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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. 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.

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), nor the agreement produced by the Uruguay Round of the General Agreement on Tariffs and Trade (GATT), contains substantive worker rights protections. These agree-

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


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


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 rights are found in the Caribbean Basin Economic Recovery Act of 1983 (CBERA), the Generalized System of Preferences Renewal Act of 1984, 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).


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).


“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
may not legally participate in the GSP.\textsuperscript{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.\textsuperscript{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.\textsuperscript{24} Although the law also gives the USTR the power to initiate investigations, the USTR has never exercised this power.\textsuperscript{25} After a public hearing by the GSP subcommittee,\textsuperscript{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”).

\textsuperscript{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”).

\textsuperscript{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”).

\textsuperscript{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 (evidencing 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).

\textsuperscript{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).

\textsuperscript{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. Since 1986, the USTR has removed or suspended ten countries from GSP eligibility for varying periods of time.

Critics argue that the GSP review process, in practice, suffers from serious substantive and procedural deficiencies. Substantively, the USTR has adopted a broad definition of "taking steps" and a narrow...
interpretation of "worker rights." While the USTR has found that even minimal progress constitutes "taking steps," it has concluded that assassinations of union leaders are not worker rights violations.

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. Second, the GSP subcommittee has refused to review, without explanation, petitions filed by worker rights advocates. Third, the USTR created by regulation, with-
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 advocates 39 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 Act 41 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 court 44

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36. 15 C.F.R. §§ 2007.0(b)(5), 2007.1(a)(4) (1993); see GSP ASsEssENT, 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).


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


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).


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.\textsuperscript{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.\textsuperscript{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?\textsuperscript{52} This debate has sharpened as United States MNCs have moved both industrial and, increasingly, service production to low-wage developing countries.\textsuperscript{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.\textsuperscript{54} Worker rights advocates, in contrast, argue that the eco-

\begin{itemize}
\item 50. \textit{See} Collingsworth et al., \textit{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); \textit{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").
\item 51. \textit{See} JOHN CAVANAGH ET AL., \textit{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").
\item 52. \textit{See} JACKSON, \textit{WORLD TRADING SYSTEM}, supra note 7, at 15 (noting that government policies may alter conditions of comparative advantage).
nomic 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 sovereignty 58 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


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.


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. 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. 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).


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. 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.

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 closings or foreign workers whose rights are violated by United States-based MNCs.

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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 displacement of subsistence farmers\(^{72}\) 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 production\(^{75}\) also began at this time.

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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).


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


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. Deepening rural poverty and increasing tensions between the coffee-producing oligarchy and an emerging stratum of industrialists 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).

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


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, while industrial and agricultural production declined. Jose Napoleon Duarte became President in 1984 with the support of the United States. 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; in 1989 ARENA’s leader, Alfredo Cristiani, became President. 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. On January 16, 1992, the civil war officially ended with the signing of the Chapultepec Accords. 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.


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).


ARENA's strategy for economic reconstruction relies heavily on low-wage export production, concentrated in export processing zones (EPZs). 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. While the GSP program is not crucial to the Salvadoran economy, 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.

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. As El Salvador industrialized in the 1960s, however, the first large-scale union organizing occurred among teachers and manufacturing employees. In addition, the American Institute for Free Labor Development (AIFLD), an arm of the AFL-CIO, supported the formation of rural cooperatives. 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.\textsuperscript{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 thou-
sands of union members.\textsuperscript{98}

Two principal union coalitions emerged to occupy the narrow political
space created by the Duarte government.\textsuperscript{99} The National Union of Wo-
rkers and Campesinos (UNOC), a coalition of unions and peasant coop-
eratives funded by AIFLD, formed Duarte's political base.\textsuperscript{100} The Na-
tional Union of Salvadoran Workers (UNTS) brought together most of
El Salvador's left-wing unions and popular organizations, including the
influential public employee associations.\textsuperscript{101} Tensions between the two
groups, based on both ideological and pragmatic considerations, subsided
after ARENA gained control of the legislature in 1988.\textsuperscript{102}

\textsuperscript{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).

\textsuperscript{98} See infra note 105 and accompanying text (discussing violations of worker
rights in El Salvador).

\textsuperscript{99} See Lungo, supra note 95, at 73-88 (discussing the resurgence of trade union
activity after 1983).

\textsuperscript{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 ef-
forts 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).

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

\textsuperscript{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 Colect-
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, 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." 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.

(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).


Since the signing of the peace accords, political violence has declined.\(^\text{106}\) 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.

2. Deficiencies in Salvadoran Labor Law

a. Freedom of Association

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

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109. See HOUSE COMM. ON FOREIGN AFFAIRS & SENATE COMM. ON FOREIGN RELATIONS, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1992, S. Prt. 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).
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. DEPT' 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 employees and to agricultural workers. 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. But such de facto bargaining gives workers little protection. Private sector workers do not fare much better; sanctions against employers who refuse to bargain in good faith are weak and rarely enforced.

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).


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

iii. Firings for Union Activity

The Labor Code prohibits discrimination or reprisals against workers on account of union activity, as well as specifically protects members of union executive boards from dismissal. Nonetheless, employers commonly dismiss workers who attempt to organize. 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, the only cost to the employer is a small amount of severance pay.

iv. Company Unions

While the Salvadoran Labor Code bars employers from setting up “company unions,” this practice, termed solidarismo, is widespread and increasing, and in some cases actively promoted by the government. 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”), enf’d, 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
investment in the EPZs increased from $400,670 to $16,145,900, while the number of employees rose from 1281 to 30,380. Projections of future employment go as high as 114,774. The United States has actively promoted investment in the EPZs by United States companies.

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. 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. In addition, plants located in the EPZs may contract out work to factories in other parts of the country.

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

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147. See De gran beneficio son inversiones asiaticos, 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.\textsuperscript{154} Employers also use blacklists to keep organizers out of the EPZs.\textsuperscript{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.\textsuperscript{156} Internal personnel policies prohibit not only non-employee organizers, but also employees themselves from organizing, even on non-working time.\textsuperscript{157}

d. Forced Labor, Child Labor, and Working Conditions

ILO Convention 105\textsuperscript{158} prohibiting forced labor is one of only six conventions ratified by the Salvadoran government.\textsuperscript{159} Nevertheless,

\begin{itemize}
  \item \textsuperscript{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).
  \item \textsuperscript{156} See Arriola, supra note 145, at 54-55 (describing employer practice of annual contracts).
  \item \textsuperscript{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).
  \item \textsuperscript{158} ILO Convention 105, supra note 60.
  \item \textsuperscript{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. Violations of minimum age laws are widespread and inspections by the Ministry of Labor are "insufficient to enforce the law." A national Minimum Wage Council establishes minimum wages, but minimum wage increases have not kept pace with inflation. Approximately forty percent of El Salvador's population now lives below the official poverty line. 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.

**e. Lack of Fair Judicial Review**

The Labor Code provides for judicial review of some actions of the Minister of Labor. Human rights monitors, however, have accused the Salvadoran judiciary of political bias and corruption. The Chapultepec Accords call for the establishment of a National Judicial Council, independent of the government and political parties, to propose
judicial nominees. While the Salvadoran Assembly passed a law purporting to establish such a Council in 1992, the United Nations Truth Commission has raised serious questions concerning the Council's political independence. 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.

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

169. Chapultepec Accords, supra note 88, Ch. 3, § I(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 (FESINCONSTRANS); 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 Watch petitioned the USTR to suspend El Salvador's GSP benefits. 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." Despite Congressional pressure, USTR rejected subsequent petitions by Americas Watch in 1988 and 1989. 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. Second, USTR...
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 report 189 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).


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).

ions guerrilla fronts, while allegedly ignoring FMLN violations of worker rights. Following the AIFLD report, an open letter from UNOC condemned Americas Watch as an FMLN dupe. 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."

C. REALIGNMENT, 1990-1993

With the end of the Cold War and the opening of negotiations between the FMLN and the Salvadoran government, 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. The AFL-CIO, meanwhile, shifted its position on trade sanctions and, in 1990, filed its first GSP petition against El Salvador. The USTR accepted this petition, along with petitions filed by other unions and by Americas Watch. USTR kept these petitions under review until July, 1994. 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).
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).
197. See ILRERF Pre-Hearing Brief, supra note 105, at 1 n.2 (listing 1990 petitioners).
against unions diminished, the focus of this review shifted to the reform of El Salvador's labor laws.\textsuperscript{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.\textsuperscript{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.\textsuperscript{201} The unions' goal, when the Forum convened in September of 1992,\textsuperscript{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.\textsuperscript{203} The unions viewed the insistence of the

\textsuperscript{199} See 1992 Worker Rights Review, \textit{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).

\textsuperscript{200} See Chapultepec Accords, \textit{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." \textit{Id.}

\textsuperscript{201} See ILRERF Pre-Hearing Brief, \textit{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, \textit{supra} note 154, at 48-49.

\textsuperscript{202} See \textit{EL SALVADOR LABOR TRENDS}, \textit{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).

\textsuperscript{203} See \textit{id.} (observing that unions requested that the Forum discuss economic adjustment policies before taking up labor law reform); \textit{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.\textsuperscript{204}

The election of Bill Clinton in November 1992, led Salvadorans to expect more rigorous enforcement of United States worker rights standards.\textsuperscript{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.\textsuperscript{206} The government, fearing that its failure to participate seriously in the Forum could jeopardize its trade benefits, agreed to a process for negotiations,\textsuperscript{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.\textsuperscript{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.\textsuperscript{209} ARENA deputies introduced a bill to make expressions of support for suspension of El Salvador's GSP privileges a crime of treason.\textsuperscript{210}
On February 17, 1993, the eve of the USTR's decision, the parties to
the Economic and Social Forum signed an Agreement of Principles.\footnote{211. Acuerdo de Principios y Compromisos Feb. 17, 1993 (El Sal.) [hereinafter Agreement of Principles], reprinted in DIARIO DE HOY, Feb. 20, 1993.} The unions dropped their demand for immediate economic measures; in
exchange, the government and private sector agreed to discuss ratifica-
tion of ILO conventions prior to negotiating reform of the Labor
Code.\footnote{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).} The unions muted their calls to cut off GSP benefits, and the
government ceased its verbal attacks on union leaders.\footnote{213. ILRERF Pre-Hearing Brief, supra note 105, at 46.} 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.\footnote{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 & RECOM-
MENDATIONS, 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 & RECOMMEN-
DATIONS, supra note 60, at 1003; 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

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 CONSTITUCIÓN, 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. CONSTITUCIÓN, 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. CONSTITUCIÓN, 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 Salaverría, 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. I, 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. The unions insisted that the Forum discuss ILO Convention 87, 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. 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. 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.

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).


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. At the same time, a wave of public employee strikes paralyzed the government, which was able to restore order only by suspending the Constitution. On October 22, 1993, an ILO expert, Dr. Arturo Bronstein, participated in a crucial work session of the Labor Code Commission of the Forum. The parties agreed to a forty-nine point program for reform of the Labor Code that Dr. Bronstein drafted.

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. 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).


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. 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.

Following the hearing, negotiations continued, with the business sector continuing to object to two provisions of the ILO draft. On December 13, 1993, the Government introduced a bill in the National Assembly to reform the Labor Code. 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. On December 17, 1993, USTR extended its review of El Salvador pending the passage of legislation “consistent with the ILO proposal.” Following the ARENA party’s electoral victory, the National Assembly enacted the government’s proposed Labor Code amendments, which became law on May 12, 1994.

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.

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

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. This language not only is unenforceably vague, but also thwarts the intent of the statute by permitting regimes that violate worker rights to avoid sanctions with token reforms. 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. 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. Second, the statute should ex-
plicitly incorporate the jurisprudence of the International Labor Organization in defining the scope of each worker right.\footnote{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.\footnote{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.\footnote{243} The GSP Reform Bill would allow USTR to reject a worker rights petition only upon a showing that the petition is frivolous.\footnote{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.\footnote{245}

Second, Congress should eradicate USTR’s “no new information” standard.\footnote{246} This criterion has no basis in the statute.\footnote{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-
sions. It is contradictory to reject petitions on the grounds that the worker rights situation in the beneficiary country is not getting worse.

Third, there should be a time limit for reviews. USTR should not have the discretion to keep a beneficiary developing country under indefinite review, without imposing sanctions. While this procedure may provide both the United States and unions in the beneficiary country with political leverage, 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. 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.

Fifth, the annual petition cycle should be made more flexible to accommodate rapidly changing events in beneficiary countries. The administration has proposed a two-stage review process which lengthens the review cycle. 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. 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. The administration's proposal does not state what criteria would be used to distinguish a full formal review from a preliminary review. 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.

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

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. 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."
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).
percent below the most-favored nation (MFN) tariff rate for developing
countries that conform to social (including worker rights) and environ-
mental clauses.\textsuperscript{265} For example, tariffs would be reduced for a country
that certifies that it allows workers to join unions and negotiate collec-
tively.\textsuperscript{266} Conversely, GSP benefits could be suspended under a narrow
set of circumstances.\textsuperscript{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.\textsuperscript{268} The GSP issue focused and stimulated the
tripartite negotiations in the Forum, where government and private sec-
tor, 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.\textsuperscript{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 conven-
tions. While El Salvador enacted a new labor code in 1994, its provi-
sions 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 viola-
tions,\textsuperscript{270} even serious and substantial legal reforms can have little effect
until the government makes a serious commitment to enforce existing
laws.

\textsuperscript{265} Letter from Michael Hindley, Member of the European Parliament, to the au-
thor (Jan. 11, 1994) (on file with author).
\textsuperscript{266} 11 Int'l Trade Rep. (BNA) No. 23, at D45 (1994).
\textsuperscript{267} Report of the Committee on Development and Cooperation, \textit{supra} note 264
(proposing that GSP benefits be suspended only in cases such as fraud, slavery, pris-
son labor, and denial of equal treatment to men and women).
\textsuperscript{268} \textit{See supra} notes 205-08, 220-23 and accompanying text (recounting the po-
litical opportunities that the GSP review process created for Salvadoran unions).
\textsuperscript{269} \textit{See supra} notes 220-26 (discussing the ILO's role in negotiating labor law
reform).
\textsuperscript{270} \textit{See supra} notes 103-72 and accompanying text (describing the history of vi-
olations 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. 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. 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. And while Salvadoran unions took substantial risks to support the cutoff of GSP benefits, ideological divisions hampered the effectiveness of labor's efforts in both El Salvador and the United States.

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. 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).