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THE EFFECTS OF WORKER RIGHTS PROTECTIONS IN UNITED STATES TRADE LAWS: A CASE STUDY OF EL SALVADOR

Benjamin N. Davis*

INTRODUCTION

During the 1980s, Congress enacted several laws requiring respect for worker rights as a condition of access to United States markets.¹ This legislation responded to concerns regarding unfair competition from countries that use political coercion to keep wages low by preventing workers from forming effective trade unions.²

Recently, the United States entered into two international agreements that set back the cause of worker rights. Neither the North American Free Trade Agreement (NAFTA),³ nor the agreement produced by the Uruguay Round of the General Agreement on Tariffs and Trade (GATT),⁴ contains substantive worker rights protections.⁵ These agree-

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1. See *infra* notes 8-19 and accompanying text (describing worker rights provisions in United States trade laws); see also Jorge F. Perez-Lopez, *Conditioning Trade on Foreign Labor Law: The U.S. Approach*, 9 COMP. LAB. L.J. 253, 254-59 (1988) [hereinafter Perez-Lopez, *Conditioning Trade*] (providing historical background on efforts to incorporate fair labor standards into United States trade laws).

2. See *infra* note 23 (describing Congressional preoccupation with economic competition from countries that violate worker rights).

3. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289, 605 (1993); see North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (implementing NAFTA in United States law).

4. General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125; see Uruguay Round Agreements Act, Pub. L. No. 103-465,

ments threaten to weaken the unilateral worker rights conditionality of existing trade laws. At the same time, worker rights advocates have introduced legislation in Congress to strengthen existing conditionality.⁶

This Comment analyzes the effectiveness of unilateral worker rights conditionality by focusing on one country, El Salvador, and one program, the Generalized System of Preferences (GSP).⁷ An examination of the impact of worker rights conditionality on Salvadoran law and practice can illuminate the legal, political, and economic debates over international worker rights.

Part I of this Comment describes the development of a legal framework that makes the benefits of United States trade laws conditional upon respect for worker rights. Part I also summarizes the economic, political, and legal debates over worker rights conditionality. Part II discusses the effects of El Salvador's history and labor laws on the current worker rights situation. Part III recounts the efforts of worker rights advocates in the United States and El Salvador to use the GSP

108 Stat. 4809 (1994) (implementing the Uruguay Round Agreements in United States law).

5. See Terry Collingsworth et al., *Time for a Global New Deal*, FOREIGN AFFAIRS, Jan.-Feb. 1994, at 9 [hereinafter Collingsworth et al., *New Deal*] (observing that multinational corporations have prevented the inclusion of labor standards in NAFTA, GATT, and the European Community Charter); Statement of the Labor Advisory Committee for Trade Negotiations and Trade Policy on the Uruguay Round of Multilateral Trade Negotiations, Jan. 15, 1994 (draft statement) [hereinafter Labor Advisory Comm.] (analyzing the Uruguay Round Agreements); IAN ROBINSON, NORTH AMERICAN TRADE AS IF DEMOCRACY MATTERED: WHAT'S WRONG WITH NAFTA & WHAT ARE ITS ALTERNATIVES? 37-46 (1993) (scrutinizing the NAFTA side agreement on labor rights); Robert F. Housman & Paul M. Orbuch, *Integrating Labor and Environmental Concerns into the North American Free Trade Agreement: A Look Back and a Look Ahead*, 8 AM. U. J. INT'L L. & POL'Y 719 (1993) (discussing the impact of NAFTA on workers in the United States and Mexico); see also 139 CONG. REC. H8770 (daily ed. Nov. 3, 1993) (statement of Rep. Gephardt) (arguing that NAFTA undermines worker rights protections in the Generalized System of Preferences). President Clinton recently stated his support for extending the provisions of NAFTA to the Caribbean Basin countries. Richard Lawrence, *Clinton Hints Support of Caribbean Trade Deal*, J. COMM., Dec. 1, 1993, at 4A.

6. See GSP Renewal and Reform Act of 1993, H.R. 3625, 103d Cong., 1st Sess. (1993) [hereinafter GSP Reform Bill] (proposing amendments to strengthen worker rights provisions of the Generalized System of Preferences).

7. See JOHN JACKSON, THE WORLD TRADING SYSTEM 278-79 (1989) [hereinafter JACKSON, WORLD TRADING SYSTEM] (noting that the GSP is an exception to the most-favored nation principle of GATT which authorizes industrialized countries to establish reduced tariff rates for imports from developing countries). The United States has implemented the GSP at 19 U.S.C. §§ 2461-66 (1988).

worker rights provisions to afford greater protection to Salvadoran workers. Part IV analyzes the impact of these efforts. Finally, Part V recommends improving the worker rights provisions of the GSP statute by toughening the substantive criteria for countries seeking access to the GSP program and clearing away procedural obstacles that currently impede removal of worker rights violators from the program.

I. WORKER RIGHTS IN UNITED STATES TRADE LAWS

A. LEGAL PROVISIONS

Statutory provisions conditioning United States trade and foreign assistance on respect for internationally-recognized worker rights⁸ are found in the Caribbean Basin Economic Recovery Act of 1983 (CBERA),⁹ the Generalized System of Preferences Renewal Act of 1984,¹⁰ the Over-

8. See U.S. DEP'T OF LABOR, BUREAU OF INT'L LABOR AFFAIRS, WORKER RIGHTS IN U.S. POLICY 20-31 (1991) (describing the principles of worker rights recognized in United States trade law as including freedom of association, the right to organize and bargain collectively, protection against forced labor, a minimum age of employment, and acceptable conditions of work). United States trade laws do not include non-discrimination on the basis of gender, race, or other criteria as a worker right. See Lance Compa, *International Labor Standards and Instruments of Recourse for Working Women*, 17 YALE J. INT'L L. 151, 164 (1992) [hereinafter Compa, *International Labor Standards*] (noting that current United States worker rights laws do not include anti-discrimination provisions); GSP Reform Bill, *supra* note 6, § 3 (1993) (proposing addition of non-discrimination as a worker right). Analysts often divide worker rights into two categories: fundamental worker rights (freedom of association, collective bargaining, forced labor, and discrimination), which are inviolable, and fair labor standards (child labor, acceptable conditions), which depend to some degree on a country's cultural practices and level of economic development. See COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1990, S. PRt. 102-5, 102d Cong., 1st Sess. 1693-94 (1991) [hereinafter 1990 STATE DEP'T REPORT] (stating that no flexibility is permitted with respect to basic labor rights standards, i.e. freedom of association, the right to organize and bargain collectively, prohibition of forced labor, and non-discrimination); Steve Charnovitz, *Fair Labor Standards and International Trade*, 20 J. WORLD TRADE L. 61, 69 (1986) [hereinafter Charnovitz, *Fair Labor Standards*] (arguing that fair labor standards should be determined by principles of voluntary choice in the labor market and universal minimum standards for working conditions).

9. Pub. L. No. 98-67, 97 Stat. 384 (codified at 19 U.S.C. §§ 2701-06 (1989)); see generally Perez-Lopez, *Conditioning Trade*, *supra* note 1, at 259-66 (describing CBERA worker rights criteria); Steve Charnovitz, *Caribbean Basin Initiative: Setting Labor Standards*, MONTHLY LAB. REV., Nov. 1984, at 54-56 (describing CBERA worker rights criteria).

10. Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 501, 98 Stat. 2948, 3018 (codified at 19 U.S.C. §§ 2461-66 (1988)); see Uruguay Round Agreements Act,

seas Private Investment Corporation (OPIC) Amendments Act,¹¹ the Comprehensive Anti-Apartheid Act of 1986,¹² the Multilateral Investment Guarantee Agency Act (MIGA),¹³ the Omnibus Trade and Competitiveness Act (OTCA) of 1988,¹⁴ the Andean Trade Preference Act of 1991,¹⁵ and foreign aid appropriations laws enacted in 1993,¹⁶ 1994,¹⁷ and 1995.¹⁸ In addition, the Trade Act of 1974 establishes

supra note 4, § 601, 108 Stat. at 4990 (extending the deadline for renewal of the United States GSP program from September 30, 1994 to July 31, 1995).

11. Pub. L. No. 99-204, § 5, 99 Stat. 1669, 1670 (1985) (codified at 22 U.S.C. § 2191 (1988)).

12. Pub. L. No. 99-440, §§ 207-08, 100 Stat. 1086 (1986) (codified at 22 U.S.C. §§ 5034-35 (1988)); *see* Perez-Lopez, *Conditioning Trade*, *supra* note 1, at 285-86 (explaining that, under the Comprehensive Anti-Apartheid Act of 1986, United States companies operating in South Africa are required to adhere to a code that includes respect for worker rights).

13. 22 U.S.C. § 290k-2 (1989). MIGA is a financing authority initiated by the World Bank. *See* Pub. L. No. 100-202, § 101(e), 101 Stat. 1329-131, 1329-134 (1987) (authorizing United States participation in MIGA and instructing the United States Executive Director of MIGA to seek adoption of a policy of refusing support to countries that violate internationally recognized worker rights); Jorge F. Perez-Lopez, *Worker Rights in the U.S. Omnibus Trade and Competitiveness Act*, LAB. L.J., Apr. 1990, at 222, 226-28 [hereinafter Perez-Lopez, *Worker Rights*] (explaining United States advocacy of worker rights in the MIGA).

14. Pub. L. No. 100-418, 102 Stat. 1107 (codified at 19 U.S.C. § 2411 (1989)); *see* Perez-Lopez, *Worker Rights*, *supra* note 13, at 222 (describing OTCA). Section 301 gives the President broad discretionary power to punish a country, or a specific product or industry, for worker rights violations that cause economic injury in the United States. *See also* Harlan Mandel, Note, *In Pursuit of the Missing Link: Int'l Worker Rights and Int'l Trade*, 27 COLUM. J. TRANSNAT'L L. 443, 466-69 (1989) [hereinafter *Missing Link*] (describing Section 301).

15. Pub. L. No. 102-182, § 203(c)(7), 105 Stat. 1233, 1238 (1991) (to be codified at 19 U.S.C. § 3202).

16. Foreign Operations, Export Financing, and Related Programs Appropriations Act, Pub. L. No. 102-391, § 599, 106 Stat. 1633, 1696 (1992) (prohibiting use of fiscal 1993 foreign assistance funds to support activities that contribute to violations of worker rights).

17. Foreign Operations, Export Financing and Related Programs Appropriations Act, Pub. L. No. 103-87, § 547, 107 Stat. 931, 959 (1993) (prohibiting use of fiscal 1994 foreign assistance funds to support activities that contribute to violations of worker rights). This legislation was enacted in response to revelations that United States aid dollars were being provided to promote relocation of firms from the United States to developing countries, using the promise of a union-free environment. *See* 138 CONG. REC. S15783-02 (1993) (statements of Sen. Byrd, Sen. Hollings, Sen. Shelby, Sen. Dodd, and Sen. Wellstone) (criticizing Agency for International Development [AID] funding of program to relocate manufacturing from the United States to

“the adoption of international fair labor standards” as a United States negotiating objective in the GATT.¹⁹

Of all these laws incorporating worker rights standards, the GSP worker rights provisions provide the strongest remedy.²⁰ Countries that are not “taking steps” to protect internationally recognized worker rights²¹

El Salvador); U.S. GENERAL ACCOUNTING OFFICE, FOREIGN ASSISTANCE: U.S. SUPPORT FOR CARIBBEAN BASIN ASSEMBLY INDUSTRIES 50-59 (1993) [hereinafter GAO REPORT] (assessing the impact of Section 599 on worker rights in Caribbean Basin nations); NATIONAL LABOR COMM. IN SUPPORT OF HUMAN & WORKER RIGHTS IN CENTRAL AM., PAYING TO LOSE OUR JOBS 59-62 (1992) [hereinafter PAYING TO LOSE OUR JOBS] (describing United States assistance to Salvadoran firms that blacklist union members). Even after Section 599 was enacted, AID funds continued to flow to the Salvadoran free trade zones. See NATIONAL LABOR COMM. EDUC. FUND IN SUPPORT OF WORKER & HUMAN RIGHTS IN CENTRAL AM., FREE TRADE'S HIDDEN SECRETS 17-18 (1993) [hereinafter FREE TRADE'S HIDDEN SECRETS] (revealing that AID spent \$8.9 million in 1993 to develop free trade zones in El Salvador); Tim Shorrock, *AID to Prohibit Funds for Projects that Cut U.S. Jobs*, J. COMM., Jan. 12, 1994, at 1A (reporting issuance of AID guidelines prohibiting any use of funds to finance projects that result in loss of jobs from the United States).

18. Foreign Operations, Export Financing, and Related Programs Appropriations Act, Pub. L. No. 103-306, § 1621, 108 Stat. 1608, 1634 (1994) (requiring United States Executive Directors of international financial institutions to advocate the adoption of policies to guarantee worker rights).

19. Trade Act of 1974, Pub. L. No. 93-618, § 121(a)(4), 88 Stat. 1986 (1974), amended by Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1101(b)(14), 102 Stat. 1107, 1125 (codified at 19 U.S.C. § 2901(b)(14) (1989) (setting forth the principal GATT negotiating objectives of the United States with regard to worker rights); see Perez-Lopez, *Conditioning Trade*, *supra* note 1, at 277-83 (describing United States efforts to incorporate worker rights conditionality into GATT); Theresa A. Amato, *Labor Rights Conditionality: United States Trade Legislation and the Int'l Trade Order*, 65 N.Y.U. L. REV. 79, 91-95 (1990) [hereinafter Amato, *Labor Rights Conditionality*] (recounting the failure of these efforts); Labor Advisory Comm., *supra* note 5 (characterizing the lack of worker rights standards as a “major shortcoming” of the Uruguay Round agreement).

20. Neither CBERA, which is geographically limited to the Caribbean region, nor OPIC contains procedures by which unions or human rights groups may petition for a country's removal. See 19 U.S.C. § 2702 (1989) (providing for withdrawal of CBERA benefits); 22 U.S.C. § 2291 (1989) (providing for withdrawal of OPIC benefits). In practice, a country that is suspended from GSP will be suspended from OPIC as well. See Perez-Lopez, *Worker Rights*, *supra* note 13, at 226 (noting that for countries in the GSP program, OPIC follows the presidential determination of compliance with the GSP worker rights criteria). While Section 301 does include such procedures, petitioners must demonstrate that the offending country's worker right violations burden or restrict United States commerce. See *Missing Link*, *supra* note 14, at 467 (explaining the injury test under Section 301).

21. See 19 U.S.C. § 2462(a)(4) (1988) (defining internationally recognized worker

may not legally participate in the GSP.²² Congress' purpose in incorporating worker rights language into the GSP was twofold: to improve conditions for workers in developing countries; and to slow the exodus of jobs from the United States.²³

The law allows any interested party to petition the United States Trade Representative (USTR) to remove a country with worker rights violation from the preference list.²⁴ Although the law also gives the USTR the power to initiate investigations, the USTR has never exercised this power.²⁵ After a public hearing by the GSP subcommittee,²⁶ the

rights as: "(a) the right of association; (b) the right to organize and bargain collectively; (c) a prohibition on the use of any form of forced or compulsory labor; (d) a minimum age for the employment of children; and (e) acceptable conditions with regard to minimum wages, hours of work, and occupational health").

22. See 19 U.S.C. § 2462(b) (1988) (stating that "[t]he President shall not designate any country a beneficiary developing country under this section . . . (7) 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)"); 19 U.S.C. § 2464(b) (1988) (requiring that "the President shall . . . withdraw or suspend the designation of any country if . . . as a result of changed circumstances such country would be barred from designation as a [beneficiary developing country]"). But see 19 U.S.C. 2462(b) (1988) (providing that a country that violates worker rights may qualify for GSP "if the President determines such designation will be in the national economic interest of the United States and reports such determination to the Congress with his reasons therefor").

23. See H.R. REP. NO. 98-1090, 98th Cong., 2d Sess. (1984) *reprinted in* 1984 U.S.C.C.A.N. 5101, 5111-12 [hereinafter HOUSE REPORT] (stating Congress's beliefs that "[t]he denial of internationally recognized worker rights in developing countries tend [sic] to perpetuate poverty, to limit the benefits of economic development and growth, [sic] to narrow privileged elites, and to sow the seeds of social instability and political rebellion," and that "the lack of basic rights for workers in many LDCs [less-developed countries] is a powerful inducement for capital flight and overseas production by U.S. industries").

24. 15 C.F.R. § 2007.0(a) (1993). Interested parties are not limited to parties with economic interests. See HOUSE REPORT, *supra* note 23, at 5125-26 (evincing Congressional intent that parties interested in protecting worker rights be granted equal participation in the GSP process with parties showing an economic interest, including an annual opportunity to submit testimony).

25. See 15 C.F.R. § 2007.0(f) (1993) (providing that the Trade Policy Staff Committee "may at any time, on its own motion, initiate any of the actions described in [the regulations creating the petitioning process]"); Terry Collingsworth, International Worker Rights Enforcement: Proposals Following a Test Case, at 7 n.19 [hereinafter Collingsworth, Worker Rights Enforcement] (on file with International Labor Rights Educ. & Research Fund (ILRERF)) (explaining that USTR has never initiated a review).

26. 15 C.F.R. § 2002.2(b)(4) (1993). The GSP Subcommittee is part of the Trade

USTR may suspend or revoke the GSP privileges of any beneficiary developing country that is not "taking steps" to afford internationally-recognized worker rights.²⁷ Since 1986, the USTR has removed or suspended ten countries from GSP eligibility for varying periods of time.²⁸

Critics argue that the GSP review process, in practice, suffers from serious substantive and procedural deficiencies.²⁹ Substantively, the USTR has adopted a broad definition of "taking steps"³⁰ and a narrow

Policy Staff Committee, comprising representatives of USTR, the Departments of Agriculture, Commerce, Defense, Interior, Labor, State, and Treasury, the Council on International Economic Policy, and, in a non-voting capacity, the International Trade Commission. 15 C.F.R. § 2002(a) (1993).

27. 19 U.S.C. § 2462(b)(7) (1988).

28. See Actions Concerning the Generalized System of Preferences, 52 Fed. Reg. 49,137 (1987) (suspending Chile); Actions Concerning the Generalized System of Preferences, 52 Fed. Reg. 389 (1987) (removing Romania and Nicaragua and suspending Paraguay); Actions Concerning the Generalized System of Preferences, 54 Fed. Reg. 15,357 (1989) (suspending Burma and the Central African Republic); Actions Concerning the Generalized System of Preferences, 55 Fed. Reg. 18,299 (1990) (suspending Liberia); Actions Concerning the Generalized System of Preferences, 56 Fed. Reg. 19,539 (1991) (suspending Sudan); Actions Concerning the Generalized System of Preferences, 57 Fed. Reg. 27,137 (1992) (suspending Syria); Actions Concerning the Generalized System of Preferences, 58 Fed. Reg. 34,861 (1992) (suspending Mauritania). Paraguay, Chile, and the Central African Republic, all removed from the GSP in 1987, were reinstated in 1991. 137 CONG. REC. S1888-89 (daily ed. Feb. 7, 1991). In addition, Ethiopia, China, and South Korea have been removed from OPIC because of worker rights violations. Compa, *International Labor Standards*, *supra* note 8, at 164-65.

29. See U.S. GENERAL ACCOUNTING OFFICE, INTERNATIONAL TRADE: ASSESSMENT OF THE GENERALIZED SYSTEM OF PREFERENCES PROGRAM 100-13 (1994) [hereinafter GSP ASSESSMENT] (summarizing criticisms of GSP country practice provisions); Collingsworth, Worker Rights Enforcement, *supra* note 25, at 5-21 (describing flaws in the GSP review process); PETER DORMAN, U.S. DEP'T OF LABOR, WORKER RIGHTS & U.S. TRADE POLICY: AN EVALUATION OF WORKER RIGHTS CONDITIONALITY UNDER THE GENERALIZED SYSTEM OF PREFERENCES 5-9 (1989) (summarizing criticisms of procedural and substantive practices of GSP worker rights reviews).

30. See DORMAN, *supra* note 29, at 8 (stating that, in practice, USTR has interpreted "taking steps" broadly to include countries' privately expressed assurances that they will respect worker rights as well as actual legal and administrative reforms). At least with respect to fundamental rights such as the freedom of association, Congress intended countries to be subject to review until they comply with absolute standards. See Collingsworth, Worker Rights Enforcement, *supra* note 25, at 12-13 & n.35 (arguing that under the GSP, statute countries must continue to take steps until they have fully complied with the worker rights standard); see also H.R. REP. NO. 285, 99th Cong., 2d Sess. 6, reprinted in 1985 U.S.C.C.A.N. 2572, 2577 (defining "taking steps" for purposes of OPIC to include whether the country "continues to make prog-

interpretation of "worker rights."³¹ While the USTR has found that even minimal progress constitutes "taking steps,"³² it has concluded that assassinations of union leaders are not worker rights violations.³³

The USTR has also created procedural obstacles to worker rights enforcement. First, the petitioning requirement shifts the enforcement burden from the USTR to worker rights advocates.³⁴ Second, the GSP subcommittee has refused to review, without explanation, petitions filed by worker rights advocates.³⁵ Third, the USTR created by regulation, with-

ress to implement internationally recognized worker rights"). With respect to labor standards that vary with the country's level of economic development, the variable nature of the right logically requires continuing review. See 130 CONG. REC. H-11574 (daily ed. Oct. 5, 1984) (remarking that the definition of worker rights should "be interpreted commensurate with the development level of the particular country"); 1990 STATE DEP'T REPORT, *supra* note 8, at 1694 (noting that countries are expected to take steps over time to achieve worker rights standards).

31. See GSP ASSESSMENT, *supra* note 29, at 109 (describing USTR's policy of distinguishing between worker rights and human rights violations); DORMAN, *supra* note 29, at 7-8 (discussing USTR's distinction between worker rights and human rights); Collingsworth, Worker Rights Enforcement, *supra* note 25, at 16-21 (criticizing USTR's failure to apply worker rights standards). In particular, the GSP Subcommittee has never taken official notice of the large body of caselaw and commentary provided by the Committee on Freedom of Association and the Committee of Experts of the International Labor Organization (ILO), although Congress apparently intended that ILO jurisprudence address the GSP worker rights standards. See HOUSE REPORT, *supra* note 23, at 5112 (stating Congress's intent that USTR apply ILO worker rights standards); 1990 STATE DEP'T REPORT, *supra* note 8, at 1693-94 (employing ILO standards to define scope of worker rights); GSP ASSESSMENT, *supra* note 29, at 99-100 (stating that the worker rights standards in GSP are those set by the ILO). It is unclear whether the Subcommittee's reliance on the testimony of an ILO expert in the 1993 El Salvador review hearing indicates a greater willingness to take account of ILO standards. See *infra* note 225 and accompanying text (describing ILO expert's testimony in GSP review hearing).

32. Collingsworth, Worker Rights Enforcement, *supra* note 25, at 8-15 (criticizing USTR's decision that although Malaysia did not allow freedom of association and collective bargaining, it would be considered to be "taking steps" under the GSP statute).

33. See DORMAN, *supra* note 29, at 7-8 (stating that USTR has consistently determined that abuses committed against unionists are not worker rights violations unless it is proven that the perpetrators intended to disrupt specific trade union activities); *infra* note 185 and accompanying text (applying the worker rights/human rights distinction to El Salvador).

34. Collingsworth, Worker Rights Enforcement, *supra* note 25, at 8.

35. See GSP ASSESSMENT, *supra* note 29, at 108 (demonstrating that of 80 worker rights petitions filed with USTR from 1985 to 1993, only 46 were accepted for review); DORMAN, *supra* note 29, at 5-6 (discussing USTR's discretionary review poli-

out statutory foundation, a requirement that rejects the subsequent review of a petition previously denied, unless the petitioners present "substantial new information."³⁶ Fourth, the USTR has placed countries "under review" rather than suspending them.³⁷ These practices have led many observers to conclude that the worker rights enforcement procedure is thoroughly politicized.³⁸

In 1990, a coalition of worker rights advocates³⁹ brought a lawsuit charging the President, the USTR, and other government officials with failure to enforce the statutory worker rights provisions of GSP.⁴⁰ The District Court dismissed the complaint, holding that section 701(a)(2) of the Administrative Procedure Act⁴¹ provided the agency with discretionary authority over worker rights provisions because they (1) were so vague that they gave the court "no law to apply"⁴² and (2) implicated the President's inherent foreign affairs powers.⁴³ The District of Columbia Circuit affirmed in a sharply divided opinion; one member of the panel relied on a jurisdictional argument rejected by the lower court⁴⁴

cy); Amato, *Labor Rights Conditionality*, *supra* note 19, at 116-17 (noting USTR's refusal to accept petitions filed on El Salvador in 1986, 1987, and 1988).

36. 15 C.F.R. §§ 2007.0(b)(5), 2007.1(a)(4) (1993); *see* GSP ASSESSMENT, *supra* note 29, at 107-09 (discussing the new information requirement); Collingsworth, *Worker Rights Enforcement*, *supra* note 25, at 11 (arguing that under USTR's interpretation of this provision, a country that makes minimal efforts to protect worker rights is effectively immunized from further scrutiny).

37. *See* Amato, *Labor Rights Conditionality*, *supra* note 19, at 116 n.253 (reporting worker rights advocates' assertion that placing countries on review undermines worker rights enforcement). *But see* DORMAN, *supra* note 29, at 5-7 (suggesting that mandatory review may reduce the United States Government's leverage depriving it of a graduated range of actions to pressure worker rights violators).

38. *See* Collingsworth, *Worker Rights Enforcement*, *supra* note 25, at 7 (concluding that the GSP Subcommittee "assumes the role of counsel to the beneficiary developing country"); *see also infra* note 65 and accompanying text (contending that worker rights laws are used to promote unrelated foreign policy objectives).

39. *See* Collingsworth, *Worker Rights Enforcement*, *supra* note 25, at 3 n.8 (listing the members of the coalition).

40. *International Labor Rights Educ. & Research Fund v. Bush*, 752 F. Supp. 495 (D.D.C. 1990) [*International Labor Rights II*], *aff'd by a divided opinion*, 954 F.2d 745 (D.C. Cir. 1992).

41. 5 U.S.C. § 701(a)(2) (1988).

42. *International Labor Rights II*, 752 F. Supp. at 497.

43. *See id.* at 498 (stating that the complaint strikes directly at the President's authority in a broad area of foreign relations).

44. *International Labor Rights Educ. & Research Fund v. Bush*, 752 F. Supp. 490 (1990) [*International Labor Rights I*] (finding that the United States District Court, not the Court of International Trade, was the proper forum to hear actions to

although conceded by the government on appeal,⁴⁵ another based his ruling on standing (an argument never raised on appeal by the government),⁴⁶ and the third member dissented.⁴⁷

B. POLICY DEBATES

Three principal positions emerge from the economic, political, and legal debates over worker rights conditions. The first position, which may be termed "low-wage internationalism," asserts the right of multinational corporations (MNCs) to relocate production from the United States to developing countries with lower labor standards.⁴⁸ The second position of "high-wage nationalism," urged by many United States unions, seeks to use worker rights provisions of trade laws to protect the jobs and living standards of workers in the United States.⁴⁹ Worker rights

enforce worker rights provisions of trade law).

45. See *International Labor Rights Educ. & Research Fund v. Bush*, 954 F.2d 745, 746 (1992) (Henderson, J., concurring) (asserting that Court of International Trade, not United States District Court, had jurisdiction).

46. See *id.* at 751 (Sentelle, J., concurring) (claiming that unions and human rights organizations could meet neither injury nor redressibility tests and therefore lacked standing).

47. See *id.* at 752 (Mikva, J., dissenting) (arguing that unions had standing to seek review and that their claim was justiciable).

48. See, e.g., Calman J. Cohen, *The Impact of Free Trade on Industry*, in *THE NORTH AMERICAN FREE TRADE AGREEMENT: LABOR, INDUSTRY, AND GOVERNMENT PERSPECTIVES* 81, 82 (Mario J. Bognanno & Kathryn J. Ready eds., 1993) (arguing that free trade causes United States firms to become more competitive).

49. See, e.g., Stephen Franklin, *Unions Urge Clinton to Renegotiate Trade Pact*, CHI. TRIB., Feb. 18, 1993, at Bus. 3 (recounting efforts by United States unions in industries that have suffered job losses to Mexico to impose conditions on United States-Mexico trade). The position of the main United States trade union center, the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO), is further complicated by its historical and fiscal links to cold war foreign policy. Prior to 1989, the AFL-CIO's International Affairs Department and its regional Institutes placed greater influence on combatting alleged communist influence in foreign labor movements than on combatting the effects of multinational corporations. See *infra* notes 186-93 and accompanying text (discussing the effects of this policy in El Salvador). In 1985, the AFL-CIO's international operations budget was \$43 million, 90 percent of which came from the United States Agency for International Development (AID), the National Endowment for Democracy (NED), and the United States Information Agency (USIA). AL WEINRUB & WILLIAM BOLLINGER, *THE AFL-CIO IN CENTRAL AMERICA* 16 (1987). The collapse of the Soviet Union, combined with the increased pressure of global competition on the United States labor movement, have mitigated this anticommunist zealotry. But the AFL-CIO's institutional links with the state apparatus remain a peculiar feature of labor's international policy. See Paul

advocates, including many in these same unions, argue that neither of these approaches shows genuine concern for the rights of workers in developing countries.⁵⁰ They urge a third position of "high-wage internationalism," which views protection of international worker rights as one part of a global strategy to promote sustainable development and increase consumption levels in developing countries.⁵¹

These conflicting approaches center on a fundamental economic question: are low wages resulting from denial of worker rights a legitimate component of a country's comparative advantage, or a political distortion of the terms of trade?⁵² This debate has sharpened as United States MNCs have moved both industrial and, increasingly, service production to low-wage developing countries.⁵³ Opponents of worker rights conditionality claim that growth in developing countries and improvements in social welfare can occur only if wages are kept low to attract foreign investment.⁵⁴ Worker rights advocates, in contrast, argue that the eco-

Garver, *Beyond the Cold War: New Directions for Labor Internationalism*, 13 LAB. RESEARCH REV. 61, 71 (1989) (arguing that the AFL-CIO must move beyond anti-communism to international labor solidarity). *But see* Tom Kahn, *Beyond Mythology: A Reply to Paul Garver*, 13 LAB. RESEARCH REV. 72, 79 (1989) (claiming that the objectives of the AFL-CIO are not in conflict with United States interests).

50. *See* Collingsworth et al., *New Deal*, *supra* note 5, at 9 (stating that while United States unions' support for worker rights legislation is seen as self-interested protectionism, MNCs' advocacy of free-trade is perceived to represent the national interest); *see also* 131 CONG. REC. H13048-04 (1985) (statement of Rep. Pease) (rejecting a debate on trade policy whose scope is limited to a choice between "free traders" and "protectionists").

51. *See* JOHN CAVANAGH ET AL., *TRADE'S HIDDEN COSTS: WORKER RIGHTS IN A CHANGING WORLD ECONOMY* 42 (1988) (stating that high-wage internationalism is intended "to promote an open trading system in which the benefits of trade are spread more broadly among nations").

52. *See* JACKSON, *WORLD TRADING SYSTEM*, *supra* note 7, at 15 (noting that government policies may alter conditions of comparative advantage).

53. *See* Terry Collingsworth, *Resurrecting the National Labor Relations Act - Plant Closings and Runaway Shops in a Global Economy*, 14 BERKELEY J. EMPLOYMENT & LAB. L. 72, 101 (1993) [hereinafter Collingsworth, *Resurrecting the NLRA*] (discussing the impact of corporate relocations from the United States to developing countries on industrial workers in the United States); *FREE TRADE'S HIDDEN SECRETS*, *supra* note 17, at A1-27 (listing firms that have closed manufacturing plants in the United States and opened production facilities in the Caribbean Basin).

54. *See* Gary S. Fields, *Labor Standards, Economic Development, and International Trade*, in BUREAU OF INT'L LABOR AFFAIRS, U.S. DEP'T OF LABOR, *LABOR STANDARDS AND DEVELOPMENT IN THE GLOBAL ECONOMY* 19, 21 (Stephen Herzenberg & Jorge F. Perez-Lopez eds., 1990) (arguing that labor standards may hamper employment, reduce competitiveness, and impede growth).

conomic well-being of both developing and developed countries depends on higher wages in developing countries.⁵⁵

The political controversy over protectionism closely tracks the economic debate. Critics of worker rights laws suggest that they are merely a self-interested response of United States unions and their political allies to increased competition from developing countries.⁵⁶ Worker rights advocates counter that the standards of United States worker rights laws parallel those of the International Labor Organization (ILO), and that the purpose of Congress in enacting these laws was "the promotion of labor rights abroad, rather than the protection of domestic industries."⁵⁷

Opponents of conditionality further argue that unilateral worker rights language in United States trade laws offends the principle of sovereignty⁵⁸ and in some instances violates the GATT principle of non-discrimination.⁵⁹ They contend that it is hypocritical for the United States, which has refused to ratify the fundamental ILO conventions on worker rights,⁶⁰ to impose its own concept of worker rights on other nations.⁶¹

55. See Richard Rothstein, *Setting the Standard: International Labor Rights and U.S. Trade Policy* (Economic Policy Inst. Briefing Paper) (n.d.), at 1 (contending that wage growth in developing nations benefits workers in both these countries and the United States); Michael J. Piore, *Labor Standards and Business Strategies*, in BUREAU OF INT'L LABOR AFFAIRS, U.S. DEP'T OF LABOR, *LABOR STANDARDS AND DEVELOPMENT IN THE GLOBAL ECONOMY* 35, 46-47 (Stephen Herzenberg & Jorge F. Perez-Lopez eds., 1990) (arguing that labor standards are necessary to effect a rapid transition from sweatshop conditions to high-wage production characterized by labor-management cooperation).

56. See Charnovitz, *Fair Labor Standards*, *supra* note 8, at 77 (observing that developed countries can demonstrate that international fair labor standards are not protectionist by opening their markets to imports from countries that comply with these standards).

57. *Missing Link*, *supra* note 14, at 460.

58. See Claudio Grossman & Daniel D. Bradlow, *Are We Being Propelled Towards a People-Centered Transnational Legal Order?*, 9 AM. U. J. INT'L L. & POL'Y 1, 1-9 (1993) (discussing the evolution of the legal concept of sovereignty in response to the growing power of multinational corporations).

59. See Amato, *Labor Rights Conditionality*, *supra* note 19, at 105 (contending that the worker rights provisions of the OTCA may violate the GATT principle of non-discrimination). This complaint does not apply to the GSP, which operates as an exception to the non-discrimination principle. See GATT, BISD 18 Supp. 24 (1972) (establishing GSP as a waiver to the most-favored nation requirement of GATT Article I); GATT, BISD 26 Supp. 203 (1980) (perpetuating GSP authority); see also JACKSON, *WORLD TRADING SYSTEM*, *supra* note 7, at 278-79 (discussing the status of GSP in international law).

60. See Compa, *International Labor Standards*, *supra* note 8, at 163 (noting that

If the United States wants to improve worker rights language, the proper method is through multilateral negotiations.⁶² Defenders of conditionality respond that worker rights laws do not violate sovereignty when they are intended to redress economic injury, or when they merely withdraw a benefit unilaterally conferred on another country.⁶³ Further,

the United States has ratified only 11 of 174 ILO conventions); Convention Concerning the Abolition of Forced Labour (Convention No. 105), *entered into force* Jan. 17, 1959 [hereinafter ILO Convention 105], *reprinted in* 1 INTERNATIONAL LABOUR ORGANIZATION, INTERNATIONAL LABOUR CONVENTIONS & RECOMMENDATIONS: 1919-1991 (1992) [hereinafter ILO CONVENTIONS & RECOMMENDATIONS], at 618 (indicating that of all the conventions defining fundamental worker rights, the United States has ratified only this Convention); Stephen I. Schlossberg, *United States' Participation in the ILO: Redefining the Role*, 11 COMP. LAB. L.J. 48, 80 (1989) (suggesting that the ratification of ILO Convention 105 in 1991 demonstrates a "new sense of enthusiasm" for the ILO on the part of the United States); Convention Concerning Discrimination in respect of Employment and Occupation (Convention No. 111), *entered into force* June 15, 1960, *reprinted in* 1 ILO CONVENTIONS & RECOMMENDATIONS, *supra*, at 702 (indicating that the United States has not ratified this Convention); Convention concerning Freedom of Association and Protection of the Right to Organise (Convention No. 87), *entered into force* July 4, 1950 [hereinafter ILO Convention 87], *reprinted in* 1 ILO CONVENTIONS & RECOMMENDATIONS, *supra*, at 4; Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (Convention No. 98), *entered into force* July 18, 1951 [hereinafter ILO Convention 98], *reprinted in* 1 ILO CONVENTIONS & RECOMMENDATIONS, *supra*, at 7; EDWARD E. POTTER, FREEDOM OF ASSOCIATION, THE RIGHT TO ORGANIZE & COLLECTIVE BARGAINING 92 (1984) (arguing that United States ratification of ILO Conventions 87 and 98 would offend sovereignty and violate constitutional principles).

61. See K. Schoenberger, *The Model Here Isn't America*, L.A. TIMES, Jan. 30, 1992, at 1 (quoting criticism by Malaysia's foreign minister of United States worker rights laws); see generally John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310 (1992) [hereinafter Jackson, *Status of Treaties*] (warning that making international agreements directly applicable with higher status than domestic laws may undermine countries' democratic lawmaking procedures and create distrust for international institutions).

62. See Amato, *Labor Rights Conditionality*, *supra* note 19 (asserting that Congress has acted unilaterally where the United States has been unable to persuade its trading partners to agree to international labor standards); Frank P. Doyle, *International Labor Standards: The Perspective of Business in INTERNATIONAL LABOR STANDARDS & GLOBAL ECONOMIC INTEGRATION: PROCEEDINGS OF A SYMPOSIUM* 43, 44 (Bureau of Int'l Labor Affairs, U.S. Dep't of Labor 1994) (suggesting that effective worker rights standards must be negotiated between equal partners and accepted as mutually advantageous); Charnovitz, *Fair Labor Standards*, *supra* note 8, at 75 (posing "the dilemma of whether fair labor standards should be pursued bilaterally or multilaterally").

63. See *Missing Link*, *supra* note 14, at 458-59 (arguing that where one state is

they suggest that new concepts of international worker rights are transforming the traditional definition of sovereignty.⁶⁴ Both advocates and opponents of worker rights sanctions agree that, in practice, the United States often uses these laws to promote foreign policy objectives unrelated to actual respect for worker rights.⁶⁵

Finally, the worker rights provisions of United States trade statutes may be unenforceable in federal courts. Generally, courts have refused to extend the protections of United States labor laws extraterritorially to protect either United States workers affected by plant closings⁶⁶ or foreign workers whose rights are violated by United States-based MNCs.⁶⁷

economically injured by lack of worker rights in other states, its unilateral actions to enforce these rights constitute permissible retorsion and its withdrawal of benefits from these states is not coercive). *But see id.* at 459 (maintaining that labor rights conditionality based purely on a human rights rationale would be a coercive violation of sovereignty).

64. See Lance Compa, *International Labor Rights and the Sovereignty Question: Two Case Studies—NAFTA and Guatemala*, 9 AM. U.J. INT'L L. & POL'Y 117, 117 [hereinafter Compa, *International Labor Rights*] (arguing that worker rights advocates challenge the traditional notion that labor relations are internal prerogatives of states); Jackson, *Status of Treaties*, *supra* note 61, at 332 (conceding that the direct application of international treaty norms with higher status than domestic legislation could protect human rights or economic structures that would not be secured by national constitutions).

65. See Amato, *Labor Rights Conditionality*, *supra* note 19, at 116 (asserting that the Reagan Administration's selective withdrawal of GSP privileges was directed at politically disfavored countries); *Missing Link*, *supra* note 14, at 463-64 (noting that Nicaragua and Romania, among the first countries suspended from the GSP program, had better labor rights records than many countries that were not suspended).

66. See Collingsworth, *Resurrecting the NLRA*, *supra* note 53, at 106 (arguing that judicial interpretation of the National Labor Relations Act has created unnecessary protections for United States companies that relocate production to developing countries).

67. See *Labor Union of Pico Korea, Ltd. v. Pico Products, Inc.*, 968 F.2d 191 (2d Cir.) (holding that section 301 of the Labor-Management Relations Act could not be applied extraterritorially to a claim by Korean workers against their United States-based multinational employer), *cert. denied*, 113 S. Ct. 493 (1992); *cf. Dowd v. International Longshoremen's Ass'n*, 975 F.2d 779 (11th Cir. 1992) (granting preliminary injunction against a United States union that allegedly violated the National Labor Relations Act's ban on secondary boycotts by inducing Japanese unions to threaten refusal to unload ships carrying non-union citrus); *Coastal Stevedoring Co.*, 313 NLRB 412 (1993) (finding that a United States union violated the NLRA's secondary boycott prohibition by inducing Japanese union's boycott threat), *appeal docketed*, No. 93-1812 (D.C. Cir. 1994). These decisions suggest that courts will apply United States labor law extraterritorially only where the application aids corporate interests. See also Terry Collingsworth, *American Labor Policy and the International Economy: Clarifying*

The *International Labor Rights* decision,⁶⁸ while reflecting no single rationale, signals that the courts are unwilling to require the executive branch to articulate its reasons for not protecting internationally-recognized worker rights.⁶⁹

II. WORKER RIGHTS IN EL SALVADOR

A. HISTORICAL BACKGROUND

El Salvador remains primarily an agricultural country,⁷⁰ characterized by extreme inequalities of wealth and political power.⁷¹ Large-scale coffee production, introduced in the late 19th century, caused massive dislocation of subsistence farmers⁷² and led to an uprising in 1932 that was crushed at the cost of up to 30,000 lives.⁷³ The development of cotton production after World War II intensified land shortages and poverty.⁷⁴ Significant industrial export production⁷⁵ also began at this

Policies and Interests, 31 B.C. L. REV. 31, 47 & n.97 (1989) [hereinafter Collingsworth, *American Labor Policy*] (arguing that while the NLRA gives some weight to the interests of United States workers affected by runaway shops, it does not consider the interests of foreign workers). *But see* *Dow Chem. Co. v. Alfaro*, 786 S.W.2d 674, 675 (Tex. 1990) (allowing Costa Rican banana plantation workers injured by pesticides to sue a United States-based pesticide manufacturer in Texas courts by abolishing the doctrine of *forum non conveniens*), *cert. denied*, 498 U.S. 1024 (1991). The Texas legislature recently reversed this decision. Act of February 23, 1993, S.B. 2, § 1, 73d Leg., 1st R.S. (to be codified at TEX. CIV. PRAC. & REM. CODE ANN., § 71.051); *see* '21' Int'l Holdings, Inc. v. Westinghouse Elec. Corp., 856 S.W.2d 479, 483 (Tex. Ct. App. 1993) (stating that "the Texas legislature has recently abrogated the *Alfaro* holding").

68. *International Labor Rights Educ. & Research Fund v. Bush*, 954 F.2d 745 (D.C. Cir. 1992).

69. *See supra* notes 40-47 and accompanying text (discussing the various judicial rationales for refusing to order USTR to enforce the worker rights provisions of the GSP).

70. *See* AMERICAS WATCH, *EL SALVADOR'S DECADE OF TERROR: HUMAN RIGHTS SINCE THE ASSASSINATION OF ARCHBISHOP ROMERO I* (1991) [hereinafter *EL SALVADOR'S DECADE OF TERROR*] (stating that El Salvador's economy is overwhelmingly agricultural).

71. *See id.* (noting that 20% of El Salvador's population receives 66% of the national income).

72. *See* DAVID BROWNING, *EL SALVADOR: LA TIERRA Y EL HOMBRE* 261-364 (1975) (discussing the impact of coffee production on Salvadoran society).

73. *EL SALVADOR'S DECADE OF TERROR*, *supra* note 70, at 2-3.

74. *See* BROWNING, *supra* note 72, at 365-438 (explaining the impact of cotton production on the rural population).

75. *See* RAFAEL MENJIVAR, *FORMACION Y LUCHA DEL PROLETARIADO INDUSTRI-*

time, accelerating in the 1960s under the auspices of the Alliance for Progress.⁷⁶ Deepening rural poverty and increasing tensions between the coffee-producing oligarchy and an emerging stratum of industrialists⁷⁷ led to the collapse of the government in 1979 and the resulting civil war between the armed forces and the Farabundo Marti National Liberation Front (FMLN).⁷⁸

The war rearranged the map of Salvadoran society. El Salvador became hyperdependent on United States military and economic assistance.⁷⁹ Military operations displaced a large part of the rural population to the cities, and hundreds of thousands of refugees fled the country.⁸⁰ Poverty and unemployment increased.⁸¹ The public sector grew

AL SALVADOREÑO 96 (1979) (stating that the number of industrial workers in El Salvador grew from 51,738 in 1951 to 148,165 in 1971).

76. See CYNTHIA ARNSON, *EL SALVADOR: A REVOLUTION CONFRONTS THE UNITED STATES* 19-23 (1982) [hereinafter ARNSON, *REVOLUTION*] (characterizing the Alliance for Progress as a program of the Kennedy administration designed to prevent Latin American revolutions through social reform and counterinsurgency).

77. See Jeffrey M. Paige, *Coffee & Power in El Salvador*, 28 *LATIN AMER. RESEARCH REV.* 7 (1993) (describing the split of the Salvadoran ruling class into "agro-financial" and "agro-industrial" factions).

78. See TOMMIE SUE MONTGOMERY, *REVOLUTION IN EL SALVADOR: ORIGINS AND EVOLUTION* (1982) (discussing the causes of El Salvador's civil war); ARNSON, *REVOLUTION*, *supra* note 76 (analyzing the origins of the civil war in El Salvador); RAYMOND BONNER, *WEAKNESS & DECEIT: THE U.S. AND EL SALVADOR* (1984) (discussing the role of the United States in El Salvador's civil war).

79. See *EL SALVADOR'S DECADE OF TERROR*, *supra* note 70, at 141 (stating that the United States provided more than \$4.5 billion in military and economic assistance to El Salvador from 1980 to 1992); CYNTHIA J. ARNSON, *CROSSROADS: CONGRESS, THE PRESIDENT, AND CENTRAL AMERICA 1976-1993* 231 & n.2 (1993) [hereinafter ARNSON, *CROSSROADS*] (arguing that total United States aid during the 1980s, including funds for covert operations, reached \$6 billion); see also *ARMS CONTROL & FOREIGN POLICY CAUCUS, BANKROLLING FAILURE: UNITED STATES POLICY IN EL SALVADOR & THE URGENT NEED FOR REFORM* 5 (1987) [hereinafter *BANKROLLING FAILURE*] (reporting that in the 1987 fiscal year, United States aid surpassed El Salvador's contribution to its own budget).

80. See *BANKROLLING FAILURE*, *supra* note 79, at 19 (observing that half a million displaced persons, or 10% of the population, live in squalor in refugee and squatter camps); Elizabeth Kay Harris, Comment, *Economic Refugees: Unprotected in the United States by Virtue of an Inaccurate Label*, 9 *AM. U. J. INT'L L. & POL'Y* 269, 288 (1993) (reporting that the population of Salvadoran refugees in the United States is estimated at 500,000 to 850,000); GAO REPORT, *supra* note 17, at 45 n.5 (stating that in 1992, Salvadorans in the United States remitted \$702 million to El Salvador, more than the total value of El Salvador's exports).

81. See HOUSE COMM. ON FOREIGN AFFAIRS & SENATE COMM. ON FOREIGN

to encompass a large share of the workforce,⁸² while industrial and agricultural production declined.⁸³ Jose Napoleon Duarte became President in 1984 with the support of the United States.⁸⁴ Unable to halt either the war or the economic collapse, Duarte's Christian Democratic Party lost control of the National Assembly to the right-wing ARENA party in 1988;⁸⁵ in 1989 ARENA's leader, Alfredo Cristiani, became President.⁸⁶ The end of the Cold War and the inability of either the FMLN or the army to win a military victory set the stage for negotiations.⁸⁷ On January 16, 1992, the civil war officially ended with the signing of the Chapultepec Accords.⁸⁸ In 1994, ARENA won both the presidency and control of a majority of the seats in the National Assembly in elections supervised by the United Nations.⁸⁹

RELATIONS, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1993, 103d Cong., 2d Sess. 444 (Joint Comm. Print 1994) [hereinafter 1993 STATE DEP'T REPORT] (estimating that 40% of El Salvador's population lives in poverty); PETER SOLLIS, POVERTY ALLEVIATION IN EL SALVADOR 2-4 (Washington Office on Latin America, El Salvador Issue Brief No. 2, 1993) (summarizing studies of the extent of poverty in El Salvador); BANKROLLING FAILURE, *supra* note 79, at 19-20 (stating that the level of underemployment and unemployment had reached 50%).

82. See David Mena, *Neoliberalismo y sindicalismo en Latinoamérica: El Caso de El Salvador* in MODELO NEOLIBERAL Y SINDICATOS EN AMERICA LATINA 195, 197 (Holm-Detlev Kohler & Manfred Wannoffel eds., 1993) (discussing the growth of public sector unions).

83. See BANKROLLING FAILURE, *supra* note 79, at 17-19 (detailing the deterioration of the Salvadoran economy as a result of the war).

84. See ARNSON, CROSSROADS, *supra* note 79, at 157-58 (describing assistance provided by the Central Intelligence Agency (CIA) and the Agency for International Development (AID) to the Duarte campaign in the 1984 elections); Carlos Acevedo, *El Salvador's New Clothes: The Electoral Process (1982-1989)*, in A DECADE OF WAR: EL SALVADOR CONFRONTS THE FUTURE 19, 28 (Anjali Sundaram & George Gelber eds., 1991) (stating that the CIA spent \$2 million to elect Duarte in 1984).

85. See Acevedo, *supra* note 84, at 30-31 (describing the results of the 1988 elections as an undisputable defeat for Duarte).

86. See *id.* at 33-34 (discussing the 1989 Presidential elections).

87. See George R. Vickers, *The Political Reality After Eleven Years of War*, in IS THERE A TRANSITION TO DEMOCRACY IN EL SALVADOR? 25, 36-37 (Joseph S. Tulchin & Gary Bland eds., 1992) (identifying the end of the Cold War and the FMLN's continued military strength as factors contributing to negotiations).

88. Acuerdos de Paz, Jan. 16, 1992 [hereinafter Chapultepec Accords], reprinted in FRENTE FARABUNDO MARTI PARA LA LIBERACION NACIONAL, ACUERDOS HACIA UNA NUEVA NACION 52 (1992) [hereinafter ACUERDOS].

89. See JACK SPENCE ET AL., EL SALVADOR: ELECTIONS OF THE CENTURY 28-29 (1994) (summarizing election results); U.S. CITIZENS ELECTIONS OBSERVER MISSION, FREE & FAIR?: THE CONDUCT OF EL SALVADOR'S 1994 ELECTIONS (1994) (criticizing

ARENA's strategy for economic reconstruction relies heavily on low-wage export production, concentrated in export processing zones (EPZs).⁹⁰ Access to the United States market is crucial to the success of this strategy. Of El Salvador's \$383.2 million in exports to the United States in 1992, \$18,747,565, or about five percent, entered duty-free under the GSP.⁹¹ While the GSP program is not crucial to the Salvadoran economy,⁹² the possibility that El Salvador would be denied access to GSP benefits was perceived as a threat by political leaders who were attempting to regain the confidence of foreign investors.⁹³

B. THE SALVADORAN LABOR MOVEMENT

El Salvador's labor movement is the product of decades of economic and political conflict. Although artisan unions developed in the 1920s under the influence of the Salvadoran Communist Party, they were severely repressed after the 1932 uprising.⁹⁴ As El Salvador industrialized in the 1960s, however, the first large-scale union organizing occurred among teachers and manufacturing employees.⁹⁵ In addition, the American Institute for Free Labor Development (AIFLD), an arm of the AFL-CIO, supported the formation of rural cooperatives.⁹⁶ Increasing union

irregularities in the electoral process).

90. See *infra* notes 153-57 and accompanying text (discussing working conditions in export processing zones).

91. GSP ASSESSMENT, *supra* note 29, at 130.

92. See GAO REPORT, *supra* note 17, at 22 (noting that participation in GSP is generally low for Caribbean Basin countries that already have access to United States markets under the CBERA). It is unclear whether suspending El Salvador from the GSP program would affect its exports under the worker rights provisions of the CBERA. See 19 U.S.C. § 2702(e)(1) (1988) (providing for withdrawal of CBERA benefits at the President's discretion).

93. See *infra* notes 209-10 and accompanying text (describing the reaction of the Salvadoran Government and business leaders to threats to suspend El Salvador's GSP benefits); DORMAN, *supra* note 29, at 11 (noting the symbolic significance of GSP to the Salvadoran government in view of its dependence on the United States).

94. See MENJIVAR, *supra* note 75, at 35-72 (describing the origins of the Salvadoran labor movement).

95. See *id.* at 83-102 (recounting the growth of the labor movement in the 1960s); MARIO LUNGO, LA LUCHA DE LAS MASAS EN EL SALVADOR 93-116 (1987) (analyzing the development of unions as a political force to 1979).

96. See BONNER, *supra* note 78, at 193 (stating that AIFLD helped to form rural cooperatives in the 1960s, but was evicted by the military government in 1973); LUNGO, *supra* note 95, at 64 (describing AIFLD activities in 1960s). After the 1979 coup, AIFLD returned to El Salvador and resumed its organizing, focusing on land

opposition to the military government made union leaders principal targets of right-wing death squads after the 1979 coup.⁹⁷ Between 1980 and 1982, the military and death squads launched a systematic attack on unions that resulted in the killing, torture, and disappearance of thousands of union members.⁹⁸

Two principal union coalitions emerged to occupy the narrow political space created by the Duarte government.⁹⁹ The National Union of Workers and Campesinos (UNOC), a coalition of unions and peasant cooperatives funded by AIFLD, formed Duarte's political base.¹⁰⁰ The National Union of Salvadoran Workers (UNTS) brought together most of El Salvador's left-wing unions and popular organizations, including the influential public employee associations.¹⁰¹ Tensions between the two groups, based on both ideological and pragmatic considerations, subsided after ARENA gained control of the legislature in 1988.¹⁰²

reform. BONNER, *supra* note 78, at 193.

97. See EL SALVADOR'S DECADE OF TERROR, *supra* note 70, at 27 (stating that the killing of union organizers during the early 1980s virtually ended union activity).

98. See *infra* note 105 and accompanying text (discussing violations of worker rights in El Salvador).

99. See LUNGO, *supra* note 95, at 73-88 (discussing the resurgence of trade union activity after 1983).

100. See AIFLD, Worker Rights in El Salvador, June 10, 1988, at 15 (reporting that according to UNOC leaders, army or police intervention in genuine labor disputes had diminished since Duarte's election). Many Salvadoran unionists and United States observers regarded AIFLD's efforts to construct a political base in the Salvadoran labor movement as a component of the United States counterinsurgency strategy. See Frank Smyth, *Duarte's Secret Friends*, 244 THE NATION 316 (1987) (quoting a 1986 memorandum prepared by the United States Embassy in San Salvador describing efforts by AIFLD, the Embassy, and the Christian Democrats to "destroy" the UNTS); LUNGO, *supra* note 95, at 77-80 (describing AIFLD influence within the Salvadoran labor movement); BONNER, *supra* note 78, at 192-97 (observing that in 1983 AIFLD received more than 95 percent of its budget from the United States government and concluding that AIFLD's advocacy of land reform was motivated by United States policy); GAO REPORT, *supra* note 17, at 58 n.12 (stating that under a bilateral grant with AID, AIFLD received \$15 million for activities in El Salvador in fiscal years 1990 through 1993).

101. See Eliseo Ruíz, *La Situación de los Trabajadores Salvadoreños Durante la Administración Duarte* 19-20 (on file with author) (describing the formation of the UNTS).

102. See Phil Bronstein, *Salvador Peace Plan Unites Labor*, S.F. CHRON., Feb. 19, 1989 (describing cooperation between the UNOC and the UNTS as an alliance threatening the ruling Christian Democratic Party); JOAQUIN ARRIOLA PALOMARES & JOSE ANTONIO CANDRAY ALVARADO, DERECHOS PROHIBIDOS: NEGOCIACION COLECTIVA Y SINDICATOS EN EL SALVADOR 37-38 (1994) [hereinafter PROHIBITED RIGHTS]

C. WORKER RIGHTS VIOLATIONS

1. Violence Against Trade Unionists

The United Nations Truth Commission, created by the 1991 Mexico Agreement between the Salvadoran Government and the FMLN,¹⁰³ describes the climate of violence which existed in the country from 1980-1992 as "a state in which certain elements of society were immune from any governmental or political restraint and operated with the most open impunity."¹⁰⁴ The armed forces and death squads assassinated, tortured, and kidnapped thousands of trade unionists, violently broke up strikes and union meetings, and bombed and ransacked union offices.¹⁰⁵

(detailing the cooperation of UNOC and UNTS in 1990 to form a broad front, the Intergremial, to combat the economic policies of the Duarte administration).

103. Acuerdo de Mexico, Apr. 27, 1991, § IV, *reprinted in ACUERDOS, supra* note 88, at 14, 18.

104. UNITED NATIONS, COMISION DE LA VERDAD PARA EL SALVADOR, DE LA LOCURA A LA ESPERANZA 240-41 (1993) [hereinafter TRUTH COMMISSION REPORT].

105. *See, e.g.*, ILO, 243d Report of the Comm. on Freedom of Association (El Salvador, Cases Nos. 953, 973, 1016, 1150, 1168, 1233, 1258, 1269, 1273 and 1281) (1986); ILO, 251st Report of the Comm. on Freedom of Association (El Salvador, Cases Nos. 953, 973, 1016, and 1168) (1987); ILO, 259th Report of the Comm. on Freedom of Association (El Salvador, Case No. 1441) (1987); ILO, 265th Report of the Comm. on Freedom of Association (El Salvador, Case No. 1168) (1989); ILO, 268th Report of the Comm. on Freedom of Association (El Salvador, Case No. 1441) (1989); ILO, 268th Report of the Comm. on Freedom of Association (El Salvador, Case No. 1494) (1989); ILO, 272d Report of the Comm. on Freedom of Association (El Salvador, Case No. 1273) (1990); ILO, 275th Report of the Comm. on Freedom of Association (El Salvador, Cases Nos. 1441 and 1494) (1990); ILO, 277th Report of the Comm. on Freedom of Association (El Salvador, Case No. 1524) (1991); ILO, 279th Report of the Comm. on Freedom of Association (El Salvador, Cases No. 1441 and 1494) (1991); ILO, 291st Report of the Comm. on Freedom of Association (El Salvador, Cases Nos. 1273, 1441, 1494, and 1524) (1993).

See also TRUTH COMMISSION REPORT, *supra* note 104, at 172-202; AMNESTY INTERNATIONAL, EL SALVADOR: 'DEATH SQUADS' - A GOVERNMENT STRATEGY (1988) [hereinafter DEATH SQUADS]; Americas Watch, Petition Before the U.S. Trade Representative on Labor Rights in El Salvador, May 29, 1987 [hereinafter Americas Watch 1987 Petition]; Americas Watch, Petition Before the U.S. Trade Representative on Labor Rights in El Salvador, Apr. 22, 1988 [hereinafter Americas Watch 1988 Petition]; AMERICAS WATCH, LABOR RIGHTS IN EL SALVADOR (1988) [hereinafter LABOR RIGHTS IN EL SALVADOR]; Americas Watch, Petition Before the U.S. Trade Representative on Labor Rights in El Salvador, Mar., 1989 [hereinafter Americas Watch 1989 Petition]; Americas Watch, Petition Before the U.S. Trade Representative on Labor Rights in El Salvador, May, 1990 [hereinafter Americas Watch 1990 Peti-

Since the signing of the peace accords, political violence has declined.¹⁰⁶ The recent debate over El Salvador's respect for worker rights has focused on the weaknesses of the country's labor laws and on violations of internationally recognized worker rights in practice.

tion]; FENASTRAS (National Federation of Salvadoran Workers) & Labor Coalition on Central America, Petition to Remove El Salvador from the List of Beneficiary Developing Countries under the General [sic] System of Preferences, June 1, 1990 [hereinafter FENASTRAS Petition]; Worker Rights and the Generalized System of Preferences: the AFL-CIO Petition to the Office of the U.S. Trade Representative, June, 1990 [hereinafter AFL-CIO 1990 Petition]; International Labor Rights Educ. and Research Fund., Pre-Hearing Brief, Oct. 20., 1993 [hereinafter ILRERF Pre-Hearing Brief].

A particularly notorious case was the October 31, 1989 bombing of the office of FENASTRAS, which killed nine union leaders and injured many more. See TRUTH COMMISSION REPORT, *supra* note 104, at 126 (describing bombing of FENASTRAS office). The Salvadoran government actually claims that the bombing was carried out by FENASTRAS itself "in an effort to discredit labor reform in El Salvador." Government of El Salvador, 1992 GSP Rebuttal Brief, December 8, 1992, at 42 [hereinafter Government 1992 Rebuttal Brief]. The Truth Commission conclusively refuted this explanation, finding no evidence to support the government's allegation and strongly criticizing its failure to conduct a thorough investigation. See TRUTH COMMISSION REPORT, *supra* note 104, at 131 (concluding that the government of El Salvador had not complied with its obligation to guarantee the human rights of FENASTRAS members); see also ILO, 288th Report of the Comm. on Freedom of Association (El Salvador, Cases Nos. 1273, 1441, 1494, and 1524), ¶ 26 (1993) (condemning the Salvadoran government's failure to investigate the FENASTRAS bombing); see generally TRUTH COMMISSION REPORT, *supra* note 104, at 146-154 (noting the Salvadoran government's refusal to investigate the disappearance by the Salvadoran Air Force of two members of FENASTRAS); *id.* at 196-202 (criticizing the Government's failure to prosecute the well-known killers of Rodolfo Viera, head of the Salvadoran Institute for Agrarian Transformation, and AIFLD advisers Michael Hammer and Mark Pearlman).

106. See GSP Subcommittee, 1992 GSP Annual Review, Worker Rights Review Summary, at 3 (1993) (noting decline in violence against unions). But see 1993 STATE DEP'T REPORT, *supra* note 81, at 434-37 (describing political violence during 1993, including the assassination of two FMLN candidates for the National Assembly in the 1994 elections); Tracy Wilkinson, *Salvador President Vows to Get Full Truth Behind Surge in Political Violence*, L.A. TIMES, Oct. 28, 1993, at A14 (describing increase in death squad attacks in 1993); *A Return of Terror: Death Squads Again Threaten El Salvador*, PHILA. INQUIRER, Nov. 12, 1993, at A26 (recounting death squad violence); *U.S. Trying to Stem El Salvador Killings*, S.F. CHRON., Nov. 12, 1993 (reporting death squad activities).

2. Deficiencies in Salvadoran Labor Law

a. *Freedom of Association*

The Labor Code¹⁰⁷ establishes procedures that all unions must follow to obtain legal recognition from the Ministry of Labor.¹⁰⁸ These procedures are highly prejudicial to unions. First, the Ministry of Labor often rejects initial applications for recognition on narrow technical grounds.¹⁰⁹ While in theory the law protects workers against being fired for union activity once they have initiated the recognition process,¹¹⁰ in practice employers frequently take advantage of the delay in granting recognition to fire the union leadership.¹¹¹ Second, the Labor Ministry often denies recognition for apparently arbitrary reasons.¹¹² Many unions have waited more than two years for responses to their

107. CODIGO DE TRABAJO (El Sal.) [hereinafter 1972 LABOR CODE], reprinted in LEGISLACION LABORAL 19 (1990). The Labor Code was amended in 1994. CODIGO DE TRABAJO (El Sal.) [hereinafter 1994 LABOR CODE], reprinted in 1 LEYES LABORALES (Ricardo Mendoza Orantes ed., 1994); see *infra* note 232 and accompanying text (discussing the amendment of the Labor Code). While the 1994 amendments resolved some of the deficiencies in the 1972 Labor Code to which worker rights advocates had objected, they failed to respond to the most serious criticisms. See *infra* note 229 (describing the inadequacies of the 1994 Labor Code amendments). Because the 1994 amendments left most of the 1972 Code intact, references in the following discussion are to the 1972 Code unless specifically noted.

108. 1972 LABOR CODE, *supra* note 107, art. 219. A parallel procedure exists for public sector associations, which must apply to the Ministry of the Interior. See LABOR RIGHTS IN EL SALVADOR, *supra* note 105, at 69-71 (describing Interior Ministry's denial of recognition to public employee associations).

109. See HOUSE COMM. ON FOREIGN AFFAIRS & SENATE COMM. ON FOREIGN RELATIONS, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1992, S. Pt. No. 103-7, 103d Cong., 1st Sess. 402 (1993) [hereinafter 1992 STATE DEP'T REPORT] (concluding that the Salvadoran Government has used legal technicalities to impede union registration); Letter from Ministry of the Interior to Association of Employees of the Ministry of Justice (ASEMJ) (on file with ILRERF) (rejecting association's application for recognition and requiring extensive changes in punctuation).

110. 1972 LABOR CODE, *supra* note 107, art. 248.

111. See ILRERF Pre-Hearing Brief, *supra* note 105, at 13-17 (describing cases of workers fired when they sought recognition for their unions).

112. See ILO, 291st Report of the Comm. on Freedom of Association (El Salvador, Case No. 1659) (1993) (criticizing as a violation of the freedom of association the Salvadoran government's denial of recognition to a branch of the Port Workers' Union (SIPES) on the grounds that employees of ports and employees of airports could not belong to the same union); see also LABOR RIGHTS IN EL SALVADOR, *supra* note 105, at 38-40 (documenting denial of recognition to unions).

applications.¹¹³ Finally, even if a union wins recognition, the employer may challenge the union's credentials before the Ministry of Labor or in domestic courts through the process of decertification (*impugnación*).¹¹⁴ Once the employer initiates the decertification process, the Labor Ministry and the courts consider the union's recognition invalid and refuse to protect union leaders from discharge or to enforce the union's attempts to bargain.¹¹⁵ As a result of these practices, which facially violate ILO freedom of association principles,¹¹⁶ few new unions obtained legal recognition in 1992 or 1993.¹¹⁷

b. The Right to Organization and Collective Bargaining

i. Constraints on Collective Bargaining

Although the Salvadoran Constitution establishes the right to collective bargaining for "all workers,"¹¹⁸ the Labor Code denies this right to

113. See ILRERF Pre-Hearing Brief, *supra* note 105, at 13-17 (recounting delays in recognition).

114. See *id.* at 12-14 (describing decertification procedure). The legality of this procedure, which has no foundation in the Salvadoran Constitution or Civil Code, is questionable. *Id.* at 13 n.26. The 1972 Labor Code also permitted the Labor Minister to dissolve unions without recourse to the courts, in violation of ILO standards. 1972 LABOR CODE, *supra* note 107, art. 230; see ILO, COMM. ON FREEDOM OF ASSOCIATION, DIGEST OF DECISIONS ¶ 487 (1985) [hereinafter ILO DIGEST OF DECISIONS] (declaring that administrative suspension of unions is a serious restriction of the freedom of association). Under the 1994 Labor Code, only the courts may dissolve a union. 1994 LABOR CODE, *supra* note 107, art. 230.

115. ILRERF Pre-Hearing Brief, *supra* note 105, at 13.

116. See ILO DIGEST OF DECISIONS, *supra* note 114, at ¶ 263 and ¶ 281 (holding that a government cannot require prior authorization to establish a union and observing that registration procedures that are complicated and lengthy or that vest broad discretion in administrative authorities create serious obstacles to union formation and effectively deny the right to organize).

117. See ILRERF Pre-Hearing Brief, *supra* note 105, at 13 (stating that no new unions were recognized in 1992 or 1993); Government 1992 Rebuttal Brief, *supra* note 105, at 11 n.15 (claiming that the Salvadoran government approved applications of 42 unions between 1989 and 1992); BUREAU OF INT'L LABOR AFFAIRS, U.S. DEP'T OF LABOR, FOREIGN LABOR TRENDS: EL SALVADOR, 1990-1992 (1993) [hereinafter EL SALVADOR LABOR TRENDS] (noting that many of the applications approved by the government were for local affiliates of existing unions, rather than new unions); PROHIBITED RIGHTS, *supra* note 102, at 45 (reporting that of the 34 applications for union sub-sections approved between 1989 and 1993, only two were for new sub-sections, while 32 were revivals of dormant subsections).

118. CONSTITUCION, art. 39 (El Sal.).

state and municipal employees¹¹⁹ and to agricultural workers.¹²⁰ The Salvadoran government argues that denying the legal right of collective bargaining to public sector workers is inconsequential because in practice public employees do bargain collectively and strike.¹²¹ But such de facto bargaining gives workers little protection.¹²² Private sector workers do not fare much better; sanctions against employers who refuse to bargain in good faith are weak and rarely enforced.¹²³

119. See 1972 LABOR CODE, *supra* note 107, art. 2(b) (denying collective bargaining rights to state and municipal employees).

120. See 1972 LABOR CODE, *supra* note 107, arts. 264-67 (providing for establishment of a tripartite commission to draft collective bargaining procedures for rural workers). Because this commission was never constituted, agricultural workers effectively had no bargaining rights under the 1972 Labor Code. See 1992 STATE DEP'T REPORT, *supra* note 109, at 402-03 (discussing restrictions on agricultural workers' right to collective bargaining); Government of El Salvador, Response to Petitions to Review El Salvador's Status as a Beneficiary Developing Country Under the Generalized System of Preferences, Sept. 12, 1990, at 12 (asserting that organization and strikes by agricultural workers are permitted by the Constitution, although prohibited by the Labor Code); see also ILRERF Pre-Hearing Brief, *supra* note 105, at 61-62 (criticizing a Salvadoran government proposal to extend limited bargaining rights to agricultural workers). The 1994 amendments to the Labor Code eliminate the tripartite commission. 1994 LABOR CODE, *supra* note 105, arts. 264-67 (repealed). Agricultural workers are now permitted to organize as either "enterprise" or "mixed enterprise" unions. *Id.*, art. 209. Because every union must have at least 35 members, and few agricultural establishments employ this many permanent workers, in practice farm workers must organize in "mixed enterprise" unions, which are defined as unions representing employees of two or more "neighboring" enterprises each of which has no more than 25 workers. *Id.* Critics of the 1994 amendments feared that the Labor Ministry would use the "neighboring" requirement to prevent unions from organizing agricultural enterprises with a common owner, but located in different parts of the country. Letter from ILRERF to USTR, Dec. 16, 1993, at 2-3 (on file with ILRERF).

121. See Government of El Salvador, Amended GSP Rebuttal Brief, Mar. 1, 1993 [hereinafter Government Amended Rebuttal Brief], at 11 (noting that the freedom of collective bargaining is guaranteed by the Constitution for both private and public employees).

122. See AFL-CIO Statement to GSP Subcomm., Oct. 1992, at 3-4 (discussing the refusal of the Ministry of the Economy and the Ministry of Labor to bargain with associations representing their employees).

123. See ILRERF Pre-Hearing Brief, *supra* note 105, at 18 (discussing cases of denial of collective bargaining rights to private sector workers). A significant practical limitation on the right to organize is the requirement that only local unions, not federations or confederations, can negotiate collective bargaining agreements. See PROHIBITED RIGHTS, *supra* note 102, at 85 (explaining that the limitation of bargaining to local unions leads to fragmentation of the labor movement).

ii. *Restrictions on the Right to Strike*

The Salvadoran Constitution guarantees the right to strike.¹²⁴ But this right is restricted for public employees¹²⁵ and agricultural workers.¹²⁶ Those workers who do have a theoretical right to strike have found it nearly impossible to strike legally.¹²⁷ Since the 1972 Labor Code required unions to go through an elaborate procedure of obligatory mediation and arbitration without setting time limits,¹²⁸ employers and the Labor Ministry delayed indefinitely the declaration of a legal strike.¹²⁹ Workers who strike illegally—historically, nearly all workers—can be dismissed without compensation.¹³⁰ In addition, as recently seen in October 1993, the government deploys broad emergency powers to declare strikes illegal and fire union leaders.¹³¹

iii. *Firings for Union Activity*

The Labor Code prohibits discrimination or reprisals against workers on account of union activity,¹³² as well as specifically protects members of union executive boards from dismissal.¹³³ Nonetheless, employers commonly dismiss workers who attempt to organize.¹³⁴ Because the

124. CONSTITUCION, art. 48 (El Sal.).

125. CONSTITUCION, art. 221 (El Sal.).

126. See *supra* note 120 and accompanying text (describing limitations on agricultural workers' rights to organize and bargain). Moreover, where unions' access to workers is restricted, effective strikes are unlikely. *Id.*

127. See LABOR RIGHTS IN EL SALVADOR, *supra* note 105, at 54-61 (describing the three principle ways in which the right to strike is impeded).

128. 1972 LABOR CODE, *supra* note 107, arts. 480-566. The 1994 amendments establish time limits of 20 days for direct negotiations. 1994 LABOR CODE, *supra* note 107, art. 489. There are 15 days for mediation. *Id.* art. 496.

129. See LABOR RIGHTS IN EL SALVADOR, *supra* note 105, at 54 (noting delays inherent in procedures for calling a legal strike).

130. 1972 LABOR CODE, *supra* note 107, art. 554; see ILRERF Pre-Hearing Brief, *supra* note 105, at 19 n.59 (noting that the last legal strike in El Salvador occurred in 1987).

131. See FENASTRAS (National Federation of Salvadoran Workers), Informe Sobre las Violaciones a los Derechos Laborales y Sindicales en El Salvador, Oct., 1993 (on file with ILRERF) [hereinafter FENASTRAS Report] (describing the government's use of Decree 296, an emergency law enacted by the revolutionary junta that briefly held power in 1980, to suppress a strike by workers at the National Pension Institute).

132. 1972 LABOR CODE, *supra* note 107, art. 205.

133. 1972 LABOR CODE, *supra* note 107, art. 248.

134. See 1992 STATE DEP'T REPORT, *supra* note 109, at 403 (remarking that in

Labor Code does not give illegally fired workers the right to reinstatement,¹³⁵ the only cost to the employer is a small amount of severance pay.¹³⁶

iv. *Company Unions*

While the Salvadoran Labor Code bars employers from setting up "company unions,"¹³⁷ this practice, termed *solidarismo*,¹³⁸ is widespread and increasing, and in some cases actively promoted by the government.¹³⁹ The National Union of Workers and Campesinos (UNOC)

some cases, workers who attempt to form unions are fired before they receive their union credentials); *See also* ILRERF, Pre-hearing Brief, *supra* note 105, at 20-24 (listing cases of workers fired for union activity); LABOR RIGHTS IN EL SALVADOR, *supra* note 105, at 42-45 (noting cases of retaliatory firings).

135. *See* 1972 LABOR CODE, *supra* note 107, arts. 251, 420 (providing remedies for illegal dismissal of fines and limited back pay). These remedies are clearly inadequate by the standards of United States law. *See* Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941) (declaring that denial of a reinstatement remedy would "sanction a most effective way of defeating the right of self-organization").

136. *See* FENASTRAS Report, *supra* note 131 (noting case of fired workers who, despite winning judgments from the labor courts, have still not received severance pay). Another way in which employers minimize the costs of severance pay is to keep workers on year-to-year contracts, preventing them from accumulating severance pay rights. *See infra* note 156 and accompanying text (describing the use of annual contracts in El Salvador's export processing zones). While the Labor Code provides for fines, in practice these are almost never imposed. *See* Generalized System of Preferences (GSP) Subcommittee of the Trade Policy Staff Committee, 1991 GSP Annual Review, Worker Rights Review Summary (1992), at 5 (citing United States Embassy report concerning Salvadoran employers' practice of making severance payments to illegally discharged workers).

137. *See* 1972 LABOR CODE, *supra* note 107, art. 205 (prohibiting interference with or discrimination because of union activities).

138. *See* KURT PETERSEN, THE MAQUILADORA REVOLUTION IN GUATEMALA 123 (1992) (defining *solidarismo* as a theory of cooperative industrial relations between workers and employers that promotes economic empowerment and labor-management harmony).

139. *See* ILRERF Pre-Hearing Brief, *supra* note 105, at 24-27 (describing cases of parallel unions); *see also* LABOR RIGHTS IN EL SALVADOR, *supra* note 105, at 53 (asserting that the Salvadoran government has sponsored the formation of parallel worker associations to weaken militant unions); *cf.* 29 U.S.C. § 158(a)(2) (1988) (making it illegal for a United States employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial aid or other assistance to it"); *Electromation, Inc.*, 309 NLRB 990 (1992) (interpreting ban on domination or interference to prohibit employer-sponsored "teams" or "councils"), *enfd.*, 35 F.3d 1148 (7th Cir. 1994). The 1994 Labor Code permits voluntary bargaining with un-

estimates that there are about forty solidarista associations in businesses throughout the country.¹⁴⁰

c. Labor Rights Violations in the Export Processing Zones

The GSP statute specifically addresses worker rights violations in Export Processing Zones (EPZs).¹⁴¹ Although the Salvadoran government has asserted that workers in the zones have no desire to join unions,¹⁴² in fact, employers in the EPZs have successfully resisted several organizing efforts.¹⁴³

Export processing zones are crucial to the Salvadoran government's economic development strategy.¹⁴⁴ There are currently five functioning EPZs (San Bartolo,¹⁴⁵ El Progreso, San Marcos, El Pedregal, and San Rafael) with another seven planned.¹⁴⁶ Between 1985 and 1993, foreign

ions that represent less than a majority of workers, which may facilitate *solidarismo*. PROHIBITED RIGHTS, *supra* note 102, at 84.

140. UNOC, *Casos de Violación a la Libertad Sindical Ocurredos en los Últimos 3 Años* [Cases of Violation of Trade Union Freedoms in the Past Three Years], Mar. 1993 (on file with ILRERF) [hereinafter UNOC Report]; see FENASTRAS Report, *supra* note 131 (describing cases of parallel unions).

141. See 19 U.S.C. § 2462(b)(7) (1988) (authorizing suspension of GSP benefits because of worker rights violations in a "country (including any designated zone of that country)"); see also Karen F. Travis, *Women in Global Production and Worker Rights Provisions in U.S. Trade Laws*, 17 YALE J. INT'L L. 173, 188-90 (1992) (noting Congressional concern for worker rights in EPZs through its inclusion of a new worker rights reporting requirement in the 1988 Trade Act).

142. See Government Amended Rebuttal Brief, *supra* note 121, at 7-8 (claiming that workers in EPZs have no desire to form unions).

143. See 1993 STATE DEP'T REPORT, *supra* note 81, at 403 (concluding that companies in the EPZs are hostile toward unions and have fired workers who attempted to organize); ILRERF Pre-Hearing Brief, *supra* note 105, at 35-38 (recounting unsuccessful organizing campaigns at Formosa Textiles and Satellite International); ILRERF Post-Hearing Reply Brief, Nov. 10, 1993 at 4 (noting firing of union executive committee at S & C Apparel after workers attempted to organize).

144. See GAO REPORT, *supra* note 17, at 27 (describing the Salvadoran government's aggressive promotion campaign to encourage foreign investment in Salvadoran EPZs).

145. See Joaquín Arriola, *Los Procesos de Trabajo en la Zona Franca de San Bartolo* (n.d.) at 477 (unpublished manuscript, on file with ILRERF) (citing statistics on EPZ employment).

146. *Zonas Francas: Tesoro a Explotar*, LA PRENSA GRAFICA, Mar. 29, 1993, at 8; see 1993 STATE DEP'T REPORT, *supra* note 81, at 403 (stating that there are currently two functioning EPZs and two more under construction). But see ILRERF Pre-Hearing Brief, *supra* note 105, at 31 (stating that there are currently five functioning

investment in the EPZs increased from \$400,670 to \$16,145,900, while the number of employees rose from 1281 to 30,380.¹⁴⁷ Projections of future employment go as high as 114,774.¹⁴⁸ The United States has actively promoted investment in the EPZs by United States companies.¹⁴⁹

Salvadoran customs law exempts offshore assembly plants from duties on both the value of materials imported for re-export and the percentage of value added in reassembly, plus an additional eight percent of value added.¹⁵⁰ The Minister of the Economy can declare any enterprise, whether or not it is located in one of the denominated zones, a "fiscal area" entitled to the same relief from export duties.¹⁵¹ In addition, plants located in the EPZs may contract out work to factories in other parts of the country.¹⁵²

To deter union organizers, employers do not permit non-employees to enter the export processing zones.¹⁵³ The Salvadoran government sup-

EPZs with another seven under development).

147. See *De gran beneficio son inversiones asiaticas*, LA PRENSA GRAFICA, July 17, 1993, at 6 (citing data provided by FUSADES [Salvadoran Development Foundation]).

148. See Arriola, *supra* note 145, at 47 (citing USAID projections of future EPZ employment). But see GAO REPORT, *supra* note 17, at 38 (questioning the future growth of Salvadoran EPZs after the cutoff of United States aid).

149. See GAO REPORT, *supra* note 17, at 27 (stating that the United States has provided \$24.8 million to the FUSADES, of which \$5 million was specifically targeted for EPZ development); *id.* at 28 (noting that in 1988, AID created a \$20 million credit line to support investment in Salvadoran EPZs); *id.* at 41 (stating that Salvadoran firms considered AID technical assistance crucial to winning contracts from United States companies).

150. Arriola, *supra* note 145, at 51; see FREE TRADE'S HIDDEN SECRETS, *supra* note 17, at 17-18 (stating that AID has offered incentives to United States companies to relocate to Salvadoran EPZs).

151. Arriola, *supra* note 145, at 50; see GAO REPORT, *supra* note 17, at 37 (stating that approximately 90 percent of the assembly plants receiving preferential customs and tax treatment under Salvadoran law are located outside the EPZs).

152. ILRERF Pre-Hearing Brief, *supra* note 105, at 22 (describing contracting out from EPZ firms to employers outside the zones).

153. See 1992 STATE DEP'T REPORT, *supra* note 109, at 403 (stating that a civilian manager denies union organizers with access to the San Bartolo EPZ).

ports this policy.¹⁵⁴ Employers also use blacklists to keep organizers out of the EPZs.¹⁵⁵

EPZ employers take other measures to restrict the right to organize. Most zone companies maintain year-to-year employment contracts that prevent employees from accruing vacation and severance pay rights.¹⁵⁶ Internal personnel policies prohibit not only non-employee organizers, but also employees themselves from organizing, even on non-working time.¹⁵⁷

d. Forced Labor, Child Labor, and Working Conditions

ILO Convention 105¹⁵⁸ prohibiting forced labor is one of only six conventions ratified by the Salvadoran government.¹⁵⁹ Nevertheless,

154. Office of the United States Trade Representative, Trade Policy Staff Comm., Generalized System of Preferences Subcomm., GSP Annual Review Public Hearing, Oct. 15, 1992, at 152 [hereinafter 1992 GSP Review Hearing] (testimony of Ambassador Miguel Angel Salaverria). This policy clearly contravenes ILO principles. See ILO DIGEST OF DECISIONS, *supra* note 114, at ¶ 220 (emphasizing the importance of guaranteeing union officials' access to plantations). It also contradicts assurances made by El Salvador to the United States. See DESIGNATION OF NINE CARIBBEAN BASIN COUNTRIES AS BENEFICIARIES UNDER THE CARIBBEAN BASIN ECONOMIC RECOVERY ACT: COMMUNICATION FROM THE PRESIDENT OF THE UNITED STATES, H.R. DOC. 98-159, 98th Cong., 2d Sess. 48 (1984) [hereinafter Caribbean Basin Countries] (reporting that the Salvadoran government, as a condition of beneficiary status under the CBERA, promised to permit union organizers to meet with workers within the San Bartolo EPZ).

155. See PAYING TO LOSE OUR JOBS, *supra* note 17, at 59 (noting that the extent of blacklisting was revealed in 1992 when an AID official informed a union investigator posing as a United States textile manufacturer that zone managers maintained a blacklist of known union members); ILO, 177th Report of the Comm. on Freedom of Association (El Salvador, Case No. 844) (1978), ¶ 276 (declaring that blacklisting constitutes a serious threat to the free exercise of trade union rights).

156. See Arriola, *supra* note 145, at 54-55 (describing employer practice of annual contracts).

157. This policy clearly would be illegal in the United States. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) (holding that employers may not prohibit union solicitation by employees on company property during non-working hours).

158. ILO Convention 105, *supra* note 60.

159. The others are: Convention Concerning Workmen's Compensation in Agriculture (Convention No. 12) (entered into force Feb. 26, 1923), *reprinted in* 1 ILO CONVENTIONS & RECOMMENDATIONS, *supra* note 60, at 39; Convention Concerning the Abolition of Penal Sanctions for Breaches of Contract of Employment by Indigenous Workers (Convention No. 104) (entered into force June 7, 1958), *reprinted in* 1 ILO CONVENTIONS & RECOMMENDATIONS, *supra* note 60, at 587; Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Popula-

compulsory labor provisions of the Salvadoran Penal Code have drawn criticism from the ILO.¹⁶⁰ Violations of minimum age laws are widespread and inspections by the Ministry of Labor are "insufficient to enforce the law."¹⁶¹ A national Minimum Wage Council establishes minimum wages,¹⁶² but minimum wage increases have not kept pace with inflation.¹⁶³ Approximately forty percent of El Salvador's population now lives below the official poverty line.¹⁶⁴ The government does little to enforce laws protecting workers' safety and health. Outdated standards, lack of resources, and corruption are the principal obstacles to enforcement.¹⁶⁵

e. Lack of Fair Judicial Review

The Labor Code provides for judicial review of some actions of the Minister of Labor.¹⁶⁶ Human rights monitors, however, have accused the Salvadoran judiciary of political bias¹⁶⁷ and corruption.¹⁶⁸ The Chapultepec Accords call for the establishment of a National Judicial Council, independent of the government and political parties, to propose

tions in Independent Countries (Convention No. 107) (entered into force June 2, 1959), *reprinted in* 1 ILO CONVENTIONS & RECOMMENDATIONS, *supra* note 60, at 627; Convention Concerning Vocational Rehabilitation and Employment (Disabled Persons) (Convention No. 159) (entered into force June 20, 1985), *reprinted in* 2 ILO CONVENTIONS & RECOMMENDATIONS, *supra* note 60, at 1278; and Convention Concerning Labour Statistics (Convention No. 160) (entered into force Apr. 24, 1988), *reprinted in* 2 ILO CONVENTIONS & RECOMMENDATIONS, *supra* note 60, at 1325.

160. 1992 STATE DEP'T REPORT, *supra* note 109, at 403; *see* ILO, Comm. of Experts on the Application of Conventions and Recommendations, Individual Observation Concerning Convention No. 105 (El Salvador) (1990) (noting Salvadoran government's failure to bring national legislation into conformity with ILO Convention 105).

161. 1992 STATE DEP'T REPORT, *supra* note 109, at 403.

162. *See* 1972 LABOR CODE, *supra* note 107, arts. 149-159.

163. EL SALVADOR LABOR TRENDS, *supra* note 117, at 5.

164. 1993 STATE DEP'T REPORT, *supra* note 81, at 444.

165. *See id.* (discussing deficiencies of safety and health enforcement); Statement of Rudy Oswald, AFL-CIO, to the GSP Subcommittee, Oct. 1991, at 3 (reporting that according to the Salvadoran Labor Ministry, 52,805 inspections during the period from June 1, 1990 to May 31, 1991 produced only 15,800 colones (US \$1,975) in fines for violations of labor code standards).

166. *See* 1972 LABOR CODE, *supra* note 107, arts. 572-93 (establishing procedures for judicial review of actions by the Ministry of Labor).

167. *See* 1993 STATE DEP'T REPORT, *supra* note 81, at 438 (stating that the Salvadoran judiciary, which is only nominally independent, was weakened by political pressures).

168. *See id.* at 443 (noting the problem of corruption in the labor courts).

judicial nominees.¹⁶⁹ While the Salvadoran Assembly passed a law purporting to establish such a Council in 1992, the United Nations Truth Commission¹⁷⁰ has raised serious questions concerning the Council's political independence.¹⁷¹ The Truth Commission has recommended reforms to create an independent judiciary, separate from administrative agencies and not subject to the direct political control of the ruling party.¹⁷²

f. Effects of Worker Rights Violations on the Labor Movement

Systematic violations of worker rights have produced a weak and fragmented labor movement in El Salvador.¹⁷³ Although there are currently 112 unions and public-sector associations, organized in six major federations,¹⁷⁴ the vast majority of Salvadoran workers have no union representation. In 1993, unions represented only 11.17% of El Salvador's labor force,¹⁷⁵ and a mere 3.74% of workers were covered by collective bargaining agreements.¹⁷⁶ Most of these contracts did little more than reiterate provisions of the Labor Code.¹⁷⁷

169. Chapultepec Accords, *supra* note 88, Ch. 3, § 1(A).

170. See *supra* notes 103-04 and accompanying text (discussing the establishment and activities of the Truth Commission).

171. See TRUTH COMMISSION REPORT, *supra* note 104, at 246 (criticizing proposed judicial reforms); 1993 STATE DEP'T REPORT, *supra* note 81, at 438 (stating that reforms of the judiciary leave power concentrated in the hands of the Supreme Court, although some of the recent reforms may ameliorate this problem).

172. See TRUTH COMMISSION REPORT, *supra* note 104, at 244-46 (recommending reforms to create an independent judiciary).

173. See PROHIBITED RIGHTS, *supra* note 102, at 40 (stating that Salvadoran unions are afflicted by low levels of affiliation, fragmented organization, and duplication of structures).

174. *Id.* at 38. The federations are: National Union of Salvadoran Workers (UNTS); National Union of Workers and Campesinos (UNOC); National Federation of Salvadoran Workers (FENASTRAS); General Confederation of Unions (CGS); Federation of Construction Industry Unions (FESINCONSTANS); and General Confederation of Workers (CGT). *Id.*

175. See *id.* at 48 (reporting the results of a survey of labor union membership and collective bargaining agreements).

176. *Id.* at 55.

177. *Id.* at 95.

III. USING THE GSP PROCESS TO ENFORCE WORKER RIGHTS

A. THE AMERICAS WATCH PETITIONS, 1987-1989

In 1987, Americas Watch¹⁷⁸ petitioned the USTR to suspend El Salvador's GSP benefits.¹⁷⁹ USTR refused to accept the petition, stating that the documented abuses against unionists did not constitute violations of their internationally-recognized worker rights because, according to the State Department, the victims were members of unions "known by the U.S. Government to be front organizations of the insurgent FMLN."¹⁸⁰

Despite Congressional pressure,¹⁸¹ USTR rejected subsequent petitions by Americas Watch in 1988 and 1989.¹⁸² USTR offered several reasons for its refusal. First, it argued that the Salvadoran government was not responsible for the killing, torture, and disappearance of trade unionists carried out by unknown death squads.¹⁸³ Second, USTR

178. See Robert Kogod Goldman, *International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts*, 9 AM. U. J. INT'L L. & POL'Y 49, 89-93 (1993) (discussing the impact of America Watch's human rights monitoring on the Salvadoran government's policies).

179. Americas Watch, Testimony Before the U.S. Trade Representative on Labor Rights in El Salvador, Oct. 1987, at 1 (documenting violations including killings, imprisonment, and disappearances of union leaders).

180. Letter from USTR to Americas Watch (Aug. 14, 1987) (on file with ILRERF) (stating reasons for refusal to accept labor rights petition).

181. See, e.g., Letter from 23 members of Congress to Clayton Yeutter, USTR (Oct. 13, 1988) (on file with ILRERF) (requesting that USTR review Americas Watch 1988 Petition); Letter from 116 members of Congress to Carla Hills, USTR (July 14, 1989) (on file with ILRERF) (requesting that USTR review Americas Watch 1989 Petition).

182. See Americas Watch 1990 Petition, *supra* note 105 (noting rejection of 1988 and 1989 petitions).

183. GSP Subcommittee, GSP Subcommittee Rationale for Non-Acceptance of Worker Rights Petition on El Salvador, Aug. 22, 1988. In fact, human rights investigators and journalists have extensively documented links between the government and the death squads. See TRUTH COMMISSION REPORT, *supra* note 104, at 181 (stating that military and civilian officials participated in, promoted, and tolerated death squad activities); DEATH SQUADS, *supra* note 105 (arguing that death squads were a component of the Salvadoran government's counterinsurgency strategy); Clifford Krauss, *U.S., Aware of Killings, Kept Ties to Salvadoran Rightists, Papers Suggest*, N.Y. TIMES, Nov. 9, 1993 (identifying Salvadoran Vice-President Francisco Merino and ARENA presidential candidate Armando Calderon Sol as death squad organizers). Moreover, the Salvadoran government bears responsibility for the actions of private parties that

claimed that arrested union members may have been involved in "illegal, politically-motivated criminal activities."¹⁸⁴ Third, USTR argued that an arrest, killing, or other abuse does not violate worker rights unless it is intended specifically to keep workers from exercising their rights to associate, organize, and bargain collectively.¹⁸⁵

B. AIFLD ATTACKS AMERICAS WATCH

AIFLD, which supported the Duarte government,¹⁸⁶ opposed suspension of El Salvador's GSP benefits.¹⁸⁷ When Americas Watch criticized AIFLD's activities and called for Congressional review of the Institute's funding,¹⁸⁸ AIFLD issued a report¹⁸⁹ accusing Americas Watch of pro-FMLN bias for reporting attacks on UNTS unions, calling the un-

violate internationally recognized worker rights. See ILO, 234th Report of the Comm. on Freedom of Association (El Salvador, Case No. 1237), ¶ 213 (stating that governments have the responsibility to ensure a climate free from violence in which trade union rights can be freely exercised).

184. Americas Watch 1988 Petition, *supra* note 105, at 2 (citing letter from J. Edward Fox, legislative liaison, Dep't of State, to Sen. Tom Harkin, Mar. 22, 1988); see Americas Watch, Testimony Before the GSP Subcommittee Concerning Worker Rights in El Salvador (1987), at 9 (noting that the Salvadoran armed forces may consider legitimate union activities, such as strikes or collective bargaining, to be political crimes). In defining what constitutes a violation of the freedom of association, the ILO has attempted to strike a balance between the exercise of trade union functions and activities of a purely political character. See ILO DIGEST OF DECISIONS, *supra* note 114, ¶ 353 (holding that governments should not interfere with a union's functions because of its relationship with a political party); cf. *id.*, ¶ 355 (admonishing unions against purely political actions).

185. Letter from Clayton Yeutter, USTR, to Americas Watch (Aug. 28, 1987); see Letter from Clayton Yeutter, USTR to Holly Burkhalter, Americas Watch, Aug. 24, 1988 (criticizing Americas Watch for concentrating too much on worker rights and too little on human rights issues); Americas Watch 1989 Petition, *supra* note 105, at 16-17 (citing instances where USTR demanded substantial evidence of Salvadoran government's intent to violate labor rights).

186. See *supra* note 100 and accompanying text (describing links between AIFLD and the Duarte administration).

187. See Kahn, *supra* note 49, at 78 (stating that the AFL-CIO believed in 1988 that calling for suspension of El Salvador's GSP benefits was unwarranted).

188. See LABOR RIGHTS IN EL SALVADOR, *supra* note 105, at 102-03 (stating that AIFLD used United States aid to set up parallel unions).

189. AIFLD, A Critique of the Americas Watch Report on Labor Rights in El Salvador, June 10, 1988, (on file with ILRERF) [hereinafter AIFLD Critique]; see Americas Watch, Americas Watch Critique of AIFLD Critique on "Labor Rights in El Salvador," July 5, 1988 (on file with ILRERF) (responding to AIFLD criticisms of Americas Watch report).

ions guerrilla fronts,¹⁹⁰ while allegedly ignoring FMLN violations of worker rights.¹⁹¹ Following the AIFLD report, an open letter from UNOC condemned Americas Watch as an FMLN dupe.¹⁹² Assistant Secretary of State for Latin America Elliott Abrams joined the fray, attacking Americas Watch Vice-Chair Aryeh Neier as "a violent partisan who hates Ronald Reagan and is determined to have no enemies to his left."¹⁹³

C. REALIGNMENT, 1990-1993

With the end of the Cold War and the opening of negotiations between the FMLN and the Salvadoran government,¹⁹⁴ a political realignment occurred in both the Salvadoran labor movement and the AFL-CIO. In early 1989, UNTS and UNOC forged an uneasy alliance against the Christian Democratic government.¹⁹⁵ The AFL-CIO, meanwhile, shifted its position on trade sanctions and, in 1990, filed its first GSP petition against El Salvador.¹⁹⁶ The USTR accepted this petition, along with petitions filed by other unions and by Americas Watch.¹⁹⁷ USTR kept these petitions under review until July, 1994.¹⁹⁸ As violence

190. See AIFLD Critique, *supra* note 189, at 7-15 (accusing UNTS of pursuing a strategy of revolutionary violence).

191. See *id.* at 27 (arguing that the Duarte government was not deliberately violating worker rights).

192. See Letter from UNOC to Tom Kahn, AFL-CIO (Aug. 2, 1988) (on file with ILRERF) (characterizing the Americas Watch report as an instrument of an FMLN strategy to undermine the Salvadoran Government).

193. Morton Kondracke, *Americas Watch: Human Rights or Politics?*, WASH. TIMES, Aug. 12, 1988.

194. See Vickers, *supra* note 87 and accompanying text (discussing the factors motivating the peace negotiations).

195. See Bronstein, *supra* note 102 (describing pact between UNOC and UNTS).

196. See generally AFL-CIO 1990 Petition, *supra* note 105, at 19-37.

197. See ILRERF Pre-Hearing Brief, *supra* note 105, at 1 n.2 (listing 1990 petitioners).

198. See GSP Subcomm., Trade Pol'y Staff Comm., USTR, 1990 GSP Ann. Rev., Worker Rights Rev. Summary 12-13 (1991) [hereinafter 1990 Worker Rights Review] (recommending continuation of review of El Salvador); GSP Subcomm., Trade Pol'y Staff Comm., USTR, 1991 GSP Ann. Rev., Worker Rights Rev. Summary 6 (1992) [hereinafter 1991 Worker Rights Review] (continuing review); GSP Subcomm., Trade Pol'y Staff Comm., USTR, 1992 GSP Ann. Rev., Worker Rights Rev. Summary 4 (1993) [hereinafter 1992 Worker Rights Review] (continuing review); *Trade Briefs*, J. COMM., Dec. 29, 1993 (reporting continuation of review); USTR Trade Policy Staff Comm., Notice of the Results of the 1993 Annual GSP Review, 59 Fed. Reg. 35,970, 35,971 (1994) (finding El Salvador to be taking steps to afford internationally recog-

against unions diminished, the focus of this review shifted to the reform of El Salvador's labor laws.¹⁹⁹

IV. THE EFFECTS OF UNITED STATES ECONOMIC PRESSURE ON EFFORTS TO REFORM EL SALVADOR'S LABOR LAWS

A. THE ECONOMIC AND SOCIAL FORUM

The principal locus of attempts to reform Salvadoran labor law has been the Economic and Social Forum, a tripartite body with equal representation of labor, business, and government, with the goal of planning for the social and economic development of the country.²⁰⁰ The main objective of the government and private sector in the Forum was to offer sufficient assurances of reform to protect El Salvador's GSP benefits without significantly altering existing industrial relations practices or shifting the balance of power between capital and labor.²⁰¹ The unions' goal, when the Forum convened in September of 1992,²⁰² was not labor law reform but rather to develop immediate measures that would alleviate the effects of the government's economic adjustment policies on El Salvador's workers.²⁰³ The unions viewed the insistence of the

nized worker rights and terminating review).

199. See 1992 Worker Rights Review, *supra* note 198, at 4 (declaring that the GSP subcommittee would extend review for six months to allow for completion of the revised Labor Code).

200. See Chapultepec Accords, *supra* note 88, Ch. 5, § 8(A) (creating the Economic and Social Forum, a tripartite body with equal representation of labor, business, and government, with the objective of planning for the social and economic development of the country). The Accords specifically state that "the Government will propose to the Forum the revision of the labor laws to promote and maintain a climate of harmony in labor relations, without detriment to the unemployed or the general public." *Id.*

201. See ILRERF Pre-Hearing Brief, *supra* note 105, at 51-53 (discussing the government's failure to fulfill promises made to the Forum). These promises are not new. In 1984, to gain access to Caribbean Basin Initiative benefits, the Salvadoran government promised to take measures to protect the security of unions, clarify farm-workers' right to organize, give unions access to EPZs, and impose sanctions on employers who harass or intimidate unions. Caribbean Basin Countries, *supra* note 154, at 48-49.

202. See EL SALVADOR LABOR TRENDS, *supra* note 117, at 3-4 (noting that while the Chapultepec Accords established the Forum in April, 1992, the Forum did not begin functioning until September due to a boycott by the private sector).

203. See *id.* (observing that unions requested that the Forum discuss economic adjustment policies before taking up labor law reform); INTERGREMIAL DE TRABAJADORES, PROPUESTA DE ANTEPROYECTO DE CODIGO DE TRABAJO [INTER-UNION

private sector and the government on discussing the Labor Code first as a delaying tactic, since neither of these sectors had presented any substantive proposals for Labor Code reform.²⁰⁴

The election of Bill Clinton in November 1992, led Salvadorans to expect more rigorous enforcement of United States worker rights standards.²⁰⁵ Seeing a political opening, the unions decided to drop their immediate economic demands and push for substantive labor law reform, using the threat of GSP suspension as leverage.²⁰⁶ The government, fearing that its failure to participate seriously in the Forum could jeopardize its trade benefits, agreed to a process for negotiations,²⁰⁷ and the unions presented a slate of demands that included both revision of the labor code and other statutes, and ratification of key ILO conventions.²⁰⁸ As the February, 1993 deadline for the USTR's decision on El Salvador's GSP benefits approached, political tensions increased. The ARENA party and business leaders began a campaign of denunciation, directed principally at the leadership of UNOC.²⁰⁹ ARENA deputies introduced a bill to make expressions of support for suspension of El Salvador's GSP privileges a crime of treason.²¹⁰

OF WORKERS, PROPOSED LABOR CODE BILL] arts. 173-77 (1991) (El Sal.) (on file with ILRERF) (proposing that El Salvador restructure the National Minimum Wage Council and increase worker representation).

204. See EL SALVADOR LABOR TRENDS, *supra* note 117, at 3-4 (observing that while the unions submitted a draft new Labor Code in August 1991, the government did not present its proposals until December of 1992).

205. See ILRERF Pre-Hearing Brief, *supra* note 105, at 43 (describing the impact of the United States presidential elections on the Forum).

206. See *id.* (summarizing the unions' negotiating strategy).

207. Situación del Foro para la Concertación Económica y Social a un Año de su Instalación, (1993) (on file with ILRERF) [hereinafter Situation of the Forum].

208. See generally *id.* (describing union demands).

209. See, e.g., *La sucia "jugada" de la UNOC*, EL DIARIO DE HOY, Jan. 28, 1993, at 6 (proclaiming that UNOC members are gangsters in the service of the AFL-CIO); *La petición laboral para ser excluidos del GSP*, LA PRENSA GRAFICA, Jan. 29, 1993, at 8 (reporting accusations that UNOC was attempting to sabotage the Salvadoran economy); *"Manoseo extranjero propicia UNOC": ISTA*, EL MUNDO, Feb. 5, 1993 (stating that the president of the Agrarian Institute called UNOC anti-Salvadoran); *Actitud de UNOC tiene que ser repudiada, dice Salguero Gross*, EL MUNDO, Feb. 8, 1993, at 6 (reporting that an ARENA deputy called UNOC "false union leaders"); *UNOC miente y actúa antipatrióticamente, dice Pdte. de Conapes*, LA PRENSA GRAFICA, Feb. 13, 1993 (stating that president of Small Business Council accused UNOC of "antipatriotic attitudes").

210. See *Piden Castigar Como "Traición a la Patria" Boicot de UNOC*, DIARIO DE HOY, Jan. 29, 1993, at 5 (stating that the bill would label as a traitor anyone

On February 17, 1993, the eve of the USTR's decision, the parties to the Economic and Social Forum signed an Agreement of Principles.²¹¹ The unions dropped their demand for immediate economic measures; in exchange, the government and private sector agreed to discuss ratification of ILO conventions prior to negotiating reform of the Labor Code.²¹² The unions muted their calls to cut off GSP benefits, and the government ceased its verbal attacks on union leaders.²¹³ For the first time in El Salvador's history, government and business seemed prepared to include labor as an equal partner.

B. CONSTITUTIONAL GRIDLOCK

This unprecedented harmony soon soured as the government raised constitutional objections to ratification of the principal ILO conventions proposed by the unions.²¹⁴ As the stalemate continued through April

who, by actions or declarations in the news media, defames the country with the objective of damaging its reputation or interests, especially by preventing foreign assistance).

211. *Acuerdo de Principios y Compromisos* Feb. 17, 1993 (El Sal.) [hereinafter Agreement of Principles], reprinted in *DIARIO DE HOY*, Feb. 20, 1993.

212. *Id.* The government and private sector pledged to relax requirements for legal registration of unions, end discrimination on the basis of union affiliation, give union leaders access to the workplace, and facilitate collective bargaining. *Id.* The parties also agreed to propose, by April 30, 1993, ratification of "those ILO conventions relating to union liberty and democracy, work of women and youth, employment and minimum wage, to the extent not contradicting the Constitution." *Id.* They agreed to complete the revision of the Labor Code by September 30, 1993. *Id.* Finally, the Forum established a tripartite commission to seek solutions to pending labor conflicts. *Id.*; see ILRERF Pre-Hearing Brief, *supra* note 105, at 46 (analyzing the Agreement of Principles).

213. ILRERF Pre-Hearing Brief, *supra* note 105, at 46.

214. See Dictamen del Sector Gubernamental: Hearings Before the Forum for Economic and Social Harmonization, Act 29-A, annex 2 (May 1993) (statement of Dr. Rene Ivan Castro, Sub Comisión Técnica Legal) (El Sal.) (asserting unconstitutionality of six ILO conventions). The government contends that the following ILO conventions are unconstitutional: ILO Convention 87, *supra* note 60; ILO Convention 98, *supra* note 60; Convention Concerning Maternity Protection (Revised 1952) (Convention No. 103) (entered into force Sept. 7, 1955), reprinted in 1 ILO CONVENTIONS & RECOMMENDATIONS, *supra* note 60, at 570; Convention Concerning Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking (Convention No. 135) (entered into force June 30, 1973), reprinted in 2 ILO CONVENTIONS & RECOMMENDATIONS, *supra* note 60, at 1005; Convention Concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service (Convention No. 151) (entered into force Feb. 25, 1981), reprinted in 2 ILO

CONVENTIONS & RECOMMENDATIONS, *supra* note 60, at 1178; and Convention Concerning the Promotion of Collective Bargaining (Convention No. 154) (entered into force Aug. 1, 1981), *reprinted in* 2 ILO CONVENTIONS & RECOMMENDATIONS, *supra* note 60, at 1222. Government Position Statement, *supra*. The private sector considers ILO Conventions 103 and 135 not unconstitutional but inconvenient. Opinión del Sector Empresarial; Hearings Before the Forum for Economic and Social Harmonization, annex 1 (May 19, 1993) (statement of Dr. Francisco Bertrand Galindo, Comisión Técnica Legal [Expert Legal Comm'n]) (El Sal.) [hereinafter Private Sector Position Statement].

The government offers three principal arguments to support its claim that the ILO Conventions are unconstitutional. First, it asserts that Article 47 of the Constitution denies state and municipal employees the right to form unions. *See* CONSTITUCION, art. 47 (El Sal.) (proclaiming that "[p]rivate sector employers and workers . . . have the right to associate freely for the defense of their respective interests, forming professional associations or unions."). Because state and municipal employees are not specifically included in Article 47, they are excluded, and therefore have no right to associate in unions. Thus Convention 87, which guarantees freedom of association, contravenes the Constitution. Second, the government argues that the right to form a union necessarily implies both the right to collective bargaining and to strike. Article 219 of the Constitution regulates conditions of employment in the civil service while Article 221 prohibits strikes by public and municipal workers. CONSTITUCION, art. 221 (El Sal.). If ILO Conventions 98, 151, and 154 grant an unrestricted right to strike to state employees, they are unconstitutional. Third, the government claims that ILO Convention 87 violates the constitutional requirement that union leaders be of Salvadoran nationality. CONSTITUCION, art. 47 (El Sal.).

The government's position is untenable, for the following reasons. First, the government's narrow reading of Article 47 creates an unnecessary conflict with El Salvador's obligations as a member of the ILO. The ILO holds that because freedom of association is a fundamental right, member states that have not ratified convention 87 are nevertheless bound by its principles under the ILO Constitution, and are subject to the jurisdiction of the Committee on Freedom of Association. *See* Alice O'Brien, Working Paper on ILO Convention No. 87, at 3 n. 10 (1993) (on file with ILRERF) (citing ILO, First Report of the Comm. on Freedom of Association, ¶ 32). For example, although the United States has not ratified Convention No. 87, the Committee on Freedom of Association has accepted eight complaints of violations of freedom of association by the United States since 1982. O'Brien, *supra*, at 3 n.11. Moreover, because the freedom of association has become incorporated into customary international law, it is binding on the Salvadoran government. *See* Leslie Deak, *Customary International Labor Laws and their Application in Hungary, Poland and the Czech Republic*, 2 TULSA J. COMP. & INT'L L. 14-26 (1994) (demonstrating that freedom of association is a part of customary international law). If Article 47 truly denies freedom of association and organization to public employees, then El Salvador must either modify its Constitution or withdraw from the ILO. But if it is possible to read Article 47 as allowing state and municipal workers the right to associate and organize, then there is no inconsistency and no constitutional impediment to ratification.

The Salvadoran government's present refusal to consider amending its constitution to conform to ILO principles may be a political show, in view of its past willingness to consider such amendments. See 1992 GSP Review Hearing, *supra* note 154, at 168 (testimony of the Hon. Miguel Angel Salaverria, Ambassador of El Salvador) (suggesting that the government would consider altering the constitution to expand public employees' right to strike). Even if the government's objections are genuine, a less narrow interpretation of Article 47 would allow it to coexist with the ILO Conventions. According to this interpretation, (1) Article 47 does not prohibit, and therefore permits, public employees to organize and bargain collectively; (2) the rights of organization and collective bargaining do not include the right to strike in all circumstances. See *Argumentación del Sector Laboral a Favor de Convenios de OIT Sobre Libertades Sindicales: Hearings Before the Forum for Economic and Social Harmonization*, annex 3 (May 19, 1993) (statement of the Labor Sector, Subcomisión Técnica Legal) (El Sal.) [hereinafter Unions' Position Statement] (on file with ILRERF) (advocating a broad reading of Article 47).

A broad reading of Article 47 is consistent with El Salvador's international treaty obligations, other articles of the Constitution, and general principles of constitutional construction. First, El Salvador is already bound by treaties that guarantee the freedom of association. *E.g.*, Acuerdo de San Jose Sobre Derechos Humanos, July 26, 1990, art. I, §5, *reprinted in* ACUERDOS, *supra* note 88, at 7, 9 (declaring that all persons have the right of free association on trade union grounds and that the government shall fully respect trade union liberty); Universal Declaration on Human Rights, art. 20, § 4, G.A. Res. 217 A(III), U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948) (establishing freedom of association); International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, art. 8, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) (addressing the right to join unions and strike in conformity with local law); International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 22, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (establishing freedom of association consistent with national security and public safety). Since the Constitution prohibits ratification of treaties that "restrict or in any way affect Constitutional dispositions," the freedom of association permitted by these treaties is presumably constitutional. CONSTITUCION, art. 145 (El Sal.). Second, the Constitution itself contains a clause guaranteeing broad freedom of association. CONSTITUCION, art. 7 (El Sal.) (stating that Salvadorans "have the right to associate freely and assemble peaceably and without arms for any licit purpose"). Third, the leading authority on Salvadoran constitutional jurisprudence holds that "constitutional dispositions should be interpreted broadly when they favor the realization of [human rights], and narrowly when they oppose [these rights]." Unions' Position Statement, *supra*, citing FRANCISCO BERTRAND GALINDO, *MANUAL OF CONSTITUTIONAL LAW* 226.

Moreover, the ILO has never held that the freedom of association or the right to organize and bargain collectively implies an absolute right to strike for all state employees. Indeed, the Technical Commission of the Forum requested and received a written opinion from the ILO to this effect. Letter from Dr. Arturo Bronstein, Chief, ILO Labor Law Section, to Sandra Dunsmore, Secretary of the Forum for Economic and Social Harmonization (Apr., 1993) [hereinafter Bronstein letter] (on file with ILRERF); see ILO DIGEST OF DECISIONS, *supra* note 114, ¶ 365 (stating that freedom of association in the case of public employees does not necessarily imply the right to

and May 1993, labor unrest increased.²¹⁵ The unions insisted that the Forum discuss ILO Convention 87,²¹⁶ while the Government took the position that even if the Forum should reach consensus on the "unconstitutional" conventions, the president would refuse to recommend their ratification by the Assembly.²¹⁷ The result was gridlock. The unions made another effort to salvage the negotiating process in July when they proposed that a panel of ILO experts determine the constitutionality of Conventions 87 and 98, and that the other disputed Conventions be incorporated into secondary legislation.²¹⁸ In August 1993, the government accepted the proposal for a labor code panel, with ILO advisors assisting the technical drafting teams, but would not allow the ILO to arbitrate the dispute over Conventions 87 and 98. The government did agree to follow the recommendations of United Nations experts operating pursuant to the Truth Commission.²¹⁹

strike); cf. 5 U.S.C. §§ 7102, 7116(b)(7) (1988 & Supp. V 1993) (granting employees of the United States Government the right to organization and collective bargaining, but denying employees the right to strike).

In addition, ILO jurisprudence clearly establishes that laws regulating the nationality of union leaders are not inconsistent with freedom of association. *See* Unions' Position Statement, *supra*, at 14 (quoting ILO Manual of Freedom of Association); ILO Recommendation Concerning Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking (Recommendation No. 143), *reprinted in* 2 ILO CONVENTIONS & RECOMMENDATIONS, *supra* note 60, at 1005 (stating that governments may regulate the types of workers' representatives entitled to protection).

215. *See* Situation of the Forum, *supra* note 207 (discussing unions' dissatisfaction with the pace of negotiations in the Forum). On May 3, workers of the Ministry of Public Works went on strike after the Minister reneged on a collective agreement that the Minister and the employees had negotiated with the assistance of the Tripartite Commission of the Forum, dealing another blow to the credibility of the negotiating process. *See Crónica del mes*, 534-535 ESTUDIOS CENTROAMERICANOS 444, 460-61 (1993) (describing strikes by public works employees).

216. *See* PROCESO, May 26, 1993 (stating unions' position).

217. *See* Gobierno de la República [Government of the Republic], *Posición ante los convenios de la Organización Internacional del Trabajo, tratados durante el Foro para la concertación económica y social* [Position towards the ILO Conventions discussed in the forum for social and economic harmonization], 534-35 ESTUDIOS CENTROAMERICANOS 497 (1993) (stating Government's position on the ILO conventions that the Forum was discussing).

218. Acuerdo Complementario, draft proposal, Forum for Economic and Social Harmonization, July 12, 1993 art. I, §§ 1-2 (El Sal.) (on file with ILRERF).

219. *See* Acuerdo Complementario, Draft Proposal, Forum for Economic and Social Harmonization, art. I, §§ 1-2 (El Sal.) (on file with ILRERF) (stating that the government agreed to follow the recommendations of United Nations experts concerning the constitutionality of ILO Conventions 87 and 98); cf. TRUTH COMMISSION REPORT,

As the November USTR hearing on El Salvador's GSP review approached, the Salvadoran government agreed to an ILO Direct Contacts Mission.²²⁰ At the same time, a wave of public employee strikes paralyzed the government, which was able to restore order only by suspending the Constitution.²²¹ On October 22, 1993, an ILO expert, Dr. Arturo Bronstein, participated in a crucial work session of the Labor Code Commission of the Forum.²²² The parties agreed to a forty-nine point program for reform of the Labor Code that Dr. Bronstein drafted.²²³

At the USTR hearing on November 3, 1993, the government testified that it was prepared to transmit the ILO proposal, without amendment, to the National Assembly by December 15, 1993.²²⁴ In an unprecedented development, the ILO's Dr. Bronstein appeared as a government

supra note 104, at 254 (recommending that El Salvador ratify ILO Conventions 87 and 98, along with other fundamental human rights instruments).

220. ILO, 291st Report of the Comm. on Freedom of Association, *supra* note 105 (reporting on the visit of Direct Contacts Mission to El Salvador from Sept. 27-Oct. 1, 1993). This was the first time since 1985 that the Salvadoran government had allowed ILO observers into El Salvador, despite repeated requests. *See, e.g.* ILO, 288th Report of the Comm. on Freedom of Association, *supra* note 105, ¶¶ 9-10 (criticizing the Salvadoran government's negative attitude toward ILO inquiries). The ILO's report noted the decline in incidents of physical violence against trade unionists, and observed that industrial relations in El Salvador are "now moving decisively toward normality." ILO, Report of the Committee on Freedom of Association, *supra* note 105, ¶ 239 (1993). The ILO qualified this conclusion by the assumption that there would be prompt and effective labor law reform. *See id.*, ¶ 243 (noting widespread anti-union discrimination reflecting weaknesses in the legal system).

221. *See La aleccionadora huelga en el Ministerio de Salud*, 539 ESTUDIOS CENTROAMERICANOS 890 (1993) (describing strikes by health care workers); *Crónica del mes*, 539 ESTUDIOS CENTROAMERICANOS 895, 902-04 (recounting strikes by public employees); Agreement between Government of El Salvador and Public Sector Unions, Sept. 25, 1993 (on file with ILRERF) (ending public sector strike); FENASTRAS Report, *supra* note 131, at 7 (reporting that El Salvador's government used Decree 296, a product of the revolutionary junta that briefly governed El Salvador following the 1979 coup, to break strikes by public employees).

222. USTR, Trade Pol'y Staff Comm., Generalized System of Preferences Subcomm., GSP Annual Review Public Hearing, Nov. 3, 1993, at 60-68 (testimony of Dr. Arturo Bronstein, Chief, ILO Labor Law Section) [hereinafter 1993 GSP Review Hearing].

223. Propuesta de la OIT para Reformar el Código de Trabajo de El Salvador (1993) [hereinafter ILO Labor Code Reform Proposal], *reprinted in* LA REFORMA DEL CODIGO DE TRABAJO: POSICIONES 25 (1993).

224. 1993 GSP Review Hearing, *supra* note 222, at 54-57 (testimony of Dr. Juan Sifontes, Minister of Labor of El Salvador).

witness to explain the details of his proposal.²²⁵ The Salvadoran unions agreed that acceptance of the ILO proposal would fulfill the statutory requirement of "taking steps," but urged USTR to set a November 30 deadline for terminating GSP benefits.²²⁶

Following the hearing, negotiations continued, with the business sector continuing to object to two provisions of the ILO draft.²²⁷ On December 13, 1993, the Government introduced a bill in the National Assembly to reform the Labor Code.²²⁸ The Government's proposal diverged from the consensus-building process of the Forum, unilaterally effecting changes that the Forum had not discussed and that weakened the ILO proposal.²²⁹ On December 17, 1993, USTR extended its review of El Salvador pending the passage of legislation "consistent with the ILO proposal."²³⁰ Following the ARENA party's electoral victory,²³¹ the National Assembly enacted the government's proposed Labor Code amendments, which became law on May 12, 1994.²³² On July 1, 1994, USTR terminated its review, in spite of the Salvadoran government's failure to comply with its promises to USTR, the ILO, and Salvadoran unions.²³³

225. *Id.* at 60-72 (testimony of Dr. Arturo Bronstein).

226. *Id.* at 35 (statement of Amanda Villatoro, representative of UNOC); *id.* at 43 (statement of Miguel Ramírez, representative of FENASTRAS).

227. *See* Propuesta del Sector Empresarial, Nov. 15, 1993 (on file with ILRERF) (stating private sector objections to ILO proposal).

228. Reformas al Código de Trabajo [Labor Code Reform Bill] arts. 1-52, Dec. 13, 1993 (El Sal.) [hereinafter Labor Code Reform Bill] (on file with ILRERF).

229. *See* Letter from ILRERF to USTR (Dec. 16, 1993) (stating objections to reform bill). A number of the proposed changes took away rights that existed under the 1972 Labor Code. *Id.* For example, the bill restricted the new category of unions proposed by the ILO to extend bargaining rights to employees of small employers. Labor Code Reform Bill, *supra* note 228, art. 15 (amending article 209 of the Labor Code). It completely eliminated the provisions in the 1972 Labor Code that established departmental union assemblies and executive boards for the 14 geographical departments of El Salvador, leaving only national and enterprise-specific structures. *Id.*, arts. 12-20 (amending articles 221-23). And it placed limits on the structure of union executive committees that were not found in either the existing Labor Code or the ILO proposal. *Id.*, art. 24 (amending article 224).

230. USTR, Kantor Notes Progress in GSP Worker Rights Reviews; Continues Four Reviews Until Actions Completed, Dec. 27, 1993, at 2.

231. *See supra* note 89, 9 and accompanying text (reporting the results of the 1994 elections).

232. Decreto Ley (D.L.) No. 859, Apr. 21, 1994 (El Sal.); Decreto orden (D.O.) No. 87-BIS, Tomo No. 323, May 12, 1994 (El Sal.); *see* 1994 LABOR CODE, *supra* note 107 (outlining the new Labor Code).

233. USTR, Trade Policy Staff Comm., GSP Subcomm., Notice of the Results of

V. RECOMMENDATIONS

The Salvadoran experience suggests several ways in which Congress could modify the worker rights provisions of the GSP statute to achieve more effectively the purposes of the statute. Both worker rights advocates and the Clinton administration have proposed changes to these provisions.²³⁴ If Congress decides to continue GSP in its present form, it must address these proposed reforms prior to the expiration of the GSP program's authorization on July 31, 1995.²³⁵

Congress should strengthen the substantive worker rights criteria of the GSP law. First, it should delete the "taking steps" language, at least with respect to fundamental freedoms of association, organization, non-discrimination, and non-coercion.²³⁶ This language not only is unenforceably vague,²³⁷ but also thwarts the intent of the statute by permitting regimes that violate worker rights to avoid sanctions with token reforms.²³⁸ Linking non-fundamental labor standards, such as wages, to a country's level of development is acceptable. But rights essential to democratic participation, such as the freedom of association, cannot be subordinated to the accumulation strategies of national elites.²³⁹ The GSP Renewal and Reform Act of 1993 requires "complete compliance" with fundamental worker rights, but considers a country's level of economic development in evaluating progress on wages, hours, and child labor standards.²⁴⁰ Second, the statute should ex-

the 1993 Annual GSP Review, 59 Fed. Reg. 35,970, 35,971 (1994) (terminating review).

234. See GSP Reform Bill, *supra* note 6 (proposing amendments supported by worker rights advocates); Administration Proposal on Renewal of the Generalized System of Preferences (GSP) Program, Annex at 4-5, May 16, 1994 [hereinafter Administration Proposal] (setting out the Clinton administration's proposed reforms); GSP ASSESSMENT, *supra* note 29, at 118-120 (discussing proposed modifications to GSP worker rights provisions).

235. Uruguay Round Agreements Act, *supra* note 4, § 601.

236. See *supra* notes 29-32 and accompanying text (describing problems with the "taking steps" language).

237. *International Labor Rights II*, 752 F. Supp. at 497.

238. See, e.g., *supra* notes 201, 212, and 233 and accompanying text (discussing unfulfilled promises by the government of El Salvador to respect worker rights).

239. See Robert B. Reich, Keynote Address, in INTERNATIONAL LABOR STANDARDS & GLOBAL ECONOMIC INTEGRATION: PROCEEDINGS OF A SYMPOSIUM 1, 4 (Bureau of Int'l Labor Affairs, U.S. Dep't of Labor, 1994) (suggesting that where a country lacks democratic institutions, low labor standards probably reflect the economic interests of elites rather than legitimate constraints on the country's economy).

240. GSP Reform Bill, *supra* note 6, at § 3(d)(4) (distinguishing the compliance

plicitly incorporate the jurisprudence of the International Labor Organization in defining the scope of each worker right.²⁴¹ Along with the removal of "taking steps," explicit reference to ILO jurisprudence in the GSP Renewal and Reform Act of 1993 should put to rest the unhappy distinction between worker rights and human rights that served to rationalize USTR's inaction on El Salvador during the Reagan and Bush administrations.²⁴²

The GSP statute needs a major procedural overhaul as well. First, USTR should be required to accept any non-frivolous complaint. The administration's reform proposal would require USTR to accept any petition containing allegations that are "factually correct and of a serious nature" with respect to any enumerated worker rights criterion.²⁴³ The GSP Reform Bill would allow USTR to reject a worker rights petition only upon a showing that the petition is frivolous.²⁴⁴ These provisions would limit USTR's discretion to accept or reject a petition, which has been employed to serve foreign policies unrelated to worker rights.²⁴⁵

Second, Congress should eradicate USTR's "no new information" standard.²⁴⁶ This criterion has no basis in the statute.²⁴⁷ Moreover, the standard is illogical: because "the concept of making progress to meet international standards is at the heart of GSP country practice provi-

standard for fundamental worker rights, such as freedom of association, from the standard for wages, hours, and child labor). The GSP Reform Bill also adds a prohibition on race, sex, and religious discrimination to the list of fundamental worker rights. *Id.*

241. *See id.* at §3(d)(4)(i) (providing that in determining compliance with the statute, USTR shall apply recognized international standards, including ILO Conventions). *See* GSP ASSESSMENT, *supra* note 29, at 107-11 (observing that despite Congress's intention, USTR has not relied upon ILO jurisprudence for interpreting GSP worker rights provisions).

242. *See supra* note 185 and accompanying text (describing USTR's efforts to distinguish worker rights from human rights).

243. Administration Proposal, *supra* note 234, Annex at 4.

244. GSP Reform Bill, *supra* note 6, at § 5(c)(1)(C).

245. *See supra* notes 178-85 and accompanying text (describing rejection of El Salvador worker rights petitions).

246. *See* GSP ASSESSMENT, *supra* note 29, at 123 (recommending that USTR clarify the new information standard to indicate that a beneficiary country's failure to comply with promises that formed the basis of a decision to deny a petition would in itself constitute substantial new information); GSP Reform Bill, *supra* note 6, at § 5(c)(1)(C) (stating that the determination whether to accept a petition shall be made without regard to allegations in previously reviewed petitions); Administration Proposal, *supra* note 234, Annex at 4-5 (retaining the existing new information standard).

247. *See supra* note 36 and accompanying text (noting that USTR's new information regulation has no basis in the statute).

sions.²⁴⁸ It is contradictory to reject petitions on the grounds that the worker rights situation in the beneficiary country is not getting worse.²⁴⁹

Third, there should be a time limit for reviews.²⁵⁰ USTR should not have the discretion to keep a beneficiary developing country under indefinite review, without imposing sanctions.²⁵¹ While this procedure may provide both the United States and unions in the beneficiary country with political leverage,²⁵² it runs the risk of undercutting the credibility of the statute when reviews are continued in exchange for mere promises.

Fourth, to balance the requirement that reviews be of finite duration, petitioners and USTR should have the option of targeting particular products from industries that violate worker rights.²⁵³ Partial sanctions would give worker rights advocates greater strategic flexibility, allowing pressure to be applied on a beneficiary country without requiring a complete revocation of its GSP benefits.²⁵⁴

Fifth, the annual petition cycle should be made more flexible to accommodate rapidly changing events in beneficiary countries.²⁵⁵ The administration has proposed a two-stage review process which lengthens the review cycle.²⁵⁶ Under this proposal, USTR would conduct a two-

248. GSP ASSESSMENT, *supra* note 29, at 125.

249. *See id.* at 122 (stating that the new information standard has prevented review of worker rights cases where a beneficiary country stops making progress once its GSP review terminates).

250. *See* GSP Reform Bill, *supra* note 6, at § 5(c)(1)(F) (requiring a decision on a petition within 270 days).

251. *See supra* notes 198-99 and accompanying text (noting continued review of El Salvador petitions).

252. *See* DORMAN, *supra* note 29, at 6 (suggesting that probationary status is necessary to give United States policy-makers flexibility in implementing worker rights standards).

253. *See* GSP ASSESSMENT, *supra* note 29, at 123 (recommending that USTR include partial sanctions as an option); DORMAN, *supra* note 29, at 6 (recommending procedures for worker rights petitions targeting specific sectors).

254. *See* GSP ASSESSMENT, *supra* note 29, at 123 (arguing that partial sanctions would produce both flexibility and equity).

255. *See id.* at 123 (recommending that USTR review country practice petitions on a separate time schedule from product petitions and that it accept emergency petitions for review out of cycle).

256. Administration Proposal, *supra* note 234, Annex at 5. The principal rationales for the two-stage process are to clarify facts prior to acceptance of a petition, to afford due process to beneficiary countries, and to make the formal review process more effective. *Id.*

to-three month preliminary review, during which it would seek comments from the beneficiary country and conduct an interagency investigation.²⁵⁷ If the petition were accepted for "full formal review," USTR would hold hearings and issue a decision within one year of the filing of the petition.²⁵⁸ The administration's proposal does not state what criteria would be used to distinguish a full formal review from a preliminary review.²⁵⁹ On balance, this proposal should be rejected because it increases the duration and reduces the flexibility of the review process, and because it gives USTR the kind of discretion to reject petitions that has been susceptible to political pressure.²⁶⁰

Finally, the statute must ensure that USTR's decisions are subject to judicial review.²⁶¹ Congress should clarify the jurisdiction of the federal courts over actions by USTR.²⁶² And the law should define the interests of petitioners so as to address potential objections that they lack standing to seek review.²⁶³

Looking beyond the current GSP framework, Congress should consider replacing the current punitive system for worker rights enforcement with an incentive system. This is the approach being developed in the European Community (EC), which is also in the midst of reforming its GSP provisions.²⁶⁴ The EC is currently discussing a proposal, supported by European trade unions, to offer discounts of twenty to thirty

257. *Id.*

258. *Id.* The Administration Proposal states that the GSP Subcommittee would use these hearings "not merely for information collection but to advance its objectives." *Id.*

259. *See* GSP ASSESSMENT, *supra* note 29, at 123 (recommending that USTR make public the guidelines it uses to decide whether or not to accept worker rights petitions for full review).

260. *See supra* notes 38 and 65 and accompanying text (discussing politicization of the GSP review process).

261. *See supra* notes 40-47 and accompanying text (discussing denial of judicial review of USTR decisions).

262. *See* GSP Reform Bill, *supra* note 6, at § 5(c)(4) (providing for review of USTR decisions by the United States Court of Appeals for the District of Columbia Circuit).

263. *See id.*, § 3(d)(5) (defining persons eligible to file worker rights petitions); Collingsworth, Worker Rights Enforcement, *supra* note 25, at 27-35 (discussing means of providing standing for petitioners).

264. *See* Report of the Committee on Development and Cooperation, Eur. Parl. Doc. (PE DOC A4-38/94) 4-5 (1994) (proposing a resolution to the European Parliament emphasizing GSP's role as a development instrument and proposing social incentives to encourage measures in compliance with ILO conventions to safeguard worker rights).

percent below the most-favored nation (MFN) tariff rate for developing countries that conform to social (including worker rights) and environmental clauses.²⁶⁵ For example, tariffs would be reduced for a country that certifies that it allows workers to join unions and negotiate collectively.²⁶⁶ Conversely, GSP benefits could be suspended under a narrow set of circumstances.²⁶⁷

CONCLUSION

El Salvador's experience with GSP teaches several lessons about the utility of applying worker rights criteria to United States trade programs. First, the GSP petitions had an effect on worker rights in El Salvador. The threat to withdraw GSP benefits created a limited political opening for Salvadoran unions.²⁶⁸ The GSP issue focused and stimulated the tripartite negotiations in the Forum, where government and private sector, for the first time in El Salvador's history, had to sit across the table with workers and negotiate the future of Salvadoran industrial relations. As a result of this process, labor emerged as a significant political force. In addition, El Salvador for the first time recognized to some degree the jurisdiction of the ILO.²⁶⁹

The second lesson is that the effect of the worker rights petitions was not very great. The Forum did not ratify the fundamental ILO conventions. While El Salvador enacted a new labor code in 1994, its provisions are substantially weaker than the unions' original proposals. More importantly, on the shop floor and the *hacienda*, employers continue to act with impunity. Given El Salvador's history of worker rights violations,²⁷⁰ even serious and substantial legal reforms can have little effect until the government makes a serious commitment to enforce existing laws.

265. Letter from Michael Hindley, Member of the European Parliament, to the author (Jan. 11, 1994) (on file with author).

266. 11 Int'l Trade Rep. (BNA) No. 23, at D45 (1994).

267. Report of the Committee on Development and Cooperation, *supra* note 264 (proposing that GSP benefits be suspended only in cases such as fraud, slavery, prison labor, and denial of equal treatment to men and women).

268. See *supra* notes 205-08, 220-23 and accompanying text (recounting the political opportunities that the GSP review process created for Salvadoran unions).

269. See *supra* notes 220-26 (discussing the ILO's role in negotiating labor law reform).

270. See *supra* notes 103-72 and accompanying text (describing the history of violations of worker rights in El Salvador).

The ineffectiveness of the GSP worker rights provisions was due in part to the debility of the statute itself.²⁷¹ Political factors were a more important determinant. The Reagan and Bush administrations, no friends of either United States or Salvadoran unions, displayed little enthusiasm for enforcing the worker rights laws.²⁷² Were it not for El Salvador's hyperdependency on the United States, the limited economic threat posed by the GSP worker rights review might have had no political consequences at all.²⁷³ And while Salvadoran unions took substantial risks to support the cutoff of GSP benefits,²⁷⁴ ideological divisions hampered the effectiveness of labor's efforts in both El Salvador and the United States.²⁷⁵

Perhaps the final lesson of El Salvador's experience with GSP is that sovereignty is a useless abstraction for workers who face economic coercion and state terror at the hands of a national elite. Worker rights advocates argue that solidarity must now replace sovereignty if workers' fundamental freedoms are to be preserved.²⁷⁶ The battle over worker rights in El Salvador is one small part of the struggle to achieve that solidarity.

271. See *supra* notes 236-63 and accompanying text (describing deficiencies in the worker rights provisions of the GSP statute).

272. See *supra* notes 178-85 and accompanying text (discussing the refusal of the Reagan and Bush administrations to accept GSP petitions on El Salvador); *supra* note 233 and accompanying text (noting the termination of El Salvador's worker rights review, even though the Salvadoran government reneged on its promises to the ILO and Salvadoran unions).

273. See *supra* notes 79-83 and accompanying text (describing El Salvador's economic and political dependence on the United States).

274. See *supra* notes 209-10 (describing attacks on Salvadoran unionists who called for suspension of El Salvador's GSP benefits).

275. See *supra* notes 186-93 (discussing political divisions in the United States and Salvadoran labor movements).

276. See Compa, *International Labor Rights*, *supra* note 64, at 149 (proposing legal strategies for workers in a global economy); Garver, *supra* note 49, at 71 (arguing for labor solidarity to protect international worker rights).