Women in Global Production and Worker Rights Provisions in U.S. Trade Laws

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I. INTRODUCTION

Over the past decade, several U.S. trade laws have, for the first time in recent U.S. history, linked international trade benefits to respect for labor rights. Several of the worker rights provisions incorporated in these statutes mirror two of the three categories of fundamental worker rights delineated by the International Labour Organisation (ILO). However, worker rights-linked trade laws[1] are starkly silent with respect to the third category of fundamental-rights specified by the ILO: equality of opportunity and treatment,[2] including freedom from gender-based discrimination in the workplace. Thus U.S. trade laws contain no provisions explicitly aimed at promoting respect for the rights of working women. While acknowledging this critical omission, this paper argues that worker rights-linked trade laws could, albeit unintentionally and indirectly, uniquely benefit female workers laboring in the export sector of developing countries. The realization of these benefits, however, depends on a number of political and economic variables and on the institutionalization of these benefits at the foreign national level.

Worker rights provisions in U.S. trade laws do not, in their intended impact, distinguish between male and female workers in foreign countries. In theory, women workers could benefit from the application of these laws in equal measure to their male counterparts. In reality, women often face restricted employment opportunities or inferior working conditions (or both) that indirectly circumscribe potential benefits. However, certain segments of the female work force in developing countries are uniquely positioned to benefit from worker rights-linked U.S. trade laws. Specifically, women who work in

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1. Trade laws containing worker rights provisions are herein referred to as "worker rights-linked trade laws."

2. According to the ILO, "fundamental" or "basic" human rights are: 1) freedom of association (including freedom to organize and bargain collectively), 2) freedom from forced labor, and 3) equality of opportunity and treatment (including equal remuneration and freedom from discrimination). *See* INTERNATIONAL LABOUR ORGANISATION, INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS: 1919-1981, at 1, 7, 42, 49 (1982) [hereinafter ILO CONVENTIONS AND RECOMMENDATIONS].

export processing zones (EPZs)[3] may inadvertently benefit from statutory language that explicitly extends specific worker rights to "designated zones" in the foreign country. These "designated zones" generally refer to EPZs. While several articles have analyzed the worker rights provisions in U.S. trade laws, none has focused on the probable effect of these laws on working women in developing countries.[4]

The application of U.S. trade laws to "designated zones" reflects congressional and public concern over the impact of certain zone practices on domestic trade policy and on domestic and foreign labor rights. For example, some EPZ authorities and foreign governments deny rights generally applicable in the foreign national territory to workers in EPZs. Others have established EPZ labor standards, such as a minimum wage, below prevailing foreign national standards.[5] Labor unions and other parties involved in trade policy debates argue that these practices confer an unfair trade advantage by effectively subsidizing foreign exports into the U.S. market.[6]

Young women comprise the majority of production workers in EPZs, which have been growing in size and number over the last decade.[7] Thus, the inclusion of statutory language on zones in worker rights-linked trade laws could, other things being equal, benefit women workers in the export sector

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3. EPZs (also known as "free trade zones" and "export free zones") are usually special enclaves for the manufacture and/or assembly of goods for export wherein firms typically enjoy freedom from import and export tariffs and may also receive an array of tax and investment incentives. In a joint study, the International Labor Organization and United Nations Centre on Transnational Corporations (UNCTC) stated: "Definitions as to what constitutes an export processing zone are at least as numerous as the names used to describe this phenomenon." INTERNATIONAL LABOUR ORG. & UNITED NATIONS CENTRE ON TRANSNAT'L CORPS., ECONOMIC AND SOCIAL EFFECTS OF MULTINATIONAL ENTERPRISES IN EXPORT PROCESSING ZONES 4 (1988) [hereinafter ECONOMIC AND SOCIAL EFFECTS]. For example, EPZs may be broadly defined to include entire countries or territories, such as Hong Kong or Singapore, which have no tariffs or import restrictions.

Individual firms and/or plants (such as *maquiladoras* in Mexico or Licensed Manufacturing Warehouses in Malaysia) may receive the same treatment as EPZs in some countries. Throughout this paper, I define EPZs as either enclaves or individual plants for assembly or light manufacturing activities where at least 80% of the output produced is destined for export, where inputs and exports are eligible for duty-free treatment, and where firms typically enjoy other fiscal and financial incentives.

Congressional interest in EPZs vis-à-vis international trade and worker rights was first evidenced in implementation guidelines for the Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67, 97 Stat. 384 (1983), *as amended by* the Customs and Trade Act of 1990 (codified as amended at 19 U.S.C.A. §§ 2701-2706 (West Supp. 1991)). *See infra* part III; *see also* Steve Charnovitz, *Caribbean Basin Initiative: Setting Labor Standards*, 44 MONTHLY LAB. REV. 54-56 (1984).

4. *See, e.g.*, Theresa A. Amato, Note, *Labor Rights Conditionality: United States Trade Legislation and the International Trade Order*, 65 N.Y.U. L. REV. 79 (1990); Ian Charles Ballon, *The Implications of Making the Denial of Internationally Recognized Worker Rights Actionable Under Section 301 of the Trade Act of 1974*, 28 VA. J. INT'L L. 73 (1987).

5. These standards will be spoken of as "differentially-lower labor standards."

6. This subsidy would be in the form of lowered production (variable labor) costs, resulting from an "artificial" lowering of labor standards (such as wages and overtime) that would otherwise have increased the flow of income and benefits to workers.

7. 1 BUREAU OF INT'L LABOR AFFAIRS, U.S. DEP'T OF LABOR, WORKER RIGHTS IN EXPORT PROCESSING ZONES 5 (1990) [hereinafter WORKER RIGHTS].

of developing countries. It is critical to recognize, however, that the potential benefits accruing to female workers through these laws are contingent on the practical ability of trade statutes to effectuate meaningful labor reforms in developing countries. In reality, a complex array of variables determines whether any meaningful reform can be achieved.[8] Four of the critical factors determining the influence and impact of worker rights-linked U.S. trade laws are:

1) The role and strength of foreign national governments (in relation to, for example, employers' associations and para-military groups) in the creation and enforcement of worker rights;
2) The importance to the foreign country of manufacturing exports to the United States, measured by the value of trade preferences received from the United States and the degree of dependence on access to the U.S. market, and affecting the country's perceived reliance on maintaining low wages and benefits to retain an "edge" in competitive international trade;
3) Foreign policy considerations for both the United States and the foreign country, including perceived tactical gains or losses resulting from a U.S. threat to impose (or to respond to) unilateral trade measures, and competing or conflicting intragovernmental goals; and
4) The configuration and relative strength of worker and employer blocs within the foreign country, as well as pressures from international interest organizations.

Given these various interactive elements, it is nearly impossible to predict the long-term influence of worker rights-linked U.S. trade laws on worker rights in affected foreign countries, let alone on women workers who may benefit only indirectly from these laws. Though it is beyond the scope of this paper to evaluate the efficacy of these laws to date,[9] observers have pointed to both apparent successes and failures during their short history. Chile is most frequently cited as a case in which the suspension of U.S. trade preferences helped to focus attention on human rights problems and contributed to important labor law reforms.[10] Myanmar (formerly Burma), which was removed from the Generalized System of Preferences (GSP) in 1989,[11] is cited as a

8. For two cogent analyses on this subject, see PETER DORMAN, U.S. DEP'T OF LABOR, WORKER RIGHTS AND U.S. TRADE POLICY: AN EVALUATION OF WORKER RIGHTS CONDITIONALITY UNDER THE GENERALIZED SYSTEM OF PREFERENCES (1989); LAWYERS COMM. FOR HUMAN RIGHTS, WORKER RIGHTS UNDER THE U.S. TRADE LAWS 1988 PROJECT SERIES NO. 2 (1989).

9. The most long-standing of these programs, the Caribbean Basin Economic Recovery Act, 19 U.S.C. §§ 2701-2706 (1988), has been in effect only eight years. The Generalized System of Preferences is currently in its fifth annual review cycle (following a general review in 1985-1986). For a discussion of these laws and programs, see *infra* part III.

10. *See, e.g.*, DORMAN, *supra* note 8, at 13-14; FAY LYLE, U.S. DEP'T OF LABOR, WORKER RIGHTS IN U.S. POLICY 14, 15 (1991).

11. Actions Concerning the Generalized System of Preferences, 3 C.F.R. 262, 263 (1990).

case in which the removal has generated few improvements.[12] However, none of these administrative decisions has focused on women workers per se.

The inclusion of language on EPZs in worker rights-linked trade laws has helped to spotlight the status of labor rights and working conditions in zones in countries subject to U.S. worker rights reviews. It is too soon to evaluate whether this attention will precipitate long term, sustainable reforms. By extension, and given the absence of any empirical evidence, it is premature to speculate what benefits, if any, have actually accrued to working women in EPZs. Further, even while we recognize that worker rights-linked trade laws can have a positive impact on the predominantly female work force in EPZs, the structure of employment opportunities in zones will, in all likelihood, continue to perpetuate occupational segregation by gender. For example, women may be helped by a country's agreement (in the wake of a worker rights review) to allow the formation of trade unions in zones, but still face very restricted occupational and salary opportunities in what amounts to a zone "gender ghetto."[13] As another example, while a lower general minimum wage imposed on EPZs would probably be considered actionable under worker rights-linked trade laws, a lower minimum wage established for a zone *industry* characterized by a predominantly female work force would not be actionable.[14] In short, gender-based, discriminatory working conditions and a panoply of other issues of critical concern to women workers remain stubbornly outside the grasp of worker rights provisions in U.S. trade statutes.

This paper begins by reviewing current worker rights provisions in U.S. international trade laws. It then discusses the implication of statutory language on "designated zones" for the rights of women laboring in the export sector of developing countries. This paper concludes that whatever benefits accrue to working women in EPZs through the implementation of worker rights-linked trade laws will necessarily be indirect and tenuous and will fall far short of addressing the specific needs of working women. Benefits are tenuous at best, because the leverage that can be exerted through these statutes is uncertain. Moreover, we have no guarantee that benefits will be institutionalized at the foreign national level.

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12. LYLE, *supra* note 10, at 14.

13. I am referring here to pervasive EPZ hiring preferences for young females in traditional EPZ industries (such as textiles, electronics, and apparel), in low-skilled, production-operator positions.

14. This disparity exists for two reasons. First, the ILO sanctions variable, industry-specific minimum wages, so the imposition of a wage differential by industry would not constitute an "unacceptable" condition of work under the GSP. *See infra* part III. Second, the consideration of any discriminatory effect on women falls outside the purview of U.S. worker rights-linked trade laws.

II. An Overview of Internationally Recognized Worker Rights

The majority of U.S. international trade laws containing worker rights provisions employ the language "internationally recognized worker rights" (IRWRs) to establish five rights and standards: 1) freedom 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. Section 503(a) of the Generalized System of Preferences Renewal Act of 1984 (Renewal Act) first enumerated and defined these five rights.[15]

The first three IRWRs are considered fundamental human rights by the ILO[16] and are codified most prominently in the Convention Concerning Freedom of Association and Protection of the Right to Organise,[17] the Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively,[18] the Convention Concerning Forced or Compulsory Labour,[19] and the Convention Concerning the Abolition of Forced Labour.[20] United States labor law protects the right of workers to associate and bargain collectively through the Labor Management Relations Act of 1947,[21] while the Thirteenth Amendment to the U.S. Constitution prohibits forced labor.[22] Several other important ILO conventions provide support for the latter two IRWRs.[23] In U.S. law, standards relating to the fourth and fifth IRWRs were

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15. 19 U.S.C. §§ 2462(a)(4) (1988).

16. International Labour Conventions and Recommendations are adopted by the International Labour Conference after consultation with all 151 member nations. The Conference is a tripartite body composed of government, employer, and worker delegates. When a member nation ratifies an ILO convention, it becomes subject to legally binding international obligations. While many other ILO conventions pertain to the first three IRWRs, those listed here are considered among the most widely recognized by the international community.

17. Convention Concerning Freedom of Association and Protection of the Right to Organize (Convention No. 87) (entered into force July 4, 1950), *reprinted in* ILO CONVENTIONS AND RECOMMENDATIONS, *supra* note 2, at 4. For example, respect for the right to associate freely is considered so important that the ILO monitors and reports on complaints in this area regardless of whether a member state has ratified Convention 87.

18. Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (Convention No. 98) (entered into force July 18, 1951), *reprinted in* ILO CONVENTIONS AND RECOMMENDATIONS, *supra* note 2, at 7.

19. Convention Concerning Forced or Compulsory Labour (Convention No. 29) (entered into force May 1, 1932), *reprinted in* ILO CONVENTIONS AND RECOMMENDATIONS, *supra* note 2, at 29.

20. Convention Concerning the Abolition of Forced Labour (Convention No. 105) (entered into force Jan. 17, 1959), *reprinted in* ILO CONVENTIONS AND RECOMMENDATIONS, *supra* note 2, at 39.

21. 29 U.S.C. §§ 141-197 (1988). The right of free association is also guaranteed by the U.S. Constitution. U.S. CONST. amend. I.

22. U.S. CONST. amend. XIII.

23. Convention Concerning Minimum Age for Admission to Employment (Convention No. 138) (entered into force June 19, 1976), *reprinted in* ILO CONVENTIONS AND RECOMMENDATIONS, *supra* note 2, at 730; Convention Concerning Minimum Wage Fixing, with Special Reference to Developing Countries (Convention No. 138) (entered into force Apr. 29, 1972), *reprinted in* ILO CONVENTIONS AND RECOMMENDATIONS, *supra* note 2, at 230; Convention Concerning the Application of the Weekly Rest in Industrial

also promulgated in the Fair Labor Standards Act of 1938[24] and the Occupational Safety and Health Act of 1970.[25]

According to two of the key participants who crafted the worker rights language incorporated in the GSP Renewal Act of 1984, the ultimate choice of these five IRWRs reflected political compromise and an assessment of which provisions would be politically palatable.[26] Thus, the five IRWRs do not perfectly mirror either U.S. laws or ILO conventions but reflect some areas of congruence. For example, the Renewal Act makes no explicit reference to the right to strike as an IRWR, because this right is restricted under U.S. law.[27] Similarly, the Renewal Act sets no minimum age for the employment of children, due to disagreements regarding the extent to which minimum age should be tied to a country's level of economic development.[28] The ambiguity of the statutes leaves open the question whether any or all of these criteria are *rights* or merely *standards*: that is whether they should be applied absolutely, or applied less strictly according to a country's level of development. Whether each IRWR is an absolute right or a relative standard continues to be the subject of policy disagreement over the administration of the GSP Renewal Act of 1984. The reporting guidelines (developed by the Department of State in its annual Human Rights Report for each of the IRWRs) suggest a possible taxonomy:

> Differences in levels of economic development are taken into account in the formulation of internationally-recognized labor standards. For example, many ILO standards concerning working conditions permit flexibility in their scope and coverage . . . countries are expected to take steps over time to achieve the higher levels specified in such standards . . . . It should be understood, however, that this flexibility applies only to internationally-recognized standards concerning working conditions. No flexibility is permitted concerning the acceptance of the basic principles contained in human rights standards, i.e., freedom of association, the

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Undertakings (Convention No. 14) (entered into force June 19, 1923), *reprinted in* ILO CONVENTIONS AND RECOMMENDATIONS, *supra* note 2, at 301; Convention Concerning Weekly Rest in Commerce and Offices (Convention No. 106) (entered into force Mar. 4, 1959), *reprinted in* ILO CONVENTIONS AND RECOMMENDATIONS, *supra* note 2, at 304; Convention Concerning Occupational Safety and Health and the Working Environment (Convention No. 155) (entered into force Aug. 11, 1983), *reprinted in* ILO CONVENTIONS AND RECOMMENDATIONS, *supra* note 2, at 350.

24. 29 U.S.C. §§ 201-219 (1988).

25. 29 U.S.C. §§ 651-678 (1988).

26. Telephone Interview with William Goold, Administrative Assistant to Representative Donald Pease (D-Ohio) (July 1991); Telephone Interview with Pharis Harvey, International Labor Rights Education and Research Fund (Nov. 1991). Goold and Harvey were actively involved in drafting the worker rights language incorporated into the GSP Renewal Act of 1984.

27. Telephone Interview with Pharis Harvey, *supra* note 26. The ILO also places conditions on the right to strike but considers it a fundamental tenet of the right of association. For a discussion of qualifications on the right to strike under U.S. law, see 2 BUREAU OF NAT'L AFFAIRS, THE DEVELOPING LABOR LAW 995-1032 (Charles J. Morriss ed., 2d ed. 1983).

28. Telephone Interview with Pharis Harvey, *supra* note 26.

> right to organize and bargain collectively, the prohibition of forced labor, and the absence of discrimination.[29]

These guidelines tend to reinforce the position taken by some parties (e.g., trade unions) that the first three IRWRs must be applied absolutely when evaluating a country's conformity with worker rights provisions under U.S. trade laws. To date, however, administrative agencies have treated these guidelines as recommendations intended primarily to assist foreign labor officers in their reporting functions.

Thus, the first three IRWRs defined under U.S. trade laws parallel the taxonomy of basic human rights defined by the ILO,[30] but these laws make no mention of the ILO's third main category of fundamental rights, subsumed under the heading "Equality of Opportunity and Treatment." A bill introduced by Representative Donald Pease (D-Ohio) in 1984 to revise the GSP program tried to make "the prohibition and elimination of discrimination in respect of employment and occupation" an IRWR for purposes of the GSP.[31] However, in negotiations preliminary to consideration of an expansive definition of IRWRs by the House Subcommittee on Trade (of the Committee on Ways and Means), this provision was deemed "untenable" as a workable criterion for evaluating labor rights observance, and was therefore withdrawn.[32]

III. U.S. Trade Laws Incorporating Worker Rights Provisions

Five U.S. laws currently condition assistance or access on respect for IRWRs, four of these laws authorize programs of trade or investment assistance, while the fifth governs direct access to U.S. markets.[33] These laws are the Caribbean Basin Economic Recovery Act (CBERA),[34] which implemented the Caribbean Basin Initiative (CBI); the Generalized System of Preferences (GSP);[35] the Overseas Private Investment Corporation (OPIC);[36] U.S. partic-

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29. U.S. Dep't of State, Country Reports on Human Rights Practices for 1990, 102d Cong., 1st Sess. 1694 (Joint Comm. Print 102-5 of Senate Comm. on Foreign Relations and House Comm. on Foreign Affairs 1991). United States trade statutes do not include *discrimination* as an actionable worker rights practice. The quoted passage reflects the ILO's position on flexibility vis-à-vis what it considers to be absolute as opposed to relative standards.

30. *See supra* note 2 and accompanying text.

31. H.R. 5136, 98th Cong., 2d Sess. (1984).

32. Telephone Interview with William Goold, *supra* note 26. One participant in the process has noted that the political feasibility of including freedom from discrimination as an IRWR was diminished by the then recent defeat of the Equal Rights Amendment. *See* Telephone Interview with Pharis Harvey, *supra* note 26.

33. A comprehensive description of the history, development, and substance of these laws can be found in Jorge F. Perez-Lopez, *Conditioning Trade on Foreign Labor Law: The U.S. Approach*, 9 Comp. Lab. L.J. 253 (1988) [hereinafter Perez-Lopez, *Conditioning Trade*]; Jorge F. Perez-Lopez, *Worker Rights in the U.S. Omnibus Trade and Competitiveness Act*, 44 Lab. L.J. 222 (1990).

34. 19 U.S.C.A. §§ 2701-2706 (West Supp. 1991)). Section 212 (19 U.S.C. § 2702) was amended in 1990 to incorporate the same worker rights language that was added to the GSP Renewal Act of 1984, codified at 19 U.S.C. §§ 2461-2464 (1988). *See* H. R. Rep. No. 101-650, 101st Cong., 2d Sess. (1990).

35. 19 U.S.C. §§ 2461-2466 (1988).

ipation in the Multilateral Investment Guarantee Agency (MIGA), authorized by the MIGA Act;[37] and Section 301 of the Trade Act of 1974.[38] With the exception of the MIGA Act, which will be discussed later, these laws contain uniform language explicitly extending to any "designated zone" in the foreign country the same statutory criteria that are applied to the country generally.

The logic behind the application of statutory worker rights standards to both EPZs and the foreign national territory is compelling from the standpoint of trade policy. Differentially-lower labor standards in EPZs could confer an unfair trade advantage on foreign exporters by lowering their production costs. The cost advantage thus received by exporting firms would distort trade flows. Differentially-lower labor standards in EPZs might also be construed as an effective subsidy, arguably subject to the imposition of countervailing duties under U.S. law.[39]

A. *Caribbean Basin Economic Recovery Act (CBERA)*[40]

The Caribbean Basin Economic Recovery Act, signed into law in 1983, was the first legislation in recent U.S. history to link international trade benefits to foreign labor laws and practices.[41] This preferential trade program provides unilateral duty-free treatment to a wide range of imports from designated developing countries in the Caribbean Basin.

The original worker rights language included in CBERA directed the President, when designating a beneficiary country, to consider "the degree to which workers in such country are afforded reasonable workplace conditions and enjoy the right to organize and bargain collectively."[42] Since neither

36. 22 U.S.C. § 2191 (1988).

37. 22 U.S.C. §§ 290k to 290k-11 (1988).

38. 19 U.S.C. §§ 2411-2420 (1988).

39. United States countervailing duty (CVD) law is contained in the Tariff Act of 1930, *as amended* sec. 331, 88 Stat. 2049 (1975) (codified as amended at 19 U.S.C. § 1303 (1988)). CVD provisions define a subsidy as a "bounty or grant" paid or bestowed "upon the manufacture or production or export of any article or merchandise manufactured or produced in such country." 19 U.S.C. § 1303(a)(1) (1988). They provide for the levying of a countervailing duty on such articles equal to the net amount of the subsidy. To date, no U.S. CVD determinations have been made on the rationale that lower worker rights standards constitute a subsidy for export. In terms of international trade rules, Charnovitz maintains that "if the GATT Subsidy (sic) Code is broadened to include government actions on a 'benefit to recipient' standard, or actions that are 'off budget,' a good case could be made that any exemption of EPZs from otherwise applicable labor laws or regulatory practices should be subject to international discipline." *See* Steve Charnovitz, *Hidden Subsidies*, 2 INT'L ECON. INSIGHTS, Jan.-Feb. 1991, at 20 (reviewing WORKER RIGHTS, *supra* note 7).

40. 19 U.S.C.A. §§ 2701-2706 (West Supp. 1991).

41. Perez-Lopez, *Conditioning Trade, supra* note 33, at 253-55. Perez-Lopez notes: "The earliest instance of U.S. Congressional action regulating trade in goods produced abroad under substandard labor conditions of which we are aware was in the context of the Tariff Act of 1890, which banned imports of goods manufactured by convict labor." *Id.* at 254.

42. Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67, § 212(c)(8), 97 Stat. 384, 387 (1983) (prior to 1990 amendment). This criterion was one of eleven discretionary criteria to be considered

"reasonable workplace conditions" nor "the right to organize and bargain collectively" were defined in the statute or its legislative history, the U.S. government relied on ILO conventions and case law for guidance, in tandem with a review of "local circumstances and the progress a country is making toward better conditions."[43]

One of the factors considered by the United States to determine which countries to designate for CBERA benefits was the level of labor standards provided in EPZs. Steve Charnovitz, a member of the U.S. government interagency task force that reviewed the eligibility of Caribbean Basin countries for designation under CBERA, states that at the time of the initial eligibility review in 1983, EPZs had become a focus of concern for the ILO and the International Confederation of Free Trade Unions (ICFTU), because officials in some countries either had suspended nationally applicable worker rights or had established lower labor standards in EPZs.[44] According to Charnovitz, "some of these zones had abusive labor conditions compared with the rest of the country that gave the zone's production an unfair competitive advantage in international markets. For example, in some of these zones, the governments prohibited trade unions."[45] Charnovitz states that the AFL-CIO actively voiced these concerns to the Reagan Administration during the government's initial review of Caribbean Basin countries in 1983.[46] Thus, because they served as platforms for export to the U.S. market, and because labor advocates viewed the imposition of differentially-lower standards in EPZs as an implicit export subsidy, these zones became both a trade and a labor issue in the designation of Caribbean Basin countries.

Implementation of the worker rights criterion in CBERA set a precedent for including zones in subsequent worker rights language. In 1990, CBERA was amended to incorporate the same worker rights language found in the GSP statute,[47] as discussed below.

B. *The Generalized System of Preferences (GSP)*

The GSP program provides nonreciprocal duty-free tariff treatment on eligible products to designated "beneficiary developing countries" (BDCs) to

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in country designation.

43. Perez-Lopez, *Conditioning Trade, supra* note 33, at 261-62.

44. Telephone Interview with Steve Charnovitz, Consultant, Competitiveness Policy Council (Nov. 1991).

45. *See* Charnovitz, *supra* note 3, at 55.

46. Telephone Interview with Steve Charnovitz, *supra* note 44.

47. CBERA was amended by the Customs and Trade Act of 1990, 19 U.S.C. §§ 2701-2706 (West Supp. 1991). This amendment requires the President, in determining whether to designate any country a beneficiary country under CBERA, to take into account "whether or not such country has taken or is taking steps to afford to workers in that country (including any designated zone) internationally recognized worker rights." 19 U.S.C.A. § 2702(c)(8) (West Supp. 1991).

promote economic development.[48] In 1990, the United States offered GSP duty-free treatment to some 4,230 products from 134 designated beneficiary countries and territories. GSP duty-free imports into the United States totaled $11.1 billion in 1990. The top five BDCs (Mexico, Malaysia, Thailand, Brazil, and the Philippines) accounted for sixty-five percent of the total.[49]

When the GSP program was renewed by the Renewal Act,[50] the criteria for designating a BDC were amended in several ways. Section 502(b) of the Renewal Act added the first mandatory worker rights criterion in the statute, and reiterated this criterion with respect to the discretionary factors to be considered by the President when designating a BDC.[51] Prior to the Act, no mandatory or discretionary worker rights criteria were part of the BDC designation process. Section 502(b)(7) of the Renewal Act now states that "the President shall not designate any country a beneficiary developing country under this section . . . if such country has not taken or is not taking steps to afford internationally recognized worker rights to workers in the country *(including any designated zone in that country)*."[52] Section 502(a)(4) defines the five IRWRs described above.[53]

Following a general review of all BDCs and eligible products in 1985-1986, the United States Trade Representative (USTR) issued implementing regulations that would permit "any person," on an annual basis, to "file a request to have the GSP status of any eligible beneficiary developing country reviewed with respect to any of the designation criteria . . . ."[54] Labor and human rights groups have actively engaged in the annual GSP review process by petitioning for the removal of countries alleged to have violated statutory criteria. As of the beginning of the fifth annual review cycle (1991-1992, in addition to the general review of 1985-1986), petitions have been filed with

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48. *See* 19 U.S.C. §§ 2461-2466 (1988).

49. OFFICE OF THE U.S. TRADE REPRESENTATIVE, 1991 TRADE POLICY AGENDA AND 1990 ANNUAL REPORT OF THE PRESIDENT OF THE U.S. ON THE TRADE AGREEMENTS PROGRAM 98, 99 (1991). Data on 1990 imports are from the GSP Subcommittee to the Trade Policy Staff Committee, Office of the U.S. Trade Representative (USTR), March 1991.

50. Pub. L. No. 98-573, §§ 501-508, 98 Stat. 3018 (1984) (codified at 19 U.S.C. §§ 2461-2466 (1988)).

51. 19 U.S.C. § 2462(a)(4) (1988).

52. 19 U.S.C. § 2462(b)(7) (1988) (emphasis added). The legislative history of the GSP Renewal Act of 1984 illustrates congressional intent with respect to the inclusion of language on designated zones:

> The reference in both section 502(b)(8) and section 502(c) to any designated zone in the particular country is intended to ensure that consideration of whether a particular country conforms to these provisions is based upon the existence of substantial uniformity between the conditions relating to internationally recognized worker rights in such zones and such rights otherwise applicable to workers in that country. The purpose of the provision is to ensure that designated zones are not used by the country as a means to circumvent the designation criteria on workers rights and to ensure the application of these criteria to the country as a whole.

H.R. REP. No. 98-1090, 98th Cong., 2d Sess. at 14 (1984).

53. *See supra* part II.

54. Regulations of the USTR Pertaining to Eligibility of Articles and Countries for the Generalized System of Preferences Program, 15 C.F.R. § 2007 (1991) [hereinafter USTR Regulations].

the GSP Subcommittee of the Trade Policy Staff Committee challenging thirty-four BDCs on worker rights grounds.[55]

Fifteen countries were accepted for full review and were found to have met the statutory requirements. Eight countries were suspended or terminated; three of these countries were subsequently reinstated in February 1991.[56] Chile, for example, was one of the three countries reinstated in 1991, following the election of a democratic, civilian government in 1989 and the subsequent removal or easing of certain restrictions on trade union rights.[57] Of the thirteen countries that were the subject of petitions for review on worker rights grounds under the current 1991-1992 review cycle, four were accepted for full review, while three were carried over from the previous cycle.[58]

Numerous country petitions submitted for review to the GSP Subcommittee have alleged violations of IRWRs in export processing zones.[59] In the 1990 review, for example, the Subcommittee examined allegations of worker rights violations in EPZs in the Dominican Republic, stating that "the Subcommittee

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55. Bangladesh, the Dominican Republic, Guatemala, Indonesia, Malaysia, El Salvador, Haiti, Thailand, and Sri Lanka are among the nations that have been the subject of complaints. Some of these countries were the subject of more than one petition.

The GSP Subcommittee of the Trade Policy Staff Committee (an interagency U.S. government group) is responsible for making staff-level recommendations on the disposition of worker rights petitions. As part of this process, the subcommittee publishes "disclosure statements" intended to explain the reasoning underlying the disposition of each worker rights petition. The disclosure statements, available through the Office of the USTR, exclude confidential information and deliberations by the Subcommittee.

56. Of the 11 remaining countries, three were the subject of petitions but were not accepted for full review, five country petitions were first-time submissions in 1991, and three other countries were carried over from 1990 and are currently under review. Nicaragua and Romania lost GSP status during the general review. Liberia and Sudan were removed during subsequent annual reviews. Paraguay, Chile, and the Central African Republic were suspended and subsequently reinstated in February 1991; Myanmar (Burma) remains suspended. 137 CONG. REC. S1788-89 (daily ed. Feb. 7, 1991).

57. *See* GSP SUBCOMM. OF THE TRADE POLICY STAFF COMM., GSP REINSTATEMENT REVIEWS, WORKER RIGHTS SUMMARY: CHILE (February 1991) (Report issued by GSP Information Center, Office of the U.S. Trade Representative, Washington, D.C.). Several of the specific reforms cited were the introduction and passage of a bill legalizing labor union centrals by the Chilean Congress, the de facto recognition given to the Chilean Unified Workers Central, Chile's largest labor union, and the introduction of several labor reform bills to modernize the Chilean labor code in the areas of collective negotiations, employment stability and termination, and the functioning of labor organizations.

58. The four countries accepted for full review were Panama, Sri Lanka, Mauritania, and Thailand. Of these, only Thailand has been the subject of a previous worker rights review. Bangladesh, El Salvador, and Syria are the three countries carried over from the 1990-1991 review cycle. *See* Office of the U.S. Trade Representative, Hills Announces Acceptance of 1991 GSP Petitions, August 21, 1991 (Press Release) (on file with author).

Evaluations of the implementation of the GSP worker rights provisions have been mixed. *See* DORMAN, *supra* note 8, at 15-16. Dorman's procedural and substantive analysis of the GSP program raises several important issues: the appropriateness of discretionary versus automatic review of petitions, the weights assigned to each of the five worker rights standards (assuming uneven country performance among the standards), the distinction, if any, to be made between human and worker rights, and the efficacy of the "taking steps" language in promoting sustained progress in respect for worker rights. *Id.* at 5-8; *see also* LAWYERS COMM. FOR HUMAN RIGHTS, *supra* note 8, at 11-33 (analyzing implementation of GSP program).

59. These petitions include Malaysia, the Dominican Republic, Bangladesh, and Mexico (*maquiladoras*). The Subcommittee did not accept Mexico for full review.

viewed such allegations as particularly serious given the large number and economic importance of EPZs in the Dominican Republic and the requirement of the 1974 Trade Act that worker rights be afforded in 'any designated zone' in GSP beneficiary developing countries."[60]

As part of its determination in April 1991 that the Dominican Republic was "taking steps to afford IRWRs," the Subcommittee indicated as a positive development:

> [T]he inclusion of specific language affecting the right of organization in EPZs in the draft labor code reforms recently submitted to President Balaguer. In addition, the Subcommittee noted the constructive approach of the government of the Dominican Republic to the EPZ union issue . . . evident in the original Ministry of Labor announcement reiterating the right of unions to be formed in EPZs . . . [and] in public statements by President Balaguer on February 15 supporting the right to organize in EPZs.[61]

A broad spectrum of labor unions and human rights groups filed suit against the U.S. government in March 1990, alleging failure to "enforce the GSP statute consistent with its express language and the intent of Congress."[62] The plaintiffs argued that the government violated its statutory obligation to investigate and review all petitions, that it improperly screened petitions on the basis of non-statutory factors, and that it failed to make the basis for decisions issued with respect to petitions and country determinations clear.[63] The U.S. District Court for the District of Columbia dismissed the complaint for failure to state a claim upon which relief could be granted. The dismissal cited an "apparent total lack of standards" in the GSP statute,[64] which when coupled with statutory discretion and "the President's special and separate authority in the areas of foreign policy," provided no basis for review of Presidential actions.[65] The court of appeals affirmed the lower court's judgment.[66]

Criticism notwithstanding, the GSP program continues to be the major tool used by advocacy groups for challenging worker-rights violations in beneficiary countries. Reliance on the GSP program by worker and human rights advocates will probably continue, given the potential leverage against BDCs exporting to the United States, the statute's mandatory worker-rights criteria, and a

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60. GENERALIZED SYSTEM OF PREFERENCES (GSP) SUBCOMM. OF THE TRADE POLICY STAFF COMM., 1990 GSP ANNUAL REVIEWS, WORKER RIGHTS REVIEW SUMMARY: THE DOMINICAN REPUBLIC 11 (GSP Information Center, Office of the U.S. Trade Representative, Washington, D.C., Apr. 1991) [hereinafter GSP DOMINICAN REPUBLIC REVIEW].

61. *Id.* at 13.

62. Plaintiff's Complaint at 21, International Labor Rights Educ. & Research Fund v. Bush, 752 F. Supp. 495 (D.D.C. 1990), *aff'd*, No. 90-5390, 1992 U.S. App. LEXIS 1060 (D.C. Cir. Jan. 31, 1992) (per curiam).

63. *Id.* at 21-23, 27.

64. 752 F. Supp. at 497.

65. *Id.*

66. International Labor Rights Educ. & Research Fund v. Bush, No. 90-5390, 1992 U.S. App. LEXIS 1060, *1 (D.C. Cir. Jan. 31, 1992) (per curiam) (affirming dismissal on ground of non-justiciability).

detailed process for petitioning and country reviews set forth in federal regulations.

C. *The Overseas Private Investment Corporation (OPIC)*

OPIC was established by Congress in 1969[67] as a self-sustaining government agency to promote economic growth in developing countries by supporting U.S. private investment there. OPIC's insurance and finance programs are available for new business ventures and expansions in over one hundred developing countries and specific geographic areas.[68] The two principal programs for assisting U.S. investors are political risk insurance and direct loans and loan guarantees to finance projects. OPIC will not provide assistance for projects that may have adverse effects on the U.S. economy or employment or that do not promise social and economic benefits to the host country.

The Overseas Private Investment Corporation Amendment Act of 1985 (OPIC Amendment Act)[69] further conditioned OPIC's operability on respect for internationally recognized worker rights. Section 5 of the Act states that:

> The Corporation may insure, reinsure, guarantee, or finance a project only if the country in which the project is to be undertaken is taking steps to adopt and implement *laws that extend* internationally-recognized worker rights, as defined in section 502(a)(4) of the Trade Act of 1974 (19 U.S.C. 2462(a)(4)), to workers in that country (including any designated zone in that country).[70]

The language used, except for that emphasized, is identical to that of the GSP statute, again incorporating the phrase "any designated zone." OPIC has abided by the USTR's GSP country practice determinations for countries that have been the subject of a worker rights review pursuant to the GSP statute. OPIC makes its own determinations, however, in consultation with the U.S. Departments of State and Labor, when it receives requests to remove countries that are not designated GSP beneficiaries. Since 1987, OPIC has suspended coverage eligibility for three countries outside the GSP program: Ethiopia in 1987,[71] the People's Republic of China in April 1990,[72] and the Republic of Korea in July 1991.[73]

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67. 22 U.S.C. § 2191 (1988).

68. OVERSEAS PRIVATE INV. CORP., EXECUTIVE SUMMARY (1990) (brochure).

69. 22 U.S.C. § 2191 (1988).

70. 22 U.S.C. § 2191a(a)(1) (1988) (emphasis added).

71. Amato, *supra* note 4, at 100 n.151, *citing* OVERSEAS PRIVATE INV. CORP., TOPICS 2 (Winter 1987).

72. 136 CONG. REC. E1756 (daily ed. May 24, 1990) (statement of Rep. Pease).

73. 137 CONG. REC. E2929 (daily ed. Aug. 2, 1991) (statement of Rep. Pease). In making its negative determination on South Korea, OPIC took into account the government's imposition of new restrictions on the right to strike by requiring mandatory arbitration in the country's EPZs. *See* OVERSEAS PRIVATE INV. CORP., 1991 OPIC WORKER RIGHTS REPORT ON THE REPUBLIC OF KOREA 2 (1991). In August 1989, the South Korean Minister of Labor ruled that all firms operating in South Korea's EPZs would henceforth be treated as "public businesses" and would be subject to the labor law restrictions governing "public interest" enterprises. Such enterprises are required to submit virtually all disputes to mandatory arbitration,

D. *Multilateral Investment Guarantee Agency (MIGA) and the MIGA Act*

The Multilateral Investment Guarantee Agency, an international development organization controlled through the World Bank, seeks to "encourage the flow of investments for productive purposes among member countries, and in particular to developing member countries."[74] MIGA, which began operations in 1988, performs two functions: 1) insuring investments against political risks in host countries; and 2) offering technical assistance and policy guidance to developing countries in order to encourage additional investment. The term "technical assistance" encompasses "help in promoting investment in a particular industry or project to assist in amending a country's regulatory framework for all foreign investment or in strengthening its national investment promotion agencies."[75] MIGA's decision to underwrite a particular investment is based on a determination that the proposed investment is economically sound and that it contributes to the beneficiary country's development.[76] Investments must also be consistent with the developing country's "laws, regulations and declared developmental objectives."[77]

In 1987, Congress passed the Multilateral Investment Guarantee Agency Act (MIGA Act).[78] The MIGA Act makes clear a congressional intent to ensure that MIGA guarantees do not benefit countries that fail to afford IRWRs. The MIGA Act authorizes the President to accept membership in MIGA on behalf of the United States and requires the U.S. Director of the Agency to seek the adoption of policies and procedures specifying, inter alia, that MIGA will not guarantee any investment in a country that has not taken or is not taking steps to afford IRWRs. It also directs the Secretary of the Treasury to instruct the U.S. Director to oppose any guarantee or investment in a country that has failed to afford IRWRs.[79] The MIGA Act further directs the Secretary of the Treasury to evaluate the extent to which investments were made in countries that did not afford IRWRs.[80]

The MIGA Act is more limited in scope than the other provisions discussed in this section for two reasons. First, the MIGA Act contains no language on

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effectively restricting the right to strike. Since firms whose production is dedicated to exports cannot be considered "essential" or "public interest" by any accepted international standard, the government's ruling sanctioned the application of weaker labor laws in South Korea's free export zones relative to the country as a whole. *Worker Rights in Export Processing Zones: Korea, in* 2 WORKER RIGHTS, *supra* note 7, at 109-11.

74. Convention Establishing the Multilateral Investment Guarantee Agency, Oct. 11, 1985, art. II, 24 I.L.M. 1605 [hereinafter MIGA Convention], *reprinted in* IBRAHIM F.I. SHIHATA, MULTILATERAL INVESTMENT GUARANTEE AGENCY AND FOREIGN INVESTMENT 356 (1988).

75. SHIHATA, *supra* note 74, at 202.

76. MIGA Convention, *supra* note 74, art. 12(d)(i).

77. *Id.* art. 12(d)(ii), (iii).

78. 22 U.S.C. §§ 290k to 290k-11 (1988).

79. 22 U.S.C. § 290k-2 (1988).

80. *Id.*

designated zones.[81] Second, although the U.S. Director must try to prevent the issuance of guarantees to countries that have not afforded IRWRs, the Act implicitly recognizes that other member countries may disagree with or oppose the U.S. Director's actions. The MIGA Act therefore lacks both specific focus and practical enforceability, although it does serve as a conduit for the identification of violations of worker rights.

E. *"Section 301"*

Section 301 of the Trade Act of 1974 (Section 301)[82] was designed to enforce U.S. rights under bilateral and multilateral trade agreements, and to facilitate U.S. exports through the elimination of foreign trade barriers. Section 1301 of the Omnibus Trade and Competitiveness Act of 1988 (1988 Trade Act) amended Section 301 in a number of ways; it now requires mandatory retaliation if a foreign government is found to have violated a trade agreement or if "an act, policy or practice of a foreign country is unjustifiable and burdens or restricts United States commerce."[83]

The 1988 Trade Act also amended the scope of the USTR's discretionary action. The USTR can now condition action on a country's progress in providing worker rights. Discretionary action in general may be taken if the USTR determines that "an act, policy, and practice is unreasonable or discriminatory and burdens or restricts United States commerce, and action by the United States is appropriate."[84] The Act defines "discriminatory" as including, when appropriate, "any act, policy, or practice which denies national or most-favored-nation treatment to United States goods, services or investment."[85] An act, policy, or practice of a foreign country is "unreasonable" if it constitutes a "persistent pattern of conduct" that: 1) denies workers the right of association; 2) denies workers the right to organize and bargain collectively; 3) permits any form of forced or compulsory labor; 4) fails to provide a minimum age for the employment of children; or 5) fails to provide standards

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81. Although the MIGA Act contains no language on EPZs, workers may still be protected. If a country has its GSP status revoked due to, inter alia, worker rights violations in EPZs, the U.S. Director would seek to have MIGA take comparable action.

82. 19 U.S.C. §§ 2411-2420 (1988).

83. 19 U.S.C. § 2411(a)(1)(B)(ii) (1988) (subject to specific direction of President, and to listed exceptions).

84. 19 U.S.C. § 2411(b) (1988). Discretionary action is also subject to presidential direction. The absence of statutory definition of the term "appropriate" highlights the USTR's broad discretionary powers in reviewing a country's acts, policies or practices.

85. 19 U.S.C. § 2411(d)(5) (1988). The concepts of national and most-favored-nation treatment are cornerstones of the international rules of trade. They have no bearing on the discussion of worker rights provisions incorporated in Section 301.

for minimum wages, hours of work, and occupational safety and health of workers.[86] However, the statute states that:

> [A]cts, policies and practices . . . shall not be treated as being unreasonable if the Trade Representative determines that (I) the foreign country has taken, or is taking, actions that demonstrate a significant and tangible overall advancement in providing throughout the foreign country (including any designated zone within the foreign country) the rights and other standards described [above], or (II) such acts, policies and practices are not inconsistent with the level of economic development of the foreign country.[87]

Worker rights language in Section 301 offers more flexibility than language contained in other U.S. trade statutes with respect to determinations on country practices. In addition, the requirement that an act, policy, or practice "burden or restrict" U.S. commerce sets a high threshold for petition acceptance. Finally, unlike GSP or OPIC worker rights determinations, worker rights actions under Section 301 are fully discretionary.[88] To date, no worker rights petitions have been filed with the USTR under Section 301, illustrating the difficulty its higher acceptance threshold poses for potential petitioners.

F. *Department of Labor Report on Worker Rights in EPZs*

Congress recently underscored its concern with worker rights in EPZs by including a new worker rights reporting requirement in the 1988 Trade Act.[89] Section 6306(b) of the Act directs the Secretary of Labor in consultation with the Secretary of State to conduct a biennial study of the extent to which countries recognize and enforce, and producers fail to comply with, IRWRs.[90] The legislative history of Section 6306(b) influenced the Department of Labor's decision to focus its first report on the provision of worker rights in export processing zones:[91]

> It is the Committee's intent that this study and report identify so-called free trade or export processing zones where they exist and describe the status of internationally recognized worker rights within them, including the extent to which those rights differ in law or practice from those generally existing in those countries.[92]

The decision of the Department of Labor to focus on the provision of worker rights in EPZs also reflected ILO concerns about differentially-lower standards in zones, and allegations of worker rights violations voiced by labor and human rights groups. The report, released in August 1990, examined the provision

86. 19 U.S.C. § 2411(d)(3)(B)(iii) (1988).

87. 19 U.S.C. § 2411(d)(3)(C)(i) (1988).

88. However, mandatory actions under both the GSP, 19 U.S.C. § 2464(c)(3)(A)(ii) (1988), and OPIC, 22 U.S.C. § 2191a(a)(3) (1988), are subject to waiver if the President determines that waiver would be in the national economic interest.

89. 19 U.S.C. § 2411(6)(d)(iii)(I)-(V) (1988).

90. 29 U.S.C. § 565(1) (1988).

91. 1 WORKER RIGHTS, *supra* note 7, at 1-2. The author participated in the preparation of this report and had primary responsibility for several country studies.

92. H.R. REP. NO. 100-40, 100th Cong., 1st Sess., pt. 5, at 95-96 (1987).

of worker rights in EPZs generally, and in case studies of EPZs in eleven countries. It found that most governments do not have special labor legislation or regulations governing EPZs. However, despite the formal application of foreign national labor laws in the zones, the study found numerous examples of efforts by governments and employers to restrict or discourage union activity.[93]

Four countries were found to have explicit legal restrictions in EPZs on the formation of unions, collective bargaining, or the right to strike.[94] It is generally assumed that governments choose to restrict these rights because they believe differentially-lower standards and the guarantee of enforced labor tranquility will serve as an added incentive to attract foreign investment. In at least six other countries, restrictive practices inhibited the provision of fundamental worker rights.[95] In three of these countries (the Dominican Republic, Jamaica, and Sri Lanka), EPZ managers denied workers access to union officials, thus depriving union leaders of the ability to organize, distribute literature to, or hold meetings with workers.[96] A comparison of unionization rates in a country's EPZs with the rates in the country as a whole demonstrates the chilling effect of such practices. As of 1990, Sri Lanka's 129 EPZ firms had no unions, while Sri Lanka as a whole had a unionization rate of about thirty percent.[97] Likewise, none of the 220 companies occupying the eighteen zones in the Dominican Republic was unionized as of mid-1991, even though employment in the zones accounted for over half of all manufacturing jobs in the country in 1989.[98]

Several recent studies identify EPZs as a growing global phenomenon and as a spearhead for implementing export-led industrialization strategies through the development of labor-intensive industries.[99] While fewer than ten countries had established EPZs in 1970, by 1986 over fifty countries had created

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93. 1 WORKER RIGHTS, *supra* note 7, at 7-8.

94. These countries were Turkey, Bangladesh, Pakistan, and Korea. Bangladesh suspended all labor laws in the Chittagong EPZ in 1985; the other three countries impose prohibitions or severe restrictions on the right to strike. *Id.*

95. These countries include Malaysia, India, Sri Lanka, Haiti, the Dominican Republic, and Colombia. *Id.*

96. *Id.* The study was conducted during 1989-1990. Since then, the Dominican Republic has been the subject of a worker rights review under the GSP program. A petition to review Sri Lanka was submitted and accepted as part of the 1991 review cycle. In April 1991, the Dominican Republic was found to be "taking steps to afford IRWRs" partly on the basis of anticipated progress in enforcement of freedom of association rights for workers in its EPZs. GSP DOMINICAN REPUBLIC REVIEW, *supra* note 60, at 14.

97. BUREAU OF INT'L LABOR AFFAIRS, U.S. DEP'T OF LABOR, FOREIGN LABOR TRENDS: SRI LANKA 2 (1990).

98. Between 10 and 12% of the overall Dominican workforce is unionized. *See* GREGORY K. SCHOEPFLE, U.S. DEP'T OF LABOR, LABOR STANDARDS IN EXPORT ASSEMBLY OPERATIONS IN MEXICO AND THE CARIBBEAN 3 (1990).

99. *See, e.g.*, 1 WORKERS RIGHTS, supra note 7; Jean Larson Pyle & Leslie M. Dawson, *The Impact of Multinational Technological Transfer on Female Workforces in Asia*, 25 COLUM. J. WORLD BUS. 40 (1990); ECONOMIC AND SOCIAL EFFECTS, *supra* note 2.

some 175 zones, with over one hundred more under construction or in the planning phase. Data since 1986 show accelerated growth in such countries as Mexico, the Dominican Republic, and Mauritius.[100] Regional growth has been especially strong in Asia, Mexico, and the Caribbean.[101]

IV. Women and Worker Rights in Export Processing Zones

While the size of EPZ work forces vary considerably from country to country,[102] young women between the ages of sixteen and twenty-five typically constitute the vast majority of production workers. For example, women make up seventy percent of total EPZ employment in the Dominican Republic, seventy-five percent in Taiwan, ninety percent in Barbados and Jamaica, and seventy percent in Malaysia.[103] Further, because these are percentages of total employment—including technical, managerial and administrative personnel—they tend to understate the proportion of females in production employment where women are overwhelmingly concentrated.

In Malaysia, for example, where EPZs account for twenty-five percent of manufacturing employment, women make up eighty-one percent of electrical and electronics employment and seventy-three percent of textiles and garment employment. These two industries account for the bulk of employment in a wide cross-section of EPZs.[104] In Mexico, however, where *maquiladoras* accounted for about fifteen percent of manufacturing employment in 1989, the female share of the production work force had declined from almost eighty percent in 1976 to sixty-one percent in 1989. This trend has been attributed to the increasing importance of heavy manufacturing activities (such as in the transportation equipment sector) relative to light assembly jobs, increased employment of males in these "traditionally male" jobs, and increased employment of male technicians and white-collar workers.[105]

Though we have no precise current figures on global EPZ employment, a conservative estimate would place the total at over three million workers.[106]

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100. 1 Workers Rights, *supra* note 7, at 3.

101. *Id.*

102. There are nearly 400,000 workers in Mexican *maquiladoras*, and over 80,000 each in EPZs in Malaysia, the Dominican Republic, and Mauritius. Panama, Pakistan, and Bangladesh have fewer than 10,000 workers each in their EPZs. China's "special economic zones," which have a number of traits in common with the classic EPZ, have an estimated work force of between 1.5 and 2.5 million. *Id.* at 5.

103. *Id.* at 6.

104. *Worker Rights in Export Processing Zones: Malaysia*, in 2 Worker Rights, *supra* note 7, at 140-41.

105. *Worker Rights in Export Processing Zones: Mexico*, in 2 Worker Rights, *supra* note 7, at 91;. *see also* Schoepfle, *supra* note 98, at 2, 3; Leslie Sklair, Assembling for Development: The Maquila Industry in Mexico and the United States 175-77 (1989).

106. This is the author's estimate and includes 1.5 million workers in China's "special economic zones." Estimates on zone employment in Mexico and the Caribbean nations are derived from data in Schoepfle, *supra* note 98, at 3. Estimates on zone employment in other regions are derived from data

Assuming that female production operators constitute seventy-five percent of this labor force, the total number of women in EPZs is at least 2.25 million. This estimate is necessarily conservative, insofar as it excludes work subcontracted out by zone firms (the vast majority of which are multinational corporations) to locally-owned businesses.[107] Furthermore, the number of women working in zones or in single-firm equivalents conveys only a narrow estimate of women working in the export sector of any given country.

Regardless of the measure used, the data underscore the critical role working women play in the export sector of developing countries. In their recent study, *The Impact of Multinational Technological Transfer on Female Workforces in Asia*, Professors Pyle and Dawson noted:

> Full recognition has not been given to the central role women have played in the achievement of high growth rates in Asian countries, inasmuch as they constitute the dominant proportion of the MNC [multinational corporation] manufacturing workforce . . . . In general, MNCs have shown a preference for young single women, often migrants from rural areas, who tend to be unaware of their legal and trade union rights and who are more amenable to discipline and less likely to cause industrial strife. Rapid turnover has been encouraged to keep wages depressed.[108]

The Department of Labor's study on worker rights in EPZs also corroborated MNCs' hiring preferences for young female workers. In Malaysia, for example, multinational electronics and electrical firms regularly advertise openings for "female production operators" and often specify an age range of between seventeen and twenty-five.[109] Advertised positions for skilled workers such as technicians, supervisors, and line leaders typically specify neither gender nor age requirements.[110]

Pyle and Dawson argue, as their central thesis, that MNCs' selection of production and managerial technologies, with their overarching goal of minimizing unit labor costs, have had distinctly negative consequences for female workers in export processing zones. Moreover, they assert, by alienating workers who are also potential consumers, MNCs undermine the goal of establishing markets in EPZ host countries. The authors maintain that in relentlessly pursuing lower manufacturing costs, MNCs have "consistently employed production processes that are hazardous to workers' health and safety, and managerial techniques that are in many respects exploitative."[111] They cite the utilization of low-wage strategies predicated on gender-based wage differ-

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in ECONOMIC AND SOCIAL EFFECTS, *supra* note 2, at 162-63; 1 & 2 WORKER RIGHTS, *supra* note 7, *passim*.

107. *See* Pyle & Dawson, *supra* note 99, at 42. The authors note that employment figures for zones in Asia are also understated by the number of women producing as home workers for multinational enterprises or their subcontractors.

108. *Id.* at 42, 43.

109. 1 WORKER RIGHTS, *supra* note 7, at 5.

110. *See, e.g., Worker Rights in Export Processing Zones: Malaysia, in* 2 WORKER RIGHTS, *supra* note 7, at 156 (Malaysia Annex C) (reproducing advertisement placed by multinational corporation).

111. Pyle & Dawson, *supra* note 99, at 41.

entials, high production quotas, assembly line speed-ups, and forced overtime.[112] Even when structural changes such as automation raise skill levels and wages and tend to upgrade safety conditions, the authors found evidence of new methods to keep remuneration low: job enlargement at the same wage, added shifts with no overtime, and firing workers and then rehiring them at entry-level wages.[113]

Pyle and Dawson's characterization of working conditions and managerial practices prevalent in Asian EPZs would certainly be disputed by some observers and would assuredly not withstand generalization to EPZs in all countries or regions.[114] For example, the authors correctly cite a dearth of statistical and epidemiological data on occupational illnesses and injuries in developing countries. Anecdotal evidence and some documentation support allegations of health and safety violations in some industries and zones, but it would be impossible to assert that compliance in zones was generally inferior to compliance in the rest of the foreign national territory.[115] Average wages and compensation in zones also vary among countries and industries, sometimes exceeding and sometimes falling below comparable foreign national averages. Nonetheless, recent research supports the claim that the high turnover characteristic of zones may be a function of wage levels that fail to meet subsistence requirements, especially of women with dependents.[116]

What are the implications of worker rights provisions in U.S. trade laws for female workers in EPZs? Insofar as women constitute the majority of the EPZ production work force, the potential leverage made available through the application of IRWR provisions to zones may provide a unique boon to women striving to attain fundamental worker rights, such as the freedom to form a union or to negotiate a contract to improve wages, hours, and other working conditions. The operational record of worker rights-linked programs has to date demonstrated a willingness by administrative agencies to accord due weight

112. *Id.* at 44.

113. *Id.* at 41-46.

114. Comparisons of working conditions in zones to conditions outside of zones are, in any event, contingent on the point of comparison. Conditions in the formal sector (consisting typically of capital-intensive, larger enterprises generally following government labor laws and other regulations) of developing countries will tend to be better than in the informal sector (small, often family-owned, labor-intensive businesses usually outside the purview of foreign national regulation), making any comparisons to conditions in EPZs relative.

115. See discussion and sources cited in Pyle & Dawson, *supra* note 99, at 44-45. For instance, many allegations have been levelled at occupational safety and environmental health conditions in Mexico's *maquiladoras*, but it would be difficult to assert that conditions in the *maquiladora* sector are generally worse than conditions elsewhere in Mexico. *See, e.g.*, NATIONAL SAFE WORKPLACE INST., CRISIS AT OUR DOORSTEP: OCCUPATIONAL AND ENVIRONMENTAL HEALTH IMPLICATIONS FOR MEXICO-U.S.-CANADA TRADE NEGOTIATIONS 3-4 (1991); LESLIE KOCHAN, THE MAQUILADORAS AND TOXICS: THE HIDDEN COSTS OF PRODUCTION SOUTH OF THE BORDER 10-12 (1989).

116. SKLAIR, *supra* note 105, at 178-79.

to statutory language on "designated zones" when reviewing country practices and eligibility for participation in preferential programs.

It is beyond the scope of this paper (and in any event, too soon) to evaluate the impact of worker-rights linked trade laws on conditions for women workers in EPZs. The worker rights review process has helped spotlight the status of rights and working conditions in these zones. The publicity generated by the filing of a petition to review a country's worker rights practices in EPZs may well raise the profile of workers' and, in particular, female workers' concerns, and it may prompt bona fide efforts to remedy alleged problems.

On the other hand, the benefits that may accrue to some female workers by virtue of the statutory reference to "designated zones" are both circumstantial and circumscribed. These benefits are circumstantial for several reasons. First, they are driven by a process that is by nature politicized, involving negotiations between advocacy groups and administrative agencies, as well as government-to-government negotiations, when millions of dollars' worth of trade or investment benefits are perceived to be at risk.[117] Second, only a narrow group of female workers in a particular phase of their productive work lives may be able to take advantage of these improvements. Barring major changes in the structure of EPZ production and managerial technologies, high labor turnover (for reasons of either demand or supply) is likely to be a continuing characteristic of zone employment patterns.[118]

Potential benefits for female workers in EPZs are also circumscribed by the flexibility permitted in the application of worker rights standards,[119] and, above all, through the omission of statutory language on discrimination. Lower working standards or conditions based on gender simply cannot be addressed under worker rights-linked U.S. trade statutes as long as these standards meet a minimum threshold of acceptability commensurate with a country's level of development. The same is true for a host of other issues critical to the welfare of women workers: equal pay for equal work, maternity leave, child care, job

117. This process assumes that a petition or request (in the case of OPIC) is taken up for investigation and review.

118. As discussed earlier, on the demand side, MNCs have expressed clear hiring preferences for young women in a narrow age range. Issues of age discrimination, job tenure, and job security fall outside of the scope of IRWRs as defined in U.S. trade laws. On the supply side, high turnover may reflect dissatisfaction with any number of work-related factors, also beyond the scope of the statutes.

119. This is especially true of minimum-age standards for employment and acceptable conditions of work. To give one hypothetical example: the U.S. statutory threshold for "acceptable conditions of work with respect to minimum wages" (19 U.S.C. § 2462(a)(4)(E) (1988)) could arguably be met through the establishment of industry-specific or occupation-specific minimum wages (which are not incompatible with ILO standards in this area). Since certain industries such as textiles/garments and electrical/electronics are often concentrated in EPZs, the effect might be differentially-lower minimum wages in EPZs, which, because they would be "masked" as industry-specific floors, meet the U.S. statutory test. If these lower minimum standards were found to have a "disparate impact" on women, the ILO might view them as an indirect form of discrimination. U.S. trade laws, however, do not address discrimination.

security, job tenure, sexual harassment, and equal opportunity for job advancement.

V. Conclusion

Under optimal circumstances, U.S. international trade laws containing worker rights provisions may afford indirect benefits to some female workers previously unprotected by their nations' laws. However, U.S. trade laws cannot guarantee that benefits will be institutionalized on the foreign national level, nor do they begin to address the multiplicity of obstacles faced by so many working women in developing countries struggling to support themselves and their families. Statutory language making employment discrimination an actionable criterion under worker rights-linked trade laws could, in theory, afford greater protection to women workers in developing countries. However, the addition of any language on discrimination certainly would not be limited to gender discrimination alone. Making all forms of discrimination an actionable criterion would probably impose an administrative burden on the implementation of these laws that would be difficult, if not impossible, to meet under current resource constraints. Thus, the inclusion of anti-discrimination language should not be viewed as a clear-cut panacea to the problems faced by female workers in developing countries.