

**Institute for International Economic Policy Working Paper Series
Elliott School of International Affairs
The George Washington University**

Reality Bites: The Myth of Labor Rights as a Non-trade Issue

IIEP-WP-2010-29

**Susan Ariel Aaronson
George Washington University**

2006

Institute for International Economic Policy
1957 E St. NW, Suite 502
Voice: (202) 994-5320
Fax: (202) 994-5477
Email: iiep@gwu.edu
Web: www.gwu.edu/~iiep

Reality Bites
The Myth of Labor Rights as a Non-trade Issue
Susan Ariel Aaronson

Introduction:

In 1999, economist Jagdish Bhagwati and 98 other prominent individuals from the developing world took a forceful position. Bhagwati, the world's preeminent trade economist, and his co-signatories argued that labor rights should not be linked to the WTO or to any other trade agreement. To these men and women, labor rights were *non trade* issues and should not be allowed to "contaminate" trade rules.¹ UN Secretary General Kofi Annan as well as trade officials from Thailand and the Philippines seconded this point of view.²

The signatories were responding to longstanding efforts by policymakers, activists, and academics, mainly from the industrialized world, who sought to include labor rights in the purview of the WTO and other trade agreements. But developing countries held fast, and they seemed to forestall any direct linkage of labor rights and trade in the WTO.

¹ See Jagdish Bhagwati et al. "Third World Intellectuals and NGOs Statement Against Linkage" http://64.233.161.104/search?q=cache:Mu7ru9z3-XkJ:www.columbia.edu/~jb38/TWIN_SAL.pdf+third+World+Intellectuals+and+NGOs+Statement+Against+Linkage%E2%80%9D&hl=en&gl=us&ct=clnk&cd=1, last searched 9/12/06 . The letter was published in August 1999. The signatories claimed that they presented a developing country point of view. They asserted that arguments for including labor standards in trade agreements are made by one of two groups: politically powerful lobbying groups that are protectionist and morally-driven human rights and other groups. They contended that the morally-driven groups are misguided because their actions may force poor workers out of their jobs without providing a viable alternative. The authors concluded that the end result of trade-based labor standards, whether protectionist or morally motivated, is to protect developed country firms from developing country competition. Also see Jagdish Bhagwati "Trade Liberalization and 'Fair Trade' Demands: Addressing the Environmental and Labour Standards Issues." *World Economy*. Vol. 18 (745-759), Nov. 1995 and Jagdish Bhagwati, "After Seattle: Free Trade and the WTO." *International Affairs*. Vol. 77, 1 (15-29). 2001.

² Annan, Thai, and Philippino officials are quoted in Steve Charnovitz, "Addressing Environmental and Labor Issues in the World Trade Organization, PPI Briefing 11/1/ 1999, fns 1-3; at http://www.ppionline.org/ppi_ci.cfm?knlgAreaID=108&subsecID=128&contentID=649; also see CUTS International, "Campaign on Linkages," CUTS Panel Discussion: Labor Linkage from the Viewpoint of Trade Sanctions, 6/20/2000, www.cuts-international.org/linkages-meeting-29.htm, both last searched 8/30/2006.

Some 7 years on, however, many developing countries participate in trade agreements which include labor rights language –and increasingly labor rights conditions. They do so under trade agreements with the EU and the United States. For example, the EU ACP Partnership Agreement (a preference program) covers some 79 countries and includes labor rights. The US has preferential agreements with some 140 developing countries with labor rights conditionality. Moreover, the EU has bilateral agreements with over 15 countries.³ The US has free trade agreements (FTAs) that include labor standards conditions with 4 countries; pending FTAs with 12 more; and as of July 2006 is negotiating with 5 countries. All of these bilaterals have labor rights conditions.⁴ Between the United States and the EU, at least 150 countries participate in trade agreements with labor rights conditions.

This article explores *how* the US and the EU have made labor rights a trade agreement issue. I focus on 3 case studies: the EU, the U.S., and the members of the WTO. The methodology for this article is simple. I begin with an overview of efforts at the international level to link labor rights and trade. I keep this story brief, as many other scholars have delineated this history. Next, I discuss what the EU and the US do to promote labor rights abroad. Both trade powerhouses use access to their huge markets as an inducement to change labor rights practices at the firm and governmental level within their trade partners. I stress that despite their shared objective, EU and US policymakers take very different approaches; these approaches are essentially “branded.” On the other

³ EU trade agreements are with EFTA (Norway, Lichenstein, Iceland); Bulgaria Romania, Turkey, the Mediterranean Association Agreements (Egypt, Israel, Jordan, Morocco, Tunisia, Algeria, Lebanon, Palestinian Authority), Chile and Mexico,

⁴ The pending FTAs (DR-CAFTA, Bahrain, Oman, Peru Trade Promotion Agreement, and Colombia) have not been ratified by all parties to the agreements. The U.S. is currently negotiating with Panama, Korea, Thailand, Malaysia, and the UAE.

side of the equation, many developing country trade partners are not always enthusiastic recipients of labor rights conditionality. But they have accepted such conditions in order to maintain good trade relations with the two trade behemoths. In addition, developing and middle income countries also bring up questions of labor rights during WTO activities, including accessions, trade policy reviews, and discussions of procurement policies.

In this article, I define labor rights as the ability of individuals “to claim freely and on the basis of equality of opportunity their fair share of the wealth which they have helped to generate.” Governments are obligated to ensure that individuals are not forced or compelled to work; children are not made to work; individuals have freedom of association and the right to collective bargaining; and are not discriminated against in employment and occupation.⁵

A Very Brief History of Trade and Labor links

As long as men and women have traded, they have wrestled with questions of labor rights. According to economist Peter Temin, the ancients shipped a wide range of goods from wheat to wine.⁶ But these traders often lived in fear; when they engaged in trade they risked being captured, sold as slaves or enslaved by pirates.⁷

In the centuries that followed, policymakers around the globe developed a wide range of approaches to govern the behavior of states and citizens at the intersection of

⁵ All members of the ILO whether or not they have signed all the conventions are obligated to adhere to the ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-Up, adopted 6/18/1998. The quote is from the Declaration.

⁶ Peter Temin, “Mediterranean Trade in Biblical Times.” MIT Department of Economics Working Paper) 3-12: March 2003, 8, 14-16. This interesting study attempts to meld economics and archeology. Also see Clarence H. Wagner Jr. “Commerce in the Bible, Israel: Crossroads of the East,” at www.bridgesforpeace.com/publications/dispatch/everydaylife/...last searched 8/25/2005.

⁷ Pirates wanted people more than goods because they could sell poor people as slaves and rich people for ransom.

trade and labor rights. Often one state would act and challenge (or inspire) others to follow. For example, after England banned the slave trade in 1807, it signed treaties with Portugal, Denmark, and Sweden to supplement its own ban. After the United States banned goods manufactured by convict labor in the Tariff Act of 1890 (section 51), Great Britain, Australia, and Canada adopted similar bans. Ever so gradually, these national laws inspired international cooperation.⁸

In the twentieth century, policymakers began to recognize the need to root protection for human rights in international law. For example, the signatories of the Versailles Treaty tried to engineer a peace that would both stabilize Europe and protect various minority groups. They also pledged to “endeavor to secure and maintain fair and humane conditions of labour...in all countries in which their commercial and industrial relations extend.” To meet that goal, they created an International Labor Organization (ILO) in 1919.⁹

During the second world war, the US and British postwar planners were determined to create an international trade regime that would help improve labor standards. With the Atlantic Charter, the Allies pledged to establish a peace with the objective of securing improved labor standards.¹⁰ But they were unable to gain approval

⁸ Susan Ariel Aaronson, Taking Trade to the Streets: The Lost History of Global Efforts to Shape Globalization (Ann Arbor: Michigan, 2001), 36, 44.

⁹ Percy Bidwell, The Invisible Tariff: A Study of the Control of Imports into the United States, (New York: Council on Foreign Relations, 1939), 111-115.

¹⁰ Susan Ariel Aaronson, Trade and the American Dream (Lexington: University of Kentucky Press, 1996), 23-33. This book was the first archival history of the development of the ITO and the GATT, using US and British archives. On August 14, 1941 the US and Britain jointly released the Atlantic Charter “to make known certain common principles...on which they base their hopes for a better future for the world.” The Atlantic Charter is at usinfo.state.gov/usa/infousa/facts/democrac/53.htm. The Declaration by United Nations built on the Atlantic Charter. It was signed by United States of America, the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics, China, Australia, Belgium, Canada, Costa Rica, Cuba, Czechoslovakia, Dominican Republic, El Salvador, Greece, Guatemala, Haiti, Honduras, India, Luxembourg, Netherlands, New Zealand, Nicaragua, Norway, Panama, Poland, South Africa, Yugoslavia. These nations agreed to the principles expressed in the Atlantic Charter and to work to

of an international organization that could govern trade, investment, and employment (the International Trade Organization or ITO.). After Congress failed to vote on the ITO, policymakers began to rely on the part of the ITO-the General Agreement on Tariffs and Trade (GATT) that governed commercial policy (tariffs and quotas).¹¹

Although the GATT included the ITO's ban on trade in goods made with forced labor, it said beyond that about labor rights. The GATT (and the WTO that superseded it) was more concerned with relationships *between* states, then relationships *within* states. Some countries, including the United States and France, repeatedly tried to expand GATT's purview to include labor rights, but each attempt failed. Many contracting partners of the GATT viewed labor standards as de facto trade barriers and proponents of including such labor standards were unable to convince these countries that including labor standards in the GATT was not a subterfuge for protectionism.¹²

During the Marrakech ministerial conference of the GATT in 1994, the United States, Norway, and several other countries hoped to include labor standards (and environmental issues) in the final Declaration, but many developing countries balked. The chair of the Trade Negotiating Committee referred to, but did not endorse, proposals for an examination of the relationship of international labor standards and the trading system.¹³ In 1996, at the Singapore ministerial, some members demanded negotiations on core labor standards, but several developing countries again objected.¹⁴ In the Singapore Declaration, the final statement of the members of the WTO at the ministerial, the

defeat the Tripartite Pact. See <http://www.ibiblio.org/pha/policy/1942/420101a.html>, both last searched 1/15/06.

¹¹ Aaronson, Trade and

¹² Aaronson, Taking Trade, 54-55, footnotes 110-113. The footnotes delineate documents in the US National Archives Record Group 364.1, Records of the Office of the United States Trade Representative.

¹³ Concluding remarks of the Chairman of the Trade Negotiations Committee of the Multilateral Trade Negotiations of the Uruguay Round at Marrakech, GATT Doc. MTN.TNC/MIN (94)/6 (April 15, 1994).

¹⁴ Press Briefing Trade and Labor Standards, http://www.wto.org/english/thewto_e/emin96_3/labstand.htm.

members of the WTO re-stated their commitment to observe internationally recognized core labor standards. They affirmed that the International Labor Organization (ILO), rather than the WTO, was the competent body to discuss and address these standards and declared that governments must not use labor standards for protectionist purposes.¹⁵

But some industrialized countries were determined to try again. Before the Seattle ministerial of the WTO in 1999, the United States, the European Union, and Canada submitted proposals for the consideration of trade and core labor rights issues. These nations argued that public confidence in the WTO would rise if the members agreed to include core labor rights in the WTO's purview. They suggested various proposals to set up working groups on the relationship between trade and labor standards, but these proposals went nowhere.¹⁶

But these efforts got crossed with politics. U.S. president Bill Clinton, the host of the ministerial, called on the members of the WTO to set up a working group on trade and labor rights. Representatives of several developing countries including India and Mexico responded angrily to President Clinton's proposal. They thought he was

¹⁵ Singapore ministerial Declaration, 12/13/1996, http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm. "We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration."

¹⁶ WTO, "Trade and Labour Standards: Subject of Intense Debate," http://www.wto.org/english/thewto_e/minist_e/min99_3/english/abo..; National Intelligence Council (CIA), "Prospects for WTO Trade Negotiations after Seattle: Foreign Strategies and Perspectives," 5/1/2000, http://www.cia.gov/nic/confreports_worldtrade.html; Pascal Lamy, "World Trade Organisation Ministerial Conference in Seattle Appraisal and Prospects," http://europa.eu.int/comm/archives/commission_1999_2004/lamy/speeches_articles/spla08_en.htm; and "EU=LDC Themes, Social, Environmental and Welfare Aspects of Trade-Research," labour standards background at http://62.58.77.238/themes/socialwelfare/socialwelfare_research1.php, all searched 2/12/2006.

pandering to U.S. labor unions, and they refused to create such a working group.¹⁷ The delegates at Seattle could not find common ground on labor rights, development, or any of the other issues that brought them to that port city. The delegates left as disappointed and frustrated as many of the activists in the streets who were protesting the ministerial.¹⁸

After so many years of trying to add labor rights to the WTO's purview, trade policymakers in both the European Union and the United States recognized that they needed to develop alternative strategies to use trade to promote labor rights. They began to focus on how they could use access to their home market as an incentive to change the labor rights practices of their trade partners.

How EU Policymakers Link Labor Rights and Trade Agreements

Philosophy and Definition of Core Labor Standards

The European Union claims that its trade policy “is conceived not only as an end in itself, but as a means to promote sustainable development.”¹⁹ EU policymakers argue that sustainable development has two broad components—core labor standards and respect for the environment. They use the ILO definition for core labor rights.²⁰ Thus, labor rights are an essential component of EU external trade strategy. However, EU

¹⁷ In an interview with the *Seattle Post Intelligencer*, President Clinton argued, "I think that what we ought to do first of all [is] to adopt the United States' position on having a working group on labor within the WTO, and then that working group should develop these core labor standards, and then they ought to be a part of every trade agreement, and ultimately I would favor a system in which sanctions would come for violating any provision of a trade agreement." Roger Downey, "Clinton Throws Brick: Shatters Chance for WTO Unity," *Seattle Weekly*, <http://www.seattleweekly.com/news/9949/features-downey.html>, last searched 1/16/2006.

¹⁸ Charavarthi Raghavan, "Clinton Uses Demonstrations to Push Labor Standards," Third World Network, 12/2/1999, <http://www.twinside.org.sg/title/clinton-cn.htm>, and "WTO Response to Clinton Proposal," <http://www.npr.org/templates/story/story.php?storyId=1067395>.
<http://www.heritage.org/Research/InternationalOrganizations/EM639.cfm>

¹⁹ World Trade Organization, Trade Policy Review, report by the European Communities, WT/TPR/G/136, 8.

²⁰ European Commission, Communication from the Commission to the Council and the European Parliament—Trade and Development: Assisting Developing Countries to Benefit from Trade, 9/18/2002, COM(2002)513 final, Brussels, 10–11.

policymakers believe that human rights are universal and indivisible. They claim to link trade agreements to a wide range of human rights outlined in the Universal Declaration of Human Rights, rather than promoting a particular basket of human rights such as labor rights.

EU Strategies to Link Trade and Human Rights

The EU has 3 main strategies with which it marries labor rights and trade agreements and policies: the human rights clause in its trade, cooperation, partnership, and association agreements; its GSP and preference programs; and through national strategies such as social labels.

Overview of the European Union's Major Regional and Bilateral Trade Agreements

Trade Agreement	Year Enacted	Other Member Nations	Special Attributes
<i>Regional Agreements</i>			
Agreement on the European Economic Area (EEA)	1994	Norway, Liechtenstein, Iceland	The EEA extends the European Union single market and its legislation to these EFTA countries, with the exception of agriculture and fisheries.
<i>Bilateral Agreements</i>			
Europe Agreements	1993	Bulgaria, Romania	The EAs are a prelude to accession to the European Union.
EU-Turkey Association Agreement	1995	Turkey	Liberalizes all trade in industrial goods. Agriculture (except processed agricultural products), services or public procurement excluded, but negotiations are ongoing.
Euro-Mediterranean Association Agreements	1997–2006	Egypt, Israel, Jordan, Morocco, Tunisia, Algeria, Lebanon, Palestinian Authority	Gradual liberalization of trade in industrial goods and agricultural products through reciprocal preferential access. Liberalization of services and investment is also part of the objectives.
Stabilization and Association Agreements	2004, 2005	Former Yugoslav Republic of Macedonia, Croatia	Gradually establish a free-trade area. The European Union supports the conclusion of a network of bilateral free trade agreements (FTAs) among the partner countries in the Balkans in the context of the Stabilization and Association Process.
EU-South Africa Trade, Development, and Cooperation Agreement	Trade-related provisions provisionally	South Africa	Gradually establish a free trade area over a period of twelve years.

(TDCA)	applied since 2000		
EU-Chile Association Agreement	Trade-related provisions provisionally applied since 2003	Chile	Gradually establishes a free trade area covering trade in goods, services and government procurement, liberalization of investment and capital flows, the protection of intellectual property rights, cooperation for competition, and an efficient and binding dispute settlement mechanism.
EU-Mexico Global Agreement	2000	Mexico	Aims to gradually establish a free trade area covering goods, services, government procurement, competition, intellectual property rights (IPR), investment and related payments.
<i>Non-Reciprocal Preferential Agreements</i>			
ACP-EU Partnership Agreement (Cotonou Agreement)	2000	Seventy-nine African, Caribbean and Pacific (ACP) countries	Unilateral preferences will be replaced by reciprocal Economic Partnership Agreements (EPAs) beginning in 2008.

Source: DG Trade, http://europa.eu.int/comm/trade/issues/bilateral/index_en.htm

The Human Rights Clause

Since 1995, the European Union has included a human rights clause in all its trade, cooperation, partnership, and association agreements, except the WTO agreements.²¹ The clause defines respect for fundamental human rights, including core labor rights as an “essential element” of the agreement.²²

EU policymakers want their counterparts to recognize that if they promote human rights and develop the habits of good governance, they will gradually attract long-term investment, stimulate trade, and achieve sustainable development.²³ But EU policymakers have not left sanctions out of their human rights equations. They can withdraw

²¹ European Commission, “The European Union’s Role,” 9.

²² European Commission, Communication from the European Commission on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries, 5/23/1995, COM(95)216, 8.

²³ European Parliament, Council, Commission, Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: “The European Consensus,” 2/24/2006, Official Journal of the European Union, C46/2. European Commission, Communication from the Commission to the Council and the European Parliament—The European Community’s Development Policy, 4/26/2000, COM(2000)212 final, Brussels, 27.

development funds or take “appropriate measures” such as suspending the agreement in full or in part if an offending partner country (mostly following a consultation procedure) fails to bring satisfactory change in its human rights records.²⁴ Such “appropriate measures” may include trade or arms embargoes.²⁵

As of July 2006, the EU has invoked the human rights clause in twelve cases, but it has never done so for labor rights.²⁶ Except for Uzbekistan, all these cases concerned countries bound to the European Union by the Cotonou Agreement.²⁷ These countries were former colonies, where the European Union had strong political and economic relationships and influence. In six out of the twelve cases, the European Union decided to impose “appropriate measures” (arms embargoes, as well as restrictions on admission—visa or travel bans—and the freezing of funds) only after years of talks broke down.²⁸ In fact, the European Parliament found that the European Union has never

²⁴ European Commission, Communication from the European Commission on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries, COM(95)216, 5/23/1995, 3.

²⁵ Other “appropriate measures” under the human rights clause include: alteration of the contents of cooperation programmes or the channels used, reduction of cultural, scientific and technical cooperation programs, postponement of a Joint Committee meeting, suspension of high-level bilateral contacts, postponement of new projects, refusal to follow up partner’s initiatives, and suspension of cooperation. See European Commission, “Inclusion of Respect for Democratic Principles,” 9.

²⁶ Togo (1998, 2004), Niger (1996 and 1999), Guinea Bissau (1999 and 2004), Comoros Islands (1999), Haiti (2000), Ivory Coast (2000 and 2001), Fiji (2000), Liberia (2001), Zimbabwe (2002), Central African Republic (2003), Guinea-Conakry (2004), Uzbekistan (2005). See Andrew Bradley, “An ACP Perspective and Overview of Article 96 Cases,” ECDPM Discussion Paper 64D, 7/01/2005, Maastricht, 3; http://www.europa.eu.int/comm/external_relations/cfsp/sanctions/measures.htm, last searched on 4/24/2006.

²⁷ Although policymakers argue that “the principle role of the clause is to provide the EU with a basis for positive engagement...with third countries,” they struggle to find a consistent and workable balance between persuasion and coercion. According to Princeton scholar Emilie Hafner Burton, the European Union has successfully used the threat of targeted measures against Togo (1998), Fiji (2000), Comoros Islands (1999), and Niger (1999). Emilie M. Hafner-Burton, “Trading Human Rights,” 610–611.

²⁸ Since 1995, the European Union has imposed “appropriate measures” on Togo (since 1998), Haiti (since 2001), Liberia (since 2002), Zimbabwe (since 2002), Guinea-Conakry (since 2005), and Uzbekistan (since 2005). See Andrew Bradley, “An ACP Perspective,” 3; and http://www.europa.eu.int/comm/external_relations/cfsp/sanctions/measures.htm, last searched on 4/24/2006

invoked the human rights clause in response to violations of economic, social, or cultural rights.²⁹

Clearly, EU policymakers are not eager to cut off trade in the interest of promoting human rights in general or labor rights in particular.³⁰ However, scholar and current EU official Hadewych Hazelzet says that the European Union's failure to use negative sanctions to protect human rights such as labor rights stems not from a lack of will but rather from the collective decision-making process at the EU level.³¹ The twenty-five EU member states in the General Affairs and External Relations Council have to decide *unanimously* on a common position in imposing such sanctions in accordance with the framework of the European Union's Common Foreign and Security Policy. Thus, one member state can derail the use of sanctions.³² These decisions then have to be implemented by either a regulation proposed by the European Commission (in the case of trade sanctions) or national legislative measures (in the case of arms embargoes).³³ Thus, each EU member state has several opportunities to block or complicate EU decisions on sanctions that would harm that member state's bilateral relations with the targeted country.

But human rights activists and the EU Parliament believe that EU technocrats make these decisions in a secretive manner, which allows commercial interests to trump

²⁹ European Parliament—Committee on Foreign Affairs, Report on the Human Rights and Democracy Clause in European Union Agreements (2005/2057[INI]), Final A6-0004/2006, 1/23/2006, 17.

³⁰ http://europa.eu.int/comm/external_relations/cfsp/sanctions/index.htm, last searched 4/24/2006.

³¹ Hadewych Hazelzet, "Carrots or Sticks? EU and U.S. Reactions to Human Rights Violations in the Nineties and Beyond," 7/2004, http://www.democracyagenda.org/papers/3.2_Hazelzet.doc, last searched 4/24/2006.

³² Art. 301 of the Treaty establishing the European Community. See Official Journal of the European Communities, Consolidated Version of the Treaty Establishing the European Community, 12/24/2002, C325/33-184.

³³ Art.301 of the Treaty establishing the European Community. See Official Journal of the European Communities, Consolidated Version of the Treaty Establishing the European Community, 12/24/2002, C325/33-184.

human rights concerns.³⁴ In a February 2005 report, the EU Parliament's Committee on Foreign Affairs noted, "the way the clause has been used, or not used, over the years...leaves room to ask if criteria for initiating a consultation procedure, or applying restrictive measures, are objective, or rather dependent on political and commercial interests."³⁵ In 2006 the Parliament called on the EC to "identify a list of "Countries of Particular Concern" with respect to human rights violations and prodded the EU to weigh imposing aid or trade sanctions if human rights breaches. Finally, the Parliament stressed that "EU officials need this kind of specific policy directive if they are to promote human rights clearly and consistently." But the Parliament did not appear particularly determined to single out labor rights³⁶

Preferential Arrangements

The EU has adopted a more straightforward approach to improving labor rights with its trade preference programs.³⁷ Under WTO rules, members can provide differential and more favorable treatment for developing countries. The European Community was the first to implement such a system in 1971. The EU has tailored its approaches to GSP to meet the needs of particular developing countries. The European Union's GSP grants certain products imported from beneficiary countries either duty-free

³⁴ Telephone interview with Lotte Leicht, director of the Brussels office of Human Rights Watch, 2/28/2006, Washington, DC.

³⁵ European Parliament—Committee on Foreign Affairs, "Report on the Human Rights and Democracy Clause," 16.

³⁶ European Parliament Resolution on the Annual Report on Human Rights in the World 2005 and the EU's Policy on the Matter, (2005/2203(INI), 5/18/2006, at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2006-0220+0+DOC+XML+V0//EN&language=EN>, both last searched 7/18/2006.

³⁷ In 1971, the contracting parties to GATT agreed upon a waiver which would allow developed country members of the GATT to provide non-reciprocal trade preferences for developing countries. In 1979, the GATT Contracting Parties adopted a decision, the Enabling Clause that permanently authorizes such treatment, the Generalized System of Preferences (GSP). The GSP Decision was taken June 1971. The Enabling Clause is "Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, Document L/4903, 28 November 1979, BISD 26S/203.

access or a tariff reduction, depending on which of the GSP arrangements a country enjoys.³⁸ The forty nine-least developed countries have duty-free access to EU markets without any quantitative restrictions, except for arms and munitions.³⁹ A second program, the GSP-Plus arrangement, grants additional market access to “dependent and vulnerable” countries that have ratified and effectively implemented key international conventions on human and labor rights, environmental protection, and good governance.⁴⁰ This is an incentive based approach. In December 2005, the European Commission granted GSP-Plus benefits to Bolivia, Columbia, Ecuador, Peru, Venezuela, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Moldova, Georgia, Mongolia, and Sri Lanka for the period from 2006 to 2008.⁴¹

³⁸ The Generalized System of Preferences, http://europa.eu.int/comm/trade/issues/global/gsp/index_en.htm, last searched 4/24/2006.

³⁹ The European Union plans to gradually reduce duties on bananas, rice and sugar. See http://europa.eu.int/comm/trade/issues/global/gsp/eba/index_en.htm, last searched 1/29/2006.

⁴⁰ A country is “dependent and vulnerable” when the five largest sections of its GSP-covered exports to the Community represent more than 75 percent of its total GSP-covered exports. In addition, GSP-covered exports from that country must represent less than 1 percent of total EU imports under GSP. The core international human and labor rights conventions that have to be ratified and implemented by the beneficiary country include the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social, and Cultural Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment; the Convention on the Rights of the Child; the Convention on the Prevention and Punishment of the Crime of Genocide; the ILO Conventions on Minimum Age for Admission to Employment (No. 138), Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (No. 182), Abolition of Forced Labor (No. 105), Forced Compulsory Labor (No. 29), Equal Remuneration of Men and Women Workers for Work of Equal Value (No. 100), Discrimination in Respect of Employment and Occupation (No. 111); Freedom of Association and Protection of the Right to Organize (No. 87) and Application of the Principles of the Right to Organize and to Bargain Collectively (No. 98); the International Convention on the Suppression and Punishment of the Crime of Apartheid. The international conventions related to environment and governance principles that have to be ratified and implemented by the beneficiary country include the Montreal Protocol on Substances that deplete the Ozone Layer; the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal; the Stockholm Convention on persistent Organic Pollutants; the Convention on International Trade in Endangered Species; the Convention on Biological Diversity; the Cartagena Protocol on Biosafety; the Kyoto Protocol to the UN Framework Convention on Climate Change; the UN Single Convention on Narcotic Drugs; the UN Convention on Psychotropic Substances; the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; and the UN Convention Against Corruption.

⁴¹ http://europa.eu.int/comm/trade/issues/global/gsp/pr211205_en.htm, last searched 2/28/2006.

The EU GSP uses both carrots and sticks to prod human rights improvements. European Union policymakers can withdraw trade preferences if the beneficiary country seriously and systematically violates core UN and ILO conventions on human and labor rights or exports goods made by prison labor.⁴²

Ironically, EU policymakers can more easily impose sanctions under GSP than under the human rights clause because they confront fewer bureaucratic hurdles.⁴³ But the EU has only done so once—in the case of Burma, because of its use of forced labor. NGOs and parliamentarians have pressured DG Trade to withdraw GSP from Belarus—a country where labor rights and freedom of association are repeatedly denied.⁴⁴ In December 2003, the European Commission began to investigate these allegations as a first step toward a possible withdrawal of the trade preferences that the “last dictatorship

⁴² Article 16 of the 2005 Council Regulation on GSP

⁴³ The Committee on Generalized Preferences assists DG Trade in its work. This Committee is composed of representatives of member states. The procedure for withdrawal is usually initiated by a complaint from an EU member state or any third party having an interest in the case. Before opening an investigation, preliminary consultations take place between DG Trade and the Generalized Preferences Committee in order to determine whether there is sufficient evidence for a case. If so, DG Trade will start an investigation. Where the DG Trade considers that its findings justify a temporary withdrawal because of serious and systematic violations of the rights referred to in the 1998 ILO Declaration on Fundamental Principles and Rights at Work (freedom of association and the effective recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labor, the effective abolition of child labor, the elimination of discrimination in respect of employment and occupation), it will monitor and evaluate the situation in the beneficiary country concerned for a period of six months. If, by the end of that period, the country has not made the required commitment to take the necessary measures to conform, DG Trade will submit an appropriate proposal to the General Affairs and External Relations Council (who decides by qualified majority). Where the Council decides for temporary withdrawal, such decision will enter into force six months after it was taken, unless it is decided before then that the reasons justifying it no longer prevail; <http://europa.eu.int/comm/trade/issues/global/gsp/gspguide.htm>, last searched 4/25/2006.

⁴⁴ Guy Ryder, Emilio Gabaglio and Willy Thys, “Request for Investigation into Violation of Freedom of Association in Belarus under the Procedures of the European Union GSP,” 1/27/2003, <http://www.icftu.org/displaydocument.asp?Index=991217051>, last searched 4/25/2004. In January 2003, the International Confederation of Free Trade Unions, the European Trade Union Confederation (ETUC) and the World Confederation of Labor (WCL) alerted the European Commission of systematic and serious violations of freedom of association and the right to collective bargaining in Belarus.

in Europe” enjoys under its GSP scheme.⁴⁵ As of September 2006, the EC had not yet announced a decision.

The EU’s approach to GSP has been challenged at the WTO. In a previous GSP arrangement, the European Union included additional preferences for countries that were engaged in efforts to combat drug production and trafficking. However, according to trade scholar Lorand Bartels, “there was no mechanism for a beneficiary country to apply for these special preferences. The European Commission decided on the beneficiaries based on its own criteria.”⁴⁶ In late 2001, trade policymakers added Pakistan to the list of countries that received additional tariff preferences under the arrangement aimed at combating drug production and trafficking. The European Union publicly admitted it wanted to reward Pakistan for its new position on the Taliban regime in Afghanistan and for its return to democratic rule.⁴⁷

On December 9, 2002, India requested that the WTO establish a panel to determine whether or not this approach distorted trade. India claimed that the conditions under which the European Union granted tariff preferences under this special incentive arrangement were discriminatory and violated the requirements set out in the Enabling Clause. India argued that it violated the European Union’s binding obligation to grant GSP preferences in a “generalized, non-reciprocal and non-discriminatory” way. The

⁴⁵ European Commission, Commission Staff Working Document—Implementation of the Commission Communication on the EU’s Role in Promoting Human Rights and Democratisation in Third Countries, SEC(2004)1041, 07/30/2004, Brussels, 9.

⁴⁶ Bartels, “Conditionality in GSP,” 468–469.

⁴⁷ Lorand Bartels, “Conditionality in GSP Programmes—The Appellate Body Report in European Communities: Conditions for Granting of Tariff Preferences to Developing Countries and its Implications for Conditionality in GSP Programmes” in Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi Bonanomi (eds.), “Human Rights and International Trade,” Oxford University Press, 2005, Oxford, 468–472.

panel found in favor of India.⁴⁸ (It is important to note that India initially also challenged the EU labor rights requirements but dropped that aspect of the challenge. This will be discussed later in this article.)

In January 2004, the European Union appealed the panel report's conclusions in the Appellate Body, and, in April, the Appellate Body issued its decision.⁴⁹ Although the Appellate Body upheld most of the panel's findings, it found that, in granting differential tariff treatment, preference-granting countries are required, by virtue of the term "nondiscriminatory," to ensure that identical treatment is available to all GSP beneficiaries that have the same "development, financial and trade needs."⁵⁰ A noted legal scholar, Lorand Bartels has interpreted the panel's decision to mean that WTO members' GSP arrangements can differentiate among developing countries as long as the arrangements grant the same preferences to *all* developing countries that face the development, financial, and trade needs the arrangements try to address.⁵¹ On July 20, 2005, the European Commission announced that it had repealed its special arrangements to combat drug production and trafficking and was now in compliance with WTO rules.⁵²

⁴⁸ India had demonstrated that the European Communities' Drug Arrangements are inconsistent with Article I:1 of GATT 1994; that the European Communities has failed to demonstrate that the Drug Arrangements are justified under paragraph 2(a) of the Enabling Clause[.] The Panel also concluded that the European Communities had "failed to demonstrate that the Drug Arrangements are justified under Article XX(b) of GATT 1994" Finally, the Panel concluded, pursuant to Article 3.8 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), that "because the Drug Arrangements are inconsistent with Article I:1 of GATT 1994 and not justified by Article 2(a) of the Enabling Clause or Article XX(b) of GATT 1994, the European Communities has nullified or impaired benefits accruing to India under GATT 1994." WT/DS246/R;

http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds246_e.htm.

⁴⁹ http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds246_e.htm, last searched 4/24/2006.

⁵⁰ http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds246_e.htm.

⁵¹ Lorand Bartels, "Conditionality in GSP Programmes," 482.

⁵² European Commission, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee - Developing Countries, International Trade and Sustainable Development: the Function of the Community's Generalised System of Preferences (GSP) for the Ten-Year Period from 2006 to 2015, COM(2004)461 final, 7/07/2004, Brussels; and http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds246_e.htm.

This decision, however, has raised questions about how nations can use their GSP programs to promote labor rights as well as other objectives. For example, law professor Robert Howse fears that, in the future, policymakers will only be able to grant or withdraw GSP treatment by justifying such actions under the exception provisions in the WTO agreements (such as Articles XX and XXI)⁵³ Professor Bartels, however, believes that the report allows for differentiation between developing countries on three conditions: when there are legitimate development needs, when the preferences represent an appropriate and positive response to these needs, and when the preferences are available to all those countries with those needs.⁵⁴ Nonetheless, he worries that countries will find it difficult to withdraw trade preferences in conditions where beneficiaries violate human rights such as labor rights: “It is very difficult to argue that a withdrawal of trade preferences is a positive response to such [development] needs.”⁵⁵ Thus, like Howse, he thinks it will be harder for industrialized countries to use trade policy to promote labor rights—which some see as a non-trade policy objectives.

Innovative policies at the national level

Specific member states have also developed some innovative approaches at the intersection of trade and human rights. For example, in January 2002, the Belgian Parliament approved a law aiming to promote socially accountable production by introducing a voluntary social label on workers’ rights. According to the Belgian government, the law “offers companies the possibility to acquire a label, which is granted to products whose chain of production respects the eight fundamental ILO conventions.”

⁵³ Robert Howse, “India’s WTO Challenge to Drug Enforcement Conditions in the European Community Generalized System of Preferences: A Little Known Case with Major Repercussions for “Political” Conditionality in US Trade Policy”, *Chicago Journal of International Law*, 2003, 386–387.

⁵⁴ Lorand Bartels, “Conditionality in GSP Programmes,” 484.

⁵⁵ Lorand Bartels, “Conditionality in GSP Programmes,” 484.

The Ministry of Economic Affairs grants the label for a maximum of three years after a committee comprised of stakeholders (government officials, social partners, business federations, consumers, and NGO representatives) reviews a company's proposals. This committee establishes a program of control for the company and monitors its compliance. Certification is carried out by the inspection bodies accredited by the Minister of Economic Affairs. This social label was not linked to a specific trade agreement but was vetted both by the Belgian government and the European Commission to ensure that it was compatible with WTO rules. The label is not just for Belgian or EU firms. A U.S. NGO, Social Accountability International, has been accredited under the Belgian social labeling law. Thus, it does not seem to violate WTO national treatment rules—it treats foreign and domestic market actors similarly. Nonetheless, both the Belgian government and the European Commission sought to ensure that it was compatible with WTO rules.⁵⁶

The Dutch government has also developed an innovative approach. It requires companies that want taxpayer-funded export subsidies to declare in writing that they are familiar with the OECD Guidelines (a voluntary code of conduct that includes sections on human rights and labor rights). These companies must declare that they will make an effort to apply the Guidelines in their corporate practices, but they are not monitored. Austria is considering a similar link.⁵⁷ Finally, some European governments use procurement policies to promote labor rights (this will be further discussed in the WTO section.)

⁵⁶ http://mineco.fgov.be/protection_consumer/social_label/home_nl.htm and http://europa.eu.int/comm/employment_social/emplweb/csr-matrix?c... SA8000 is a way for retailers, brand companies, suppliers, and other organizations to maintain just and decent working conditions throughout the supply chain, <http://www.sa-intl.org/SA8000/SA8000.htm>.

⁵⁷ http://europa.eu.int/comm/employment_social/emplweb/csr-matrix/csr_topic_allcountries_en.cfm?field=15, last searched 5/06/2006.

Capacity Building and Labor Rights Assessment

EU policymakers recognize they can't help their trade partners promote human rights without helping them create both a demand for labor rights and a supply of good governance (laws, regulations and effective enforcement). Thus the European Union also funds specific labor rights capacity-building projects aimed at building the expertise of government officials to enforce labor laws. For example, it funds a project called the Joint Initiative on Corporate Accountability and Workers Rights to attempt to improve workplace conditions in global supply chains.⁵⁸ It also works closely with the ILO on similar capacity building projects.⁵⁹

But while EU policymakers play great attention to labor rights abroad, they do not examine the broad impact of its trade policies on labor rights (as opposed to employment) at home. The EU does hire independent consultants to carry out sustainable impact assessments. These consultants weigh the impact of trade agreements on biodiversity, income, poverty, equity etc in the EU, its trade partners, and sometimes even assess the trade impact on third countries. EU policymakers could add a labor rights impact assessment to this assessment, to make it more comprehensive.⁶⁰

How the U.S. Links Trade Agreements and Labor Rights

Philosophy and Definition

⁵⁸ European Union, Human Rights Report, 2005, 58.

⁵⁹ European Commission, Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee—Promoting Core Labour Standards and Improving Social Governance in the Context of Globalisation, COM (2001)416 final, Brussels, 13–16.

⁶⁰ The European Community contracts with external consultants to conduct Sustainable Impact Assessments for DG Trade. The consultants study indicators such as real income, employment, and fixed capital formation; equity, poverty, health, and education; and biological diversity, environmental quality, and natural resource stocks. Negotiators are supposed to use these assessments to develop capacity building programs linked to trade policies. The European Union launched the first assessment in 1999. As of this writing, the European Union has performed such as carrying out assessments for the Doha Development Agenda negotiations; for the negotiations with the African, Caribbean, and Pacific (ACP) countries; with Mercosur; and with the Gulf Cooperation Council (GCC) countries. See http://europa.eu.int/comm/trade/issues/global/sia/index_en.htm, last searched 1/29/2006.

The U.S. and the EU rely on the same tools to promote labor rights: bilateral or regional trade agreements, preference programs, and capacity building. But the US approach and the EU approach are essentially night and day. In the EU trade policy is made by technocrats and senior elected officials from member states. To a great degree, the process is insulated from politics.

But in the U.S. trade policymaking is very much a political process, to a great extent because authority is shared between the Congress and the Executive. The Congress sets the objectives for trade policymaking and maintains tight control over executive branch discretion. Members of Congress are deeply divided about labor rights and how the US should use trade to advance such rights. Moreover, many members of Congress, in particular Republican members are deeply concerned about sovereignty and are unwilling to allow certain aspects of U.S. labor policies to be subject to binding dispute settlement under U.S. Free Trade Agreements (FTAs). As a result, the US approach to linking trade agreements and labor rights is constantly evolving, reflecting both conditions in a particular trade partner as well as the interaction of Democrats and Republicans in Congress.

But the EU and U.S. also differ in their vision of labor rights as a human right. Congress has made promotion of labor rights a key objective of U.S. trade policy. Because the US has specific chapters in its FTAs on labor rights (and has labor rights conditionality in its preference programs), the US appears to view labor rights as more

important than other human rights outlined in the Universal Declaration of Human Rights.⁶¹

Finally, the US has adopted a slightly different definition of labor rights under the TPA than that delineated under the ILO Declaration on Fundamental Principles and Rights at Work. U.S. trade legislation does not include the elimination of discrimination in respect of employment and occupation as a negotiating objective and core element of FTAs or preferential programs.

Table 1. U. S. Free Trade Agreements in Effect or Signed*

Name of Agreement	Date Signed or Entered into Force
<u>U.S. -Israel FTA</u>	Entered into force September 1, 1985
<u>U.S.-Canada FTA</u>	Implemented by P.L. 100-449 (September 28, 1988) Entered into force January 1, 1989
<u>North American Free Trade Agreement (NAFTA)</u>	Entered into force January 1, 1994
<u>U.S.-Jordan FTA</u>	Entered into force December 17, 2001
<u>U.S.-Singapore FTA</u>	Entered into force January 1, 2004
<u>U.S.-Chile FTA</u>	Entered into force January 1, 2004
<u>U.S. Australia FTA</u>	Entered into force January 1, 2005
	Pending FTAs
<u>U.S. Morocco FTA</u>	Signed into law by President Bush August 17, 2004.
<u>U.S. Dominican Republic-Central America FTA (DR-CAFTA)</u>	Signed on May 28, 2004. Not yet ratified by all member nations.
<u>U.S. Bahrain FTA</u>	Signed September 14, approved by Congress. Expected to enter into force August 2006.
<u>U.S. Oman FTA</u>	Approved by both houses in July 2006, but must be reap proved by Senate. ⁶²
<u>U.S. Peru Trade Promotion Agreement</u>	Signed April 12, 2006, ratified by Peru, not yet ratified by United States
<u>U.S. Colombia FTA</u>	Signed February 27, 2006, not yet ratified.

Table by Jan Cartwright: updated July 2006. The table does not include ongoing negotiations Malaysia, Panama, Korea, Thailand, and UAE.

Labor Rights and Free Trade Agreements

⁶¹ At its 2006 trade policy review, the U.S. government reported to the WTO that with trade policy tools, U.S. policymakers prod the rest of the world “to value freedom, transparency, accountability and openness.” “WT/TPR/S/160, 14, 34.

⁶² <http://www.thomas.gov/cgi-bin/bdquery/z?d109:HR05684:@@@X>

Labor rights are the only human right that Congress designated as an overall trade negotiating objective for U.S. trade policy. In its most recent legislation authorizing trade promotion authority (TPA) the authority that permits the executive to negotiate trade agreements, Congress required the executive branch to negotiate agreements that promote respect for workers' rights and the rights of children.⁶³ Congress delineated labor obligations as *overall* trade negotiating objectives, *principal* negotiating objectives, and as *priorities to address U.S. competitiveness*. Moreover, Congress stated that trade agreements negotiated under this law should require trade partners to effectively enforce their own labor laws; trade agreements should be designed to “strengthen the capacity of U.S. trading partners to promote respect for core labor standards, and to ensure that labor practices and policies do not arbitrarily or unjustifiably discriminate against U.S. exports.”⁶⁴ Finally, the Act also asserted that, in order to maintain “United States competitiveness in the global economy,” the president shall encourage cooperation between the WTO and the ILO, work to promote respect for core labor standards, and review the impact of future trade agreements on U.S. employment and labor markets.⁶⁵ With these provisions, Congress signaled that it would closely monitor how the executive handled labor rights concerns within trade agreements.⁶⁶

⁶³ Section 2102 (a) Trade Negotiating Objectives of the Bipartisan Trade Promotion Authority Act of 2002. The overall U.S. labor rights negotiating objectives are to “promote respect for worker rights and the rights of children consistent with core labor standards of the ILO... and an understanding of the relationship between trade and worker rights; to seek provisions in trade agreements under which parties to these agreements strive to ensure that they do not weaken or reduce the protections afforded in domestic environmental and labor laws as an encouragement for trade;... and to promote universal ratification and full compliance with ILO Convention No. 182...” on the prohibition of child labor. The United States does not promote the same rights as the core ILO labor standards.

⁶⁴ Section 2102, (b) (11) Principal Trade Negotiating Objectives.

⁶⁵ Section 2102, (c) Promotion of Certain Priorities

⁶⁶ In response, USTR set up a new office of labor affairs. That office works closely with officials from the State Department, the Labor Department, and the U.S. Agency for International Development to help countries with which the United States is negotiating (or has negotiated) trade agreements to improve labor rights laws and enforcement. The two-person office oversees and negotiate labor provisions in multilateral,

Congress also mandated that the U.S. Department of Labor examine how a particular trade agreement might affect employment at home, labor rights abroad and in particular child labor abroad. But Congress did not require the U.S. government to examine how trade policy might affect labor rights at home.⁶⁷ Thus, like the EU, the U.S. does not examine how trade agreements might affect U.S. labor standards.

Despite this explicit labor rights negotiating mandate, policymakers, business and labor leaders and other members of civil society were all divided as to *how* to incorporate labor rights in trade agreements. Many Republican members of Congress were unenthusiastic about linking trade and labor rights.⁶⁸ Some business leaders argued that labor rights were non-trade issues and should be governed outside of the trade agreement. Other business leaders agree that labor rights should be addressed in the context of trade, but they were unwilling to accept sanctions linked to labor standards, fearing that would alienate potential U.S. trade partners.⁶⁹ Labor and human rights organizations in contrast, insisted those enforceable workers' rights provisions must be in the core of any agreements approved under fast track and adhere to internationally accepted labor

regional, and bilateral free trade agreements, formulates recommendations concerning countries' adherence to workers' rights provisions of U.S. trade preference programs, and develops U.S. positions on the relationship between trade and labor in the International Labor Organization, World Trade Organization, Organization for Economic Cooperation and Development, Inter-American Conference of Ministers of Labor, and other relevant international bodies, http://www.ustr.gov/Who_We_Are/Bios/Lewis_Karesh.html, last searched 6/06/2006.

⁶⁷ www.dol.gov/ilab/media/reports/usfta.main.htm.

⁶⁸ For a good overview, see I. M. Destler and Peter J. Balint, *The New Politics of American Trade: Trade Labor and the Environment* (Washington: IIE, 1999), Policy Analyses in International economics 58.

⁶⁹ "U.S. Chamber Welcomes U.S.-Jordan Free Trade Agreement But Opposes Non-Trade Provisions" 10/25/2000, The Chamber of Commerce takes the position that it is not appropriate to try and address social and labor issues in trade agreements. <http://www.uschamber.com/press/releases/2000/october/00-185.htm>. Other influential business associations were not as adamant that these were non-trade issues. The Business Roundtable appeared to accept the link. See Business Roundtable, TPA Letter to House of Representatives, 12/3/2001, at www.businessroundtable.org/taskforces/taskforce/document.as...; The National Association of Manufacturers said they were open to "dialogue" on linking trade and labor. Keith Koffler, "Business Officials to Fight Labor, Enviro Trade Sanctions," *National Journal's Congress Daily*, 2/16/2001 <http://www.ilwu19.com/rustyhook/archives/spring2001/labor.htm>

standards.⁷⁰ Many, but not all Democrats, agreed with that perspective, and they had public opinion behind them. Recent polling data revealed that most Americans polled want labor standards to be incorporated into trade agreements.⁷¹ Americans see this issue as one of morality. A June 2005 poll found that 75 percent of Americans agreed with the statement, “If people in other countries are making products that we use, this creates a moral obligation for us to make efforts to ensure that they do not have to work in harsh or unsafe conditions.”⁷²

Given these diverse perspectives, the Bush Administration found itself in a difficult position on labor rights. Like many Republicans in Congress, it was not enthusiastic about linking labor rights and trade agreements. But the USTR had to respond to these Congressional mandates. Moreover, USTR Robert Zoellick had to defend the Jordan free trade agreement, which included labor rights obligations as enforceable obligations subject to dispute settlement. However, the Bush Administration soon found a way to steer through this minefield, pleasing few labor rights advocates, and relatively few Democratic members of Congress. They developed a strategy that included labor rights within the body of trade agreements and make some but not all labor rights

⁷⁰ Human Rights Watch Briefing Paper, “Labor Rights and Trade: Guidance for the United States in Trade Accord Negotiations, 2002, at hrw.org/press/2002/laborrightrights-bck.htm; and Testimony of John J. Sweeney, President, American Federation of Labor and Congress of Industrial Organizations on the Jordan Free Trade Agreement, 3/20/2001.

⁷¹ NA, “Globalization: What Americans Are Worried About,” *Business Week*, 4/24/2000, p. 4. This poll of 1,024 Americans found some 75 percent think trade agreements should prevent unfair competition by countries that violate workers rights; 77 percent thought these trade agreements should prevent the loss of U.S. jobs, and 79 percent thought Congress should only give China permanent access to the U.S. markets when it agrees to meet human rights and labor standards. A more recent 2004 PIPA/Knowledge Networks poll found that nine in ten favor incorporating labor and environmental standards into trade agreements. “Majority of Americans Disapproves of U.S. Government Approach to Trade: Wants More Efforts to Mitigate Effects on Workers, Environment,” 1/22/2004, <http://worldpublicopinion.org/pipa/articles/btglobalizationtradera/81.php?nid=&id=&pnt=81&lb=btgl>, last searched 6/2/2006.

⁷² Steven Kull, “Mexican, U.S. Publics Strongly Support Labor and Environmental Standards in Trade Agreements,” 7/20/2005, <http://worldpublicopinion.org/pipa/articles/brlatinamericara/73.php?nid=&id=&pnt=73&lb=btgl> ...

provisions enforceable under dispute settlement.⁷³ In order to understand their strategy, we need to understand how earlier Presidents George W. Bush and Bill Clinton linked labor rights to trade agreements.

The United States first included labor rights issues in a side agreement of the North American Free Trade Agreement (NAFTA), a trade agreement between the United States, Canada and Mexico. NAFTA was initiated during the Presidency of George H.W. Bush (1988-1992) and completed and approved under President William J. Clinton (1993). NAFTA provided a mechanism (the North American Agreement on Labor Cooperation [NAALC]) to investigate and discuss labor rights problems within any of the 3 participating nations. In addition nongovernmental organizations, trade unions, business representatives and other interested parties could submit complaints alleging non-compliance with the labor provisions to national administrative offices created in each of the 3 countries.⁷⁴ However, some U.S. labor and human rights advocates did not like the NAFTA approach to trade and labor rights. They didn't see NAFTA advancing labor rights, because it required the parties to enforce their own laws (which were often lower than internationally accepted core labor standards.) Also, NAFTA's labor provisions were in side agreements, rather than in the body of the trade agreement. They wanted Congress to press the Administration to take a more comprehensive, enforceable and binding approach that built on internationally accepted standards.

⁷³ As Carol Pier of Human Rights Watch has noted, the decision to limit the labor rights provisions subject to binding dispute settlement is suggested by the Bipartisan Trade Promotion Act. Carol Pier, "Workers' Rights Provisions in Fast Track Authority, 1974-2007, A Historical Perspective and Current Analysis," 13 *Ind. J. Global Legal Studies*, 77 (Winter: 2006), 5. Pier notes that TPA could either "give rise to enforceable workers' rights protections or ...preclude this possibility."

⁷⁴ If the parties could not agree, they could appoint a panel to review cases on issues such as minimum wages, health and safety, and child labor. According to Kimberly Elliott and Richard Freeman, allegations of forced labor and discrimination are evaluated by a panel of independent experts. It also included the possibility of fines for child labor and other major labor issues. Elliott and Freeman, *Can Labor Standards*, p. 86.

The Clinton Administration negotiated the next major trade agreement after NAFTA, the U.S. - Jordan FTA. In contrast to NAFTA, in this agreement the two parties agreed to place the labor rights provisions in the main text. The parties pledged to strive to ensure that domestic labor laws incorporated ILO principles, to effectively enforce domestic labor laws, and not to waive or derogate from those laws as an encouragement for trade or investment. These obligations were enforceable obligations subject to dispute settlement under the Agreement. Although the AFL-CIO, the U.S. confederation of labor unions, described the labor rights commitments as “modest,” it supported the agreement and fought for its Congressional approval.⁷⁵

But the Clinton Administration left office before the Congress considered the U.S. - Jordan FTA, leaving the Bush Administration to defend it before Congress. Many members of Congress wanted to quickly approve the agreement; they wanted to reward Jordan for its political moderation and its economic stewardship⁷⁶ But the Congress quickly divided on whether the Jordan model should become a template for future trade agreements or whether it went beyond the instructions Congress provided under trade promotion authority.

Some Republican members of Congress didn't like that idea that Jordan could challenge U.S. adherence to international labor standards, although such a challenge was unlikely. Moreover, these members didn't like the strong emphasis on labor rights within the agreement. Republican Senator Phil Gramm was particularly alarmed. He warned, “We are literally transferring a degree of American sovereignty in labor... areas to

⁷⁵ John J. Sweeney, President, AFL-CIO, Testimony on the Jordan Free Trade Agreement, Senate Finance Committee, 3/20/2001, 2-3.

⁷⁶ Statements by Members of Congress on the Jordan-U.S. Free Trade Agreement, <http://www.jordanembassyus.org/new/aboutjordan/uj3.shtml#back>, last searched 7/30/2006.

decision-making entities that will be beyond the control of the United States.”⁷⁷ These members demanded that the US and Jordanian governments issue a side letter stating that the two countries did not anticipate a labor-related trade dispute.⁷⁸ Both Robert Zoellick, U.S. Trade Representative and the Jordanian Ambassador to the United States agreed to this approach.⁷⁹ But this step to appease the Republicans infuriated some Democratic Members of the House Ways and Means Committee. In the House Report on the Implementing Act of the Jordan FTA, they stressed, “We are disturbed by the precedent set by the exchange of letters.” They noted that the letters were not binding commitments. It was clear that the Administration and many Republicans were unwilling to accept trade sanctions as a tool to enforce labor obligations in trade agreements and they were registering their disagreement with that approach.⁸⁰ Despite these disagreements, in 2001, the Jordan FTA passed the U.S. Congress unanimously by voice vote.⁸¹

Since 2002, the George W. Bush Administration has developed several different approaches to promoting labor rights within its FTAs. U.S. trade officials developed these approaches to reflect the recognition that some countries have inadequate labor laws and conditions, some countries do not do a good job of enforcing their laws, and

⁷⁷ Pier, “Workers’ Rights Provisions,” fns. 69-70.

⁷⁸ Kimberly Ann Elliott and Richard B. Freeman, *Can Labor Standards Improve Under Globalization*, (Washington: Institute for International Economics, 2003), 88-89; and I. M. Destler, *American Trade Politics*, 4th ed., (Washington: IIE, 2005) 270, 340-342.

⁷⁹ The two sent each other the exact same letter. It said, “I would expect few if any differences to arise between our two Governments over the interpretation or application of the Agreement... In particular, my Government would not expect or intend to apply the Agreement’s dispute settlement enforcement procedures to secure its rights under the Agreement in a manner that results in blocking trade.” Marwan Muasher, Ambassador of the Hashemite Kingdom of Jordan to the United States of America, to the Honorable Robert B. Zoellick, 7/23/2001, and Ambassador Robert B. Zoellick, U.S. Trade Representative, United States of America to His Excellency Marwan Muasher, Ambassador of the Hashemite Kingdom of Jordan to the United States, 7/23/2001, copies in possession of author.

⁸⁰ House Report 107-176-Part 1-United States-Jordan Free Trade Area Implementation Act, VII. Additional Views. Some 13 Democrats expressed this view. See http://thomas.loc.gov/cgi-bin/cpquery/?&dbname=cp107&sid=cp107gre9Q&refer=&r_n=hr176p1.107&item=&sel=TOC_53714&

⁸¹ This means no member’s name was recorded as they voted. This gave individual members cover for their votes.

other FTA partners such as Australia do not need U.S. assistance in this venue. Despite this diversity of approaches, the main advisory committee to the U.S. government on trade and labor issues (the Labor Advisory Committee for Trade Negotiations and Trade Policy urged the Congress to reject every trade agreement negotiated since 2002 (Chile, Australia, Morocco, Central America, Dominican Republic, Bahrain, Oman, and Peru.)⁸² The Advisory Committee, comprised of some 60 labor union leaders and a few academics, agrees that each of these countries have different labor rights conditions, but they concluded that every Bush Administration FTA was a “back track from the minimal workers’ rights provisions of the Jordan Agreement.” The Labor Advisory Committee stressed, under the Jordan agreement parties can bring a dispute regarding the other party’s failure to comply with any provision of the labor chapter, including the commitments on non-derogation and ILO standards. However, under the Chile and Singapore agreements, “complaints regarding these two key commitments cannot be brought before dispute resolution at all. In fact, the only labor provision that is subject to dispute resolution in both agreement is the commitment to effectively enforce domestic laws...And while the dispute resolution procedures and remedies were identical for the labor environment, and commercial provisions of the Jordan FTA, the labor...enforcement provisions in the Chile and Singapore FTAs are both different from and weaker than the provisions for the enforcement of the agreements’ commercial obligations.”⁸³ The Labor Advisory Committee was not alone in its criticism. Human

⁸² Report of the Labor Advisory Committee for Trade Negotiations and Trade Policy, Chile, 2/28/2003, 16; Australia, 3/12/2004, 14; Central America, 3/19/2004, 15; Morocco, 4/6/2004, 9; Dominican Republic, 4/22/2004, 7; Bahrain, 7/14/2004, 8; Oman, Peru, 2/1/2006, 12. It is interesting to note that the membership of the LAC went from 58 in 2004 to 28 (twenty-six from unions and two from academia). These reports are all available at the www.ustr.gov/bilaterals web site.

⁸³ Labor Advisory Committee for Trade Negotiations and Trade Policy, “The U.S.-Singapore Free Trade Agreement,” 2/28/2003, 6, 16.

Rights Watch called for enforcement parity for all trade agreement obligations and a more meaningful system of dispute settlement, in the belief that governments cannot effectively police each other on labor rights.⁸⁴

Although the labor provisions in these FTAs were widely criticized in the United States, they received a more positive response from some U.S. FTA partners. Government officials from Jordan and Morocco recognized that U.S. labor demands gave them political cover to take politically difficult action and improve labor laws.⁸⁵ According to USTR, countries such as Chile, Morocco, Oman and Bahrain have updated their laws to meet international standards. In July 2006, Oman's government issued a royal decree significantly reforming its labor laws and clarifying that unions will be free to operate without government interference. But the House Ways and Means Democrats stressed that the decree did not address areas in Oman's labor law that fall short of international standards. (As of this writing, Oman has not been approved by Congress).⁸⁶

While officials in America's FTA partner countries change their laws to meet U.S. expectations, they may not be willing or able to devote adequate resources to enforcement. In May 2006, the National Labor Committee of the United States documented substandard conditions in one-quarter of the one hundred garment factories in Jordan. Most of the workers in these factories were guest workers from Bangladesh

⁸⁴ Human Rights Watch argued that the existing dispute settlement mechanisms have often failed to address allegations made in complaints and, in some cases, have issued reports lacking findings of fact; and ministerial consultations, often recommended by National Administrative Offices, have resulted in agreements that provide little possibility for resolving problems identified in complaints. The Jordan FTA, for its part, relies exclusively on the trading partners' political will to enforce the accord's labor rights commitments, thereby compromising the implementation of those commitments, <http://hrw.org/press/2002/10/laborrightrights-bck.htm>, last searched 6/06/2006.

⁸⁵ USTR, "Morocco FTA Leads to Progress on Labor Reform, Cooperative Approach Produces Real Results," 6/23/2004.

⁸⁶ "USTR Cool to Finance Labor Amendment to Oman Draft FTA Bill," *Inside U.S. Trade*, 5/19/2006, pp. 1 and 19; "USTR Cites Oman Labor Rights Move in Advance of House Vote on FTA," *Inside US Trade*, 7/14/2006, 9; and <http://www.thomas.gov/cgi-bin/bdquery/z?d109:HR05684:@@X>.

and China working without full pay in substandard conditions. U.S. trade officials told the Senate Finance Committee that if these allegations were true, they would violate the Jordan FTA. However, these officials stressed that the United States would work with Jordan to address the issue before considering dispute settlement provisions in the FTA. The Jordanian minister of trade and industry told reporters that the country's inspection regime appeared to have "failed us miserably," but the government would work to ensure that violations of human rights, labor rights, or human trafficking do not reoccur on Jordanian soil.⁸⁷ As of this writing, Republicans and Democrats still disagree as to what labor rights provisions should be in these FTAs and which provisions should be subject to binding dispute settlement.⁸⁸ Democrats continue to push for a more comprehensive and binding approach.⁸⁹ On April 6, 2006, senior Democrats on the trade-writing committees of both houses wrote to the USTR criticizing it for not taking up the president of Peru's offer to include international labor standards in the U.S.-Peru FTA.⁹⁰

⁸⁷ Steven Greenhouse and Michael Barbaro, "An Ugly Side of Free Trade: Sweatshops in Jordan," *New York Times*, 5/3/2006; "Jordan Curbing Abuse of Workers: Minister," *The Peninsula*, http://www.thepeninsulaqatar.com/Display_news.asp?section=World_News&subsection=Gulf%2C+Middle+East+%26+Africa&month=June2006&file=World_News2006061844959.xml and "USTR Cool to Finance Labor Amendment to Oman Draft FTA Bill," *Inside U.S. Trade*, 5/19/2006, pp. 1-2.

⁸⁸ Most Republican members of Congress can accept a definition of internationally accepted labor rights that means adherence to the four fundamental rights outlined in the ILO Declaration on Fundamental Principles and Rights at Work (freedom of association, recognition of the right to collective bargaining, effective abolition of child labor, and the elimination of discrimination in respect of employment and occupation.) But they claim they will not accept an approach to linking trade and labor standards that bound the United States to adhere to ILO Conventions that Congress has not agreed to or which subjects the United States to binding dispute settlement under the agreement.

⁸⁹ For example, Human Rights Watch claimed that during the negotiation of the U.S.-Andean FTA, "the Andean countries [...] proposed to include the elimination of employment and workplace discrimination on the list of internationally recognized labor rights." (USTR says this was not part of the negotiations.) The United States, however, did not agree to include these labor rights in the labor chapter of the agreement. See "Letter to United States Trade Representative Robert Portman from Arvind Ganesan, Director, Human Rights Watch," 8/6/2005, <http://hrw.org/english/docs/2005/09/06/usintl1670.htm>.

⁹⁰ *Inside U.S. Trade*, 4/14/2006, p. 17 and "Finance Considers Draft Peru Deal," *Inside U.S. Trade*, 7/28/2006, 17. In July Senator Charles Schumer and other Democratic Senators offered an amendment to the draft Peru FTA that would have incorporated ILO standards into the text of the agreement, and subjected the labor chapter to the same dispute settlement as other chapters of the agreement. Although one Republican voted for the Amendment, it did not pass the Committee.

The same FTAs that allow U.S. policymakers to contest labor standards abroad also provide mechanisms for the United States' FTA partners to criticize the labor rights practices in the United States which may distort trade. These consultations have not generally led the United States to commit to change public policy.⁹¹ However, in July 2004, the Department of Labor and Mexico's Foreign Relations Secretariat signed a joint declaration and two letters of agreement aimed at protecting and promoting the rights of Mexican migrant workers in the United States. The United States agreed to develop initiatives to improve compliance with and awareness of workplace laws and regulations protecting Mexican workers in North Carolina and other areas in the United States.⁹²

Trade Capacity Building

Under Trade Promotion Authority, Congress set forth as a principal negotiating objective that the United States should help strengthen the capacity of its trade partners to promote respect for core labor standards. In this regard, Congress has authorized general trade capacity building assistance and has also provided specific funds for specific FTAs. But the Bush administration has repeatedly tried to cut the budget of the Bureau of International Labor Affairs, which directs labor rights capacity building.⁹³ Congress also

⁹¹ For example, the Mexican government has requested consultations on labor rights affecting migrant workers at one of the largest egg farms in Maine, as well as on the rights of workers to organize at a California solar energy panel manufacturer. See Public Submission 9501; 9801; 9804 at <http://www.dol.gov/ilab/programs/nao/status.htm#iib4>; <http://www.dol.gov/ilab/programs/coopact/sectcoopact.htm>; and <http://www.dol.gov/ilab/programs/coopact/sectcoopact.htm#iii>, last searched 6/05/2006.

⁹² Mexico NAO Submission 2003-1 (North Carolina) was filed by the Farmworker Justice Fund, Inc., and Mexico's Independent Agricultural Workers Central (CIOAC), <http://www.dol.gov/ilab/programs/nao/status.htm#iib4>.

⁹³ Interview with Kimberly Ann Elliott, Institute for International Economics, 6/3/2006; and Human Rights Watch, "U.S. Budget Proposal Shortchanges Labor Rights," <http://hrw.org/English/docs/2004/02/04/usint7268.htm>, last searched 6/7/2006.

shares some blame for not backing up promised aid with real money and expertise.⁹⁴

Nonetheless, members of Congress did convince the Administration to agree to provide significant funds for capacity building linked to particular FTAs. For example, in agreements such as CAFTA-DR, the United States created trade capacity–building working groups for its FTA partners to identify trade capacity building needs.⁹⁵ In these working groups, the United States’ FTA partners specified their needs, and NGOs, firms, and governments in the United States specified what they could do to help.⁹⁶

Preferential Programs

Like other industrialized countries, the United States has created several preference programs to help developing countries participate in international trade (see Table 2). The United States grants unilateral preferential tariff treatment to countries that qualify under its generalized system of preferences (GSP), the Caribbean Basic Economic

⁹⁴ For a good assessment of the problems of U.S. capacity building, see GAO, “Foreign Assistance: U.S. Trade Capacity Building Extensive, but Its Effectiveness Has Yet to Be Evaluated,” GAO-05-150, 2/2005.

⁹⁴ No congressional committee has direct responsibility to fund capacity building. In June 2006, Congressman Jim Kolbe proposed gathering trade capacity building funds, scattered throughout the U.S. government, into a new account to provide an incentive to countries to enter into new trade agreements. “Needs and Solutions: Trade Capacity Building in Sub-Saharan Africa,” 3/17/2006, summary at <http://www.carnegieendowment.org/events/index.cfm?fa=eventDetail&id=865&&prog=zgp&proj=zted>, Committee on Appropriations, Subcommittee on Foreign Operations and export Financing, 5/19/2006, <http://appropriations.house.gov/index.cfm?fuseAction=PressRelease...>, both last searched 6/7/2006. On the new fund, see “House Appropriations Approves New Trade Capacity Fund for 2007,” *Inside U.S. Trade*, 5/26/2006, p. 11. Kolbe’s plan would take money from funds in USAID and the Department of State, not USTR.

⁹⁵ U.S. Trade Representative, 2005 Trade Policy Agenda, www.ustr.gov, pp. 277–281.

⁹⁶ Thus, USAID agreed to purchase and install computers and provide training to manage trade data in the CAFTA countries. The U.S. Department of Labor contributed to projects to strengthen labor relations. The Humane Society of the United States committed to provide assistance to broaden outreach to civil society and agreed to provide workshops in administrative procedures. And the Worldwide Responsible Apparel Production certification program agreed to train governments, manufacturers, and civil society leaders in factory compliance and labor inspection. See *Tratado de Libre Comercio Entre Centroamericay Estados Unidos*, “Conceptual Proposal for a National Action Plan: Costa Rica,” http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/asset_upload_file310_3357.pdf; and “Strengthening Democracy, Promoting Prosperity: A Partnership to Build Capacity in Costa Rica, El Salvador, Honduras, Guatemala and Nicaragua,” http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/asset_upload_file445_3363.pdf, both last searched 5/27/2006.

Recovery Act (as amended [CBTPA]), the Andean Trade Preference Act (ATPA), and the African Growth and Opportunity Act (AGOA).⁹⁷

The U.S. GSP program encourages trade from poorer countries by providing incentives to U.S. firms to buy tariff-free products from GSP beneficiary countries.⁹⁸ GSP recipients must adhere to certain requirements, particularly related to workers rights and the protection of intellectual property rights. If these beneficiaries do not do so, their benefits may be reviewed and possibly removed.⁹⁹ The United States reserves the right to remove these benefits at the behest of U.S. firms or for a wide range of policy reasons. Moreover, policymakers can threaten not to reauthorize GSP, as a strategy to change the

⁹⁷ The US reports these duty-free benefits apply to some 85 percent of the products in the U.S. tariff schedule. WTO/TPR/S/160, 33. 34 On the belief that trade is more powerful than aid, see *Economic Report of the President*, 2005, p. 165. The United States also allows products of the U.S. insular possessions, freely associated states such as Micronesia, and the West Bank and Gaza unilateral tariff preference treatment.

⁹⁸ For example, in August 2006, U.S. Trade Representative Susan Schwab announced that U.S. officials would consider whether to limit, suspend or withdraw the eligibility of some 13 countries, including Brazil and India. Senator Charles Grassley, the chairman of the Senate Finance Committee, and Congressman Bill Thomas, the chairman of House Ways and Means (the two trade-writing committees) blamed these two countries for the collapse of the Doha Round of trade talks, and had threatened not to renew the GSP program in general if the U.S. continued to provide the two countries with preferential treatment.

⁹⁹ Laura M. Baughman and Justin D. Hoffman, "Written Statement of the Coalition for GSP to the Committee on Ways and Means," U.S. House, 2/15/2006, <http://www.tradepartnership.com>, last searched 6/06/2006; and interview with Laura Baughman, president of the Trade Partnership, 6/8/2006. Only 10 percent of total imports from developing countries benefit from GSP. But many countries rely on this program for market access for their exports. And many U.S. firms are dependent on key products imported under GSP, such as ferroalloys used in steel or spices used in food products.

behavior of participating nations.¹⁰⁰

Table 2: U.S. Trade Preference Programs

Trade Preference Program	Year of Authorization/Expiration	Special Attributes
Generalized System of Preferences (GSP)	Authorized under the Trade Act of 1974; current authorization expires in 2006	Duty-free entry for more than 4,650 products from 144 designated developing country beneficiaries.
African Growth and Opportunity Act (AGOA)	Signed into law on May 18, 2000, authorized until September 30, 2015; third-country fabric provisions authorized until September 2007	Provides reforming sub-Saharan African countries with the most liberal access to the U.S. market available to any country or region with which the United States does not have an FTA. AGOA GSP provides duty-free market access for 6,400 items.
Andean Trade Preference Act*	Enacted in 1991	Designed to combat drug production and trafficking in Bolivia, Colombia, Ecuador, and Peru; provides duty-free access to U.S. markets for approximately 5,600 products.
Caribbean Basin Initiative	Begun in 1983; expanded in 2000	Designed to "to facilitate the economic development and export diversification of the Caribbean Basin economies"; provides twenty-four beneficiary countries with duty-free access to U.S. markets for most goods.

*Now called the Andean Trade Promotion and Drug Eradication Act

Sources: William Cooper, "Free Trade Agreements: Impact on U.S. Trade and Implications for U.S. Trade Policy," Congressional Research Service Report, 12/6/2005; Office of the U.S. Trade Representative website, <http://www.ustr.gov>

Table created by Jan Cartwright

The United States rarely removes countries from the beneficiary list for labor rights violations. For example, Bangladesh and Guatemala have been frequently reviewed for labor rights violations, but they have not lost their benefits.¹⁰¹ According to

¹⁰⁰ "Grassley Reluctant to Take Up GSP Renewal, Ties It to Doha Talks," 2/17/2006; "Grassley Warns Brazil, India on GSP; Stops Short of Predicting Graduation," *Inside U.S. Trade*, 2/17/2006; and "Schwab Says GSP Review will Consider Limits on India, Brazil," *Inside U.S. Trade*, 8/1/2006. In 2005, 22.3 percent of India's exports, 14.9 percent of Brazil's exports, 36 percent of Croatia's exports, and 17.4 percent of South Africa's exports to the United States were based on using GSP. "The US Generalized System of Preferences Program: An Update," <http://www.tradepartnership.com>.

¹⁰¹ 2005 Trade Policy Agenda, p. 239; and <http://a257.g.akamaitech.net/7/257/2422/14mar20010800/edocket.access.gpo.gov/2004/04-8203.htm>, last searched 6/06/2006. On April 12, 2004, USTR announced it was reviewing Bangladesh's GSP privileges, because Bangladesh had not implemented long-standing commitments to the United States to allow its national labor law to be applied in its export processing zones. In 1999, the AFL-CIO filed a petition

scholars, Kimberly Ann Elliott and Richard Freeman “workers’ right conditionality works reasonably well in the GSP program because the target countries are mostly small and they perceive that denying U.S. demands will have higher costs than complying with them.”¹⁰² However, some analysts note that the United States uses these provisions in an inconsistent manner. For example, it is reluctant to use these provisions in countries where stable economic or strategic relationships are important U.S. foreign policy goals.¹⁰³

How WTO members Introduce Labor Rights Concerns into the WTO

As noted above, for over 60 years, policymakers have tried and failed to include labor rights under the purview of the world trading system. Therefore, advocates of labor rights have had to find other ways short of negotiations to encourage a discussion about the relationship between trade rules and labor rights at the WTO. They have used several avenues: including trade policy reviews, accessions, procurement rules and discussions of social labeling.

Ironically, for a brief shining moment, India (one of the most vociferous opponents of a labor trade link) tried to use the WTO to discuss trade and labor rights. In its challenge the EU GSP program in 2002, India requested the establishment of a WTO

seeking withdrawal or suspension of GSP benefits for Bangladesh. USTR accepted the petition for review, sought public comment on the petition, including whether withdrawal or suspension of benefits is warranted, and conducted a public hearing. In Bangladesh, unions are very corrupt, and the government has sought to establish new mechanisms for workers to organize collectively, <http://www.thedailystar.net/2005/07/25/d5072501085.htm>.

¹⁰² Scholars Kim Elliot and Richard Freeman found relatively higher success rates when human rights groups were involved in the petition. More democratic countries tend to be more amenable to improving workers’ rights. Countries that are more trade dependent on the United States tend to be more willing to work toward change. Finally, their assessment suggests that it is easier to improve minimum wages and safety rather than long-standing practices such as child or forced labor. Elliott and Freeman, *Can Labor Standards*, pp. 76–78, quotation on p. 78, also see p. 84.

¹⁰³ Lance Compa and Jeffrey Vogt, “Labor Rights in the GSP: A Twenty Year Review,” *Comparative Labor Law and Policy Journal*, Vol. 22, No. 2-3, pp. 14, 49, 57. As examples of inconsistent application of labor rights GSP criteria, they cite Chile, Malaysia, Indonesia, and Pakistan.

panel to determine whether provisions under the EU's GSP program relating to labor rights, the protection of the environment, and to combat drug production and trafficking were compatible with WTO rules.¹⁰⁴ The request received wide attention, largely because it was the first to contest a trade measure used to promote respect for a particular category of human rights. However, in March 2003, India informed the EC that it was withdrawing its challenge on tariff preferences granted under the GSP's environmental and labor clauses (but maintaining the rest of its challenge on drug production and trafficking).¹⁰⁵ Indian policymakers did not publicly explain its reasons for limiting its challenge. But it appeared that India did not want to bring its own labor rights practices into the center of a trade dispute, which clearly contradicted its position that labor rights are a non-trade issue.

WTO members have also talked about labor rights as they discussed trade distortions that could arise with export processing zones (EPZs). The WTO allows nations to use EPZs as instruments to attract investment and encourage economic development.¹⁰⁶ Although every country's approach to EPZs is different, many countries allow firms to breach national fiscal and sometimes labor laws in these zones.¹⁰⁷

¹⁰⁴ Request for the establishment of a panel by India, WT/DS246/4, 9 December 2002, p. 2. http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds246_e.htm.

¹⁰⁵ Bridges Weekly Trade News Digest, "India Challenges EU GSP Scheme on Environment and Labour Standards," www.ictsd.org/weekly/03-01-15/story3.htm. Bridges Weekly, "DSB: India Wins Landmark EU-GSP case," 11/5/2003, www.ictsd.org/weekly/03-11-05/story1.htm, both last searched 8/15/2006. Also see Howse, "India's WTO Challenge," 4, 386; and Robert Howse, "Back to Court after Shrimp/Turtle? Almost but not Quite Yet: India's Short Lived Challenge to Labor and Environmental Exceptions in the European Union's Generalized System of Preferences", *American University International Law Review* v. 18 no1333 (2003) p. 1333-1381.

¹⁰⁶ Hoe Lim, "Trade and Human Rights: What's at Issue?" *Journal of World Trade*, 35 No. 2 (2001), pp. 12-14.

¹⁰⁷ According to a World Bank Discussion Paper, policymakers presume that lax labor standards attract investment. Takayoshi Kusago and Zafiriz Tzannatos, "Export Processing Zones: A Review in Need of an Update," Social Protection Discussion Paper No. 9802, 1/1998, p. 23, <http://www.worldbank.org>.

According to the United Nations in 2003, at least sixteen countries allowed weaker labor rights to workers in EPZs than to those outside.¹⁰⁸

In the 1980s, as more countries began to rely on EPZs to attract investment, some members of the GATT alleged that some EPZ incentives are the effective equivalent of an export subsidy. In the Uruguay Round, members agreed to discipline these “export subsidies” by gradually phasing them out. Governments can still maintain EPZs, but they can no longer provide them with financial incentives. Developing countries with less than \$1,000 per capita GNP were exempted from these disciplines and were given until the end of 2003 to phase out these prohibited export subsidies.¹⁰⁹ However, many developing countries have asked for an extension of the phase out date for these prohibited subsidies for their EPZs.

Some countries have also used the trade policy review process to press developing countries to improve their compliance with internationally accepted labor standards within EPZs. For example, the representative of the United States noted during El Salvador’s trade policy review that there were reports of violations of workers’ rights in the EPZs. The representatives of the United States and the European Union also urged El Salvador to reconsider the use of these zones to stimulate growth.¹¹⁰ The United States also used its own 2004 trade policy review to make a connection between labor rights and

¹⁰⁸ United Nations Development Program, "Human Development Report," p. 124, footnote 28, at http://hdr.undp.org/reports/global/2005/pdf/HDR05_chapter_4.pdf, last searched 1/13/2006.

¹⁰⁹ http://www.wto.org/english/tratop_e/scm_e/subs_e.htm. A subsidy, according to the WTO, contains three basic elements: (i) a financial contribution (ii) by a government or any public body within the territory of a member (iii) which confers a benefit. All three of these elements must be satisfied in order for a subsidy to exist. Multilateral disciplines are the rules regarding whether or not a subsidy may be provided by a member. They are enforced through invocation of the WTO dispute settlement mechanism. Countervailing duties are a unilateral instrument, which may be applied by a member after an investigation by that member and a determination that the criteria set forth in the SCM Agreement are satisfied. Also see WTO Secretariat, “Special and Differential Treatment for Least-Developed Countries: Note by the Secretariat,” WT/COMTD/W/135, 10/5/2004, pp. 2 and 14.

¹¹⁰ Trade Policy Review of El Salvador, WT/TPR/M/111, February 3 and 5, 2003, pp. 10–11.

trade. The U.S. government report noted, in the context of the Doha ministerial Declaration, that the subject of implementation of core labor standards was relevant for trade policy reviews.¹¹¹ However, some other nations were offended by this tactic. In the discussion of U.S. trade policies that followed, India noted that the ILO, not the WTO, was competent to deal with labor issues. Moreover, the Indian representative stressed that these reviews should not deal with “non-trade” issues. The government of Venezuela seconded these remarks.¹¹²

¹¹¹ WTO, Trade Policy Review Body, Report by the United States, 12/17/2003, WT/TPR/G/126. See Section 100, “WTO ministers renewed their commitment to the observance of internationally recognized core labor standards in the 2001 Doha Ministerial Declaration. Recognizing that there is a connection between labor standards and trade issues, we believe that the subject of implementation of core labor standards is relevant for TPRM reviews. In reviews of other countries, the United States has raised questions about the application of core labor standards. In that spirit, we are including, in this statement, relevant information on U.S. labor law and practice as it relates to fundamental workers' rights.” Also see sections 97 and 98, which describe U.S. objectives regarding labor rights: “The labor-related overall U.S. trade negotiating objectives are threefold. First, to promote respect for worker rights and rights of children consistent with the core labor standards of the International Labor Organization (ILO). TPA defines core labor standards as: (1) the right of association; (2) the right to organize and bargain collectively; (3) a prohibition on the use of forced or compulsory labor; (4) a minimum age for the employment of children; and (5) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. Secondly, to strive to ensure that parties to trade agreements do not weaken or reduce the protections of domestic labor laws as an encouragement for trade. And finally, to promote the universal ratification and full compliance with ILO Convention 182—which the United States has ratified—concerning the elimination of the worst forms of child labor...” The principal trade negotiating objectives in TPA include, “for labor, the provision that a party to a trade agreement with the United States should not fail to effectively enforce its labor laws in a manner affecting trade. TPA recognizes that the United States and its trading partners retain the sovereign right to establish domestic labor laws, and to exercise discretion with respect to regulatory and compliance matters, and to make resource allocation decisions with respect to labor law enforcement. To strengthen the capacity of our trading partners to promote respect for core labor standards is an additional principal negotiating objective, as is to ensure that labor, health or safety policies and practices of our trading partners do not arbitrarily or unjustifiably discriminate against American exports or serve as disguised trade barriers. A final principal negotiating objective is to seek commitments by parties to trade agreements to vigorously enforce their laws prohibiting the worst forms of child labor.”

¹¹² India wished to draw attention to the view of ministers, both at Singapore and at Doha, that while they were committed to the observance of internationally recognized core labour standards, the competent body to set and deal with labour standards was the International Labor Organization (ILO). It was clear, therefore, that the WTO was not competent to deal with this matter. The representative of India recalled the mandate of the Trade Policy Review Mechanism (TPRM) exercise and stated that it could not be used as an open forum to discuss non-trade issues or address issues not discussed elsewhere in the WTO. Venezuela joined the representative of India in his assessment that it was not pertinent to discuss labour issues in the context of the TPRM. Discussion of those issues belonged in the ILO. WTO, Trade Policy Review, Minutes of Meeting, 1/14-1/16, WT/TPR/M/12615 March 2004

But India and Venezuela could not quash discussions about the intersection of labor rights and trade. Some members were particularly concerned about labor rights and conditions in China's EPZs. China has used these zones (special economic zones) to experiment with market-based, outward-oriented policies. In many of these zones, Chinese labor law is flouted or unenforced. As China sought to join the WTO, members of the WTO recognized that China might thus attract investment from countries that have more stringent workers' rights standards. They also noted that China lacked an impartial judiciary, an effective and transparent social and environmental regulatory system, and a strong central government capable of enforcing the law.¹¹³ As a result, WTO members attached stringent conditions for China's accession.¹¹⁴

The 2001 Protocol on the Accession of the People's Republic of China is an unusual document. Unlike the Accession Protocols of previously admitted members, it specifically comments on the effectiveness of the rule of law in China. It states as a condition of accession that China must enforce "uniform administration of Chinese law" throughout China as a condition of accession. "The provisions of the WTO Agreement and this protocol shall apply to the entire customs territory of China, including...special economic zones...and other areas where special regimes for tariffs, taxes and regulations are established." The agreement also calls on China to "apply and administer in a uniform, impartial and reasonable manner all its laws, regulations and other measures of

¹¹³ Richard H. Steinberg, "Institutional Implications of WTO Accession for China," February 1999, <http://brie.berkeley.edu/~briewww/publications/WP110.pdf>, last searched 1/10/2006, pp. 5, 6, 8.

¹¹⁴ Other recent accessions have not included similar language designed to ensure that the country applies the rule of law to all of its environs, including special/foreign trade zones or EPZs. We examined a number of accession documents for countries that use EPZs as a means of stimulating trade and investment. See, as example, Accession of the Republic of Panama, WT/ACC/PAN/21, 10/11/1996, and Accession of the Hashemite Kingdom of Jordan, WT/ACC/Jor/35, 12/1999, both at <http://www.wto.org>. None included information on administration of trade agreements, special economic zones, or transparency. See also accessions, noted in footnotes 64–68, of Cambodia, Nepal, Macedonia, and Saudi Arabia.

the central government as well as local regulations, rules and other measures...pertaining to or affecting trade.... China shall establish a mechanism under which individuals and enterprises can bring to the attention of the national authorities cases of non-uniform application.”¹¹⁵ The agreement requires China to notify the WTO about “all the relevant laws, regulations and other measures relating to its special economic areas.” Finally, it calls on China to ensure that “those laws, regulations and other measures pertaining to and affecting trade shall be enforced.”¹¹⁶ The China accession document did not address labor laws explicitly, but it reveals that members recognized that the failure to enforce human rights laws, whether labor law or intellectual property law, could distort trade.

Labor rights issues have not only seeped into discussions about accessions, but also discussions about social labeling and procurement policy. Social labels are designed to inform consumers that products were produced in accordance with internationally accepted labor standards. For example, the South African government partnered with organized labor, business, government and community organizations, to support job creation and socially responsible business in South Africa. To use the “Proudly South Africa Label, a company's products or services must incur at least 50% of their production costs, including labor, in South Africa, and be "substantially transformed" (in other words a product that is merely imported and re-packaged would not be eligible) in South Africa, and meet high quality standards. A company must also be committed to labor and environmental standards. By meeting these standards, consumers can be assured that companies and their products carrying the *Proudly South African* symbol are of a high quality, are socially responsible and are supporting the local economy. The

¹¹⁵ WTO, “Accession of the People’s Republic of China, Decision of 10 November 2001,” WT/L/432, (A) 1, 2, <http://www.wto.org>.

¹¹⁶ *Ibid.*, Sections (B), (C), 3.

Proudly South African label is supposed to attract and maintain production in South Africa through higher social standards.¹¹⁷ In its multistakeholder and voluntary character it is similar to Belgium's social label described above. This social label was not designed to link to a trade agreement but was vetted both by the Belgian government and the European Commission to ensure that it was compatible with WTO rules. The label is not just for Belgian or EU firms. A US NGO, Social Accountability International, has been accredited under the Belgian Social labeling law.¹¹⁸

However, some trade observers allege that these social labels could be trade distorting because they create barriers to trade based on a technical or qualitative requirement. In advance of the Doha ministerial, WTO documents reemphasized that eco-labeling efforts should not become disguised trade restrictions or impede market access for developing country producers. It did not comment on social labels. Thus, the WTO agreements provide little guidance on how and when government can encourage the use of social and eco-labeling. Moreover, trade measures based on how goods are made could challenge the WTO approach to "like products." Currently, WTO rules state: "In conformity with Article 2.9 of the Agreement, Members are obliged to notify all mandatory labeling requirements that are not based substantially on a relevant international standard and that may have a significant effect on the trade of other Members....When assessing the significance of the effect on trade of technical regulations, the Member concerned should take into consideration such elements as the value or other importance of imports in respect of the importing and/or exporting Members concerned, whether from other Members individually or collectively, the potential growth of such imports, and difficulties for producers in other Members to comply with the proposed technical regulations. The concept of a significant effect on

¹¹⁷ Wakabi W. (2005) "Not a Level Playing Field," *Africa Today* 7/24/05 ; and Ayesha Kajee, "Made in China, Made Scared In a Textile Mill in Africa," www.saiia.org.za/modules.php?op=modload&name=News&file=article&sid=515.

¹¹⁸ Information on the Belgian Social Label at mineco.fgov.be/protection_consumer/social_label/home_nl.htm and europa.eu.int/comm./employment_social/emplweb/csr-matrix?c... SA8000, is a way for retailers, brand companies, suppliers and other organizations to maintain just and decent working conditions throughout the supply chain. [/www.sa-intl.org/SA8000/SA8000.htm](http://www.sa-intl.org/SA8000/SA8000.htm)

trade of other Members should include both import-enhancing and import-reducing effects on the trade of other Members, as long as such effects are significant.¹¹⁹

¹¹⁹ WTO Analytical Index; Technical Barriers to trade: Agreement on Technical Barriers to Trade, [/www.wto.org/english/res_e/booksp_e/analytic_index_e/tbt_01_e.htm#top](http://www.wto.org/english/res_e/booksp_e/analytic_index_e/tbt_01_e.htm#top).

Thus, short of a trade dispute, it seems likely that members will seek additional clarity on the use of these labels.

Labor standards have also penetrated discussions of procurement policy. For example, some European governments including Belgium want ILO conventions to be included as selection criteria for the awarding of public contracts. Some provinces of Italy use SA 8000 certifications (a certification of socially responsible manufacturing) to award public procurement. In 2001 the Danish Parliament passed an act which enables public authorities to stipulate certain social obligations in relation to enterprises that either provide services for the public authority or are receiving grants from the public authority.¹²⁰

Thus the members of the WTO- developing, middle income and industrialized—are talking about labor rights—during trade disputes, accessions, trade policy reviews, in discussions about procurement policy and about social labeling. But the relationship of labor rights and WTO rules remains an open question. In December 2005, one day before the opening of the Hong Kong ministerial, WTO Director-General Pascal Lamy met with trade unionists. He told them “the WTO and its secretariat do not have a mandate to work on coherence between what is done in the WTO and what is done in the ILO.” Lamy urged labor leaders to ensure they had enough leverage on their governments before they made a push for labor standards in future trade negotiations.¹²¹ Lamy seemed to signal that despite progress within the WTO and bilaterally, labor rights would remain *officially* outside the turf of the WTO.

Conclusion

¹²⁰ europa.eu.int/comm/employment_social/emplweb/csr-matrix/csr_topic_allcountries_en.cfm?field=14

¹²¹ Jamil Anderlini, “Lamy Backs Inclusion of Standards for Workers,” [South China Morning Post](#), 12/13/2005. Lamy never endorsed including labor standards in the WTO. The headline is misleading.

Actions speak louder than words. At the behest of the EU and the U.S, most countries participate in trade agreements or preference programs where labor rights and trade are linked. Moreover, although proponents of linking trade and labor rights could not achieve consensus to include labor rights within the WTO's direct purview, WTO members often touch on labor rights issues. As example, industrialized and developing country members have brought up labor rights concerns during accessions, trade disputes, trade policy reviews, discussions of procurement, and social labeling. Even India initially used a WTO venue-dispute settlement to challenge the labor (and other provisions) of the EU GSP-thereby using WTO rules to discuss the relationship between trade and labor rights.

The U.S. and the EU are the main advocates of linkage. With their actions, they have forced many developing countries to put in place stronger labor protections. But the approaches that the EU and the US use to link labor rights and trade are problematic. While these governments use capacity building projects to increase the supply of labor standards, their strategies do little to increase the demand for labor rights improvements among the public in countries such as India or Guatemala. Moreover, their strategies send inconsistent signals about labor rights as a human right (often signaling that labor rights are not a human rights priority).

The European Union relies on dialogue to improve workers rights abroad. Using the lure of its huge market, it offers its trading partners incentives to improve labor standards, and promises disincentives if they don't. But EU policymakers rarely use such sticks to punish labor rights violators, instead using them to respond to violations of other

human rights. Because of this reluctance, the European Union sends conflicting signals to its trade partners about the importance of labor rights.

Meanwhile, at the behest of Congress, the U.S. has made promoting labor rights a top U.S. priority for trade policy. The U.S. requires explicit labor rights provisions in its trade agreements and labor rights are subject to a system of binding dispute settlement. But the U.S. appears hypocritical. The U.S. does not rely on all core ILO standards-it excludes nondiscrimination). Moreover, these trade agreements do not require parties to meet international standards (which the U.S. does not meet). In this way, the U.S. is less supportive than it should be of international labor standards.

The inconsistency of the EU's approach and the hypocrisy of the US approach are major hurdles to convincing other countries that it is in their interest to meet international standards. Their efforts will be more effective if they can find ways to collaborate. Nonetheless, the EU and the US have made labor rights a trade agreement reality. And for most members of the WTO, reality bites.