is well-suited for a formal role in U.S. trade and labor governance. Recall that, under its constitutional processes, the ILO alone holds the governmental reports describing how national laws and practices implement the ILO's labor rights. By formally cooperating with the ILO, USTR would align its trade commitments with the ILO's supervisory knowledge and processes.

USTR could begin working with the ILO before or as soon as it launches trade negotiations with potential partners. The ILO's mandate requires that both the United States and its counterparts request such ILO assistance. Nevertheless, given the alternative of U.S.-imposed rights, trade partner governments have a great incentive to do so.

These parallel processes—USTR negotiations and ILO-led consultations—should not delay negotiations, as feared in the scholarship. USMCA negotiations, without ILO consultations, took over a year. During that time, USTR and the ILO would have had ample opportunity to consult and work within countries.

Based on those consultations, the ILO could then be responsible for monitoring the implementation of international labor rights on the ground. When the international labor rights under trade overlap with governments' constitutional requirements under ratified ILO conventions, the organization could ensure that governments respect their minimum labor standards commitments. The ILO would thus be well-placed to track its members' various commitments and supervisory processes and their respective international economic obligations. When trade partners violate the ILO's rights as incorporated into agreements, USTR's procedures should account for ILO enforcement recommendations.

Informally, the Biden Administration illustrates this ILO cooperation in U.S. trade administration. Under USMCA's Rapid Response Mechanism, the United States and Mexico requested ILO observers to attend factory-

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RIGHTS AT WORK 1 (June 11, 2022), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/normativeinstrument/wcms_716594.pdf (recognizing the organization's obligation "to assist its Members, in response to their established and expressed needs . . . .").

level trade union elections subject to potential sanctions.[326] While USTR's invitations to the ILO are increasing, they are not unprecedented. The Clinton Administration also requested that the ILO monitor and report on the labor conditions in the Cambodian apparel factories under the US-Cambodia Textile Agreement in 1999.[327] According to Sandra Polaski, a key government official in those negotiations, the ILO was appealing because "it possessed an established record of neutrality and expertise and was acceptable to all concerned parties."[328]

Formal ILO engagement will also strengthen USTR's accountability and transparency. Under the APA's foreign affairs exception, USTR's rulemaking, monitoring, and enforcement are "not subject to the same accountability mechanisms as other agencies . . . ."[329] Claussen notes that "given the entrenched nature of the trade administrative state together with the breadth and scope of congressional trade delegations to the executive," congressional oversight mechanisms are minimal.[330] If USTR's authority is limited under labor clauses to incorporating the ILO's labor rights and taking action based on ILO recommendations, the ILO could provide a significantly missing accountability mechanism. If USTR violated the ILO's processes or principles, the organization could disavow USTR's actions or terminate its own role in the agreement.

To be sure, balancing USTR's authority with the ILO's procedures could interfere with some aspects of U.S. trade administration. Up to now, USTR could address the labor rights commitments in trade instruments based on domestic policy goals, including geopolitical interests at stake and interagency priorities. Nevertheless, trade partners have resisted or been understandably confused by the United States' efforts to enforce labor rights through trade. On balance, the legitimizing features of the ILO's processes and worker and employer participation in interpreting and enforcing those rights outweigh national interests, at least in the labor context.

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326. *See, e.g.*, Press Release, Office of the U.S. Trade Representative, Statement from Ambassador Katherine Tai on the Vote by Workers in Silao, Mexico (Aug. 19, 2021), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/february/statement-ambassador-katherine-tai-february-1-2-vote-workers-silao-mexico ("We also thank the International Labor Organization and Mexico's National Electoral Institute for the important role they have played as observers at the vote and its lead-up.").

327. *See* Sandra Polaski, *Combining Global and Local Forces: The Case of Labor Rights in Cambodia*, 34 WORLD DEV. 919, 920, 922 (2006).

328. *Id.* at 922.

329. Claussen, *supra* note 7, at 894.

330. *Id.* at 893.

The endgame of rights-based sanctions procedures, in whatever form they eventually take, should secure commitments to international labor rights that pay homage to the participatory nature of those rights. The ILO's governance allows public and private actors to consult over and contest the meaning of labor rights as applied in their countries. U.S. trade procedures to interpret and enforce those rights should absorb those processes and fortify them further by linking them to U.S. markets and other financial incentives.

CONCLUSION

The United States deserves recognition for leveraging its market access to induce compliance with international rights. However, USTR's rights-based sanctions procedures continue to exclude the foreign actors it seeks to influence. Its programs consequently risk undermining meaningful compliance. The implications of USTR's procedural inadequacies for international rights are thus far-reaching. The increased frequency with which the agency threatens to impose sanctions under those procedures warrants immediate attention.

My purpose here is not to dispel the critical role of rights-based sanctions in protecting international labor rights. On the contrary, I acknowledge sanctions' critical role in garnering the political will to comply with global rights. Because of that critical role, their procedures must be more deliberate.

Scholars from multiple disciplines, including GAL, trade, labor, and U.S. administrative law, debate the utility and efficacy of requiring federal agencies to adopt more participatory procedures. This Article shows how the United States could thread the needle between participation and necessary Executive decision-making by formally delegating some rulemaking and adjudication responsibilities to the ILO in its trade agreements. USTR would retain authority over its trade negotiations and enforcement decisions while carving out the space for tripartite consultations around the ILO's process-oriented rights. Under those procedures, USTR would discharge its trade authority more effectively. Its trade rules would better reflect participatory processes. The interpretations of those rules and their potential enforcement might become more evident to counterparts, foreign workers, and employers. USTR's modified procedures would improve the accuracy, legitimacy, and transparency of U.S. trade legislation. It would consequently enable U.S. agencies to protect international rights worldwide more equitably.