

Connecting Trade and International Labor Standards: Denial of Worker Rights as an Unfair Trade Practice

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Huddled over a primitive loom in a dimly lit carpet factory in Morocco, an eleven year old boy works for endless hours tying small knots over and over again as he slowly goes blind.¹ On the other side of the world in South Korea, labor organizers are tortured by Government security forces with beatings and electric shock.² Meanwhile, in the Philippines, young women are recruited to do monotonous factory work, and then receive periodic pregnancy tests in order to avoid maternity benefits.³ Glass-factory employees in India work among glass splinters and molten glass without safety glasses or even shoes, many bearing scars or open wounds as vivid reminders of the dangerously unsafe working conditions.⁴

As is evident above, abusive labor practices come in many forms. But whether it be exploitation of child labor, dangerous work conditions, lack of a livable wage, or denial of any other basic

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1. Joseph Albright and Marcia Kunstel, *Child Labor: The Profits of Shame*, Washington Post, July 12, 1987, at C1, col. 1. This article describes shocking examples of exploitative child-labor practices in several countries, many of which are significant United States trading partners. The article is reproduced and briefly discussed in connection with the trade bill amendment discussed later. See 133 Cong. Rec. S10332 (daily ed. July 21, 1987) (statement of Sen. Cranston).

The literature is full of other appalling examples of the mistreatment of workers. See e.g., Charles D. Gray, *Business Forum: Do We Subsidize Exploitation of the Workers?*, N.Y. Times, May 31, 1987, § 3, at 2, col. 3 (describing the death of 19 workers in a Bangkok factory fire).

2. Julie Brill, *Press South Korea On Labor Abuses*, N.Y. Times, Jan. 12, 1987, at A21, col. 1.

3. Hobart Rowen, *The Exploitation of Filipino Workers*, Washington Post, Mar. 6, 1986, at A23, col. 3.

In Southeast Asia, women are particularly subject to mistreatment by their employers. N.Y. Times, *supra* note 1; *Systematic Labor Repression is an Unfair Trade Practice*, Christian Science Monitor, Apr. 21, 1987, at 16 (describing the practice where 10-14-year-old Southeast Asian girls are "sold" into factory work by their impoverished parents for \$20-\$100).

4. Albright & Kunstel, *supra* note 1.

right, the systematic repression of fundamental worker rights is a problem of global proportions. Such horrendous practices, however, are often dismissed as necessary consequences of the ever expanding global economy,⁵ or as problems over which the United States has no control. Such assumptions cannot be further from the truth. In various ways the United States plays a substantial role in perpetuating this situation. Massive United States corporations in search of the cheapest possible costs have invested billions in less developed countries (LDCs),⁶ many of which have dismal records on worker rights. Furthermore, United States trade policies do little to alter these substandard labor practices by granting most favored nation status and other trade benefits to the worst offenders.⁷

Workers in LDCs are not the only group affected by United States trade policies and the behavior of transnational corporations (TNCs).⁸ Hundreds of thousands of jobs are "exported" from United States workers to other countries.⁹ The United States sim-

5. It is frequently asserted that various Third World countries must provide "cheap labor" in order to survive. But such horrendous labor practices are not a "necessity" in the world economy. While inexpensive and abundant labor forces are an integral part of the complex global economy, it does not follow that the workers which make up this labor force must be denied the most minimal safeguards. Many countries, including the U.S., have overcome previously substandard labor practices and prospered. Furthermore, less developed countries such as Jordan engage in fair labor practices, while in Morocco, with a similar economic profile, labor abuses run rampant. 133 Cong. Rec. S10332 (daily ed. July 21, 1987).

6. Don J. Pease & J. William Goad, *The New GSP: Fair Trade With the Third World*, 4 World Pol'y J. 351, 358 (1985). In 1982, U.S. corporations invested \$221 billion. *Id.* at 358. As of 1984, well over 2,000 U.S. firms operated more than 21,000 foreign subsidiaries in at least 121 foreign nations. 1 *Directory of American Firms Operating in Foreign Countries* (10th ed. 1984).

7. Chile, for example, until recently has been granted trade benefits which ignited \$250 million worth of investments by U.S. corporations despite barbaric treatment of labor. Lance Compa, *Eliminate Trade Benefits for Chile*, Oakland Tribune, Dec. 15, 1986, at 9, col. 1.

8. In the literature, the term Transnational Corporation (TNC) is used interchangeably with Multinational Enterprise (MNE), although there are slight distinctions. TNC will be used in this article since the United Nations has adopted the term. See Commission on Transnational Corporations, Report on the Sixth Session, 66 U.N. ESCOR, Supp. (No. 10), at 14, U.N. Doc. E/C 10/75 (1980). Furthermore, this term reflects the article's focus on business enterprises. However, when quoting or referring to other authorities the terminology used will be that employed by the authority.

There are several definitions of TNC. Generally, a TNC is a "number of affiliated business establishments which function simultaneously in different countries, are joined together by ties of common ownership of control, and are responsible to a common management strategy." William Feld, *Nongovernmental Forces and World Politics: A Study of Business, Labor, and Political Groups* 22-23 (1972).

9. See, e.g., D. Quinn Mills, *Destructive Trade-offs in U.S. Trade Policy*, Harv. Bus. Rev., Nov.-Dec. 1986, at 119.

It is estimated that a joint venture between General Motors and a Korean

ply cannot compete with LDCs such as Taiwan and South Korea where, through repression of the labor force, the wages are forced to be a fraction of what they are here.¹⁰ The result is massive foreign investment by TNCs in countries where even minimal worker rights are ignored.¹¹

While the effect of trade policies on the availability of domestic jobs has long been recognized, until recently the connection between United States trade policies and the rights of international workers has been minimized or completely overlooked.¹² Yet few actions could have a more profound effect on basic human rights among the citizens of LDCs than trade policies of the world's premier economic power encouraging the implementation of certain minimal labor standards.¹³ Direct aid to developing countries aimed at improving living conditions, while praiseworthy, often proves fruitless. Approximately two billion dollars a year has been

automaker, where labor conditions are substandard, resulted in a loss of 20,000 jobs to U.S. workers. Remarks of United Auto Workers President Owen Bieber before the Conference on Labor Rights and Trade, Mar. 6, 1986 (on file with Law & Inequality).

10. D.L.U. Jayawardena, *Free Trade Zones*, 17 J. World Trade Law 427, 431 (1983).

11. This in turn has resulted in the U.S. being swallowed by a gigantic trade deficit. The trade balance, which showed a surplus for the U.S. as recently as 1981, has plummeted to \$170 billion as more and more TNCs shift their production overseas. Put another way, the deficit amounts to over \$600 for each American. Bill Gould and John Cavanagh, *A Trade Policy for the People*, The Nation, Mar. 29, 1986, at 452.

Recent figures indicate that there are a few signs of relief from these deficits. In October, 1987, the trade deficit jumped to a record \$17.6 billion for the month. 4 Int'l Trade Rep. (BNA) No. 49, at 1552 (Dec. 16, 1987). By May, 1988, however, the deficit had decreased significantly, although it remains disturbingly high. David Wessel, *New Trade Data Show Deficit Shrinking*, Wall St. J., June 10, 1988, at 2, col. 2.

12. While there have been several half-hearted attempts to join trade policy with worker rights, their effect has been minimal. See *infra* notes 39-62 and accompanying text.

13. Worker rights have long been categorized as a human right, although they have been frequently overlooked. William B. Gould, *The Rights of Wage Earners: Of Human Rights and International Labor Standards*, 3 Indus. Rel. & Int'l Bus. 489 (1979). For a collection of works which discuss worker rights or the right to development as a human right, see International Commission of Jurists, *Development, Human Rights and the Rule of Law* (1981).

It has frequently been asserted that U.S. foreign policy, including trade policy, can effectively carry out human rights objectives. See generally David Weissbrodt, *Human Rights Legislation and U.S. Foreign Policy*, 7 Geo. J. Int'l & Comp. L. 231 (1977); Oscar Schachter, *International Law Implications of U.S. Human Rights Policies*, 24 N.Y.L.Sch.L.Rev. 73 (1978).

The Universal Declaration of Human Rights states in Article 23: "Every one who works has the right to just and favourable remuneration insuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection." Gould, *supra*, at 497 (quoting Human Rights: A Compilation of International Instruments (United Nations 1978)).

channeled into "development assistance programs" in recent years.¹⁴ The impact of such programs when compared to the 221 billion dollars invested abroad by United States TNCs and the 402 billion dollars in lending by United States commercial banks is minimal.¹⁵ The true power for change lies not with direct aid, but with the huge amounts of capital and resources being invested by United States TNCs. If these billions can be directed toward countries that afford basic rights to their workers rather than those countries which exploit and abuse their workers, true progress can be made.

At a time when Congress is considering major reforms in United States trade law,¹⁶ the possibilities of basing trade benefits on the fulfillment of certain internationally recognized labor standards must be examined.¹⁷ This article will discuss first the background of the denial of basic worker rights, focusing on the role that two major forces—United States TNCs and United States trade policy—play in perpetuating the problem. This will be followed by an analysis of the feasibility of connecting trade with labor standards, including the specific proposal being considered by Congress. The goal of this proposal is to prevent countries from exploiting their work force in order to gain trade advantages, by defining such conduct as an unfair trade practice under existing United States trade laws.

This article advocates the adoption of a "worker rights" provision to designate the denial of internationally recognized worker rights as an unfair trade practice under section 301 of the Trade Act of 1974.¹⁸ Although the bill, the Fair Trade and Economic Justice Act, may have other effects relating to employment for United States workers, the trade deficit and other United States economic

14. Pease and Goold, *supra* note 6, at 358.

15. *Id.* at 358. The power of trade as a tool for promoting policy concerns is potentially staggering considering that \$150 billion in trade moves across national borders every day. John H. Jackson & William J. Davey, *International Economic Relations* 3 (2d ed. 1986).

16. See 133 Cong. Rec. S10249-10373 (daily ed. July 21, 1987).

17. Both houses of the Congress have been struggling and debating over the passage of an omnibus trade bill throughout the entire session of the 100th Congress. H.R. 3, the house version of the bill, was introduced on January 6, 1987, and the Senate's version, S. 490, on February 5, 1987. 133 Cong. Rec. H101 (1987); 133 Cong. Rec. S1851 (1987). The bill was amended numerous times and finally passed in both houses, but was vetoed by President Reagan. The Senate by a vote of 61-37 barely failed to override the veto. At the time this article went to press, the status of the bill was still uncertain. Monica Langley, *Senate Falls Short of Overriding Veto of Trade Measure*, Wall St. J., June 16, 1988, at 3, col. 3.

18. 19 U.S.C. § 2401 (1975).

woes, the focus of this article is the bill's possibilities with respect to the basic rights of workers all over the world.

I. The Problem: The Role That Two Major Forces Play

The denial of internationally recognized basic worker rights stems, in part, from the unfortunate marriage between United States TNCs and United States government trade policies. TNCs in recent years have sprawled to dozens of LDCs in search of vast amounts of cheap labor.¹⁹ This rapid expansion is not expected to cease in the near future.²⁰ Meanwhile, the government's trade policy has thrown fuel on the fire.²¹ Trade policies that effectively reward labor exploitation compound the problems created by TNCs, harming the millions of laborers in poverty stricken or repressive countries.

A. *The Transnational Corporation*

Only recently has there been an awareness among the American people of the conduct of TNCs in foreign countries.²² In the name of maximizing profits many TNCs will do business in any country where cheap labor can be found, regardless of the labor practices of that country.²³ The argument usually made on behalf

19. As of 1984, over 2,000 U.S. firms operated more than 21,000 foreign subsidiaries in at least 121 foreign nations. Introduction to 1 *Directory of American Firms Operating in Foreign Countries* (10th ed. 1984). According to Peter Hansen, director of the Committee on TNCs, U.S. firms have increased their share of foreign investments from 10% to 60% over the last decade. *N.Y. Times*, Apr. 8, 1987, § D, at 19, col. 3.

20. *N.Y. Times*, *supra* note 19.

21. South Korea, the second largest beneficiary of the Guaranteed System of Preferences program (see *infra* text accompanying notes 43-52) has blatantly restricted the rights of labor through martial law decrees and other measures. Ostensibly, South Korea allows its labor to organize for increased benefits, but in reality such requirements as 30 workers per work site in order to organize, effectively stamps out unions where 80% of all workers are employed in businesses of less than 30 people. Pease and Goold, *supra* note 6, at 359.

22. Unfortunately, it takes a tragedy like the Bhopal, India, incident to draw attention to the behavior of U.S. corporations in LDCs. The deaths of an estimated 2,500 people from lethal gas escaping from a Union Carbide plant prompted new calls for a code of conduct to guide TNCs. *Associated Press*, June 17, 1985. At the outset of the discussion of the role that TNCs play in perpetuating the denial or worker rights, it should be noted that some TNCs are taking steps to foster improved conditions in many of the countries where they are located. See generally, Leonard Glynn, *Multinationals in the World of Nations* (1983); Norbert Horn, *International Rules for Multinational Enterprises: The ICC, OECD, and ILO Initiatives*, 30 *Am.U.L.Rev.* 923, 928 (1981). These improvements, however, are not sufficient given the magnitude of the problem.

23. A senior vice-president in charge of Citibank's international division was quoted as saying: "Who knows what political system works? The only test we care about is: Can they pay their bills?" In response to this quote Melville J. Ulmer,

of TNCs is that most of these countries are much better off with the business of TNCs than they otherwise would be.²⁴ The validity of this argument has been seriously questioned in a number of studies.²⁵ Certainly foreign investment into LDCs has some favorable effects, but for the laborer these effects remain illusory for several reasons.

First, the earnings that are generated from the sweat of the workers are typically removed from the LDCs' struggling economies by the TNCs. This capital is rarely reinvested into the host country's economy where it is needed for development, but rather is quickly removed to the United States.²⁶ Therefore, the fruits of the worker's labor are never realized in the form of real develop-

Professor Emeritus at the University of Maryland, said: "As representatives of their stockholders, business executives in fact have only one legitimate obligation: to take whatever prudent actions are necessary to maximize profits within the limits set by the nations's [sic] laws." 41 Bus. & Soc'y Rev. 4, 5 (1982). The message is clear: anything goes with respect to doing business in foreign countries, no matter how repressive the regime, as long as profits are made. Furthermore, these quotes underscore the need for controls on the behavior of TNCs in LDCs.

24. Some have articulated this argument in flowery terms, which ignore reality to such an extent to be almost comical:

As it was in the industrial west, the process of development will be wrenching, painful, sometimes halting. But the sheer productive capacity unleashed by the MNC [Multinational Corporation] is bringing with it the means of eradicating hunger, poverty, and disease. Harnessing that engine of wealth to realize those human dreams remains a vital, unfinished task of our time.

Glynn, *supra* note 22, at 32.

25. See generally, Richard J. Barnet & Ronald E. Muller, *Global Reach* (1974); Arghiri Emmanuel, *Appropriate or Underdeveloped Technology* (1982); Adeoye A. Akin Sanya, *Multinationals in Changing Environment 2* (1984).

The following episode is a prime example that countries are not always "better off" when it comes to the presence of TNCs:

Mattel Corporation decides it no longer wishes to manufacture dolls in the U.S. as it can get cheaper labor overseas as well as government guarantees of a docile labor force. It moves its plant across the border to Mexico where wages are a fifth of U.S. levels. Workers in the plant, however, form a union and fight to achieve basic worker rights. Mattel decides to move to Korea. The same action occurs in Korea. Mattel picks up the factory and moves to the Philippines. Here, the Philippine government promises even cheaper labor, a tax holiday of eight years, a prohibition on strikes and union activity, and the ability to lock workers into the factory for forced overtime when needed The latest chapter occurred last year when the tax holiday ran out in the Philippines. The government of Thailand offered even cheaper wages and its own form of tax holiday. Mattel accepted.

Trade Reform Legislation, 1986: Hearings before the Subcomm. on Trade of the House Comm. on Ways and Means, 99th Cong., 2nd Sess. 956 (1986) (statement of John Cavanagh, Fellow, Institute for Policy Studies; Coordinator, International Labor Rights Working Group).

26. A United Nations study showed that U.S.-based TNCs took an average of 79% of their profits out of Latin American countries. Barnet & Muller, *supra* note 25, at 153.

ment, but instead are returned to the United States to line the pockets of corporation shareholders.²⁷ Second, TNCs frequently use scarce local resources of capital, thus severely limiting those available for local operations.²⁸ For example, when given the choice a local bank will loan to a worldwide corporation such as General Motors rather than a local entrepreneur who wants to start a manufacturing company. The effect is to stagnate the development of domestic industries. A third reason why the "benefits" of TNC operations are illusory is that only a small minority of the country's people see any of the profits that are amassed. A World Bank study revealed that during the explosion of investment into LDCs that occurred in the 1960s, the income of the richest five percent showed a "striking" increase while the poorest forty percent saw their share decrease.²⁹ The above facts demonstrate that the benefits of the TNCs' investments are not being distributed among the large work force, currently existing on subsistent wages and inhuman conditions. If these workers were to receive their equitable share of the capital being pumped into their countries, then the true development of LDCs might become a reality.

The exploitation of the labor conditions in developing countries is further compounded by the inability of those countries to regulate TNCs. One consideration is simply the immense economic power of large TNCs. The economic activity of massive TNCs is on the scale of most medium size countries. For example, General Motors' earnings in a single year are roughly equivalent to the Swiss national budget.³⁰ Given this vast economic power, TNCs have a tremendous impact on the economies of LDCs. A decision by a corporate manager could seriously affect an unstable and overly-dependent LDC.³¹ Another factor often present is the fierce competition among the countries themselves for foreign in-

27. As one commentator put it: "[C]ompany accountants do everything possible to launder money out of [that country's] sights." F.E.I. Hamilton, *The Multinationals: Spearhead or Spectre?*, in *Multinational Corporations and the Third World* 15 (C.J. Dixon ed. 1986).

28. Barnet & Muller, *supra* note 25, at 152.

29. *Id.* at 149.

30. Matthew Lippman, *Transnational Corporations and Repressive Regimes: The Ethical Dilemma*, 15 Cal. W. Int'l L.J. 542 (1985).

31. *Id.* at 545. For example, Barnet and Muller observe that a decision by a corporate manager can impact "where people live; what work, if any, they will do; what they will eat, drink and wear; what sorts of knowledge schools and universities will encourage; and what kind of society their children will inherit." *Supra* note 25, at 16.

vestment.³² The TNC will not typically do business in a country which it perceives as over regulating business practices. Therefore, the capital-poor LDCs are forced to provide little or no regulation if they want to receive any of the TNCs' business. Additionally, technical and legal development essential for effective regulation is lacking. The fact is, LDCs simply do not have the ability to regulate TNCs effectively. The net result is that TNCs, drawn by loose regulations, flock toward the LDCs, taking advantage of their labor conditions and their inability to exert any significant control over the companies while leaving behind few real benefits for the workers. This inability to regulate, when coupled with the serious questions being raised regarding the conduct of TNCs,³³ has produced calls for a set of guidelines to govern the actions of TNCs. Such guidelines, or "codes of conduct," suggest standards of behavior for TNCs to follow in foreign countries.³⁴ Several international organizations, most notably the United Nations (UN), have attempted to develop codes of conduct.³⁵ The UN would seem the logical source for a code of conduct given its role

32. One commentator has termed this competition as "cut-throat" among various developing countries. Hamilton, *supra* note 27, at 16.

33. For two disturbing examinations of the behavior of TNCs and their officers, see generally Barnet & Muller, *supra* note 25, and Michael Macoby, *The Gamesman* 122 (1977). Macoby's study indicates that a corporate executive "will pollute the environment, even when he privately supports environmentalists, unless the law is such that each corporation must clean up its mess and none is being penalized for being cleaner than the others. He will produce and advertise anything he can sell unless food and drug laws or other legislation stops him." Macoby, *supra*, at 122.

Interesting analogies of the profit motive have been used: "It is in my opinion, as absurd to praise the profit motive—i.e., economic action based on self-interest—as it is to condemn it. The human impulse to such action is like the sexual impulse, a natural fact." Irving Kristol, *No Cheers for Profit Motive*, Wall St. J., Feb. 20, 1979, at 18, col. 4.

34. See generally, Seymour Rubin, *Transnational Corporations: Supervision, Regulation or What?* 1 Int'l Trade L.J. 1 (1975); Werner Feld, *Multinational Corporation and U.N. Politics: The Quest for Codes of Conduct* (1980); Seymour Rubin, *Transnational Corporations and International Codes of Conduct: A Study of the Relationship Between International Legal Cooperation and Economic Development*, 30 Am.U.L.Rev. 903 (1981); Note, *Host State Treatment of Transnational Corporations: Formulation of a Standard for the United Nations Code of Conduct on Transnational Corporations*, 7 Fordham Int'l L.J. 467 (1983).

Recently, a joint delegation of U.S. and Japanese union officials called for a code of conduct specifically dealing with workers' rights. The leaders expressed concern that TNCs "entertain no national loyalty or commitment, they exploit any and all workers in the name of greed and profit. Their record shows that they will drop any country and the workers involved if they find that they can make a greater profit elsewhere." 4 Int'l Trade Rep. (BNA) No. 43, at 1345 (Nov. 4, 1987).

35. Two notable codes require attention. The International Labor Organization's "Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy" was adopted by the ILO on November 16, 1977, at its Zoym Session in Geneva. See 17 Int'l L. Materials 423-30 (1978). The Organization for Eco-

in international affairs and general acceptance worldwide. The UN's code of conduct, however, has been in the works for several years and many fundamental issues have yet to be resolved.³⁶

Although a step in the right direction, codes of conduct are simply not enough to solve the problems of TNCs exploiting worker rights in LDCs for several reasons. Most importantly, the codes are merely voluntary with no legally binding effect. TNCs policing themselves may be a classic case of the fox watching over the chicken coop. In fact, the issue of the voluntariness of the code has been a major stumbling block of the UN code.³⁷ Given the shortcomings of the various codes of conduct, they cannot be the vehicle through which fundamental worker rights are protected.³⁸

B. *United States Trade Policy*

The second factor which has played a key role in denying international worker rights is reflected in the trade policies of the United States government. These trade policies perpetuate the problem by encouraging trade with countries that ruthlessly exploit their workers. Through a system of reduced tariffs, duty-free status and other trade benefits to countries which repress and abuse the labor force, United States trade policy makes it desirable for TNCs to do business with these countries.³⁹ Moreover, current United States trade laws demonstrate a double standard with respect to unfair trade practices involving labor.⁴⁰

Historically, the United States government ignored the relationship between trade policy and worker rights. Then in 1971, when the United States experienced its first trade deficit in seventy-five years, an increasing sensitivity to unfair trade practices emerged.⁴¹ In the last decade, as the United States continues to

conomic Cooperation and Development (OECD) has also promulgated a code. See OECD Guidelines for Multinational Enterprises (1986).

36. See Kwamena Acquah, *International Regulation of Transnational Corporations: The New Reality* 115-18 (1986).

37. *Id.* at 115. Other problems with the UN Code include the issues of unresolved objectives for the code and the proper definition of TNC. For example, would a corporation with one employee abroad be subject to the code? *Id.* at 115-18.

38. For the multitude of problems inherent in codes of conduct, see generally, *Legal Problems of Codes of Conduct for Multinational Enterprises* (Norbert Horn ed. 1980).

39. Korea and Taiwan, for example, are among the very largest beneficiaries of duty-free treatment. Richard Lawrence, *Labor Standards Proposed for GATT*, *The J. of Com.*, Mar. 13, 1986, at 1. Yet, the reprehensible labor abuses that take place in these countries are well documented. See generally, U.S. State Department County Reports on Human Rights Practices for 1986.

40. See *infra* discussion accompanying notes 53-55.

41. Susan C. Schwab, *Politics, Economics and U.S. Trade Policy*, 23 *Stan. J. of Int'l L.* 155, 162-65 (1987).

drown in an ever-deepening trade deficit, calls for treating the denial of internationally-recognized worker rights as unfair trade practices are becoming louder and more persistent.⁴²

A primary factor in United States trade policy which encourages TNCs to do business with labor exploitive LDCs is the Generalized System of Preferences (GSP). This program was conceptualized in 1964 at the United Nations Conference of Trade and Development (UNCTAD).⁴³ Initially, GSP was envisioned as a temporary system which would allow LDCs to become more competitive by granting them preferential trade treatment.⁴⁴ The underlying theory is that the program will increase the countries' ability to export, thus fostering economic development. In 1976, the United States entered the program and has since designated almost 150 countries and territories as recipients of duty-free exporting privileges. Since 1976 the amount of import receiving GSP treatment has risen dramatically.⁴⁵

There is general agreement that the GSP system is essentially a good program which is vital to the economic survival of LDCs.⁴⁶ In fact, the 98th Congress extended GSP through 1993.⁴⁷ Through most of its history, however, GSP did not address the labor practices of the countries which received trade benefits. The Trade Bill of 1984 amended GSP to withhold benefits from those countries which violate their workers' rights,⁴⁸ but this has turned out to do little more than pay lip service to the problem. There are essentially two reasons for this. First, under section 505 of the GSP Renewal Act the President is given free reign to terminate GSP status as he so chooses.⁴⁹ The result has been that a GSP nation rarely has lost preferential trade status based on its violation of worker rights,⁵⁰ despite open refusal by most all GSP nations to

42. See N.Y. Times, *supra* note 1; National Journal, Apr. 5, 1986, at 818; Oakland Tribune, *supra* note 7; *Worker Rights: A Moral Basis for Trade Policy*, Christian Science Monitor, Dec. 29, 1986, at 12, col. 1.

43. Diana Tussie, *The Less Developed Countries and the World Trading System* 30 (1987).

44. Pease and Goold, *supra* note 6, at 352. For more information on GSP, see Jackson & Davey, *supra* note 15, at 1154-66; Ronald I. Meltzer, *The U.S. Renewal of the GSP: Implications for North-South Trade*, 20 J. World Trade L. 507 (1986).

45. Pease & Goold, *supra* note 6, at 353.

46. Dag Wilkinson, *The Trade and Tariff Act of 1984: Its Impact on Developing Countries*, 20 Tex. Int'l L. J. 453, 468 (1985).

47. P.L. 98-573 (1984).

48. 19 U.S.C. § 2465 (1985).

49. P.L. 98-573 (1984); 19 U.S.C. § 2462 (1984). The ineffectiveness of a system where the President is given wide discretion is compounded by the fact that President Reagan strongly opposed the bill. *U.S. Will Suspend Chile's Duty-Free Trade Privilege*, L.A. Times, Dec. 25, 1987, § 1, at 18, col. 3.

50. *Linking Trade to Workers' Rights*, National Journal, Apr. 5, 1986, at 818.

respect the "internationally recognized worker rights" as described in the GSP Renewal Act.⁵¹ Second, the GSP program covers only five percent of all the imports coming into the United States, minimizing the impact it can have on worker rights.⁵² Therefore, as it currently stands, the GSP does little to reduce the labor abuse which it has played a role in fostering.

An additional problem with United States trade policy is the way that current law approaches unfair trade practices. Under section 301 of the Trade Act of 1979, certain practices, such as failure to recognize intellectual property rights, are prohibited.⁵³ The denial of fundamental worker rights, however, is not considered to be unfair under section 301. The purpose of section 301 is to retaliate against trade practices which unfairly distort trade.⁵⁴ This section is the primary vehicle through which citizens harmed by unfair trade practices may challenge such conduct.⁵⁵ It is difficult to imagine a trade practice which distorts trade and undercuts competition in a more unfair way than the denial of basic worker rights, yet current trade law permits this conduct. In short, the absence of section 301 protection for denial of worker rights, while allowing such protection for other trade practices, sends a clear message to our trading partners: abuse of labor in order to gain competitive advantage is fair game under United States trade law.

There are two positive aspects of United States trade law in this area. One is the 1983 Caribbean Basin Initiative (CBI), which eliminates tariffs on most products from the Caribbean region.⁵⁶ This act calls for the President to "take into account," as one of

For the first time, a few countries lost preferential trade status in 1987 because of worker rights violations. These included Paraguay, Nicaragua, Chile and Romania. Ray Marshall, *Workers Need International Code to Protect Their Rights*, L.A. Times, July 26, 1987, § 4, at 3, col. 5.

51. The following are recognized as protected rights under 19 U.S.C. § 2462: the right of association; the right to organize and bargain collectively; a prohibition on the use of any form of forced or compulsory labor; a minimum age for the employment of children; and, acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. For a further discussion of these concepts, see discussion corresponding to notes 80-86.

52. For example, Chile which lost its GSP status on December 24, 1987, had only about 1/8 of all its imports to the U.S. covered by the program. 5 Int'l Trade Rep. (BNA) No. 1, at 10 (Jan. 6, 1988).

53. 19 U.S.C. § 1337. Since it is an unfair trade practice to deny intellectual property rights while it is not to deny worker rights, we must assume that it is more of an "unfair" trade practice to pirate a video cassette than to work children 15 hours a day in a textile factory. See Christian Science Monitor, *supra* note 3.

54. S. Rep. No. 1298, 93rd Cong., 2d Sess. 164 (1974).

55. Bart S. Fisher & Ralph G. Steinhardt, *Section 301 of the Trade Act of 1974: Protection for U.S. Exporters of Goods, Services, and Capital*, 14 L. & Pol'y Int'l Bus. 569, 571 (1982).

56. P.L. 98-66 (1983); 19 U.S.C. § 2702 (c)(8).

eighteen criteria, the extent to which certain worker rights are recognized in determining benefits for a particular country.⁵⁷ This initiative is a positive part of the United States trade policy, but only deals with relatively few countries and products, so its worldwide effect is limited.⁵⁸ Observers, however, have noticed improved labor conditions since the enactment of CBI in various Latin American countries.⁵⁹

A second positive step is the Overseas Private Insurance Corporation (OPIC), which insures United States businesses operating in politically risky countries.⁶⁰ As one of the requirements to receive the backing of OPIC, the country where the TNC is planning on investing must be "taking steps to adopt and implement laws that extend internationally recognized worker rights."⁶¹ Unfortunately, the President can easily waive this "requirement."⁶² It is still too early to tell what effect the OPIC standards will have, although its free-wielding presidential discretion will probably limit its actual effect. On the whole, both the CBI and OPIC, while promising ideas, fail to send a strong directive to our trading partners that labor abuses will not be tolerated.

II. A Proposal: Worker Rights Violations as an Unfair Trade Practice

From out of these positive, yet for the most part ineffective measures being taken in United States trade policy, emerges legislation with the potential of having some actual effect in the area of international worker rights. In the last two Congressional sessions bills have been introduced which make it an actionable unfair trade practice for a country to gain a competitive advantage by exploiting labor.⁶³ The first bill, H.R. 4412, introduced in 1986 was not enacted when the Senate neglected to act on it before the end

57. P.L. 98-66 § 212(c) (1983). Subdivision 8 states that the President must consider "the degree to which workers in such a country are afforded reasonable workplace conditions and enjoy the right to organize and bargain collectively"

58. The Act only applies to 28 countries, many of which have relatively good records on worker rights. 19 U.S.C. § 2702 (b) (1983).

59. *Connecting Trade Policy to Foreign Labor Rules*, Cong. Q. 852, 854 (Apr. 19, 1986). This fact provides positive support that the U.S. can, through its trade laws, encourage the implementation of minimal labor standards.

60. 22 U.S.C. § 2191 (1985).

61. *Id.* at § 2191 (a)(1).

62. *Id.* at § 2191 (a)(3).

63. Both of these bills, H.R. 4412 in the 99th Congress, and H.R. 1735, which was introduced in March 1987, are primarily the work of Rep. Donald Pease (D.Ohio).

H.R. 4412 was introduced on March 13, 1986, as part of the House version of a comprehensive trade bill. Cong. Index 28, 397 (1986). The bill died when the Senate failed to act on it. The bill was reintroduced as H.R. 1735 in March, 1987.

of the session. During 1987 Congress reintroduced the bill, called the Fair Trade and Economic Justice Act of 1987, as part of H.R. 3, a massive trade bill.⁶⁴ The House and Senate passed the trade bill, but then sent it to conference to hammer out the differences between the House and Senate versions.⁶⁵ The Administration and certain other groups have risen in opposition to the worker rights provision in the trade bill, raising concerns that it will not be part of the final bill.⁶⁶

A. *Background of International Fair Labor Standards*

Before an analysis of the bill is undertaken, it is important to understand the background from which International Fair Labor Standards (IFLS) have evolved, since these standards are the basis from which the bill is derived. Furthermore, this background, which involves standards set by numerous world organizations over many years, lends support to the need for the recognition of these standards in United States trade laws.⁶⁷

Perhaps the first time the principle of labor standards for our trading partners emerged was in 1890 when Congress banned imports produced by convict or "slave labor."⁶⁸ While that type of legislation may seem far removed from current proposals, the principle involved—an intolerance for trade based on exploitation of labor—is the same. In fact, given the severe abuses currently taking place in some parts of the world⁶⁹ the relationship between bans on slave labor and proposals for minimum labor standards is actually quite close.

Almost thirty years later, the Treaty of Versailles included significant IFLS proposals.⁷⁰ A provision of the Treaty stated that members "will endeavor to secure and maintain fair and humane conditions of labour for men, women and children, both in their own countries and in all countries to which their commercial and

64. 133 Cong. Rec. H. 1502 (daily ed. Mar. 19, 1987) When it went to conference the bill contained almost 150 amendments and was 1,000 pages long. 133 Cong. Rec. S10293 (daily ed. July 21, 1987).

65. 133 Cong. Rec. S10372 (daily ed. July 21, 1987).

66. The Reagan Administration was quick to oppose the worker rights provision. 4 Int'l Trade Rep. (BNA) No. 12, at 416 (Mar. 25, 1987). Deputy U.S. Trade Representative Michael R. Smith remarked that the Administration was "firmly committed" to international worker rights, but argued that "avenues now available" would suffice. *Id.* at 416.

67. For a more extensive look at the history of IFLS, see 1 International Encyclopedia for Labour Law and Industrial Relations, International Labor Law (1983).

68. N.Y. Times, *supra* note 1.

69. See discussion accompanying notes 1-15.

70. 9 The American Labor Legislation Review 302-14 (1986).

industrial nations extend. . . ."⁷¹ In addition, the treaty laid the groundwork for the International Labor Organization (ILO).⁷²

The ILO has played a vital role in the evolution of international fair labor standards. The ILO is a tripartite organization with representatives of governments, employers and employees.⁷³ Its goal is to improve the economic and social position of workers and to protect their fundamental rights.⁷⁴ Through the years the standards promulgated by the ILO have been a substantial force in furthering the cause of workers worldwide. In fact, these standards lay the groundwork for the worker rights legislation currently before Congress.

In 1948 the United Nations Conference on Trade and Employment attempted to establish an International Trade Organization. In what came to be known as the Havana Charter, there was a provision on "Fair Labour Standards," which called for the elimination of unfair labor conditions.⁷⁵ Meanwhile, in the United States, IFLS gained increased attention when President Dwight D. Eisenhower named them as a key issue to be addressed in the upcoming Reciprocal Trade Agreement negotiations.⁷⁶

A number of international commodity agreements also made attempts at establishing IFLS.⁷⁷ The value of these were minimal, however, as they only applied to the single commodity that was the subject of the agreement, such as tin or sugar. This created the glaring inconsistency of protecting laborers in, for example, the sugar industry, while workers in the coffee industry were open to abuse.⁷⁸ Additionally, because they had no binding effect, they

71. Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles), June 28, 1919, Part I, Art. 23.

72. Treaty of Versailles, Part XIII "Labour."

73. For more complete information on the ILO, see *The Impact of International Labour Conventions and Recommendations* (Geneva: ILO, 1976); Earnest A. Landy, *The Implementation Procedures of the ILO*, 20 Santa Clara L. Rev. 633 (1980).

74. See generally K.T. Samson, *A Portrait of the ILO and its Impact on the Lives of Workers Around the World*, 9 Human Rights 32 (1980).

75. Clair Wilcox, *A Charter for World Trade 233-34* (1972). Interestingly, the International Trade Organization was never established because the U.S. refused to ratify it. However, the ITO evolved into the Generalized Agreement on Tariffs and Trade (GATT) which since 1947 has been the primary instrument guiding international trade. Tussie, *supra* note 43, at 12.

76. "Annual Message to the Congress on the State of the Union," *Public Papers of the Presidents, Dwight D. Eisenhower*, at 15 (1953). Attempts were made to implement an unfair labor clause into GATT in 1953, but no agreement could be reached as to the definition of "unfair." Steve Charnovitz, *Fair Labor Standards and International Trade*, 20 J. World Trade L. 61, 64 (1986).

77. See Ulrich Kullman, *Fair Labor Standards in International Commodity Agreements*, 14 J. World Trade L. 529 (1980).

78. *Id.* at 531-32.

were generally ignored.⁷⁹

Recently, a minimum package of IFLS was identified by the Netherlands National Advisory Council for Development Cooperation.⁸⁰ Existing International Labor Organization "Conventions" were utilized as a minimum package for IFLS.⁸¹ These Conventions, which are the standards forming the basis of the worker rights provision in the trade bill currently under consideration by Congress, include: the right of association,⁸² the right to organize and bargain collectively,⁸³ the abolition of forced labor,⁸⁴ a minimum age,⁸⁵ and a minimum subsistence wage.⁸⁶

In short, there have been scattered attempts over the past 100 years to implement international labor standards. Although these attempts have been limited in their ability to effectuate real change, at the very least they have created an awareness concerning labor abuses. Furthermore, this historical support for basic worker rights lays a solid foundation for the current proposal to implement these rights into United States trade law.

B. *The Proposed Legislation*

The proposed legislation before Congress is a multi-faceted worker rights initiative, which seeks to establish that certain basic rights of workers are to be respected worldwide in the conduct of international trade. Its objective is to prevent any country from maintaining competitive advantage based upon the exploitation of its workers. The bill consists of three parts which attempt to reach this goal.

79. The agreements contained non-binding language such as "countries declare that they will seek to . . ." ensure worker rights. Kullman, *supra* note 77, at 528.

80. Hans Tevnisson, *Recommendation on Minimum International Labor Standards*, 80 Am. J. Int'l L. 385 (1986).

81. A "convention" is a decision reached by the ILO which is binding upon the states which ratify it. This is distinguished from a "recommendation" which is primarily perceived as a guideline. Landy, *supra* note 73.

82. International Labour Office, *International Labour Conventions and Recommendations 1919-1981* (1982). Convention No. 87, *Convention Concerning Freedom of Association and Protection of the Right to Organize*.

For an exhaustive review of ILO conventions, see International Labor Office, *supra*.

83. *Id.*, Convention No. 98, *Convention Concerning the Application of the Principles of the Right to Organize and to Bargain Collectively*.

84. *Id.*, Convention No. 105, *Convention Concerning the Abolition of Forced Labour*.

85. *Id.*, Convention No. 5, *Convention Fixing the Minimum Age for Admission of Children to Industrial Employment*.

86. *Id.*, Convention No. 131, *Convention Concerning Minimum Wage Fixing, with Special Reference to Developing Countries*.

1. Title I, Finding and Statement of Policy

The first part of the legislation specifies the findings and policy behind the bill.⁸⁷ In stating these findings and policies, this section refers to several agreements to which the United States is a party that affirm various fundamental labor rights, such as the United Nations Charter and the Revised Charter of the Organization of American States.⁸⁸ Some of the most notable findings include: exploitation of workers is an unacceptable means for any country or industry to gain competitive advantage in international trade;⁸⁹ labor repression has become an important unfair trading practice used against the United States⁹⁰; and exports from countries that deny internationally recognized worker rights undermine living and working standards in both developing countries and the United States, because international corporations play workers off against one another to minimize costs.⁹¹

The bill then states its fundamental policy objectives:

to promote the development of an open and fair international trading system in which the benefits of trade are shared more fully within trading countries as well as among them; to strengthen and supplement international trading rules with a view to renouncing the exploitation of workers by any trading country as a means of gaining any measure of competitive advantage in international trade, and to amend United States law so as to treat as an unfair trade practice any competitive advantage for a country in international trade which is derived from the denial of internationally recognized worker rights.⁹²

This first part of the bill, dealing with findings and policy, is important for several reasons. First, it establishes the worldwide support for worker rights as indicated by the various international agreements that are cited.⁹³ Second, this section emphasizes the need to use fair labor standards to open up and liberalize the trading system, rather than as a means to protect domestic markets. Third, the language contained in this policy statement is much

87. H.R. 1735, 100th Cong., 1st Sess., 133 Cong. Rec. H. 1502 (1987).

88. H.R. 1735 § 2(a) (1987). The UN Charter states in Article 55 that "the United Nations shall promote higher standards of living, full employment, and conditions of economic and social progress and development." The Revised Charter of the Organization of American States (OAS) provides in Article 31 that "member states agree to dedicate every effort to achieve the following basic goals[:] . . . Fair wages, employment opportunities, and acceptable working conditions for all."

89. H.R. 1735 § 2(a)(3).

90. H.R. 1735 § 2(a)(2).

91. H.R. 1735 § 2(a)(4).

92. H.R. 1735 § 2(a)(1-3).

93. These agreements include the United Nations Charter, and three other UN agreements as well as the Revised Charter of the Organization of American States. *Supra* note 85.

more firm and direct in its renunciation of exploiting workers in order to achieve competitive advantage. This contrasts favorably with the weak and ineffective worker rights provisions in other statutes and agreements.⁹⁴

2. *Title II—General Agreement on Tariff and Trade
Negotiating Objectives*

The second section of the bill links the statutory authority of the administration to participate in the new General Agreement on Tariff and Trade (GATT) round of negotiations to the adoption of a provision on worker rights.⁹⁵ Before Congress will enact any trade agreement the administration negotiates with other countries, administration officials must show that steps have been taken to implement international labor standards into the agreement. This part of the bill is important because GATT is the foundation of worldwide trade relations, and in its current state it makes no mention of fair labor standards.⁹⁶

In carrying out the objectives of the second part of the bill, three alternative approaches are allowed. The first two approaches call for GATT to declare that the exploitation of workers is an unjustifiable means by which a country may gain competitive advantage. The first provision would accomplish this by adding another article to GATT and the second would do so by amending existing articles. The third alternative would be the adoption and implementation of the internationally recognized worker rights as already defined in the United States Code.⁹⁷ These approaches would clarify conduct which is acceptable in international trade and provide procedures to petition and confront violations.⁹⁸

In order to ensure compliance, Title II requires that before the President enters into any trade negotiations, the administra-

94. See discussion accompanying notes 56-62 and 77-78.

95. H.R. 1735 § 2(a)(5)(A-F). GATT is both an agreement which governs the basic trade policy commitments of nearly 100 countries and an organization which coordinates the world trading system. See Jackson & Davey, *supra* note 15, at 293-312. For more information on GATT, see generally, Robert Hudec, *The GATT Legal System and World Trade Diplomacy* (1975).

96. GATT does prohibit trade based on "prison labour." GATT: Basic Instruments and Selected Documents, Vol. IV, Art. XX (e). In essence, this provision requiring the President to incorporate worker rights into GATT trade agreements is a stronger and more detailed version of a provision in the original Trade Act of 1974. 19 U.S.C. § 2131(a)(4). This provision proclaimed that "as soon as practicable" the President take action toward the "adoption of international fair labor standards." As the language suggests, this provision has been ineffective as a means for making worker rights a priority in GATT negotiations. See H.R. 1735 § 2(a)(7).

97. This definition is found at 19 U.S.C. § 2462 (1984), *supra* note 51.

98. H.R. 1735 § 201.

tion must submit a written report to Congress specifying those actions which have been taken regarding worker rights with respect to GATT.⁹⁹ Additionally, the President would be required to consult with congressional committees regarding the progress being made.¹⁰⁰ The overall effect of Title II is to provide a means of implementation for worker rights into GATT, the foundation of the United States trade policy and the most important instrument guiding world trade relations.

3. *Title III—Relief from Unfair Trade Practices*

Currently, section 301 of the Trade Act of 1974¹⁰¹ defines denial of market access, the opportunity to establish a business in a foreign country, and the denial of intellectual property rights as “unreasonable” and unfair trade practices.¹⁰² Title III would amend section 301 to include the denial of internationally-recognized worker rights as an unfair trade practice. In the same way that denial of market access by a country is considered an unfair trade practice, the denial of fundamental worker rights by a country would also fall into that category. The bill provides several possible sanctions for unfair trade practices including the suspension of most-favored nation status for offending countries.¹⁰³ Thus, countries that are systematically repressing their workers would potentially lose preferential trade status until significant steps are taken toward implementing internationally recognized rights.

The bill provides that any “interested party” may petition the United States Trade Representative for relief against a foreign country that is getting a trade advantage by exploiting its workers. So this process is not one that can only be instigated by the Administration, but rather a cause of action for any party with requisite interest.¹⁰⁴ This is a key distinction from other attempts by

99. H.R. 1735 § 202(a).

100. H.R. 1735 § 202(b).

101. P.L. 93-618 § 301 (1975); 19 U.S.C. § 2411 (1984).

102. 19 U.S.C. § 2411 (e)(3).

103. H.R. 1735 § 301A (a)(2)(E). Other possible sanctions include the suspension of the benefits of any trade agreements with that country, the assessment of duties or the imposition of import restrictions, the negotiation of an orderly market agreement or the development of administrative actions to restore the position of the injured industry. *Id.* at § 301A (a)(2)(A-D).

104. Under H.R. 1735 § 301A(d), an “interested party” includes “a person alleging that internationally recognized worker rights defined in section 502(a)(4) have been denied, regardless whether that person has a material interest in action being taken under this title in response to such allegations.” The complaint by an interested party putting forth “substantial evidence” of an unfair trade practice would be investigated by the U.S. Trade Representative, who would have nine months to

the United States to encourage international fair labor practices, such as CBI and OPIC.¹⁰⁵ Parties who are actually affected by the advantage gained through the unfair labor practices, such as businesses and trade unions, have direct access to a cause of action through section 301.

III. Evaluating the Feasibility of H.R. 1735

The fact that current trade rules demand fair competition with respect to other countries "dumping" their products in the domestic market at less than fair market value, while they condone competition at any cost as far as workers are concerned, is entirely inconsistent.¹⁰⁶ Furthermore, hardly an eyebrow is raised when the government uses trade policies to effectuate political or military ends,¹⁰⁷ but if trade is used to help reduce the plight of the working poor in other countries various groups rise in opposition.¹⁰⁸ In addition, the United States has long had a policy of protecting human rights throughout the world, yet the nation closes its eyes when the abuses take place in the context of the labor forces of our trading partners.¹⁰⁹

Despite these apparent double standards, opponents of this

make a decision. The representative would then offer a recommendation to the President as to what action should be taken.

105. See discussion *supra* notes 56-62.

106. This practice is frequently referred to as the "dumping" of labor or "social dumping" to highlight the absurd inconsistency of not allowing foreign product prices to undercut U.S. markets while permitting foreign labor to do so. See generally Goold & Cavanagh, *supra* note 11, at 454.

107. A recent example is the quick calls for trade sanctions against Panama. Within days after Panamanian strongman Manuel Noriega was indicted for alleged drug trafficking, Congress was calling for trade sanctions against Panama in an attempt to force the leader to resign. *Bipartisan Senate Group Introduces Bill to Halt All Trade with Panama*, Daily Rpt. Exec. (BNA) (Mar. 4, 1988).

108. Business groups such as the American Chambers of Commerce have come out strongly against the worker rights provision of the trade reform bill (H.R. 3). *Trade Legislation Could Harm Multinationals, International Chamber Representatives Warn*, 4 Int'l Trade Rep. (BNA) No. 24, at 802 (June 17, 1987).

At least one consumer group, concerned about rising prices, also has lobbied against the worker rights legislation. *Consumer Advocates Warn Against Adoption of "Dangerous" Trade Bill Protectionism*, 4 Int'l Trade Rep. (BNA) No. 37, at 1158 (Sept. 23, 1987). In fact, there is no real evidence that prices would rise if workers' wages in LDCs rose to a minimal standard. Even though better labor conditions would raise labor costs somewhat, a whole new class of consumers for U.S. goods could be created as well, thus stimulating the U.S. economy.

Even if it is conceded that prices will rise, it is a sad commentary on U.S. consumers that they would rather pay a few cents less for a product, even if it is produced by children working 15 hour days.

109. Perhaps the ultimate example of how little regard is given to human rights abuses taking place against the working poor in other countries, is that U.S. trade laws currently protect endangered plants and animals but remain silent on imports made by child labor. *Christian Science Monitor*, *supra* note 3.

legislation have voiced several objections. Essentially, these objections have run along three lines: the bill is a form of protectionism; it imposes United States standards on the rest of the world; and the bill would harm the nation's economy. A close examination of the basis of the bill and its likely effects reveals that these objections are for the most part unfounded.

A. Protectionism

Throughout the international trading community and particularly in the United States, few words elicit a more negative reaction than "protectionism." It is not surprising, therefore, that critics of this legislation have attempted to slap this label on the bill.¹¹⁰ Such a position mischaracterizes the bill, which may actually, when all factors are considered, liberalize trade.¹¹¹

Protectionist trade legislation is that which protects domestic products or industries from foreign competition by providing higher tariffs on foreign goods or limiting them in number, even if that country has legitimately gained a competitive advantage.¹¹² Examples of typical protectionist measures include countervailing duties, increased tariffs, quotas, and surcharges or surtaxes. Yet H.R. 1735 imposes no such limitations on foreign goods. It simply encourages foreign countries which gain a competitive advantage through an unfair practice—abuse of workers—to raise their labor conditions to internationally recognized standards or lose preferential status. This type of system can be distinguished from a protectionist one. Rather than impose higher tariffs or other restrictions to protect a domestic industry from foreign goods which have fairly entered our markets, the United States would merely condition preferential trade status on competition based on fair labor

110. See, e.g., *A Thinly Veiled Rush for Protectionism*, N.Y. Times May 31, 1987, § 3, at 2, col. 3; *Trade Policy: Administration Opposes Worker Rights Amendment to Omnibus Trade Legislation*, 4 Int'l Trade Rep. (BNA) No. 12, at 416 (Mar. 25, 1987).

111. See *infra* discussion accompanying notes 100-05. In fact, one of the major studies conducted on this issue recommended that International Fair Labor Standards be adopted in order to "facilitate trade liberalization." Report of the Independent Commission on International Development Issues Under the Chairmanship of Willy Brandt, North-South: A Program for Survival 288 (1980).

Several other studies and commentators have come to the similar conclusion that fair labor standards would liberalize trade. See, e.g., John Mainwaring, *International Fair Labour Standards: Some Issues* 21-22. (Canadian Dept. of Labor 1979); Gus Edgren, *Fair Labour Standards and Trade Liberalization*, 118 Int'l Lab. Rev. 1 (1979); Philip Alston, *International Trade as an Instrument of Positive Human Rights Policy*, 4 Human Rights Q. 183 (1982).

112. See generally Jackson & Davey, *supra* note 15, at 17-19.

practices.¹¹³

Furthermore, it is important to emphasize that the bill is not aimed at protecting particular goods or industries like protectionist legislation. The fair labor standards apply across the board, with the goal being improved working conditions, not protecting a particular domestic industry or product. This fact differentiates the bill from many other "fair trade" proposals which are often merely vehicles for protecting a politician's favored industry.¹¹⁴

The argument that this bill is protectionist is further diminished by the fact that in several ways this bill would substantially decrease protectionism in United States trade policy. There are at least two key ways in which this would be accomplished. First, much of the public's confidence in a "free trade" system is dependent on what it perceives as fairness in the world economy.¹¹⁵ Americans have difficulty supporting free trade when the goods produced domestically are at a severe disadvantage due to unfair practices by other countries.¹¹⁶ These types of disadvantages in the past have led to protectionist legislation aimed at warding off foreign products. One of the most common arguments for protectionism is that United States workers should not have to compete with "sweat-shop" labor.¹¹⁷ Imposing international fair labor standards

113. Trade policy approaches are often categorized into three areas. One is an open world trading system, with minimal government intervention. The second is a protectionist philosophy, characterized by protecting import-sensitive industries. The third is pursuit of fairness in trade, through defining and limiting unfair trade practices. Schwab, *supra* note 41. The proposed legislation would fall into this third category which finds its roots in "pragmatism and in the longstanding political values of fairness and equity . . .", rather than the Keynesian notions of active government intervention in the market place (i.e., protectionism). *Id.* at 161-63.

114. Phedon Nicolaidis, *How Fair is Fair Trade?*, 21 *J. World Trade L.* 147, 162 (1987).

115. In a NBC/Wall Street Journal Poll conducted in 1986, Americans identified cheap foreign labor as the overwhelming cause of America's trade deficit. *The Wages of Trade*, *N.Y. Times*, June 5, 1977, at E16.

116. This effect is illustrated by the position of labor unions on trade policies. Not too many years ago a majority of unions supported a liberal trade policy. Currently, the attitude is just the opposite with almost all of organized labor opposing liberal trade. If labor were to perceive international competition as being more fair, the likelihood of a return of support for liberal trade policies would increase. *Fair Trade and Economic Justice Act: Hearings on H.R. 4412 Before the House Comm. on Ways and Means*, 99 Cong., 2d Sess. 1531 (1986) (statement of David C. Williams, Senior Fellow, Council on Hemispheric Affairs). Secretary of Labor William Brock also identified this phenomenon in a 1986 speech:

Those countries which are flooding world markets with goods made by children, or by workers who can't form free trade unions or bargain collectively, or who are denied even the most minimum standards of safety and health are doing more harm to the principle of free and fair trade than any protectionist groups I can think of.

Quoted in Christian Science Monitor, supra note 3.

117. Charnovitz, *supra* note 76, at 74.

would undercut such an argument for protectionism. In short, if Americans view foreign competition as fair, rather than subsidized by the exploitation of labor, then there is greater support for liberal trade policies.¹¹⁸

The second way that the bill encourages liberal trade is by providing a release for "protectionist steam." Filing an unfair trade practice complaint under section 301 serves as a "safety valve" in the determination of trade policy by discharging pressures that exist.¹¹⁹ Such pressures in the past have led to extreme protectionist measures by Congress.¹²⁰ Thus, protectionist sentiments which may arise when a domestic industry is feeling the strain of international competition can be mitigated by pursuing relief under section 301. This effect of section 301 has already been realized in other areas, where drastic protectionist measures initiated in Congress were dropped following the filing of section 301 complaints.¹²¹

Finally, it is important to note that labor standards which exist in our domestic economy are not viewed as restricting open commercial competition. The United States would never allow part of a domestic industry to gain competitive advantage over other businesses through denial of fundamental worker rights. Yet within a certain framework of minimal standards, businesses are free to compete in the open market.¹²² In a similar way internationally recognized labor standards should be the framework within which countries are free to trade and compete in world markets. Substantial differences exist between the world economy and individual countries, yet the examples set by the United States and other countries in successfully implementing labor standards while maintaining free markets is encouraging.

118. Critics of H.R. 1735 who base their objections on the notion of "free trade" are misguided. Ever since the Boston Tea Party there has been U.S. government intervention into the world market. Free trade is a high-sounding principle, but in today's worldwide economy it is a fallacy. Bill Goold and John Cavanagh, *A Trade Policy For the People*, *The Nation*, Mar. 29, 1986, at 452. See generally Harry Shutt, *The Myth of Free Trade* (1985).

119. Fisher & Steinhardt, *supra* note 55.

120. *Id.* at 579.

121. *Id.* at 579-81.

122. The example of the U.S. Fair Labor Standards Act (FLSA) provides strong incentive for an international counterpart. Prior to its passage in 1938, abusive labor practices such as child labor and unsafe conditions were rampant in the United States. In addition, the economy was in shambles and there were essentially two classes in American society, the rich and the poor, with a virtually nonexistent middle class. History has proven that the implementation of the FLSA has worked remarkably well. To parallel the rationale that was behind the U.S. FLSA, see John Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 *Law & Contemp. Probs.* 464 (1939).

B. The Imposition of United States Standards on the World

The second line of criticism against H.R. 1735 argues that the United States, by imposing its labor standards on the rest of the world, is meddling in the internal affairs of other countries.¹²³ Advocates of this position believe that Americans should not force their own standards for workers on countries with different cultures and values. This objection is based on a misconception of the proposed standards. The labor standards in the bill are not based on our Fair Labor Standards, nor were they conceived by the United States. These standards are based on International Labor Organization conventions,¹²⁴ which have been adopted either in whole or part by hundreds of nations.¹²⁵ In addition to the ILO, several other international agreements support these basic rights.¹²⁶ They are truly internationally recognized, and, not surprisingly, those countries which do not recognize these standards are those which are among the worst violators of worker rights.¹²⁷

Still, critics persist in arguing that the ILO is primarily a Western organization and does not truly reflect a world consensus.¹²⁸ Even if this is accepted, it still does not explain the other international pacts which also support basic worker rights. Most notably, the UN, with over 150 member States, including numerous non-Western countries,¹²⁹ has indicated its support of these fundamental rights in several agreements.¹³⁰ When reviewing the numerous international agreements which embody the principles of worker rights, it becomes clear that the opposite of what critics say is true. In a world where there is little consensus on any issue, support for fundamental rights for workers has gained amazing international acceptance. Additionally, foreign countries are surprisingly willing to discuss their internal labor policies.¹³¹

123. Shortly after the introduction of H.R. 1735, Deputy U.S. Trade Representative Michael R. Smith rejected it as "fundamentally flawed," and stated that such an attempt to impose labor standards on the rest of the world would "reduce trade." *Supra* note 66, at 416.

124. See *supra* notes 80-86.

125. 133 Cong. Rec. H1499 (daily ed. Mar. 19, 1987).

126. See discussion accompanying *supra* notes 88-89.

127. 133 Cong. Rec., *supra* note 125, at H1499.

128. Deepak Lal, *Resurrection of the Pauper-Labour Argument* 54-56 (1981).

129. For a list of UN member States, see Thomas Hovet, Jr. & Erica Hovet, *A Chronology and Fact Book of The United Nations 1941-1985*, at 304 (1986).

130. These Agreements include the UN Charter art. 55, para. a; The UN Universal Declaration of Human Rights art. 23; The UN International Covenant on Civil and Political Rights art. 8; and The UN International Covenant on Economic, Social and Cultural Rights, art. 7.

131. Charnovitz, *supra* note 76, at 75.

Moreover, the bill takes into account the individual differences in standards of living and economic systems that exist between countries.¹³² Certainly it is not expected that LDCs provide the same minimum wage or safety standards as the United States. The purpose behind the bill is not that workers in Bangkok are paid the same as those in Detroit.¹³³ Nor are safety standards which exist for the laborer in London expected to be as stringent in Bombay. Rather, the goal is that within a particular country's economic and social condition, certain minimal standards which allow a worker to recognize his or her basic human rights are followed.

C. *The Effect on the Economy*

Despite the concern about protectionism and meddling in the internal affairs of another country, perhaps the primary reasons behind the opposition to the bill lies with concerns over profit loss.¹³⁴ United States TNCs argue that in order to compete with foreign companies that benefit from lower labor costs, they must also be able to take advantage of cheap labor in foreign countries.¹³⁵ If not, they argue, profits will fall and prices will rise, damaging the economy.¹³⁶ Certainly we all benefit to an extent from United States corporations that are profitable. This does not mean, however, that by encouraging countries to recognize minimum labor standards TNCs will be unable to gain substantial benefit from less expensive labor. Labor costs in LDCs would continue to be considerably lower, but not to the point that the worker suffers.

132. Through the discretion allowed the Trade Representative in deciding what action to take, a country's economic and social condition will be taken into consideration. H.R. 1735 § 302 (a)(4).

133. The bill does not propose a world minimum wage in the sense that, for example, all countries must pay at least \$1 per hour. But it does provide for a minimum subsistence wage—enough so a person can live off what he or she makes. Pope John Paul II has written that a "just" wage is one sufficient for "establishing and properly maintaining a family." *Quoted in Charnovitz, supra* note 76, at 75. It is beyond the scope of this article to recite a detailed economic analysis of the possible effect of international labor standards. For such an analysis, see generally Gote Hansson, *Social Causes and International Trade: An Economic Analysis of Labour Standards in Trade Policy* (1984).

134. *Trade Legislation Could Harm Multinationals, supra* note 108. Few would find it surprising that the large corporations are the same group that opposed similar fair labor standards for the U.S. worker earlier this century. Cong. Q., *supra* note 59, at 852.

135. Cong. Q., *supra* note 59, at 854. The bill applies to *all* importers of goods from countries that refuse to improve labor standards, so U.S. companies will not be at a disadvantage to foreign companies.

136. *Id.*

Competitive advantages that a country has legitimately attained will continue to be attractive to TNCs. LDCs will still offer an abundant source of lower cost labor to TNCs interested in foreign investment. Furthermore, other benefits would continue to exist, including less stringent regulatory schemes and preferential tax environments.¹³⁷ In addition, LDCs frequently are able to offer ample supplies of cheap natural resources and newer factories and equipment.¹³⁸ With the continuation of these benefits, LDCs would maintain competitive advantages, but not at the expense of the working poor, and the TNCs will continue to enjoy lower production costs.

In addition, there is strong evidence that by improving the economies of LDCs, the United States economy will benefit.¹³⁹ By limiting the workers wage, the TNCs and host governments are severely restricting the purchasing power of a giant class of potential consumers. LDCs buy nearly forty percent of America's exports, which is more than Japan and the entire European Community combined.¹⁴⁰ Clearly an improved economy for the LDCs means an improved United States economy. Therefore, when substandard labor practices are supported by United States dollars, there may be some limited savings in labor costs, but there are numerous detrimental effects on the nation's economy as a whole.¹⁴¹

As the above discussion suggests, H.R. 1735 can be an effective mechanism for improving labor conditions in many countries, while encouraging fair liberal trade. The concerns of critics are at best exaggerations, and at worst totally unfounded. The United States has already proven on a smaller scale that trade based on

137. Tax incentives are utilized by many LDCs in attracting foreign business, and they are a legitimate advantage which LDCs have over developed countries. However, LDCs must be careful in carrying out these tax programs. See generally Lotfi Maktouf & Stanley Surrey, *Tax Expenditure Analysis and Tax and Budgetary Reform in Less Developed Countries*, 15 *Law & Pol'y Int'l Bus.* 739 (1983).

138. Jackson and Davey, *supra* note 15, at 629.

139. Pease and Goold, *supra* note 6, at 354. They cite a study which showed that the deterioration of the economies of LDCs cost the U.S. \$18.2 billion in exports between 1980 and 1983. Furthermore, the decreasing inability of LDCs to import products has stagnated industrialized economies' growth to the point that growth would have been 1.3 times higher in countries such as the U.S. if the LDCs importing power had not dropped between 1982 and 1983.

140. According to the U.S. Department of Commerce, U.S. exports to LDCs were valued at \$72.3 billion in 1983. Cited in Pease & Goold, *supra* note 6, at 354.

141. There is another important, although somewhat intangible factor, which counters the argument that connecting trade with labor standards will hurt TNCs and the economy. Several studies, as well as common sense, tell us that the better treated a worker is the more productive and loyal he or she becomes to the company. Thus, TNCs have a distinct interest in the conditions under which their labor force works. See Anthony D'Amato, *Are Human Rights Good for International Business?* 1 *Nw. U. J. Int'l L. & Bus.* 22 (1979).

recognition of worker rights can be achieved without disrupting trade.¹⁴² The next step should be a comprehensive implementation of fair labor standards into United States trade law.

IV. Conclusion

The crisis that exists for millions of workers throughout the world manifests itself in different ways—child labor, subsistent wages, hazardous work conditions—but the results are often the same. People are unable to provide for even the basic needs of their families, and they are unable to offer much hope to future generations that the situation will change unless substantial steps are taken to improve conditions. Undoubtedly, the LDCs themselves must share in the blame, yet the role of United States corporations and trade policy should not be underestimated. As the situation now exists, LDCs are discouraged from making any improvements for their workers out of fears that they will decrease their trading competitiveness or lose foreign investment to other countries that continue to exploit their work force. In other words, it pays to exploit workers under the current international trading system.

The Fair Trade and Economic Justice Act is not a panacea to the complex and extensive problems that exist. The bill, however, could be a clear indication that abusing the rights of workers in order to attain some perceived competitive advantage will not be tolerated. The incentive for countries to recognize fundamental labor standards will be strong, since they would have to do so in order to maintain preferential trade status. Furthermore, the bill is consistent with internationally accepted standards and with the United States' trade policies which encourage liberal and fair trade. But most importantly, the bill, by connecting trade and basic worker rights, could play a significant role in promoting improved standards of living for people in many countries throughout the world.

142. The CBI program is one example, and its positive effects have already been noted. See *supra* note 58. Additionally, worker rights have been linked successfully to trade in bilateral agreements. Charnovitz, *supra* note 76, at 77. As far back as 1955 the U.S. entered into a trade agreement with Japan which called for fair labor practices. *Id.* at 64. This agreement led Japan to enact its first minimum wage law. *Id.* at 65.