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INTERNATIONALLY RECOGNIZED WORKER RIGHTS AND THE EFFICACY OF THE GENERALIZED SYSTEM OF PREFERENCES: A GUATEMALAN CASE STUDY

Amy E. Belanger*

INTRODUCTION

On the morning of August 24, 1994, the anti-riot division of the Guatemalan National Police, in conjunction with private security forces, executed a savage raid on the plantation workers of the Empresa Exacta finca, at the Hacienda San Juan del Horizonte in western Guatemala.¹ More than 500 police² broke through the main gate of the finca with a bulldozer and fired tear gas and live bullets at the workers.³ The Guatemalan National Police killed three workers and critically wounded a fourth worker.⁴ Additionally, eleven workers required hospitalization,

* J.D. Candidate, 1996, Washington College of Law, American University. The author would like to thank Lance Compa and Professor Mark Hager for their assistance and support. To my family, Caroline George, Mark Pihlstrom, and John Truong, thanks for keeping the sanity, smiles, and sentences flowing.

1. Petition Against the Republic of Guatemala For Violations of the American Convention on Human Rights and Other International Instruments at 2, *In re Laborers of La Hacienda San Juan del Horizonte: de la Empresa Exacta, S.A., et al.*, Inter-Am. C.H.R. (No. 11, 273) (1994) [hereinafter *Petition Against the Republic of Guatemala*]; William Clark Harrell et al., Request for Precautionary Measures and For a Hearing-Before the Commission in Plenary (Sept. 9, 1994) at 2 (petition submitted to the InterAmerican Commission on Human Rights) (on file with *American University Journal of International Law and Policy*).

2. See *Guatemalan Peasant Occupation Turns Violent*, REUTERS, August 25, 1994 (reporting that more than 500 police opened fire on men, women, and children). The Guatemalan National Police stated that they did not have any information on the incident. *Id.*

3. See *Petition Against the Republic of Guatemala*, *supra* note 1, at 2 (quoting an official statement of the Bishops of Quetzaltenango, describing the incident).

4. *Petition Against the Republic of Guatemala*, *supra* note 1, at 2. Diego

many of whom were shot in the back while attempting to flee.⁵ While these horrendous state-sanctioned murders may be characterized as "the most overtly violent repression of workers in years,"⁶ such violence and other forms of repression are rampant in Guatemala.⁷ The plight of the workers at the Empresa Exacta finca parallels the situation of many other laborers in Guatemala today.⁸

The workers of Empresa Exacta occupied the land in response to the inaction of the judicial system in enforcing their constitutionally and statutorily mandated rights.⁹ Prior to the violent eviction, the workers embarked on an organizing campaign to compel their employer to recognize the minimum wage¹⁰ and to comply with other legally mandated

Orozco García, a leader of the workers, was one of the three workers killed by the Guatemalan National Police. *Id.* The National Police transported García via helicopter to a nearby army base. *Id.* García's body was found 50 kilometers from the finca, with clear signs of torture. *Id.* It is presumed that his body was thrown from the helicopter but it is not clear whether he was alive at that time. *See Five Labor Activists Killed on Guatemalan Plantations*, U.S./GUAT. LAB. EDUC. CAMPAIGN, Nov. 1994, at 3 (reporting that Diego Orozco Garcia was "apparently dropped to his death" from the helicopter that brought him to the army base).

A second incident of violence directed toward the occupying workers of the Empresa Exacta finca occurred several weeks later. On September 15, 1994, three men handed documents with unknown contents to Juan Jose Garcia Gonzalez, a participant in the occupation, and escorted him out of the village of Chiquirines, located near the Hacienda San Juan del Horizonte. *Petition Against the Republic of Guatemala*, *supra* note 1, at 6. The following day, 20-year-old Gonzalez was found with a fatal gun shot wound in his spine. *Id.* A statement by the Archbishop's office affirmed that "the killing was a consequence of the occupation of finca San Juan del Horizonte". *Id.*

5. *Petition Against the Republic of Guatemala*, *supra* note 1, at 2. The police also detained 40 workers, who have been released on the condition that they do not return to the finca, and with the requirement that they report to the prosecutor's office every week. *Id.*

6. *Five Labor Activists Killed on Guatemalan Plantations*, *supra* note 4, at 3.

7. *See infra* notes 106-15 and accompanying text (discussing the repression of the labor movement in Guatemala as a function of the government's export-led economic strategy).

8. *See* Trish O'Kane, *Guatemalans Still Under the Boss' Heel*, S.F. CHRON., Dec. 19, 1994, at A8 (citing the Empresa Exacta incident and noting similar conflicts at over 40 other fincas where companies refuse to pay the minimum wage); *Petition Against the Republic of Guatemala*, *supra* note 1, at 5 n.7 (reporting that over 400 similar complaints filed in 1994 remain unresolved by the judiciary).

9. *Petition Against the Republic of Guatemala*, *supra* note 1, at 4.

10. U.S./GUATEMALAN LABOR EDUCATION PROJECT, LABOR AND WORKER RIGHTS BULLETIN ON GUATEMALA 2 (Sept. 5, 1994) (on file with *The American University*

labor provisions.¹¹ After the workers sought judicial enforcement of their rights,¹² the company illegally fired sixty-two workers.¹³ The workers immediately notified the court, seeking reinstatement within twenty-four hours, as mandated by the Labor Code of 1992.¹⁴ The judiciary did not respond and effectively denied any form of legal recourse for the aggrieved workers.¹⁵ The impotence of the courts prompted the workers to resort to self-help, and on July 17, 1994, the workers collectively occupied the finca.¹⁶

In contrast to its handling of the workers' complaints, the court in Coatepeque responded immediately when the general manager of the Empresa Exacta finca initiated legal proceedings against the occupying workers by ordering their eviction by the police in the violent manner

Journal of International Law and Policy) [hereinafter U.S./GLEP BULLETIN]. Although the legal minimum wage is 10 *quetzales* per day, less than \$2.00, the workers received only six *quetzales* a day, or approximately \$1.00. *Id.*

11. Petition Against the Republic of Guatemala, *supra* note 1, at 4. The workers sought compliance with the following statutory provisions: 1) payment of the legally required minimum wage and legally required bonus; 2) recognition of the right to have one day of rest per week; 3) respecting legally required vacation time; 4) access to the state health care system; and 5) respect for the right to organize and bargain collectively in a union. *Id.*

12. U.S./GLEP BULLETIN, *supra* note 10, at 2. On February 18, 1994, the court issued an *emplazamiento*, or injunction, against the company, which prohibits the company from firing workers without court approval. *Id.*

13. U.S./GLEP BULLETIN, *supra* note 10, at 2; see Petition Against the Republic of Guatemala, *supra* note 1, at 4-5 (discussing the illegal dismissal of 62 workers). The company began to fire the workers on March 2, 1994, without obtaining the required court authorization. U.S./GLEP BULLETIN, *supra* note 10, at 2.

14. Petition Against the Republic of Guatemala, *supra* note 1, at 4-5.

15. Petition Against the Republic of Guatemala, *supra* note 1, at 4-5. The case remained unaddressed for two months until June 15, 1994, when the Labor Court of Coatepeque notified the workers that the case was transferred to the Sixth Court of Labor and Social Welfare in Guatemala City. *Id.* While the Government of Guatemala cites the establishment of this new labor court as an advancement in the recognition of worker rights, this court is not easily accessible to the rural population. *Id.* To date, the case remains unprocessed. Interview with William Clark Harrell, Attorney, Centro para la Acción Legal en Derechos Humanos, Guatemala, Washington, D.C. (Feb. 17, 1995).

16. Petition Against the Republic of Guatemala, *supra* note 1, at 5. The workers attempted to negotiate with the owners to reach an equitable solution. U.S./GLEP BULLETIN, *supra* note 10, at 2. Despite pressure from the Ministry of Labor, the Procurador de Derechos Humanos, and the Procurador General de la Nación, the company refused to negotiate. *Id.*

described above.¹⁷ Guatemalan President Ramiro de Leon Carpio defended the military action, proclaiming, "I am sorry about the loss of life, and about the wounded, but the anti-riot troops acted legally and we will continue to act this way in the future, even though it causes pain in my heart . . . The right to private property is protected in the Constitution."¹⁸

The Empresa Exacta incident is the basis for extending the "continuing review" of Guatemala's status as a beneficiary under the United States' Generalized System of Preferences (GSP) program.¹⁹ The GSP is a unilateral trade instrument which provides that the products of developing countries that respect worker rights will be granted duty-free access into United States markets.²⁰ The GSP program officially expired on July 31, 1995.²¹ The House Ways and Means Subcommittee on Trade favorably reported a bill introduced by Congressman Philip M. Crane (R-IL) to reauthorize the GSP program.²²

As a unilateral trade instrument, the United States GSP program can be utilized to achieve social harmonization through the imposition of trade sanctions.²³ Although a multilateral forum for addressing and en-

17. Petition Against the Republic of Guatemala, *supra* note 1, at 5.

18. Petition Against the Republic of Guatemala, *supra* note 1, at 3.

19. O'Kane, *supra* note 8, at A8. On the October 1, 1994 deadline for the decision to maintain or revoke Guatemala's status as a beneficiary developing country under the GSP program, the United States Trade Representative (USTR), Mickey Kantor, postponed the decision indefinitely due to the incident at the Empresa Exacta finca. *Id.*

Congressman George Brown wrote to Mickey Kantor, expressing concern: "[t]he Empresa Exacta incident, which was initially defended by President Ramiro de Leon Carpio until a public outcry persuaded him to reverse course, appears to provide an unfortunate illustration that the Guatemalan government and business community have not yet developed a commitment to respect [for] worker rights." Letter from George E. Brown, Member of Congress, to Michael Kantor, United States Trade Representative (Sept. 8, 1994) (on file with *The American University Journal of International Law and Policy*).

20. 19 U.S.C. §§ 2461-2466 (1988); *see infra* notes 43-58 (discussing the United States GSP history and evolution incorporating worker rights conditionality).

21. *See* Uruguay Round Agreements Act, Pub. L. No. 103-465, § 601, 108 Stat. 4809, 4990 (1994) (renewing GSP retroactively until July 31, 1995); Notice, 59 Fed. Reg. 65,547 (1994) (announcing the decision to extend the GSP program until July 31, 1995).

22. H.R. 1654, 104th Cong., 1st Sess. (1995). The House Bill does not amend the existing statutory provisions regarding internationally recognized worker rights. *Id.*

23. *See* GSP Renewal and Reform Act of 1993, H.R. 3625, 103d Cong., 1st Sess. (1993) [hereinafter GSP Renewal Bill] (proposing substantive modifications to

forcing labor rights abuses may be more desirable in that it is more consistent with the transnationalization of the global economy, no effective international enforcement mechanism has been established yet.²⁴ The World Trade Organization (WTO) presents a feasible multilateral forum wherein international standards could be formulated and non-compliance could be countered with trade sanctions. The multilateral trade negotiations of the General Agreement on Tariffs and Trade (GATT), which yielded the new WTO, however, did not generate international consensus on linking a trade instrument to labor rights.²⁵ Thus, despite

the GSP program designed to improve beneficiary countries' compliance with internationally recognized worker rights); 140 CONG. REC. E1458-01, E1459 (1994) (statement of Rep. Brown) (advocating that the proposed amendments of the GSP Renewal Bill to strengthen protection of worker rights would encourage sustainable economic and social development).

24. See Harlan Mandel, *In Pursuit of the Missing Link: International Worker Rights and International Trade?*, 27 COLUM. J. TRANSNAT'L L. 443, 448-49 (1989) (discussing the advantages of achieving a multilateral consensus on international labor standards over a unilaterally dictated instrument). Many commentators suggest that unilateral trade measures are inherently biased and protectionist, and are much less effective than the product of multilateral negotiations. See Kriensak Kittichaisaree, *Using Trade Sanctions and Subsidies to Achieve Environmental Objectives in the Pacific Rim*, 4 COLO. J. INT'L ENVTL. L. & POL'Y 296, 299 (1993) (noting that unilateral trade measures involve a "stick," in the form of economic sanctions, and a "carrot," in the form of trade preferences extended under GSP); JAMES M. ZIMMERMAN, *EXTRATERRITORIAL EMPLOYMENT STANDARDS OF THE UNITED STATES: THE REGULATION OF THE OVERSEAS WORKPLACE* (1992) [hereinafter ZIMMERMAN, *EXTRATERRITORIAL EMPLOYMENT STANDARDS*] (arguing that the negative implications of unilateralism include the possible violation of the sovereignty of other countries and that the unilateral designation of "internationally recognized worker rights" is unreasonable and lacking in international consensus). In the context of OPIC, Zimmerman argues that the United States should not summarily condemn other countries for failing to establish and maintain internationally recognized worker rights. James M. Zimmerman, *The Overseas Private Investment Corporation and Worker Rights: The Loss of Role Models for Employment Standards in the Foreign Workplace*, 14 HASTINGS INT'L & COMP. L. REV. 603 (1991) [hereinafter Zimmerman, *OPIC and Worker Rights*].

25. GÖTE HANSSON, *SOCIAL CLAUSES AND INTERNATIONAL TRADE: AN ECONOMIC ANALYSIS OF LABOUR STANDARDS IN TRADE POLICY* 22 (1983). The Havana Charter to the International Trade Organization (ITO), founded in 1948, included a labor rights clause. *Id.*; *Havana Charter for an International Trade Organization and Final Act and Related Documents*, U.N. Conference on Trade and Employment, art. 7, ch. 2, U.N. Doc. ICITO/1/4 (1948). The refusal of the United States to ratify the Havana Charter dissolved the impetus of the ITO, and thus facilitated its failure. See also Theresa A. Amato, *Labor Rights Conditionality: United States Trade Legislation and the International Trade Order*, 65 N.Y.U. L. REV. 79, 93-96 (1990) (discussing

efforts of the United States, the GATT Uruguay Round negotiations did not yield a consensus on labor rights violations.²⁶

Consequently, the International Labour Organization (ILO)²⁷ remains the only worldwide multilateral forum²⁸ where the recognition of worker rights can be pursued.²⁹ While the ILO is instrumental in establishing international standards and defining labor rights,³⁰ it does not pos-

attempts of the United States to introduce a working party on labor rights in the GATT institutional framework).

26. 19 U.S.C. § 2901(14) (1988). The United States incorporated labor rights as a negotiating objective in the Uruguay Round in the Omnibus Trade and Competitiveness Act of 1988. *Id.* The primary negotiating objectives with respect to worker rights include: 1) promoting respect for worker rights; 2) reviewing the relationship of worker rights to the objectives and articles of GATT with the purpose of securing the benefits of free trade to all workers; and 3) to adopt as a GATT principle that a country cannot gain a competitive advantage through the denial of worker rights. *Id.* Currently, the United States is the primary proponent of creating a GATT working party to investigate labor rights violations. Resistance to this effort resulted in the lack of a labor rights clause in the WTO.

But see James F. Smith, *NAFTA and Human Rights: A Necessary Linkage*, 27 U.C. DAVIS L. REV. 793, 806-12 (1994) (discussing the resistance of the United States to unconditional ratification of multilateral human rights commitments embodied in various United Nations human rights conventions and conventions of the Organization of American States (OAS)). Smith outlines the "illusory nature" of the recent ratification, combined with extensive reservations, by the United States of three International Labour Organization (ILO) Conventions: the Genocide Convention; the Torture Convention; and the International Covenant on Civil and Political Rights. *Id.* at 824-33.

27. THE INTERNATIONAL LABOR ORG., BACKGROUNDER ¶ 1 (Sept. 1991). The ILO, first established in 1919, is a section of the United Nations that promulgates conventions and recommendations which embody international labor standards. *Id.* The ILO, recognizing that progress in economic productivity is not commensurate with progress in social harmonization, adheres to the philosophy that "development is not a purely economic concept but that its purpose is fundamentally social and human in character and that economic development cannot automatically ensure social progress." INTERNATIONAL LABOUR OFFICE, THE IMPACT OF INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS 8 (1976).

28. *See generally* Lance Compa, *Labor Rights and Labor Standards in International Trade*, 25 LAW & POL'Y INT'L BUS. 165 (1993) (providing a comprehensive discussion of possible forums for labor rights advocates to seek vindication of worker rights internationally and domestically).

29. Stephen I. Schlossberg, *United States' Participation in the ILO: Redefining the Role*, 11 COMP. LAB. L.J. 48, 55-56 (1989). Although ILO Recommendations are non-binding instruments, ILO Conventions are binding on those members who have ratified that particular Convention. *Id.* at 57-59.

30. *See* Michelle E. Gorden, Comment, *Haitian Forced Labor in the Dominican*

sess the remedial power to impose sanctions.³¹ Although the use of "minilateral" or regional free trade agreements is an increasingly utilized phenomenon,³² the Side Agreement on Labor³³ of the North American Free Trade Agreement (NAFTA) does not establish enforceable international standards by which to measure or redress labor rights abuses.³⁴ Hence, the GSP program remains a viable alternative to ameliorating the prevalent labor abuses in developing countries.

This Note will examine the worker rights provisions embodied in the United States GSP program. Part II discusses the origin of the GSP in the United States and the incorporation of labor rights as a prerequisite

Republic, 15 COMP. LAB. L.J. 206, 238 (1994) (describing the role of the ILO in the creation of international standards of labor rights and development policies).

31. Lee Sweptson, *Human Rights Complaint Procedures of the International Labour Organization*, GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 99, 102 (Hurst Hannum ed., 2d ed. 1992). The ILO has a comprehensive supervisory mechanism which monitors member countries' compliance with the various Conventions. *Id.* According to Zimmerman, "the ILO is the only organization devoted to employment issues that has both the experience and the institutional framework by which to regulate international labor practices." ZIMMERMAN, EXTRATERRITORIAL EMPLOYMENT STANDARDS, *supra* note 24, at 179. Compa notes that the leverage of the ILO "is limited to exhortation and censure." Lance Compa, *International Labor Standards and Instruments of Recourse For Working Women*, 17 YALE J. INT'L L. 151, 152 (1992). Furthermore, Theresa Amato claims that:

[t]he United States prefers GATT to the ILO because GATT may afford a method of sanctioning through trade that the ILO cannot provide; however, the United States' choice of GATT leads critics to view this choice of forum as a mechanism more apt to stress the economic rather than humanitarian aspects of linking worker rights to trade.

Amato, *supra* note 25, at 121.

32. See C.A. Primo Braga & Alexander J. Yeats, *Minilateral and Managed Trade in the Post-Uruguay Round World*, 3 MINN. J. GLOBAL TRADE 231, 245 (1994) (discussing the dissatisfaction with and deficiencies of multilateral trade negotiations and the impetus toward negotiating "minilateral" trade arrangements to achieve trade liberalization in regional trade blocs). Experience under the North American Free Trade Agreement (NAFTA) labor side agreement has proved unsatisfactory. See Lance Compa, *International Labor Rights and The Sovereignty Question: NAFTA and Guatemala, Two Case Studies*, 9 AM. U. J. INT'L L. & POL'Y 117, 133-35 (1993) (critiquing the NAFTA labor side agreement and its failure to establish binding international labor standards).

33. See North American Agreement on Labor Cooperation Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, Sept. 13, 1993, art. 2, 32 I.L.M. 1499, (containing the finalized agreement of the NAFTA parties on labor).

34. See Compa, *supra* note 32, at 133-35 (critiquing the NAFTA Labor Side Agreement and its preservation of sovereignty in establishing labor standards).

for obtaining beneficiary status for developing countries. Part III examines the enforcement structure of the GSP program, analyzing the review procedure and the substantial barriers erected that prevent enforcement of the GSP program in conformance with the purported congressional intent. Part IV discusses Guatemala's experience under the review process of the GSP and analyzes the effectiveness of the probationary "continuing review" procedure. Part V proposes necessary substantive and administrative changes that should be adopted in the future reauthorization of the GSP program.

I. THE UNITED STATES AND THE GSP

A. ORIGIN OF THE GSP

In the United States, the GSP program grants preferential duty-free tariff treatment to specifically designated "beneficiary developing countries."³⁵ The concept of GSP originated in 1964 at the United Nations Conference on Trade and Development (UNCTAD), during which time developing countries expressed a desire to reduce their dependency on foreign aid and stimulate their economies by increasing exports and generating foreign exchange.³⁶ The unilateral extension of trade concessions to lesser developed countries³⁷ is consonant with GATT under the "Special and Differential" approach designed to augment the economic growth of developing nations.³⁸

35. 19 U.S.C. §§ 2461-2466 (1988). Statutory authority for the United States GSP program is set forth in Title V of the Trade Act of 1974, as amended by the GSP Renewal Act of 1984. *Id.* The United States became the 19th developed market economy to implement a GSP program in 1976. U.S. DEPT. OF STATE, GIST: GENERALIZED SYSTEM OF PREFERENCES 1 (Dept of State Dispatch, Sept. 2, 1991).

36. See GSP RENEWAL ACT OF 1984, H.R. REP. NO. 1090, 98th Cong., 2d Sess. 11 (1984), reprinted in 1984 U.S.C.C.A.N. 4910, 5101 (discussing the development of the concept of GSP); Bartram S. Brown, *Developing Countries in the International Trade Order*, 14 N. ILL. U. L. REV. 347, 354 (1994) (discussing the adoption of GSP by GATT members in 1971).

37. H.R. REP. NO. 1090, *supra* note 36, at 11. The House Ways and Means Committee describes the original purpose of the GSP program:

As initially conceived, GSP systems were to be: (1) temporary, unilateral grants of preferences by developed countries to developing countries; (2) designed to extend benefits to sectors of developing countries which were not competitive internationally; and (3) designed to include safeguard mechanisms to protect domestic industries sensitive to import competition from articles receiving preferential tariff treatment.

Id.

38. See Kele Onyejekwe, *GATT, Agriculture, and Developing Countries*, 17

B. EVOLUTION OF THE GSP PROGRAM IN THE UNITED STATES

1. Initial Enactment in the 1974 Trade Act

The GSP program, as originally authorized by Title V of the 1974 Trade Act, provided developing countries "fair and reasonable access" into the United States market for certain eligible products.³⁹ In addition to product eligibility criteria,⁴⁰ the statute delineated threshold requirements that must be met in order for a country to qualify for beneficiary status.⁴¹ The statutory scheme of the 1974 Act is tailored to allow only those countries that demonstrate economic need to achieve and maintain beneficiary status.⁴²

HAMLIN L. REV. 77, 95 (1993) (noting that the term "Special and Differential" derives from the 1973 Tokyo Round Declaration, and in practice means that developing countries are allowed to protect their domestic markets more than developed countries). GATT first implemented the GSP in June 1971, by waiving the Most Favored Nation (MFN) Principle for 10 years. *Id.*; Waivers: Generalized System of Preferences, Decision of 25 June 1971, 18 GENERAL AGREEMENTS ON TARIFFS AND TRADE, BASIC INSTRUMENTS & SELECTED DOCUMENTS 24 (1972) [hereinafter BISD]. In 1979, GATT permanently established the GSP as a preferential treatment scheme for developing countries that does not contravene the MFN Principle. Differential and More Favorable Treatment Reciprocity and Fuller Participation of Developing Countries, Decision of 28 Nov. 1979, 26 BISD 203 (1980).

39. Pub. L. No. 93-618, 88 Stat. 2066 (1975) (codified at 19 U.S.C. §§ 2461-2466 (1980)).

40. 19 U.S.C. § 2463 (1980).

41. *Id.* § 2462(b)(1)-(6). In its original enactment, the GSP statute prevented the President from designating a developing country a beneficiary under GSP if the country: 1) is a Communist country; 2) is a member of the Organization of Petroleum Exporting Countries; 3) adversely affects United States commerce by affording preferential treatment to the products of another developed country; 4) has nationalized, expropriated, or seized ownership of property of United States citizens; 5) does not cooperate with the United States in controlling international narcotics trafficking; or 6) did not act in good faith in enforcing or recognizing arbitral awards rendered in favor of United States citizens. *Id.* Amendments in 1976 imposed the additional requirement that the President could not designate a country as a beneficiary under GSP if that country aids or abets international terrorists. *Id.* § 2462(b)(7).

42. H.R. REP. NO. 1090, *supra* note 36, at 11. The GSP program, as envisioned by GATT members and the United States, is designed to serve as an interim program to boost the economic competitiveness and global integration of developing countries. *Id.* The United States GSP program incorporates the principles of "graduation" and "competitive needs limitations"; countries and products can be "graduated" from the GSP program pursuant to section 2464, which provides that "[t]he President may withdraw, suspend, or limit the application of the duty-free treatment . . ." 19 U.S.C. § 2464 (1980). In addition, the "competitive need limit" provision automati-

The original GSP statute proved unsatisfactory, as it became apparent that the benefits of the GSP program flowed directly to "narrow privileged elites" in a small portion of the newly industrialized countries.⁴³ Evidence accumulated demonstrating that the duty-free treatment of imports into the United States provided a powerful incentive for United States industries to relocate to beneficiary developing countries in order to minimize production costs.⁴⁴ The absence of fundamental worker rights in developing countries strengthened the inducement to relocate.⁴⁵ The United States Congress proactively implemented various pieces of "social dumping"⁴⁶ legislation to combat against the developing

cally suspends a product's eligibility under GSP for a particular country if that product is deemed "competitive." *Id.* § 2464(c). The President is required to consider, in his decision to suspend or limit GSP benefits according to principles of graduation or competitive need limits, among other factors, "whether or not such country has taken or is taking steps to afford workers in that country (including any designated zone in that country) internationally recognized worker rights." *Id.* §§ 2464(a)(1), 2462(c)(7). As a protectionist measure, section 2463(c) lists statutorily-excluded import-sensitive items. *Id.* § 2463(c). According to the General Accounting Office (GAO), "[r]estrictions on GSP benefits have been enacted due to the need to balance benefits provided to BDCs [beneficiary developing countries] with concerns over the impact on domestic interests." UNITED STATES GEN. ACCOUNTING OFFICE, INTERNATIONAL TRADE: ASSESSMENT OF THE GENERALIZED SYSTEM OF PREFERENCES PROGRAM 50 (1994) [hereinafter GAO ASSESSMENT].

43. H.R. REP. NO. 1090, *supra* note 36, at 11. See Brown, *supra* note 36, at 352 (reporting that in 1987, 60 percent of the benefits of GSP flowed to the "Four Tigers" of Asia: Hong Kong, South Korea, Taiwan, and Singapore).

44. H.R. REP. NO. 1090, *supra* note 36, at 11. With the globalization of markets, labor costs became critical in calculating maximum profitability for United States industries. See Karl A. Hofstetter & Richard A. Klubeck, *Accommodating Labor and Community Interests in Mass Dismissals: A Transnational Approach*, 9 INDUST. REL. L.J. 451, 474-75 (1987) (discussing the repercussions in the United States and abroad of capital "hypermobility," plant relocations, and the use of such tactics to gain concessions from American workers).

45. H.R. REP. NO. 1090, *supra* note 36, at 11. The theory of comparative advantage provides the primary rationale for the international division of labor whereby developed countries participate in the more capital-intensive stages of production and developing countries provide the labor-intensive assembly. KURT PETERSEN, *THE MAQUILADORA REVOLUTION IN GUATEMALA* 6 (1992). This exchange of resources is facilitated by the respective governments. See Susanna Peters, Comment, *Mexican Labor Law From Three Perspectives: The Constitution, The Trade Unions, and The Maquiladoras: Labor Law For the Maquiladoras: Choosing Between Workers' Rights and Foreign Investment*, 11 COMP. LAB. L. 226, 228 (1989) (discussing Mexico's liberal trade policy, as evidenced by "incentive packages" that encourage foreign investment in manufacturing for export).

46. Philip Alston, *Labor Rights Provisions in U.S. Trade Law: "Aggressive*

countries' policy of exploiting labor as a comparative advantage in trade.⁴⁷ The rationales behind these initiatives range from a genuine

Unilateralism?", 15 HUM. RTS. Q. 1, 2 n.2 (1993). Philip Alston defines "social dumping" as "the practice of relying upon low 'social' costs . . . to produce goods that can then be sold in another market at a price which is well below the cost of production in that market, primarily because producers in that market would not be permitted to tolerate such low social standards." *Id.* But see Amato, *supra* note 25, at 83 n.21 (noting that the term "social dumping" legislation is actually a misnomer in that the goods are more costly, not in terms of market price in the foreign market, but in terms of the price of the exploitation borne by the workers).

47. See Amato, *supra* note 25, at 82-83 (documenting the "social dumping" legislation enacted in response to the flux of capital movement to countries that deny basic worker rights).

The Caribbean Basic Economic Recovery Act (CBERA) grants duty free status to exports from the Caribbean Basin on a more extensive basis than under the GSP. 19 U.S.C. §§ 2701-06 (1988). The CBERA is the first legislation to incorporate labor rights conditionality, originally requiring the President, when determining beneficiary status, to consider "the degree to which workers in such country are afforded reasonable workplace conditions and enjoy the right to organize and bargain collectively." Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67, § 212(c)(8), 97 Stat. 384, 387 (1983). The GSP provides duty free treatment to developing countries that meet eligibility criteria, including respect for "internationally recognized worker rights." 19 U.S.C. §§ 2461-66 (1988). The Customs and Trade Act of 1990 amended the CBERA so that the labor rights provision comported with the GSP standards. Customs and Trade Act of 1990, 19 U.S.C.A. § 2702(c)(8) (West Supp. 1991).

The Overseas Private Investment Corporation (OPIC) program provides insurance for overseas investments to countries that meet certain eligibility standards. 22 U.S.C. §§ 2191-2200 (1988). In 1985, Congress incorporated "internationally recognized worker rights" criterion as an eligibility requirement. Overseas Private Investment Corporation Amendments Act of 1985, Pub. L. No. 99-204, § 5, 99 Stat. 1669, 1670 (1985) (codified at 22 U.S.C. § 2191(a) (1988)). CBERA and OPIC do not have their own mechanisms for review, rather, the determinations of the GSP Subcommittee are adopted.

The Multilateral Investment Guarantee Agency (MIGA) is an international development organization that insures investments in host countries against political risks and provides technical assistance to countries desiring to encourage foreign investment. Convention Establishing the Multilateral Investment Guarantee Agency, Oct. 11, 1985, art. II, 24 I.L.M. 1605, *reprinted in* IBRAHIM F.I. SHIHATA, MULTILATERAL INVESTMENT GUARANTEE AGENCY AND FOREIGN INVESTMENT 356 (1988). In the United States, the MIGA Act requires that countries receiving investment guarantees adhere to internationally recognized worker rights. 22 U.S.C. §§ 290k-2 to 290k-3 (1988).

Section 301 of the Trade Act of 1974, as amended by the Omnibus Trade and Competitiveness Act of 1988, allows the imposition of retaliatory economic sanctions on any country trading with the United States that engages in unfair trade practices, defined to include worker rights violations. 19 U.S.C. § 2411(d)(3)(B)(iii) (1988).

concern for oppressed workers abroad to protection of United States domestic industries.⁴⁸

2. The GSP Renewal Act of 1984

The Trade and Tariff Act of 1984, which reauthorized the GSP, addressed the trade perversion experienced under the original act and introduced protectionist mechanisms which further restricted the availability of GSP trade benefits to potential developing countries.⁴⁹ Amendments to the GSP program limited preferential access to the United States market according to the principle that "trade, rather than aid"⁵⁰ will enable developing countries to compete in the global economy through

48. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, HUMAN RIGHTS AND U.S. FOREIGN POLICY 38 (1992) (discussing the dichotomy of economic and moral justifications for labor rights conditionality). While moral rationales invoke the improvement of worker rights in countries that do not maintain worker rights as a justification for conditionality, the economic rationale "seeks to reverse 'social dumping,' the economic advantage obtained by countries utilizing cheap labor to lower their production costs." *Id.*

See GAO ASSESSMENT, *supra* note 42, at 97 (outlining the opposing positions in the controversy over worker rights conditionality in the GSP). Beneficiary developing countries regard the conditions as penalties, particularly because other GSP programs have not incorporated workers rights conditionality. *Id.* at 100. Beneficiaries under GSP resent this new conditionality in a trade instrument created under the auspices of nonreciprocity and designed to promote developing countries' economic competitiveness. *Id.* Worker rights advocates contend that conditionality is necessary in order to achieve parallel development in the social and political spheres, so that sustainable economic growth can be realized. *Id.* at 101.

49. 19 U.S.C. §§ 2461-2466 (1988); see *infra* notes 54-56 and accompanying text (discussing labor rights conditionality in the GSP statute).

50. Statement of Purpose for GSP Renewal Act, Pub. L. 98-573, § 501(b), 98 Stat. 3019 (1984). The first four purposes set forth by the GSP Renewal Act of 1984 are as follows:

- (1) promote the development of developing countries, which often need temporary preferential advantages to compete effectively with industrialized countries;
- (2) promote the notion that trade, rather than aid, is a more effective and cost-efficient way of promoting broad-based sustained economic development;
- (3) take advantage of the fact that developing countries provide the fastest growing markets for US exports and that foreign exchange earnings from trade with such countries through the GSP can further stimulate US exports;
- (4) allow for the consideration of the fact that there are significant differences among developing countries with respect to their general development and international competitiveness.

Id.

export expansion.⁵¹ The magnitude of the world debt crisis influenced the protectionist stance adopted by the United States in its trade policy.⁵² Accordingly, the GSP Renewal Act incorporates several provisions that curtail the availability of the GSP benefits to countries that demonstrate advanced economic competitiveness.⁵³

C. LABOR RIGHTS CONDITIONALITY

Cushioning itself in trade liberalization rhetoric, the new GSP program presented new obstacles for potential beneficiary countries to hurdle.⁵⁴ The most contentious impediment to beneficiary status is the labor rights clause.⁵⁵ The reauthorization of the GSP program added stricter eligibility criteria for beneficiary developing countries, stipulating that a beneficiary country respect "internationally recognized workers' rights."⁵⁶ The

51. *Id.*

52. See EDWARD J. RAY, U.S. PROTECTIONISM AND THE WORLD DEBT CRISIS 146 (1989) (noting that the debt crisis did not exist during the original enactment of the GSP in 1974).

53. See *supra* note 42 and accompanying text (discussing statutory limitations exempting countries that achieve certain levels of economic competitiveness from beneficiary status).

54. 19 U.S.C. § 2462 (1988). A per capita gross national product (GNP) limit excludes countries from beneficiary status if the GNP exceeds the statutory ceiling of \$5,000. *Id.* § 2464(c)(3)(D)(ii)(I).

55. *Id.* § 2462(b)(7). The most controversial addition is the eligibility requirement that countries must respect worker rights. *Id.*; see GAO ASSESSMENT, *supra* note 42, at 100 (reporting that there is more resistance to the labor rights provision than to the intellectual property provision). An intellectual property provision requires that the President, in determining whether to confer beneficiary status, "shall take into account . . . the extent to which such country is providing adequate and effective means under its laws for foreign nationals to secure, to exercise, and to enforce exclusive rights in intellectual property, including patents, trademarks, and copyrights." 19 U.S.C. § 2462(c)(5) (1988). The United States GAO suggests that the intellectual property provision provokes less contention because the link between trade policy and commercial policy is directly quantifiable, whereas the link between trade policy and labor rights is harder to measure. GAO ASSESSMENT, *supra* note 42, at 101.

56. 19 U.S.C. § 2462 (b)(7) (1988). The reauthorization of the GSP in 1984 incorporated a worker rights provision as a specific criterion in the designation of a beneficiary developing country: "[t]he President shall not designate any country a beneficiary developing country . . . if such country has not taken or is not taking steps to afford internationally recognized workers' rights to workers in the country (including any designated zone in that country)." *Id.*

With respect to the withdrawal or suspension of beneficiary status, "[t]he President shall . . . withdraw or suspend the designation of any country as a beneficiary

United States Congress employs the term "internationally recognized worker rights" to signify and establish the following five essential labor rights: 1) freedom of association; 2) the right to organize and bargain collectively; 3) prohibitions on the use of forced or compulsory labor; 4) a minimum age for employment; and 5) acceptable conditions of work, including minimum wages and hours, and occupational safety and health.⁵⁷ The first three of these "internationally recognized worker rights" are fundamental human rights defined by the ILO.⁵⁸ The fourth and fifth rights, while not considered fundamental human rights by the ILO, are supported by various ILO Conventions.⁵⁹

developing country if, after such designation, he determines that as the result of changed circumstances such country would be barred from designation as a beneficiary developing country" *Id.* § 2464(b). Despite the mandatory language, the failure to enforce worker rights "shall not prevent the designation of any country as a beneficiary developing country under this section if the President determines that such designation will be in the national economic interest of the United States." *Id.* § 2462(b)(7). This escape clause effectively converts the worker rights provision into a discretionary exercise.

The worker rights provision of section 301, embodied in the Omnibus Trade and Competitiveness Act of 1988, contains stricter language, providing that a country is in compliance if "the foreign country has taken, or is taking, actions that demonstrate a significant and tangible overall advancement in providing throughout the foreign country [internationally recognized worker rights]." 19 U.S.C. § 2411(d)(3)(c)(1) (1988).

57. *Id.* § 2462(a)(4).

58. Convention Concerning Freedom of Association and Protection of Right to Organise (Convention No. 87), *entered into force* July 4, 1950, *reprinted in* INTERNATIONAL LABOUR ORGANISATION, INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS: 1919-1981, at 4 (1982) [hereinafter ILO CONVENTIONS]; Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (Convention No. 98), *entered into force* July 18, 1950, *reprinted in* ILO CONVENTIONS, *supra*, at 7; The Convention Concerning Forced or Compulsory Labour (Convention No. 29) *entered into force* May 1, 1932, *reprinted in* ILO CONVENTIONS, *supra*, at 29; Convention Concerning the Abolition of Forced Labour (Convention No. 105) *entered into force* Jan. 17, 1959, *reprinted in* ILO CONVENTIONS, *supra*, at 39; See Stephen I. Schlossberg, *United States' Participation in the ILO: Redefining the Role*, 11 COMP. LAB. L.J. 48, 79-80 (1989) (discussing the implementation of ILO labor standards by the United States GSP program). Ironically, the United States has not ratified either Convention 87 on the freedom of association or Convention 98 on the right to organize and to bargain collectively with employers. Schlossberg, *supra*, at 77. The only ILO Convention ratified by the United States that addresses fundamental human rights defined by the ILO is the convention concerning forced labor. Convention Concerning the Abolition of Forced Labour (Convention No. 105), *entered into force* Jan. 17, 1959, *reprinted in* ILO CONVENTIONS, *supra*, at 618.

59. Convention Concerning Occupational Safety and Health and the Working

The United States Congress thus determined that a country should not reap the benefits of this preferential trade program by exploiting labor.⁶⁰ When a developing country is allowed to abuse its workforce, the benefits under GSP accrue to the business community at the direct expense of suppressed workers. Theories of comparative advantage in free trade falter when confronted with the egregious oppression of labor as an exploitable resource. Therefore, the rationale is that developing countries should not be allowed to exploit labor as a comparative advantage.⁶¹

1. Lack of International Consensus

Even though "internationally recognized worker rights" are derived from ILO Conventions, the GSP statutory language does not provide any guidance as to how the five delineated rights are to be interpreted and which body of international jurisprudence is to be applied when evaluating a country's compliance with the labor rights mandate.⁶² Additional-

Environment (Convention No. 155) *entered into force* Aug. 11, 1983, *reprinted in* ILO CONVENTIONS, *supra* note 58, at 350; Convention Concerning Minimum Age for Admission to Employment (Convention No. 138), *entered into force* June 19, 1976, *reprinted in* ILO CONVENTIONS, *supra* note 58, at 730; Convention Concerning Minimum Wage Fixing, with Special Reference to Developing Countries (Convention No. 138), *entered into force* Apr. 29, 1972, *reprinted in* ILO CONVENTIONS, *supra* note 58, at 230; Convention Concerning Weekly Rest in Commerce and Offices (Convention No. 106), *entered into force* Mar. 4, 1959, *reprinted in* ILO CONVENTIONS, *supra* note 58, at 304; Convention Concerning the Application of the Weekly Rest in Industrial Undertakings (Convention No. 14), *entered into force* June 19, 1923, *reprinted in* ILO CONVENTIONS, *supra* note 58, at 301.

60. H.R. REP. NO. 1090, *supra* note 36, at 11. The House Ways and Means Committee, in adopting the labor rights conditions into GSP, stated that:

[P]romoting respect for the internationally recognized rights of workers is an important means for ensuring that the broadest sectors of the population benefit from the GSP program The denial of internationally recognized workers' rights in developing countries tends to perpetuate poverty, to limit the benefits of economic development and growth to narrow privileged elites, and to sow the seeds of social instability and political rebellion.

Id.

61. See Michael S. Barr et al., *Labor and Environmental Rights in the Proposed Mexico-United States Free Trade Agreement*, 14 Hous. J. INT'L L. 1, 27-28 (1991) (discussing worker rights provisions as a countervailing measure against a developing countries' exploitation of its workforce to induce foreign investment).

62. 19 U.S.C. § 2462(4) (1988). While the rights embodied in the GSP statute derive from ILO Conventions, the President is not required to refer to standards adopted by the ILO in furtherance of these rights. *Id.*; see Alston, *supra* note 46, at 7

ly, the United States is viewed as imposing unilaterally developed standards that lack international consensus and legitimacy.⁶³ Critically, the list of "internationally recognized worker rights" does not include the principle of non-discrimination.⁶⁴

Furthermore, the GSP statute fails to differentiate between the relative weights accorded to the five worker rights.⁶⁵ Thus, it is unclear whether all five rights are absolute rights that may not be abrogated by any country.⁶⁶ Whether these rights are mere standards that can fluctuate relative to a country's particular level of development is an additional area of contention.⁶⁷

(stating that the GSP statute "carefully eschews any reference to the ILO standards per se"). For example, the GSP Subcommittee refuses to recognize human rights violations against unionists as a violation of worker rights. *See infra* note 101 and accompanying text (discussing the GSP Subcommittee's practice of dismissing allegations of violence against Guatemalan union leaders as human rights violations). This distinction is in direct contravention of the ILO's standards regarding the freedom of association. *See* Alston, *supra* note 46, at 12 (noting that the GSP Subcommittee adopts a narrower interpretation of the freedom of association than the ILO in distinguishing between human rights and labor rights). Furthermore, the GSP statute does not require referral to any "international" standards in evaluating the respect or denial of the five "internationally recognized worker rights." 19 U.S.C. § 2462(4) (1988).

63. *See* Alston, *supra* note 46, at 11-12 (discussing the lack of international consensus in the interpretation of the "internationally recognized worker rights"); Amato, *supra* note 25, at 121-22 (discussing the possible implications of the United States unilateral definition of "internationally recognized worker rights").

64. *See* Karen F. Travis, *Women in Global Production and Worker Rights Provisions in U.S. Trade Laws*, 17 YALE J. INT'L L. 173, 177 (1992) (noting that there is a conspicuous absence of the fundamental right to equal opportunity and treatment); Compa, *supra* note 28, at 164 (critiquing the lack of non-discrimination as an internationally recognized worker right); Alston, *supra* note 46, at 7 (stating that the list of workers' rights is artificially restricted in that it does not include the principle of non-discrimination, which is necessary to combat not only gender and race discrimination, but also oppression on the basis of ethnicity or political beliefs); *see also* GSP Renewal Bill, *supra* note 23, § 3 (1993) (proposing the inclusion of non-discrimination as a right recognized under the GSP); H.R. 5136, 98th Cong., 2d Sess. (1984).

65. 19 U.S.C. § 2462(4) (1988).

66. *See* Travis, *supra* note 64, at 178-79 (discussing whether these rights are deemed absolute or relative); Compa, *supra* note 28, at 165 (distinguishing between unconditional rights, which include the right of association and freedom from forced labor, and rights that are dependent upon a country's level of development, which include minimum wages, hours, and standards of employment).

67. H.R. REP. NO. 1090, *supra* note 36, at 11. The legislative history of the GSP Renewal Act of 1984 suggests that a country's level of economic and social development should be taken into account when evaluating the labor situation. *Id.* The

2. "Taking Steps" Standard

The standard of adherence to internationally recognized worker rights is whether the beneficiary country is "taking steps" to afford these fundamental worker rights, rather than full compliance.⁶⁸ While "steps" may be difficult to quantify in definitive terms, neither the GSP statute⁶⁹ nor the Regulations of the United States Trade Representative (USTR)⁷⁰ provide any guidance as to what actions constitute "taking steps" toward the recognition of labor rights. Elaboration on this standard may be found in the legislative history to the Overseas Private Investment Corporation (OPIC) Amendment Act of 1985.⁷¹ The OPIC Amendment Act limits extension of insurance and financing to private investors in countries that are "taking steps to adopt and implement laws that extend internationally recognized worker rights . . . to workers in that country"⁷² An explanation of what may constitute "internationally recognized worker rights" is set forth in the House Foreign Affairs Committee Report, which specifies that a country should be found in compliance if that country: 1) is a member of ILO and a signatory to the ILO Constitution; 2) has laws conforming to one or more of the delineated worker rights; 3) and demonstrates continued progress in implementing the worker rights.⁷³

Committee on Ways and Means recognized that developing countries should not be judged according to the labor standards prevailing in the developed countries. *Id.* Furthermore, the Committee noted "that acceptable minimum standards may vary from country to country." *Id.*

68. 19 U.S.C. § 2462(b)(7) (1988).

69. *Id.*

70. Regulations of the USTR Pertaining to Eligibility of Articles and Countries for the Generalized System of Preferences Program, 15 C.F.R. § 2007.0 to 2007.7 (1995).

71. Pub. L. No. 99-204, 99 Stat. 1670 (1985) (codified at 22 U.S.C.A. § 2191 (West Supp. 1988)).

72. 22 U.S.C. § 2191a(a)(1) (1988). "Internationally recognized worker rights" are defined by reference to GSP Renewal Act. *Id.*

73. H.R. REP. NO. 285, 99th Cong., 1st Sess. 6, *reprinted in* 1985 U.S.C.C.A.N. 2572, 2577.

II. ENFORCEMENT OF THE LABOR RIGHTS MANDATE

A. STRUCTURE AND ADMINISTRATION OF THE REVIEW PROCESS

Although the President has the ultimate authority to enforce the GSP program,⁷⁴ the GSP Subcommittee of the Trade Policy Staff Committee (TPSC)⁷⁵ administers the program.⁷⁶ The GSP renewal statute provides three types of reviews. First, the President is required to conduct a General Review "[n]ot later than January 4, 1987, and periodically thereafter" of both eligible articles and beneficiary countries.⁷⁷ To date, the President has conducted only one General Review.⁷⁸ Second, pursuant to the acceptance of requests submitted by interested parties, the GSP Subcommittee conducts Annual Reviews to ascertain the eligibility of countries and products.⁷⁹ Third, the President may revoke unilaterally

74. 19 U.S.C. §§ 2461-2466 (1988).

75. LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 48, at 2. The Trade Policy Staff Committee (TPSC) consists of members of the Departments of State, Labor, Agriculture, Commerce, Treasury, and the United States Trade Representative (USTR). *Id.* The Trade Expansion Act of 1962 first established the Office of the USTR as the "Special Representative for Trade Negotiations." Trade Expansion Act of 1962, § 241, Pub. L. No. 87-794, 76 Stat. 872, 878 (1962). The Omnibus Trade and Competitiveness Act of 1988 broadened and codified the duties of the USTR. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (codified at 19 U.S.C. §§ 2411-2416 (1988)).

76. 15 C.F.R. § 2007.2(a)(2) (1995).

77. 19 U.S.C. § 2464(c)(a)(A) (1988).

78. Memorandum of January 2, 1987: Actions Concerning the Generalized System of Preferences, 52 Fed. Reg. 389 (1987). The GSP Subcommittee conducted the first General Review during 1985 and 1986. *Id.*

79. 19 U.S.C. §§ 2461-2466 (1988). The GSP statute does not provide any guidance on how the review process is to be administered. *Id.* The USTR Regulations, promulgated pursuant to the GSP statute, specifies the technical details of the petition and review process. 15 C.F.R. §§ 2007-2007.8 (1995). The Annual Review process, as defined by the USTR Regulations, is the mechanism for reviewing the addition or deletion of products and countries pursuant to requests for review which are submitted by independent parties. *Id.* §§ 2007(a), 2007(b). The USTR Regulations detail the timetable for submission of requests for review, hearings, and final decisions of the Annual Review process. *Id.* § 2007.3.

The GSP Subcommittee has the discretion to accept or deny petitions to review the worker rights situation in the challenged country. PETER DORMAN, BUREAU OF INTERNATIONAL LABOR AFFAIRS, U.S. DEP'T. OF LABOR, WORKER RIGHTS AND U.S. TRADE POLICY: AN EVALUATION OF WORKER RIGHTS CONDITIONALITY UNDER THE GENERALIZED SYSTEM OF PREFERENCES 5 (1989). This policy effectively shifts the burden on to the petitioner to establish a *prima facie* case for review. *Id.*

the beneficiary status of any country that fails to recognize worker rights.⁸⁰

If a petition is accepted for review, the GSP Subcommittee conducts an investigation⁸¹ to determine whether a beneficiary developing country's labor rights violations are sufficiently egregious to warrant revocation of GSP status.⁸² Yet, while a country is under review, its status as a beneficiary under GSP remains intact. At the expiration of the review period, the USTR may elect to either extend the review, resulting in a probationary "continuing review;"⁸³ withdraw the country as a beneficiary under GSP because of pervasive and unaddressed labor rights violations; or terminate review status, determining that the country is in compliance with the mandates of GSP, and thus its status as a beneficiary is no longer in jeopardy. The common practice of extending the review of a country which is not deemed to be in compliance with the mandates of the labor rights provision is neither intended by Congress nor contemplated by the GSP statute or the USTR Regulations.⁸⁴

80. 19 U.S.C. § 2464(a) (1988). The USTR Regulations also allow for the TPSC to initiate a review. 15 C.F.R. § 2007(f) (1995). This discretionary authority has never been exercised by the President or the TPSC.

81. See FAY LYLE, BUREAU OF INTERNATIONAL LABOR AFFAIRS, U.S. DEP'T. OF LABOR, WORKER RIGHTS IN U.S. POLICY 9 (1991) (noting that petitions which are accepted for review are considered along with the United States Department of State's annual Human Rights Reports, reports from United States embassies, and ILO findings).

82. 15 C.F.R. § 2007.2(f) (1995). According to the USTR Regulations, the GSP Subcommittee conducts the first level of review and reports to the TPSC. *Id.* The TPSC considers the results of the GSP Subcommittee's review and conducts further review if necessary. *Id.* § 2007.2(g). The TPSC then prepares recommendations to the President, which are first submitted to the USTR. *Id.* The USTR, after reviewing the findings of the TPSC and the Trade Policy Committee (TPC), makes the ultimate recommendations to the President on any action to be taken. *Id.*

83. 15 C.F.R. § 2006.6 (1995); 19 U.S.C. §§ 2461-2466 (1988). The probationary continuing review period, adopted in practice by the GSP Subcommittee, has no basis in the GSP Renewal Act or the USTR Regulations. *Id.*; see Amato, *supra* note 25, at 117-18 (discussing the USTR's justification for extending the review of worker rights in Chile).

84. 15 C.F.R. § 2006.6 (1995); 19 U.S.C. §§ 2461-2466 (1988).

B. LIMITATIONS ON THE ACCESSIBILITY OF THE REVIEW PROCESS

1. "Substantial New Information" Standard

The USTR Regulations permit "any person" to "file a request to have the GSP status of any eligible beneficiary developing country reviewed with respect to any of the designation criteria."⁸⁵ Many labor rights advocates utilize the GSP petition and review process as a mechanism for redressing worker rights violations internationally.⁸⁶ Even though the TPSC has the authority to initiate a review on its own motion,⁸⁷ the TPSC has not exercised this discretion.

While the USTR Regulations provide for broad standing to petition the GSP Subcommittee,⁸⁸ several limitations serve to diffuse the availability of the review process. The USTR Regulations require that if the GSP Subcommittee previously considered a petition to review worker rights in a specific country, a new petition must present "substantial new information" in order to be reconsidered.⁸⁹ This standard applies whether the GSP Subcommittee accepted a previous petition for review and found the country under investigation to be in compliance, or rejected the petition for not demonstrating a labor rights violation under GSP.⁹⁰ In cases where a beneficiary country's promises for improvement pursuant to previous review periods remain unfulfilled, this policy forecloses further review of worker rights violations. Thus, labor rights violations from previous years remain unaddressed, and the beneficiary developing country's status remains securely intact, despite such intentional and negligent evasion.⁹¹ According to the GSP Director, as of late 1994, the "new information" standard is being interpreted more

85. 15 C.F.R. § 2007(b) (1995).

86. See Compa, *supra* note 28, at 175 (explaining that labor rights advocates utilize the GSP as a forum for redressing the exploitation of workers abroad).

87. 15 C.F.R. § 2007(f) (1995).

88. 15 C.F.R. § 2007(b) (1995).

89. 15 C.F.R. § 2007(b) (1995). For a request for review of product or country eligibility, the Regulations provide that "[i]f the subject matter of the request has been reviewed pursuant to a previous request, the request must include substantial new information warranting further consideration of the issue." *Id.* Requests for modifications in the list of eligible articles considered previously "must include either new information which indicates changed circumstances or a rebuttal of the factors supporting the denial of the previous request". 15 C.F.R. § 2007.1(a)(4) (1995).

90. GAO ASSESSMENT, *supra* note 42, at 101.

91. *Id.* at 10, 110.

broadly so that a country's nonfulfillment of past promises may constitute "new information."⁹²

2. Denial of Judicial Review

Furthermore, while "any person" may petition the GSP Subcommittee to investigate labor rights violations, both labor rights and human rights advocates are denied standing to seek judicial enforcement of the worker rights provision of the GSP program.⁹³ In 1990, twenty-three labor and human rights activists filed suit in the United States District Court for the District of Columbia against the President of the United States and other government officials alleging failure to enforce the GSP labor rights provisions according to congressional intent.⁹⁴ Both the District Court and the United States Circuit Court for the District of Columbia dismissed the case on various jurisdictional grounds, thereby avoiding a determination based on the merits of the case.⁹⁵ More importantly, however, is that the Circuit Court ruled that the labor groups and the human rights groups lacked standing to pursue an action challenging the administration of the GSP statute.⁹⁶ Circuit Judge David Sentelle found that the human rights groups did not meet the first threshold of standing or the personal injury requirement.⁹⁷ The court states, in contrast, that the labor organizations do meet the first criterion of standing in their allegations of injury.⁹⁸ The court concludes that the causal connection,

92. *Id.* at 111. The GAO proposes that the new information standard should be amended to clarify that evidence demonstrating a lack of promised improvements is new information for purposes of submitting a petition. *Id.* The GAO notes that "[t]he concept of making progress to meet international standards is at the heart of GSP country practice provisions; it is especially critical for worker rights, given the 'taking steps' language in the statute." *Id.* at 125.

93. *International Labor Rights Educ. and Research Fund v. Bush*, 752 F. Supp. 490 (D.D.C. 1990), *aff'd per curiam*, 954 F.2d 745 (D.C. Cir. 1992); *see also* *Florsheim Shoe Co. v. United States*, 744 F.2d 787, 795 (Fed. Cir. 1984) (holding that the President's determinations under the GSP program are not subject to judicial review).

94. *Bush*, 752 F. Supp. at 490.

95. *Bush*, 954 F.2d at 746. Judge Karen Henderson ruled that the Court of International Trade has exclusive jurisdiction over the subject matter. *Id.* Judge David Sentelle found that the plaintiffs lacked standing to bring the action. *Id.* at 748.

96. *Id.* at 748 (Sentelle, J., concurring).

97. *International Labor Rights Educ. and Research Fund v. Bush*, 752 F. Supp. 490 (D.D.C. 1990), *aff'd per curiam*, 954 F.2d 745, 750 (D.C. Cir. 1992) (Sentelle, J., concurring).

98. *Bush*, 954 F.2d at 750 (Sentelle, J., concurring).

however, between the alleged injury and the granting of beneficiary trade status under GSP is "at best a tenuous one."⁹⁹ Chief Judge Abner Mikva, in his dissent, concedes that while the human rights groups lack standing, the labor rights groups do have standing, and further argues that Congress specifically addresses the connection between trade benefits and injury in the GSP statute.¹⁰⁰

3. Tactics Foreclosing Review

Other less transparent standards and devices employed by the GSP Subcommittee in its review procedure serve to weaken the mandatory language of the GSP statute. One such device is the policy of dismissing allegations of abuse and violence directed at labor leaders and unionists by characterizing the allegations as human rights violations, and therefore beyond the realm of GSP protection.¹⁰¹ This policy creates a dichotomous inequity by assuming that labor rights violations are not human rights violations. Secondly, the GSP Subcommittee repeatedly rebuts information in petitions with reports from United States embassies, rendering the petition a complaint that can be summarily dismissed for failure to state a claim, without investigating the veracity of the allegations.¹⁰²

99. *Id.*

100. *Id.* at 756 (Mikva, C.J., dissenting). Mikva concludes that the policy behind the labor rights clause is to remove incentives for United States firms to relocate or to extract unfair concessions from workers in the United States. *Id.*

101. See GAO ASSESSMENT, *supra* note 42, at 109 (stating that the GSP Subcommittee classifies the murder of a trade union activist as a human rights violation rather than a workers rights violation, and therefore is outside the purview of GSP); DORMAN, *supra* note 79, at 7 (reporting that the GSP Subcommittee will not classify the murder of a union member as a labor rights violation unless the violence resulted from a specified range of labor activities); see also Petition/Request For Review of the GSP Status of Guatemala Under GSP Worker Rights Provisions 3 (June 2, 1992) [hereinafter 1992 Petition] (on file with *The American University of International Journal of Law and Policy*) (explaining that the GSP Subcommittee consistently rejected allegations of violence toward unionists on the grounds that violence is endemic in Guatemala and there was no causal link between the violence and the victim's union activity).

102. See GENERALIZED SYSTEM OF PREFERENCES SUBCOMM. OF THE TRADE POLICY STAFF COMM., 1990 GSP ANNUAL REVIEW 6-7 [hereinafter 1990 ANNUAL REVIEW] (illustrating the GSP Subcommittee's policy of rebutting petitioners' allegations with information provided by embassy reports).

III. THE GUATEMALAN LABOR CRISIS: BATTLING AGAINST IMPUNITY

A. A PARADIGM OF REPRESSION

In the decade following the Second World War, the labor movement in Guatemala prospered¹⁰³ and workers secured protective legislation establishing a minimum wage and social insurance.¹⁰⁴ The military coup in 1954, sponsored by the United States Central Intelligence Agency,¹⁰⁵ signified the demise of the organized labor movement and effectively curtailed any further hope for protection of the labor force.¹⁰⁶ For the past forty years, the military and military-controlled civilian governments of Guatemala suppressed the organized labor movement¹⁰⁷ as the wealthy elite reasserted power.¹⁰⁸ Repression of the

103. See JAMES HANDY, *GIFT OF THE DEVIL: HISTORY OF GUATEMALA* 124-25 (1984) (reporting the increase in union membership and activity following the Second World War); Compa, *supra* note 32, at 136 (discussing the relative stability enjoyed by Guatemalan workers during this period).

104. See JUAN CARLOS ZARATE, *FORGING DEMOCRACY: A COMPARATIVE STUDY OF THE EFFECTS OF U.S. FOREIGN POLICY ON CENTRAL AMERICAN DEMOCRATIZATION* 57-58 (1994) (discussing the progressive socioeconomic program of President Juan Jose Arevalo, elected in 1945). Reforms included a comprehensive social security program and labor code, which protected organized labor and helped to raise the standard of living for both the urban and rural laborers. *Id.* The Labor Code promulgated in 1947 explicitly recognized unions in the public and private sectors and extended the right to strike. JAMES A. GOLDSTON, *SHATTERED HOPE: GUATEMALAN WORKERS AND THE PROMISE OF DEMOCRACY* 7 (1989).

105. ZARATE, *supra* note 104, at 55-57. The United States covertly enabled the overthrow of democratically elected Jacobo Arbenz Guzman in an effort to secure the power of the oligarchy. *Id.* at 56.

106. *Id.* at 61. One of the consequences of the United States intervention and backing of the 1954 coup is the loss of the socioeconomic reforms gained under President Arevalo. *Id.* Repression of the labor and social movements included numerous assassinations of labor activists. *Id.*; see Compa, *supra* note 32, at 138 (discussing the impact of the 1954 coup on the labor movement); STEPHEN SCHLESINGER & STEPHEN KINZER, *BITTER FRUIT: THE UNTOLD STORY OF THE AMERICAN COUP IN GUATEMALA* 28 (1982) (explaining the decline of the labor movement after the 1954 coup).

107. See Compa, *supra* note 32, at 145 (discussing the violent repression of labor in the past four decades); GOLDSTON, *supra* note 104, at 5-9 (discussing the patterns of labor suppression in Guatemala).

108. See Compa, *supra* note 32, at 140 (discussing the non-enforcement of protective labor legislation to bolster the economically privileged at the expense of the labor force); GOLDSTON, *supra* note 104, at 147-54 (discussing the lack of protection afforded to the workers and the failure to enforce the labor laws).

labor movement and chronic social inequities, legacies of the 1954 coup,¹⁰⁹ persevered in Guatemala into the 1990s¹¹⁰ as a product of the export-led economic model that favors foreign investment at the expense of a more equitable distribution system.¹¹¹ Today, the frequency of mass killings of labor leaders has declined and workers exercise limited political freedom.¹¹² Nevertheless, assassinations, violence, and harassment continue to occur at an alarming rate.¹¹³

Currently, Guatemala is an extremely polarized society, with eighty percent of the population residing in rural areas.¹¹⁴ Of approximately 2.9 million workers in Guatemala, it is estimated that only seven percent of the working population belong to unions.¹¹⁵

B. BENEFICIARY STATUS UNDER THE GSP

In the first General Review, conducted in 1986 to 1987 pursuant to the GSP Renewal Act,¹¹⁶ the GSP Subcommittee found Guatemala in compliance with the labor rights provision.¹¹⁷ For five consecutive years, from 1987 to 1991, the USTR rejected petitions filed by various

109. See EDELBERTO TORRES-RIVAS, PRESENTATION BY THE PROSECUTOR, GUATEMALA: TYRANNY ON TRIAL 14-15 (1984) (discussing the Guatemalan government's repression of the labor movement in its establishment of an industrial sector in the 1960s).

110. ZARATE, *supra* note 104, at 61.

111. *Id.*; see KURT PETERSEN, THE MAQUILADORA REVOLUTION IN GUATEMALA 23 (1992) (discussing the government's legislative pursuit of an export-led economic development strategy, which promotes foreign investment through incentives).

112. GOLDSTON, *supra* note 104, at 11.

113. See *supra* notes 1-18 and accompanying text (describing the Empresa Exacta incident); Petition Against the Republic of Guatemala, *supra* note 1 (documenting continued acts of violence and the persistent repression of union activity); LAWYERS COMMITTEE FOR HUMAN RIGHTS, ABANDONING THE VICTIMS: THE UN ADVISORY SERVICES PROGRAM IN GUATEMALA 48 (1990) (reporting that unionists continue to be the principal victims of death threats, killings, and "disappearances").

114. LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 113, at 21.

115. IMCC, LABOR RELATIONS ANALYSIS 8-9 (May 1993) (report submitted to the United States Agency for International Development).

116. 19 U.S.C. § 2464(c)(2)(A) (1988). The AFL-CIO filed a petition for review under the General Review of 1987. See 1990 ANNUAL REVIEW, *supra* note 102, at 1. Although the GSP Subcommittee "accepted" the petition for review, it did so under the congressional mandate of section 2464(c)(2)(A), providing for a General Review. 1990 ANNUAL REVIEW, *supra* note 102, at 1.

117. Memorandum of January 2, 1987: Actions Concerning the Generalized System of Preferences, 52 Fed. Reg. 389 (1987).

American labor groups requesting review of the labor situation in Guatemala.¹¹⁸ The GSP Subcommittee rejected all five requests filed during the Annual Reviews of 1987 through 1991¹¹⁹ on the basis that the petitions failed to satisfy the informational requirements set forth in the USTR Regulations.¹²⁰

118. *Labor Groups Say They Will Ask USTR to Deny GSP Benefits to Guatemala*, 9 Int'l. Trade Rep. (BNA) No. 21, at 891 (May 20, 1992). The GSP rejected each petition notwithstanding detailed allegations of violence confirmed in the United States Department of State's Human Rights Reports. 1992 Petition, *supra* note 101, at 3. In 1990 and 1991, the GSP Subcommittee cited the introduction of a labor code reform bill in the Guatemalan Congress as evidence of "taking steps" toward the recognition of worker rights. *Id.* at 6; GENERALIZED SYSTEM OF PREFERENCES SUBCOMM. OF THE TRADE POLICY STAFF COMM., 1991 GSP ANNUAL REVIEW: WORKERS RIGHTS REVIEW SUMMARY, GUATEMALA 7 (Oct. 1991) [hereinafter 1991 ANNUAL REVIEW]; 1990 ANNUAL REVIEW, *supra* note 102, at 7-9. Each year, however, the reform bill did not pass in the Congress. 1992 Petition, *supra* note 101, at 7-8; *see also* Compa, *supra* note 32, at 151 (discussing the labor law reform bill and its failure to pass in Congress). The GSP Subcommittee also distinguished the assassinations of trade union activists as human rights violations, refusing to acknowledge the chronic labor rights abuses. 1992 Petition, *supra* note 101, at 3.

119. 1990 ANNUAL REVIEW, *supra* note 102, at 1. The AFL-CIO filed the first request for review under the Annual Review on June 1, 1987. *Id.* The International Labor Rights Education and Research Fund (ILRERF) filed a petition on June 1, 1988 as part of the 1988 Annual Review. *Id.* at 2. The United Electrical, Radio and Machine Workers of America filed the 1989 petition. *Id.* In 1990, Americas Watch and a group consisting of The Labor and Employment Committee of the National Lawyers Guild, the United Electrical, Radio & Machine Workers of America, and the ILRERF filed separate requests as part of the 1990 Annual Review. *Id.*

120. 1991 ANNUAL REVIEW, *supra* note 118, at 2. The GSP Subcommittee cites section 2007.2(a)(2) of the USTR Regulations, which provide in pertinent part:

If a request . . . does not conform to the requirements set forth above, or if the request does not provide sufficient information relevant to subsection 502(b) or 502(c) . . . to warrant review, or if it is clear from available information that the request does not fall within the criteria of subsection 502(b) or 502(c), the request shall not be accepted for review.

15 C.F.R. § 2007.2(a)(2) (1995).

In the 1991 GSP Annual Review, the GSP Subcommittee reports its assessment of the prior five requests:

Specifically, the Subcommittee found in each case that the petitions either 1) provided insufficient information relevant to the statutory provisions of the Trade Act of 1974, as amended, 2) failed to clearly demonstrate that the information provided fell within the criteria of those same statutory provisions, or 3) failed to present substantial new information warranting further consideration^o of the issue.

1991 ANNUAL REVIEW, *supra* note 118, at 2.

In June 1992, the AFL-CIO and ten labor, human rights, and religious groups filed two separate petitions with the USTR's office requesting review of Guatemala's labor situation.¹²¹ Similar to previous petitions, the 1992 labor rights petition cited continued violence, death threats, and intimidation directed at trade union activists, non-enforcement of existing minimum wage and hours, the widespread use of child labor, and the inadequacy of the Labor Code in vindicating worker rights.¹²² In August 1992, the GSP Subcommittee accepted the petitions for review of the labor situation in Guatemala.¹²³ The Guatemalan Congress responded to the scrutinization of the labor situation and the threatened revocation of GSP benefits by reforming the Labor Code for the first time in forty years.¹²⁴

1. GSP Leverage Realized in the Political Sphere

Economic leverage of GSP is acutely demonstrated by the events surrounding Jorge Serrano's coup d'état on May 25, 1993.¹²⁵ After Serrano assumed authoritarian powers, suspending the Congress and the judiciary, the United States responded swiftly by suspending all aid to Guatemala and threatening to revoke Guatemala's status as a beneficiary under GSP.¹²⁶ The business community in Guatemala, facing the threat

121. GENERALIZED SYSTEM OF PREFERENCES SUBCOMM. OF THE TRADE POLICY STAFF COMM., 1993 GSP ANNUAL REVIEW: WORKER RIGHTS REVIEW SUMMARY, GUATEMALA 1 (July, 1994) [hereinafter 1993 ANNUAL REVIEW].

122. Petition/Request For Review of the GSP Status of Guatemala Under GSP Worker Rights Provisions (June 2, 1992) (on file with *The American University Journal of International Law and Policy*).

123. See *U.S. May Probe Guatemala Labor Practices, Could Lead to End of Import Preferences*, Int'l. Trade Daily (BNA) (July 9, 1992) (reporting that, according to United States officials, the petitions would likely be accepted for review because they were "better written," with increased support from labor groups, and the Government of Guatemala failed to implement promises to reform the labor crisis). If the GSP Subcommittee found Guatemala in violation of the labor rights provisions of GSP, its status as a beneficiary developing country would have been terminated in July 1993. *Id.*

124. 1993 ANNUAL REVIEW, *supra* note 121, at 4.

125. See Compa, *supra* note 32, at 154 (discussing the GSP review of Guatemala as a "fortuitous policy instrument" utilized by the United States to influence the restoration of constitutional order in Guatemala).

126. See ZARATE, *supra* note 104, at 114-15 (reporting that the United States suspended \$50 million dollars in aid and threatened to revoke trade benefits under the GSP). The United States Department of State issued a statement advising that "trade benefits under the Generalized System of Preferences cannot be maintained in a coun-

of losing over \$200 million in trade benefits under the GSP, pressured Serrano to restore constitutional order.¹²⁷ The military, which initially announced support for the self-coup, advised Serrano that they could no longer support him¹²⁸ due to extreme opposition in the business and civilian sectors.¹²⁹ On June 5, 1993, the Guatemalan Congress reconvened and elected Ramiro de Leon Carpio, the Attorney General for Human Rights, as the new president.¹³⁰ The United States responded by restoring the aid programs and suspending the economic sanctions.¹³¹

2. "Continuing Review" and Deferring Action in 1993

In July, 1993, the GSP Subcommittee issued its determination with respect to the review of Guatemala initiated in August 1992, extending the review for six months "to allow the Government of Guatemala time to effect changes through enforcement of the laws."¹³² Initially, the

try where labor rights are not respected. Unless democracy is restored in Guatemala, GSP benefits are likely to be withdrawn." U.S. DEPT. OF STATE, DEPT. OF STATE DISPATCH (Statement of Richard Boucher, May 27, 1993).

127. *President Ousted in Guatemala Amid Celebration*, FIN. TIMES, June 2, 1993, at 7.

128. ZARATE, *supra* note 104, at 115. On June 1, 1993, Serrano abdicated his power. *Id.*; see Emily Gurnon, *Adios, Jorge; Jorge Serrano Elias, Former President of Guatemala*, 256 THE NATION, No. 25 at 892 (1993) (stating that "[t]here is widespread consensus that this threat was a major factor in the army's decision to devise a solution acceptable to the United States").

129. ZARATE, *supra* note 104, at 117. The unprecedented coalition of business interests, trade unions, and other social groups united with the common goal to force Serrano to abdicate. *Id.* Zarate notes that this mobilization of an otherwise dual society "showed that the ideal of democracy provided a common base from which a disparate population can coalesce and mend a polarized society." *Id.*

130. See Compa, *supra* note 32, at 156 (discussing the Serrano self-coup and subsequent election of Carpio as President of Guatemala); ZARATE, *supra* note 104, at 115 (reporting that the election of Carpio raised hopes both internationally and domestically because of Carpio's former capacity as the Attorney General for Human Rights).

131. William I. Robinson, *Guatemala's Failed Coup D'etat: Has the Clinton Administration Passed the Test?*, NOTISUR, July 9, 1993.

132. GENERALIZED SYSTEM OF PREFERENCES (GSP) SUBCOMM. OF THE TRADE POLICY STAFF COMM., 1992 GSP ANNUAL REVIEW, WORKER RIGHTS REVIEW SUMMARY, GUATEMALA 1 (July 1993) [hereinafter 1992 ANNUAL REVIEW]; see also Kantor *Announces Results of 1992 GSP Reviews: Emphasis on Worker Rights is Underscored*, PRESS RELEASE (Office of the United States Trade Representative), June 25, 1993, No. 93-42 (announcing the six-month "continuing review" of Guatemala's

Government of Guatemala addressed high-profile labor disputes to assuage any concern that the government espoused a national labor policy of systematic repression.¹³³ For example, when the GSP Subcommittee expressed concern over a February 19, 1993 decree to implement a ban on strikes by public employees,¹³⁴ the Guatemalan Congress quickly withdrew the decree.¹³⁵ The GSP Subcommittee lauded the enactment of the Labor Code in late 1992, citing this as an example of administrative reform.¹³⁶ Other positive actions cited include the recognition of

labor situation, during which period Guatemala would remain a beneficiary under GSP).

At this time, Mickey Kantor expressed a strong commitment to the expedient resolution of labor rights investigations, stating:

We are committed to vigorously implementing worker rights provisions of the GSP law, to ensure that countries which benefit from preferential U.S. trade treatment are making serious efforts to implement international labor norms. Short periods of review for these countries underscore the Administration's commitment to worker rights. We do not want to wait a full year before seeing these countries make progress in this important area.

Kantor Underscores Worker Rights in Announcing 1992 GSP Review Results, 10 Int'l Trade Rep., No. 26, at 1069 (June 30, 1993).

133. See IMCC, *supra* note 115, at 8-9 (reporting that the review of labor rights in Guatemala pursuant to GSP resulted in a "flurry" of remedial actions). To date, the most prominent actions include: initiatives taken by the Guatemalan Ministry of Labor to improve the labor inspection program, including the hiring of additional inspectors and the establishment of new regional inspection bureaus; the expansion of the labor court system; amendments to the Labor Code in November 1992; the ratification of a Tripartite Agreement between the government, unions, and the private sector, formalized on March 8, 1993; and pledging cooperation to improve labor relations. *Id.*

134. See 1993 ANNUAL REVIEW, *supra* note 121, at 3 (noting that the decree may be constitutionally overbroad and affect a broader number of public sector workers than ILO practices contemplate).

135. Stephen R. Coats & Lance A. Compa, Continuing Worker Rights Review: Guatemala, Testimony presented before the GSP Subcommittee 9 (Nov. 3, 1993) [hereinafter Testimony]. In their testimony before the USTR, Stephen Coats of U.S.-GLEP and Lance Compa of ILRERF noted that "a *backward* step on worker rights, followed by a return to the *status quo ante*, cannot be cited as evidence of progress on worker rights." (emphasis in original) *Id.*

136. 1992 ANNUAL REVIEW, *supra* note 132, at 2. The GSP Subcommittee noted with approval the addition of key provisions that directly affect union formation. *Id.* These provisions include the following: workers may not be dismissed for participation in union formation; the process of obtaining legal union recognition is simplified; maximum fines for labor code violations are increased substantially; the judicial process is expedited; and labor courts have increased ability to redress the dismissal of workers without just cause after negotiations have begun. *Id.*

the CAMOSA union at the Phillips Van Heusen maquila factory.¹³⁷ The Ministry of Labor authorized the CAMOSA union, which had been fighting for legal recognition since 1991, several weeks after the GSP Subcommittee placed Guatemala under review in August 1992.¹³⁸ CAMOSA reportedly has not been recognized by employers for purposes of bargaining.¹³⁹

3. Extension of Continuing Review: 1994 - 1995

In December 1993, the USTR determined once again that Guatemala's status under GSP should remain under continuing review for an additional six months.¹⁴⁰ After the six months expired in July 1994, the GSP Subcommittee again extended review for an additional ninety days, "to provide the [Government of Guatemala] some additional time to show that improved enforcement is occurring in practice."¹⁴¹ The GSP Subcommittee summarily addressed the issue of continued violence against unionists, stating that it "noted with regret reports of continuing acts of violence and threats of violence against trade unionists in 1994 . . . [and] it hopes that the GOG [Government of Guatemala] will take swift action to resolve these issues"¹⁴² The GSP Subcommittee favorably cited the Labor Code enacted in December 1992, noting "progress made by the Government of Guatemala in the past year to expand its labor law enforcement mechanisms."¹⁴³ Despite detailed allega-

137. 1992 ANNUAL REVIEW, *supra* note 132, at 4.

138. Anthony Murawski, *Challenging Guatemala's Labor Abuses*, MULTINAT'L MON., May 1993, at 6.

139. Testimony, *supra* note 135, at 4-5. In addition, three other companies cited delayed union recognition and bargaining and shut down their plants to avoid unionization. Legal union recognition came after the plant relocated. *Id.* at 5.

140. *Administration Cancels Reviews of Worker Rights in Paraguay, Costa Rica*, Int'l Bus. & Fin. Daily (BNA) (Dec. 29, 1993). Mickey Kantor states that "[w]e are committed to seeing that [the worker rights] provision is strictly enforced," but then added that "a failure to enact labor legislation that is in compliance with international standards at the earliest practical opportunity would constitute a serious setback to these GSP reviews." *Id.*

141. 1993 ANNUAL REVIEW, *supra* note 121, at 7. Mickey Kantor announced that "in those worker rights cases that we have continued, we want to reiterate our commitment to ensuring that the worker rights standard in the GSP law is met, and our desire for a quick resolution of outstanding issues." *USTR Announces 1993 GSP Review Results: 10 Additional Products Eligible for GSP*, Int'l Trade Daily (BNA) (July 6, 1994).

142. 1993 ANNUAL REVIEW, *supra* note 121, at 5.

143. *Id.*

tions of serious, systematic violations of each of the specified "internationally recognized worker rights," the GSP Subcommittee did not take any meaningful action toward Guatemala.

C. CONTINUING REVIEW: ERODING THE LEVERAGE OF GSP

The leverage that GSP can exert economically to influence worker rights erodes as a country is placed on a probationary "continuing review" period wherein the country is "monitored" for improvements in the labor sector. The mandatory language of the worker rights provisions of GSP loses legitimacy as an economic sanction when threats to revoke beneficiary status are illusory.

Economic sanctions can be a powerful instrument¹⁴⁴ in securing compliance with labor standards and as demonstrated by the events of the coup in 1993, can influence the political climate. Remedial measures taken by the Government of Guatemala, cited with approval by the GSP Subcommittee, are superficial and merely employed as evasive tactics to avoid the threatened trade sanctions and withdrawal of GSP eligibility.¹⁴⁵ These tactics compromise the enforcement value of the GSP program, converting the mandatory language to mere threats. Any appearance of substantive reform in the new Labor Code in 1992 proved largely cosmetic because the new law suffers from lax enforcement.¹⁴⁶

IV. RECOMMENDATIONS

A. ADMINISTRATIVE AND PROCEDURAL REFORM OF THE GSP REVIEW

1. Consolidated Review

The establishment of an administrative body to investigate compliance with internationally recognized worker rights provisions present in all

144. MICHAEL P. MALLOY, *ECONOMIC SANCTIONS AND U.S. TRADE* 12 (1990). Michael Malloy defines economic sanctions as "coercive economic measures taken against one or more countries to force a change in policies or at least to demonstrate a country's opinion about the other's policies." *Id.*

145. *See* Compa, *supra* note 32, at 165 (noting that the Government of Guatemala quickly resolved longstanding labor disputes and reformed the labor code in an effort to avoid sanctions).

146. DEPARTMENT OF STATE, *COUNTRY REPORTS ON ECONOMIC POLICY AND TRADE PRACTICES* 375 (1994). The State Department notes that "[t]he greatest obstacle to union organizing and collective bargaining is not the law, but the inability of the legal system to enforce the law." *Id.*

relevant United States trade instruments¹⁴⁷ would resolve many of the tensions under the current statutory scheme.¹⁴⁸ This body should be distinct from the Office of the USTR in order to de-politicize its findings with respect to a country's labor rights practices.¹⁴⁹ By coordinating the reviews of all United States trade instruments in one body, countries that do not recognize worker rights would have their beneficiary status revoked under all applicable trade instruments.¹⁵⁰ This consolidation would unify treatment under the various trade instruments and would streamline the review process.¹⁵¹ The administrative body, or "Labor Council," shall be responsible for promulgating the regulations necessary to implement the annual petition procedure and the automatic review.

2. Annual/Automatic Review

The Labor Council would issue annual reports on the labor practices of each country receiving preferential treatment under United States trade legislation. An automatic, annual review of the labor situation in the developing countries provides several advantages. First, automatic

147. See *supra* note 47 and accompanying text (listing United States trade instruments that incorporate worker rights conditionality).

148. See Mandel, *supra* note 24, at 478 (proposing the coordinated enforcement of GSP, OPIC, and section 301 regimes under a single administrative regime); DORMAN, *supra* note 79, at 16 (suggesting that GSP could be coordinated with other worker rights policy instruments).

149. *The Generalized System of Preferences: In a Rush to Import Trouble?: Hearing Before the Subcomm. on Gov't Information, Justice and Agric. of the House of Rep. Comm. on Gov't Operations*, 102d Cong., 2d Sess. 15 (1992) (statement of Rep. Nagle). Representative Nagle accused political agendas of certain personnel arguing that they interfered with the administration of the GSP program: "... the [GSP] Subcommittee has disregarded certain legal provisions that acknowledge that GSP can be harmful domestically, override ITC [International Trade Commission] advice, and set arbitrary decision making standards that are not supported by the law or administrative guidance pertaining to the law." *Id.*; see also Amato, *supra* note 25, at 116 (concluding that the pattern of dismissing petitions and extending reviews illustrates "the use of the GSP worker rights provision to sanction politically disfavored countries").

150. But see Zimmerman, *OPIC and Worker Rights*, *supra* note 24, at 617 (proposing an OPIC exemption from the worker rights provisions when investors voluntarily agree to comply with worker rights in a particular country).

151. Mandel, *supra* note 24, at 478-479. Mandel notes that coordination would foster efficiency, decrease bureaucratic waste, and simplify the review procedure by providing a single forum. *Id.* at 478.

review assures that the labor rights situation in each country is closely monitored and recorded.¹⁵² Annual documentation would enable the Labor Council to trace the development and progress of labor rights policies in each beneficiary developing country. Second, the accumulated information would enable the Labor Council to make informed decisions about the severity and history of labor rights abuses in a particular country. Third, an automatic review of all beneficiaries would remove the stigmatization and political humiliation associated with the review under the current regulatory scheme.

In addition, the Annual Review procedure implemented by the USTR Regulations¹⁵³ should remain in place, with some modifications. First, the review process for country eligibility, based on conformance to the worker rights provision and the intellectual property provision, should be separate from the review of product eligibility — a complex review procedure with a distinct set of standards, hearings, and issues.¹⁵⁴ Second, a petition requesting review of a country's labor practices should create a *prima facie* case for review, unless the petition is clearly frivolous.¹⁵⁵ Third, the current standard requiring the submission of "substantial new information," promulgated under the USTR Regulations, should be eliminated. Fourth, the determinations of the USTR should be subject to judicial review.¹⁵⁶

152. *But see* DORMAN, GSP EVALUATION, *supra* note 79, at 6 (stating that an automatic review procedure would dilute the remedial measures taken by a country during a review initiated by petition).

153. 15 C.F.R. § 2007 (1995); *see supra* notes 74-84 and accompanying text (describing the Annual Review process administered by the GSP Subcommittee).

154. GAO ASSESSMENT, *supra* note 42, at 105. The General Accounting Office reports that a review of "[c]ountry practice cases were fundamentally different [from product eligibility review] in that they involved changes in the internal practices of another sovereign nation and triggered government-to-government negotiations or representations." *Id.*

155. *See* GSP Renewal Bill, *supra* note 23, § 5 (requiring that a petition will be accepted for review unless the USTR issues a finding that the petition is frivolous). *But see* DORMAN, *supra* note 79, at 15 (proposing that each petition submitted should be automatically accepted for review). Automatic acceptance of petitions for review of a country's labor practices leaves the burden of establishing a case on the labor rights advocates in the United States. By instituting an automatic review of each country receiving preferential trade treatment under United States legislation, this shifts the initial burden to the Labor Council to detect labor rights violations.

156. *See supra* notes 96-103 and accompanying text (discussing the denial of judicial review); *see also* GSP Renewal Bill, *supra* note 23, § 5 (providing for judicial review of decisions of the USTR as final agency actions).

By retaining the Annual Review petitioning, any party can participate in the dialogue between the USTR, the GSP Subcommittee, and the Labor Council by filing petitions for review of the labor rights situation in a beneficiary country. An accepted petition, submitted by labor advocates and interested parties, would trigger an investigation into the labor practices of the named country. The investigation, conducted by the Labor Council, would utilize the annual reports, the submitted petition, the Department of State's Human Rights Reports, and representations of officials from the country under investigation to determine whether the country promotes respect for worker rights. These petitions would complement the automatic review conducted by the Labor Council and would serve as an additional source of information.

A finding of the Labor Council with respect to the recognition or denial of worker rights would be adopted by the GSP Subcommittee. At the end of a specified period, the country's status as a beneficiary under the GSP would be affirmed or revoked. The practice of extending review periods upon the expiration of the previous review period should be eliminated.¹⁵⁷ By extending the review period for more than three years, as is the case with Guatemala,¹⁵⁸ the threat of imposing economic sanctions becomes diluted. Furthermore, the automatic review would obviate the need for "continuing review" because the country's labor rights practices would be assessed annually.

3. Product-Specific Sanctions

To alleviate the tension in imposing the extreme economic sanction of revoking beneficiary status, the GSP program should allow sector-specific¹⁵⁹ or product-specific¹⁶⁰ suspension of GSP trade benefits.¹⁶¹ Product-based sanctions imposed against a beneficiary country are advantageous in several ways. First, suspending duty-free treatment against

157. *But see* DORMAN, *supra* note 79, at 16 (proposing that the continuing review period should be formally instituted as a probationary period).

158. *See supra* notes 132-43 and accompanying text (discussing the continued review of the labor rights situation in Guatemala since July 1992).

159. *See* DORMAN, *supra* note 79, at 15 (recommending that the labor rights provisions should attach to targeted sectors).

160. *See* Barr, *supra* note 61, at 42 (proposing the use of product-specific sanctions to reduce the stigma associated with the complete revocation of preferences under the GSP).

161. *See* Barr, *supra* note 61, at 41 (describing the disadvantages of "the blunt instrument of country removal from trade benefits").

a product serves the policy goals of the worker rights provision, targeting a specific industry without the political ramifications of the complete removal of a country from the GSP.¹⁶² Second, the Labor Council would be more likely to impose product-based sanctions because they are less of an overall indictment against the charged country.¹⁶³ Third, companies in the affected sector would have the economic incentive to redress labor rights abuses themselves and would pressure the government to actively comply with recognizing worker rights.

The Labor Council should be cognizant of the disadvantages posed by product-specific sanctions. For example, affected industries might feel unduly targeted. Choosing an appropriate product or sector entails a sensitive balance between the policies underlying the GSP statute and the risk of impingement of sovereignty and intrusion into domestic affairs.

4. Composition of the Labor Council

Candidates for membership in the Labor Council should be chosen from individuals in the legal profession, the judiciary, unions and other trade affiliations, labor scholars, and representatives of the business community. The Labor Council should be distinct from the Office of the USTR and should be closely aligned with the United States Department of Labor. Council members should be nominated and elected by Congress to serve six-year terms.

5. Advantages

As a permanent institution, the Labor Council would develop expertise in the evolution of international labor law standards and practices and the transnationalization of the world economy, becoming intimately familiar with the labor policy and socioeconomic forces of each country. By working closely with government and labor officials of beneficiary countries, the Labor Council would create an open dialogue which would facilitate the review process.

The establishment of a Labor Council properly places the authority to investigate labor abuses in a specialized body which is disassociated from politically and economically inspired bias. Furthermore, the benefi-

162. *Id.* at 42.

163. *Id.* at 43.

ciary countries may cultivate trust in a Labor Council, striving to achieve economic and social harmonization.

B. SUBSTANTIVE REFORM

1. Standards and Compliance

The worker rights conditionality should eliminate the ambiguous "taking steps" language and require complete conformance with "internationally recognized worker rights."¹⁶⁴ Furthermore, the list of internationally recognized worker rights should include the principle of non-discrimination.¹⁶⁵ The GSP statute should require that the internationally recognized worker rights are to be construed in accordance with ILO standards and jurisprudence,¹⁶⁶ and should provide distinct guidelines for interpreting these rights.¹⁶⁷ Application of ILO principles and international standards ensures that the worker rights provision is not applied arbitrarily.

2. Pursuit of International Consensus

To legitimize the authority of the Labor Council, the United States must take a number of actions. First, the United States should ratify the relevant ILO Conventions and Recommendations embodying fundamental

164. See GSP Renewal Bill, *supra* note 23, § 3 (proposing that the requirement should be "whether or not such country is in compliance with internationally recognized worker rights").

165. See *supra* note 64 and accompanying text (discussing the absence of the prohibition against discrimination).

166. See *supra* notes 62-67 and accompanying text (discussing the lack of international standards applied by the GSP Subcommittee in interpreting the scope of worker rights); see also GSP Renewal Bill, *supra* note 23, § 3 (requiring the USTR to apply ILO standards and standards relevant to workers in various international human rights instruments).

167. See GSP Renewal Bill, *supra* note 23, § 3 (requiring that compliance with worker rights shall be determined by evaluating: the existing labor laws of a country and the enforcement of those laws; findings of human rights organizations and the Department of State's Annual Human Rights Report; provisions in voluntary codes of conduct and collective bargaining agreements; and the opinions of academics).

worker rights.¹⁶⁸ Second, the list of "internationally recognized worker rights" must be reformulated with valid international consensus.

There are several possible approaches to establishing international harmonization of worker rights jurisprudence. The United States should harness the momentum created by the ILO in unifying international principles of worker rights. The Labor Council could conduct formal conferences with developing country beneficiaries to achieve international accord on realistic standards. The future establishment of a working party within the institutional framework of the WTO could contribute vastly to the task of harmonizing labor standards internationally.

CONCLUSION

Aggrieved workers suffer as a direct result of tariff preferences granted to developing countries under the GSP. GSP currently operates as a subsidy, allowing developing countries duty-free preferences to promote their economic development and open their markets so that they can participate in the globalization of the world economy and reap the benefits of free trade schemes. The United States recognized that this preferential scheme can ultimately be damaging to domestic workers and industries, luring corporations to relocate abroad where labor is an exploitable commodity. Thus, the United States amended the GSP statutory scheme to include certain internationally recognized worker rights.

Companies in host beneficiary countries specifically rely upon receiving duty-free tariff treatment for exports into the United States. If the labor rights clause of the GSP is not stringently enforced, this subsidization increases exploitation of the work force. GSP thus effectively rewards those businesses that operate at the expense of oppressed workers, by exporting GSP eligible articles into the United States without acknowledging worker rights. It is unconscionable to reward businesses duty-free treatment, and in turn condemn the laborers to continued repression solely to sustain and promote a developing country's economy. The comparative advantage of cheap and exploitable labor does not justify repression on this scale.

168. See Mandel, *supra* note 24, at 32 (noting that the credibility and persuasiveness of the United States would be heightened if the United States ratified the ILO Conventions on fundamental rights). Honorable Bernard Sanders defends the United States failure to ratify ILO Conventions on the basis that the standards elaborated in the ILO Conventions exist in the United States by virtue of statutes, and extensive case law. 140 CONG. REC. E1665-01 (1994). This rationale, therefore, suggests that there is no impetus for the United States to ratify the ILO Conventions. *Id.*