

INTERNATIONAL LABOR RIGHTS AND THE SOVEREIGNTY QUESTION: NAFTA AND GUATEMALA, TWO CASE STUDIES

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INTRODUCTION

Worker rights advocates in trade unions, human rights groups, and other non-governmental organizations (NGOs) have played an increasingly important role in promoting internationally established fair labor standards as a factor in international trade.¹ Particularly in the United States, recent developments have widened the scope for action on labor rights in a transnational economy.² Advocates of international fair labor standards have challenged the traditional right of countries to address their labor laws and labor relations as solely internal matters.³ They have sought to constrain the right of multinational corporations to implement labor policies based solely upon the laws of each nation where they operate, especially where laws are designed to repress rather than protect workers,⁴ and provide a competitive edge in international trade.⁵

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1. See JOHN CAVANAGH ET AL., INTERNATIONAL LABOR RIGHTS EDUCATION AND RESEARCH FUND, *TRADE'S HIDDEN COSTS: WORKER RIGHTS IN A CHANGING WORLD ECONOMY* 41-43 (1988) [hereinafter *TRADE'S HIDDEN COSTS*] (explaining the origins of the promotion of worker rights in international trade); see generally UNITED STATES DEPARTMENT OF LABOR, *LABOR STANDARDS AND DEVELOPMENT IN THE GLOBAL ECONOMY* (Stephen Herzenberg & Jorge F. Perez-Lopez eds., 1990) [hereinafter *LABOR STANDARDS*] (providing a comprehensive introduction to issues of worker rights in global trade); Terry Collingsworth, *American Labor Policy and the International Economy: Clarifying Policies and Interests*, 31 B.C. L. REV. 31 (1989) (analyzing and defending international labor rights advocacy).

2. See *TRADE'S HIDDEN COSTS*, *supra* note 1, at 42.

3. See *TRADE'S HIDDEN COSTS*, *supra* note 1, at 54-59 (recommending increased publication of foreign labor rights violations and the consideration of these violations when the United States conducts trade negotiations).

4. See *TRADE'S HIDDEN COSTS*, *supra* note 1, at 28-40 (reviewing repressive labor laws and practices in Haiti, Chile, South Korea, Guatemala, Taiwan, and South Africa).

5. Rep. Don J. Pease, *Preface to TRADE'S HIDDEN COSTS*, *supra* note 1, at viii

Opponents of international fair labor standards contend that each nation has the sovereign right to order its labor relations in accordance with domestic economic policies and development strategies.⁶ Most labor laws reflect this domestic approach.⁷ United States domestic regulations and laws, for example, regulate union organizing, collective bargaining, and other features of labor-management relations, and also set wage and hour levels, occupational safety and health rules, and other minimum workplace standards.

As the United States has applied worker rights provisions of its trade laws to other countries, some leaders in those countries have responded with charges that the United States acts hypocritically.⁸ They further contend that the United States Government fails to ratify most of the Conventions of the International Labour Organisation (ILO)⁹ and is

(arguing that countries which trade with the United States and deny basic labor rights to their citizens are engaging in unfair competition). Labor rights advocates argue that countries and corporations can gain a competitive advantage by employing "social dumping" tactics, such as banning strikes or independent union organizing, holding wages below a genuinely fair return on the workers' productivity, or permitting forced labor or child labor. *Id.*

6. See Gary S. Fields, *Labor Standards, Economic Development and International Trade*, in LABOR STANDARDS, *supra* note 1, at 19, 31-32 (stating that raising trade-linked international labor standards may conflict with a country's economic objectives and likely will protect one part of the workforce at the expense of another).

7. See *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 143-44 (1957) (declaring that United States labor law "is concerned with industrial strife between American employers and employees"). In *Benz*, the Supreme Court held that the Labor Management Relations Act of 1947 did not cover labor disputes between a foreign ship and its foreign crew and dismissed a claim by a foreign sailor to enforce worker rights under United States law while in a United States port. *Id.*

8. See Karl Schoenberger, *The Model Here Isn't America*, L.A. TIMES, Jan. 30, 1992, at A1 (quoting Malaysian Prime Minister Mahathir Mohammed's statement to a group of American businessmen that "[t]he hedonistic materialism of present (Western) models [of development] is not for us."); see also Paul Lewis, *Splits May Dampen Rights Conference; Some Standards Don't Apply to Third World, It Says*, N.Y. TIMES, June 6, 1993, at A1, A14 (reporting statements that "different cultures have different human rights standards while insisting that developing countries also have an absolute right to assistance with their economic development").

9. See EDWARD POTTER, FREEDOM OF ASSOCIATION, THE RIGHT TO ORGANIZE AND COLLECTIVE BARGAINING: THE IMPACT ON U.S. LAW AND PRACTICES OF RATIFICATION OF ILO CONVENTIONS NO. 87 AND NO. 98 (1984). A specialized agency of the United Nations, the ILO is the principal multilateral body devoted to labor rights and labor standards. While its conventions and recommendations reflect consensus among government, employer, and trade union representatives to annual ILO conferences, the ILO has no power to enforce the standards that it sets. See Stephen I.

itself guilty of widespread labor rights violations.¹⁰

Labor rights advocates in the United States and allied organizations abroad attempting to establish international fair labor standards run up against traditional notions of sovereignty in formulating national labor policies and development strategies. In the same way that entrenched sovereignty principles gradually yielded to international *human* rights claims after World War II,¹¹ sovereignty is now being challenged by claims of international *labor* rights in the field of employment standards and industrial relations.

This Article seeks to illuminate this challenge to sovereignty in two case studies of labor rights advocacy. Part I sets the stage with an overview of the growing importance of labor rights and labor standards as the world economy shifts from a nation-based economy to a single, global economy. Part II examines the case studies: the North American Free Trade Agreement (NAFTA) and Guatemala. NAFTA is a case study of advocacy to establish fair international labor standards. The

Schlossberg, *United States Participation in the ILO: Redefining the Role*, 11 COMP. LAB. L.J. 48-49, 57-58 (1989) (providing a brief history and description of the ILO and discussing the role of the United States in the ILO's development); see also DAVID A. MORSE, *THE ORIGIN AND EVOLUTION OF THE I.L.O. AND ITS ROLE IN THE WORLD COMMUNITY* (1969) (providing a historical overview of the ILO). The United States has ratified eleven of 174 ILO Conventions, seven of them relating to conditions in the maritime industry. Of the rest, one ratification concerned approval of ILO constitutional changes. The other three are of wider significance: Convention No. 144 on Tripartite Consultations, committing to government-business-labor consultation on labor affairs (ratified 1988); No. 160 on Labor Statistics, standardizing statistical reporting requirements and measurement methods (ratified 1990); and, most significantly, No. 105 on forced labor (ratified 1991). United States multinational corporations acceded to ratification of Convention No. 105, given the universality of strictures against forced labor, but strongly resisted United States ratification of ILO Conventions favorable to trade unions.

10. See *International Union Report Places U.S. Among Violators of Basic Labor Rights*, 7 Lab. Rel. Wk. (BNA), at 441 (May 5, 1993) (reporting that the International Confederation of Free Trade Unions cited the United States as one of 87 countries violating fundamental trade union rights as recognized by the Conventions of the International Labour Organisation in its "Annual Survey of Violations of Trade Union Rights"); *International Unions Accuse Food Lion of Unfair Practices in United States*, 7 Lab. Rel. Wk. (BNA), at 577-78 (June 16, 1993) (reporting that Food Lion, a United States subsidiary of a Belgian retailer, is guilty of unfair labor practices and refuses to deal with trade unions).

11. See Richard B. Bilder, *An Overview of International Human Rights Law*, in *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* 4-5 (Hurst Hannum ed., 2d ed. 1992) (describing the emergence of universal human rights after World War II).

Guatemala case study exemplifies advocacy by U.S. labor rights supporters on behalf of workers and trade unions in Guatemala, where recourse is sought through worker rights provisions in U.S. trade laws and through a litigation strategy that views U.S. courts as a forum for asserting international labor rights claims.

I. THE GROWING IMPORTANCE OF WORKERS' RIGHTS IN INTERNATIONAL TRADE

As the world moves toward a global economy, differences in labor standards, worker organization, and labor relations policies among countries at varying levels of development become critical variables in trade and investment decision making. The NAFTA and Guatemala labor rights cases that are the focus of this Article do not arise in a vacuum: these cases arise in a context of increasing importance of labor rights on the international agenda.¹²

A. ORGANIZED LABOR, TRADE, AND INVESTMENT PATTERNS

In many countries, organized labor movements play an important role in influencing trade and development strategies. For example, workers and unions often mount sharp resistance to austerity and privatization policies imposed on their governments by the World Bank, the International Monetary Fund (IMF), and other global lending agencies.¹³

12. The United States has recognized the importance of labor rights by linking them to preferential treatment for developing countries in trade programs. Labor rights provisions in U.S. trade laws specify five "internationally recognized worker rights" whose observance conditions a country's beneficiary trade status with the United States:

- (A) the right of association;
- (B) the right to organize and bargain collectively;
- (C) a prohibition on the use of any form of forced or compulsory labor;
- (D) a minimum age for the employment of children; and
- (E) acceptable conditions of work with respect to minimum wages, hours of work, work, and occupational safety and health.

19 U.S.C. § 2462(4) (1988).

13. See, e.g., James Brooke, *Brazil Ignores Protests and Begins to Privatize*, N.Y. TIMES, Oct. 25, 1991, at D2 (reporting on outbreaks of violence in protest of Brazil's privatization plan); Shelley Emling, *Latin Labor Strife Expected to Intensify*, J. COM., Dec. 30, 1991, at A1 (reporting that Central American governments will "lock horns" with labor organizations over plans to sell inefficient state enterprises to pay back foreign debts to international lenders); *Job Protests in Argentina*, N.Y. TIMES, Sept. 17, 1991, at D5 (stating that thousands of employees of state-owned banks had gone on strike to protest privatization plans which they feared threatened their jobs).

Traditional union tactics of organizing, bargaining, and striking also have important effects on trade and investment. Korean workers, after decades of suppression by military governments, countered the suppression with a broad movement of strikes in the 1980s and organizing campaigns that transformed Korea's export base.¹⁴ This movement forced sharp salary increases and challenged management's autocratic control of the workplace.¹⁵ Companies retaliated by moving operations to Thailand, Malaysia, Central America, and other lower-cost export processing areas.¹⁶ As turmoil continued to jeopardize the stability desired by international investors, the Korean government responded by launching new crackdowns on organized labor.¹⁷ Like Korea, the Malaysian Government intervened by prohibiting independent, freely-chosen unions in the growing semiconductor industry. This measure created investment problems in Malaysia and placed the government in a precarious situation. If Malaysia continued to prohibit the formation of national unions, the United States considered imposing trade sanctions for labor rights violations. If Malaysia lifted the ban on genuine unions, United States-based multinational companies threatened to leave.¹⁸ Political reform and union tactics presented governments with difficult questions on how to address labor rights in the context of international trade.

14. See generally GEORGE E. OGLE, *SOUTH KOREA: DISSENT WITHIN THE ECONOMIC MIRACLE* 115-53 (discussing the Korean labor movement from 1987 to 1989).

15. See Steven R. Weisman, *Korea's Boom Slows Just a Bit; Labor Unrest Jolts A Surging Economy*, N.Y. TIMES, June 10, 1989, at 35-36 (describing strikes and salary demands, and their impact on the Korean economy).

16. See Peter Maass, *Foreign Firms a Target in South Korea*, WASH. POST, May 21, 1989, at H3 (describing plant shutdowns and relocations by U.S. firms in Korea).

17. See IMF Welcomes ILO Adjudication Calling for Worker Rights in Korea, INT'L METALWORKERS FED. No. 4, Mar. 22, 1993 (press release) (describing ILO findings of continuing worker rights violations in Korea).

18. See Jeyamalar Kandiah, *National Union's Out; Electronic Workers Can Form Only In-House Unions: Kim Sai*, STAR (Kuala Lumpur), Oct. 20, 1988 (stating that the Malaysian Government announced that electronic workers could form in-house unions but not a national union); see also International Labor Rights Education and Research Fund, *Petition Before the United States Trade Representative for Malaysia's Violations of the Worker Rights Provision of the Generalized System of Preferences*, June 1, 1990 (requesting that Malaysia's status as a beneficiary of the Generalized System of Preferences be terminated because Malaysia's non-compliance with worker rights standards).

B. WORKER EXPLOITATION AND DISCRIMINATION IN THE WORKPLACE

1. Child and Forced Labor

A tactic that may affect investment and directly provide a country with a competitive advantage in international trade is the exploitation of workers. For example, the ILO¹⁹ determined that the exploitative use of child labor was a growing factor in world trade,²⁰ and several media reports in recent years have substantiated these accusations.²¹ The use of children younger than age thirteen to produce clothing, hand-woven carpets, and other products in India, Pakistan, Bangladesh, and other Asian countries has provoked legislation in Congress to outlaw the importation of goods produced in this manner into the United States.²²

The United States also has disapproved of countries that employ prison or forced labor. The use of prison labor in China to manufacture goods for the United States market has led to congressional challenges to China's most favored nation (MFN) trade status.²³ Similarly, charges of forced labor of Haitian sugar cane cutters in the Dominican Republic has prompted the United States to threaten export sanctions.²⁴ Finally,

19. See *supra* note 9 (discussing the functions and effectiveness of the ILO).

20. See INTERNATIONAL LABOUR ORGANISATION, WORLD LABOR REPORT 13 (1992) (noting that hundreds of millions of children are at work throughout the world). As many as eleven percent of the children in various Asian countries, twenty percent of the children in certain African countries, and up to twenty-six percent of the children in some Latin American countries are members of the workforce. *Id.*

21. See, e.g., Edward A. Gargan, *Bound to Looms by Poverty and Fear, Boys in India Make a Few Men Rich*, N.Y. TIMES, July 9, 1992, at A8 (illustrating the harsh conditions under which children are forced to work in India); Gina Kolata, *More Children Are Employed, Often Perilously*, N.Y. TIMES, June 21, 1992, §1 at 1 (exposing the use of child labor in the United States).

22. See S. REP. NO. 613, 103d Cong., 1st Sess. § 5(a) (1993) (prohibiting the entry into the United States market of products from industries suspected of using child labor).

23. See Daniel Southerland, *China Said to Still Use Forced Labor: Report Contends Exports Violate Pact, Threaten Favored Trade Status*, WASH. POST, May 19, 1993, at F3 (reporting that the Clinton Administration was contemplating the revocation of China's most favored nation status in part because of China's continued illegal exportation to the United States of goods produced by forced labor).

24. See LAWYER'S COMMITTEE FOR HUMAN RIGHTS, A CHILDHOOD ABDUCTED: CHILDREN CUTTING SUGAR CANE IN THE DOMINICAN REPUBLIC 77-80 (1991) (explaining that the United States Trade Representative nearly revoked the Dominican Republic's trade preference status under the General System of Preferences and the

millions of workers around the world are offered advance payments of salary and then held in debt bondage by their employers.²⁵

2. Discrimination and Additional Worker Abuses in Developing Countries

Claims of discrimination in the workplace also have contributed to the recognition of labor rights as an international dilemma. Apartheid in South Africa, for example, has been a target of trade sanctions for many years. Workplace discrimination against Black South Africans prompted anti-apartheid advocates in the United States to promulgate the Sullivan Principles, which stated that U.S. corporations voluntarily should enforce non-discrimination practices in their operations in South Africa.²⁶ In 1986, Congress passed more expansive, mandatory sanctions.²⁷

The massive transfer of operations from developed to developing countries in the garment, manufacturing, and electronic assembly industries²⁸ has led to widespread claims of sex discrimination against women workers, who make up the majority of the workforce in these factories.²⁹ Seen as submissive to male authority, women workers are

Caribbean Basin Initiative, because it was alleged that the country was not adhering to basic international standards of worker rights); NATIONAL COALITION FOR HAITIAN REFUGEES, AMERICAS WATCH, *A TROUBLED YEAR: HAITIANS IN THE DOMINICAN REPUBLIC* 5 (1992) (attacking the failure of the United States to use its influence as the Dominican Republic's largest trading partner to protect the basic human rights owed to the Haitian workers).

25. See INTERNATIONAL LABOUR ORGANISATION, *WORLD LABOR REPORT* 11 (1993) (explaining that, due to low wages and practices that require payments from laborers for tools and fine workers for unsatisfactory work, laborers are never able to repay their debts); see also Molly Moore, *Casting Off the Caste System; Indian Movement Teaching Bonded Laborers to Rebel*, WASH. POST, Nov. 17, 1992, at A1 (providing specific examples of debt bondage in India).

26. See Daniel Pink, *The Valdez Principles: Is What's Good for America Good for General Motors?*, 8 YALE L. & POL'Y REV. 180, 182-85 (1990) (outlining the Sullivan Principles and discussing their success in achieving certain improvements in working conditions).

27. Anti-Apartheid Act of 1986, 22 U.S.C. §§ 2151(d), 5001-5116 (1988).

28. See JOSEPH GRUNWALD & KENNETH FLAMM, *THE GLOBAL FACTORY: FOREIGN ASSEMBLY IN INTERNATIONAL TRADE* 217-37 (1985) (differentiating the means of production in the semiconductor industry in the developing world from that in the industrial world).

29. See Kathryn B. Ward, *Women in the Global Economy*, in 3 WOMEN AND WORK: AN ANNUAL REVIEW 28-32 (Barbara A. Gutek, Ann H. Stromberg & Laurie Larwood eds., 1988) (discussing economic subjugation of women in the global assem-

thought to be hostile to labor unions and are vulnerable to sexual exploitation by supervisors.³⁰

In addition to discrimination in the workplace, payment of minimum wages, excessive working hours and poor occupational health and safety standards also can affect trade and investment patterns. During the fall of 1992, United States television shows *60 Minutes* and *Nightline* broadcast dramatic revelations of United States government assistance to Central American countries luring businesses from the United States.³¹ In one telling sequence, a hidden camera and microphone at a trade show sponsored by the United States Agency for International Development (AID) recorded representatives of Honduras, El Salvador, and Guatemala underbidding each other with minimum wage quotes, beginning at ninety cents and falling to fifty-seven cents per hour.³² The controversy became a potent issue in the 1992 U.S. presidential campaign³³ and provoked immediate congressional action ordering AID to halt such assistance.³⁴

bly line).

30. See M. PATRICIA FERNÁNDEZ KELLY, *FOR WE ARE SOLD, I AND MY PEOPLE: WOMEN AND INDUSTRY IN MEXICO'S FRONTIER* (1983) (documenting the plight of female workers in the garment industry in Mexico); RACHEL KAMEL, *THE GLOBAL FACTORY: ANALYSIS AND ACTION FOR A NEW ECONOMIC ERA* 11-12 (1990) (discussing and criticizing assertions of a "natural docility" of women workers in Third World factories).

31. *Nightline: Paying to Lose Our Jobs* (ABC television broadcast, Sept. 29-30, 1992 [hereinafter *Nightline*] (reporting that money from the United States Agency for International Development is given to foreign governments to finance their promotion of a better business climate for United States manufacturers in Latin America and the Caribbean Basin); *60 Minutes: Hiring Rosa Martinez* (CBS television broadcast, Sept. 27, 1992) (documenting that the United States Government is promoting the export of textile factories to Central America and the Caribbean Basin by providing companies with low-interest loans, as well as by advertising the availability of inexpensive labor in foreign countries).

32. *Nightline*, *supra* note 31.

33. See RICHARD ROTHSTEIN, ECONOMIC POLICY INSTITUTE, *SETTING THE STANDARD: INTERNATIONAL LABOR RIGHTS AND UNITED STATES TRADE POLICY* 5 (Mar. 1993) (outlining President Clinton's campaign promises with respect to achieving uniform workplace standards and proposing various initiatives that should be pursued in order to achieve better standards for workers throughout the world).

34. See *The 1992 Campaign: In Dispute; Quayle and Gore Battle Devolves Into a Hand-to-Hand Fight About 4 Issues*, N.Y. TIMES, Oct. 14, 1992, at A19 (describing the congressional response to the AID program in Central America); David Judson, *Don't Scrap Foreign Aid, Redesign It, Lawmaker Says*, GANNETT NEWS SERVICE, Oct. 2, 1992 (discussing legislation to reverse the "job exports" strategy in aid to Central America).

Excessive working hours, like minimum wages, characterize life on the "global assembly line" in the developing world. Twelve- to fourteen-hour days, double shifts, overnight work to meet rush orders, and other extended workdays are not uncommon.³⁵ Hazardous job safety and health conditions are also common. In Korea, the economic "miracle" was financed, at least in part, by ignoring worker safety.³⁶ As noted above, violent rank and file reaction to such policies in the late 1980s deeply affected trade and investment patterns throughout Asia.³⁷

3. Labor Rights in Developed Nations

Discrimination and abuses in the workplace do not occur solely in developing nations. They also occur in and have major trade implications for industrialized nations. In Europe, many employers have objected to "burdensome" employee protections in European labor law, such as layoff restrictions and severance pay requirements.³⁸ In turn, major European car manufacturers such as BMW and Mercedes-Benz are beginning to erect plants in the United States, citing lower wages and weaker unions than the powerful German Metalworkers Federation.³⁹

35. See Denis MacShane, *Dreaming of the Forty-Hour Week*, 1989 NATION 658 (illustrating the excessive working hours faced by laborers in parts of Asia).

36. See Peter Maass, *S. Korea's Economic Miracle Taking Toll Among Workers; Job Safety Continues to Be Low Priority*, WASH. POST, Apr. 25, 1989, at E1 (documenting the current mistreatment of laborers in South Korea).

37. See OGLE, *supra* note 14, at 1-26 (explaining that the poor working conditions in South Korea evolved from a legacy of military rule throughout the early and middle 1900s, and left the Korean worker with a long, uphill struggle for better wages and conditions once their labor movement was established).

38. See Patrick Oster, *EC's Labor Proposals Are Causing Concern; Changes Would Raise Costs for U.S. Firms*, WASH. POST, Aug. 13, 1991, at C4 (reporting that European business owners are wary that, if enacted, the new workplace rules proposed by the European Community (EC) Council will result in higher operating costs); see also Donald C. Dowling, Jr., *Worker Rights in the Post-1992 European Communities: What "Social Europe" Means to United States-Based Multinational Employers*, 11 NW. J. INT'L L. & BUS. 564, 594-613 (1991) (outlining the twelve worker rights proposed by the EC Council in the Community Charter of Fundamental Social Rights); Roger Cohen, *European Fears of Unemployment Will Only Rise; Companies Shift Jobs to Escape High Pay*, N.Y. TIMES, June 13, 1993, at A1 (hypothesizing that the recent increase in unemployment in Europe is due in large part to the changes in workplace rules, not as a result of the overall economic depression).

39. See Doron P. Levin, *What BMW Sees in South Carolina*, N.Y. TIMES, Apr. 11, 1993, at 5 (announcing BMW's decision to open a car assembly plant in South Carolina); see also Warren Brown, *Mercedes to Build U.S. Assembly Plant*, WASH. POST, Apr. 6, 1993, at D3 (reporting that Mercedes will open a plant in the United

Additional labor problems exist in Europe. The Maastricht Treaty, which set forth an economic integration plan for Europe, has been jeopardized by Great Britain's refusal to accept the "Social Chapter" on labor rights and labor standards.⁴⁰ Upsetting its continental partners, the UK is luring enterprises by promising low labor costs and tamed unions.⁴¹ The controversy promises to continue as the opposition Labor Party pledges to adopt the Social Chapter if empowered. Even Mickey Mouse cannot evade labor rights issues in trade: the new EuroDisney park near Paris ran into protests when Disney — a leader in the United States trade surplus in international services and entertainment — imposed its personal appearance code on employees who claimed that their fundamental rights were violated.⁴²

In addition to Europe, worker rights in the United States also are sharply debated in connection with trade and investment plans. Thousands of employees are illegally fired each year for union activity.⁴³ In the United States, the right to strike, treated by most analysts as an integral feature of the right of association,⁴⁴ has been weakened by the use of permanent replacements to break strikes.⁴⁵ One case in particular,

States for the production of utility vehicles).

40. See Richard W. Stevenson, *Major Is Rebuffed in Parliament in Vote on the European Treaty*, N.Y. TIMES, July 25, 1993, at A1 (explaining the political division within the British Parliament in which Prime Minister Major opposed the passage of the Social Chapter of the Maastricht Treaty while the opposition Labor Party supported it).

41. See William Drozdiak, *French Say United Europe Promoted 'Job Poaching': Shift of Plant to Scotland Sets Off Furor*, WASH. POST, Feb. 10, 1993, at A23 (reporting that Scottish workers agreed to waive their right to strike and accepted a year-long wage freeze, which has attracted several businesses to the area from other European locations).

42. See *Disney Dress Code Chafes in the Land of Haute Couture*, N.Y. TIMES, Dec. 25, 1991, at 1 (noting the problems that EuroDisney has encountered by enacting detailed rules regarding how its employees may dress and the type of appearance such employees must uphold). Not only are the employees complaining that the rules violate their rights, but also scholars and critics are claiming that Disney is violating the privacy of its French employees by attempting to impose American culture on the French. *Id.*

43. See Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983) (discussing the high level of discriminatory discharges for union activity by U.S. employers).

44. See RUTH BEN-ISRAEL, *INTERNATIONAL LABOUR STANDARDS: THE CASE OF THE FREEDOM TO STRIKE* 71-92 (1990) (arguing that labor organizations and the right to strike are basic human rights that should be recognized by all nations).

45. The permanent replacement doctrine was enunciated by the Supreme Court in

when the Caterpillar Corporation broke a United Auto Workers strike in 1992 by threatening to bring in permanent replacements,⁴⁵ has important implications for a key export industry. The resulting bitterness,⁴⁷ in contrast to what had been an extensive program of labor-management cooperation, now jeopardizes Caterpillar's place as a premier exporter of heavy construction equipment in its competition with Japanese manufacturers.

Charges of sex, race, and national origin discrimination also mark labor relations in developed countries. The place of immigrant laborers from Southern Europe and Northern Africa has been sharply debated in France, Germany and other Northern European countries. The opening of borders in Eastern Europe has brought large-scale migration of workers seeking better-paying jobs in the West, and finding painful discrimination as well.⁴⁸ Discrimination against Hispanic workers in the United States, both undocumented migrants and United States citizens, continues to undermine worker rights in this country.⁴⁹

As the globalization of economic activity proceeds apace and capital goods and services become increasingly mobile, workers and unions are pushing for expanded rights and protections on an international scale.⁵⁰ In many cases, employers and governments are responding with demands for austerity and concessions.⁵¹ The ensuing conflicts complicate

NLRB v. Mackay Radio and Tel. Co., 304 U.S. 333 (1938).

46. See Kevin Kelly et al., *Caterpillar's Don Fites: Why He Didn't Blink*, BUS. WK., Aug. 10, 1992, at 56-57 (citing the UAW's animosity and its belief that it is engaged in a "long war").

47. *Id.*

48. See John Darnton, *Western Europe Is Ending Its Welcome to Immigrants*, N.Y. TIMES Aug. 10, 1993, at A1, A6 (describing restrictions and discrimination against immigrants seeking refuge in Western Europe).

49. See L.A. COUNTY FEDERATION OF LABOR, AFL-CIO, THE IMPACT OF THE IMMIGRATION REFORM AND CONTROL ACT ON ORGANIZED LABOR IN LOS ANGELES 18-19 (1992) [hereinafter L.A. LABOR] (discussing the extent of discrimination against immigrant workers and the effects of discrimination on the ability of unions to organize and bargain for such workers); IMMIGRATION LAW ENFORCEMENT MONITORING PROJECT, AMERICAN FRIENDS SERVICE COMMITTEE, SEALING OUR BORDERS: THE HUMAN TOLL 14-15 (1992) [hereinafter THE HUMAN TOLL] (stating that discrimination by employees against Hispanics and Asian immigrants divides and weakens unions).

50. See Don J. Pease, *New Thinking in East-West Trade*, CHRISTIAN SCI. MONITOR, April 20, 1989, at 18 (noting that recognition of economic rights of workers may be a harbinger of future international policy making).

51. See Ben Parfitt Vansun, *Mill Closures Will Idle More Than 500 Staff*, VANCOUVER SUN, Sept. 4, 1991, at D1 (stating that as a result of higher costs, a Canadi-

trade policy and development strategies, and challenge traditional patterns of sovereignty in establishing labor rights and labor standards within national borders.

Having established a framework focusing on the growing importance of labor rights in international trade, this Article now addresses two concrete cases of international labor rights advocacy. The cases show a variety of ways in which the issues arise and are dealt with by unions, employers, governments, and NGOs.

II. CASE STUDIES

This Article examines two current case studies to evaluate the effectiveness of private actors challenging traditional notions of sovereignty with respect to worker rights in the transnational economy. The first study looks at the role of trade unions and allied human rights organizations in the struggle over NAFTA. The second examines labor rights advocacy in the United States on behalf of workers and unions in Guatemala. Although the elements, strategies, and tactics of the non-governmental actors differ, they still share the same effect of raising labor rights and labor standards from a purely domestic to an international level.

A. PRIVATE ACTORS AND NAFTA

1. Contributions and Actions of Private Actors

The U.S. House of Representatives approved the North American Free Trade Agreement on November 17, 1993.⁵² The Senate gave its approval on November 20, 1993.⁵³ The congressional voting culminated an arduous legislative battle marked by splits among Democratic Party leaders,⁵⁴ and Republican and Democratic Party activists.⁵⁵ In addition,

an company is seeking concessions in areas of seniority and scheduling).

52. See Kenneth J. Cooper, *House Approves U.S.-Canada-Mexico Trade Pact on 234 to 200 Vote, Giving Clinton Big Victory; NAFTA Split Parties, Shuffled Politics As Administration Overtook Opponents*, WASH. POST, Nov. 18, 1993, at A1 (recounting Clinton's victory in winning House approval of NAFTA).

53. See Helen Dewar, *NAFTA Wins Final Congressional Test*, WASH. POST, Nov. 21, 1993, at A1 (reporting Senate approval of NAFTA by a 61 to 38 vote).

54. See Robin Toner, *Congressional Leaders: Divided Sentiments, Divided Loyalties*, N.Y. TIMES, Nov. 16, 1993, at B10 (describing politicking in Congress prior to the NAFTA vote).

55. See Dan Balz, *NAFTA Forces Each Party to Face Internal Divisions*, WASH. POST, Nov. 17, 1993, at A8 (explaining differences of opinion on NAFTA within political

unusual pro- and anti-NAFTA coalitions formed,⁵⁵ which resulted in Clinton Administration "trading" for pro-NAFTA votes.⁵⁷ The NAFTA vote also exposed conflict between the Democratic Administration and two of its chief constituencies, the organized labor movement⁵⁸ and an important faction of the environmental movement.⁵⁹

International labor rights and other social standards became pivotal issues in the debate over NAFTA.⁶⁰ These issues became critical in part due to the breadth of the coalitions formed in the United States, Canada, and Mexico to oppose NAFTA,⁶¹ and in part due to the barbed treatment of the agreement by Ross Perot, who evoked "the great sucking sound" of jobs going South in televised presidential debates and in a

parties).

56. See David E. Rosenbaum, *Splintered on Trade: 2 Unusual Political Alliances Reflect Long-Term Gain and Short-Term Fear*, N.Y. TIMES, Sept. 15, 1993, at B12 (noting "scrambled politics" surrounding the NAFTA debate in the United States).

57. See Michael Wines, *A 'Bazaar' Method of Dealing for Votes*, N.Y. TIMES, Nov. 11, 1993, at A23 (discussing "retail politics" involved in assuring NAFTA votes); Kevin Merida & Tom Kenworthy, *For Some, a Bitter NAFTA Taste: House Awaits Fallout from Bipartisan Vote Deal-Making*, WASH. POST, Nov. 18, 1993, at A1 (describing "logrolling" and "deals President Clinton cut" assuring special treatment for sugar, citrus, vegetable, beef, peanuts, appliances and other products to secure lawmakers' votes for NAFTA).

58. See Peter T. Kilborn, *Unions Gird for War Over Trade Pact*, N.Y. TIMES, Oct. 4, 1993, at A14 (reporting that unions sought to turn NAFTA into a single issue debate over labor rights); Thomas K. Friedman, *Adamant Unions Zero In on Clinton*, N.Y. TIMES, Nov. 16, 1993, at B10 (discussing union leaders' grave concerns with NAFTA).

59. See Keith Schneider, *Environment Groups Are Split on Support for Free-Trade Pact*, N.Y. TIMES, Sept. 16, 1993, at A1 (discussing rift within environmental community over NAFTA).

60. See, e.g., Anthony DePalma, *Vague Mexico Wage Pledge Clouds Free Trade Accord*, N.Y. TIMES, Sept. 29, 1993, at A1 (focusing on minimum wage concerns of NAFTA); Anthony DePalma, *Painful Lessons for Mexican Labor*, N.Y. TIMES, Nov. 13, 1993, at 39 (discussing Volkswagen's lockout as a precursor to Mexican labor problems after NAFTA); Tim Golden, *A History of Pollution in Mexico Casts Clouds Over Trade Accord*, N.Y. TIMES, Aug. 16, 1993, at A1 (reporting efforts in Mexico City to address Mexican environmental concerns).

61. See generally INSTITUTE FOR POLICY STUDIES AND ALLIANCE FOR RESPONSIBLE TRADE, NAFTA RESOURCES (1993) (providing a substantial list of anti-NAFTA coalition participants and resources). The principal United States coalition with respect to labor, trade, and development concerns is the Alliance for Responsible Trade (ART), coordinated in Washington, D.C. by the International Labor Rights Education and Research Fund (ILRERF). The Citizens Trade Campaign (CTC), also based in Washington, D.C., focuses on environmental and consumer affairs in connection with NAFTA. Canada's major coalition is the Action Canada Network, based in Ottawa; Mexico's major coalition is the National Action Network on Free Trade, based in Mexico City.

later debate with Vice President Al Gore.⁶² The alleged lack of adequate labor protections became a focal point of opposition to NAFTA,⁶³ along with news of Mexican efforts to lure deliberately businesses from the United States,⁶⁴ by revelations that claims of net gains in United States employment under NAFTA are exaggerated,⁶⁵ by continuing evidence that Mexico's political and judicial systems are rife with corruption,⁶⁶ and by reports that United States companies operating in Mexico are among the worst violators of labor rights.⁶⁷

United States NGOs have long been active on issues of labor rights and working conditions, particularly in the *maquiladora* factory zones along the United States-Mexico border. United States-based companies own hundreds of *maquiladora* plants and employ approximately half a million Mexican workers.⁶⁸ Concerns about pollution, unsafe working

62. *The '92 Vote: The 2nd Presidential Debate* (ABC television broadcast, Oct. 15, 1992); *The '92 Vote: The 3rd Presidential Debate* (ABC television broadcast, Oct. 19, 1992); *Larry King Live* (CNN television broadcast, Nov. 9, 1993).

63. See Lane Kirkland, *A Backward-Looking Deal: The Pact Is Full of Safeguards for Property Rights, but None for Workers' Rights*, WASH. POST, Nov. 12, 1993, at A25 (criticizing NAFTA for failing to account for critical labor issues in the United States and Mexico).

64. See Tim Golden, *Who's Stealing Jobs From Whom? Mexico Is Finding Free Trade Has Political Barriers*, N.Y. TIMES, Feb. 21, 1993, at E5 (finding that entrepreneurs had established an investment fund to buy American companies and move them to Mexico).

65. See Keith Bradsher, *Trade Pact Job Gains Discounted*, N.Y. TIMES, Feb. 22, 1993, at D1 (analyzing reports that claims of job gains for the United States under NAFTA do not hold up beyond 1995, and concluding that in the long term the United States will lose jobs).

66. See Enrique Rice et al., *'Trick or Trade?': For Most Mexicans, This Treaty Only Props Up One-Party Rule*, WASH. POST, Nov. 14, 1993, at C3 (arguing that reform in Mexico's civil liberties, political process, and labor rights are needed before approving the free trade agreement); Tim Golden, *Mexican Leader Asks Executives To Give Party \$25 Million Each*, N.Y. TIMES, Mar. 9, 1993, at A1 (stating that the contributions may have been improper and that such contributions are unregulated in Mexico); Tod Robberson, *In Mexico, System Turns Cops Into Robbers*, WASH. POST, Mar. 12, 1993, at A1 (reporting that bribery and theft is a way of life for Mexico City police officers due to the corruption of their "bosses").

67. See Anthony DePalma, *Report on Trade Treaty Is Critical of Companies*, N.Y. TIMES, July 28, 1993, at D2 (discussing reports that "major American companies that are staunch supporters of the North American Free Trade Agreement [have] . . . consistently violated workers' rights").

68. See Larry Weiss, *The Wealthy, Not Workers, Stand to Gain from Trade Pact*, STAR TRIB., May 16, 1992, at 17A (noting that of the half-million Mexican workers employed by U.S. companies, seventy percent are women).

conditions, and poverty-level wages have motivated the AFL-CIO and a coalition of religious and environmental groups to issue a code of conduct for United States companies in the *maquiladora* region.⁶⁹

The MAQUILADORA STANDARDS OF CONDUCT (Code) seeks to promote a safe environment, safe workplaces, and an adequate standard of living for workers.⁷⁰ The Code addresses hazardous waste disposal, chemical leaks, and transportation of toxic materials. The Code further requires disclosure to workers and communities on the use and risks of chemicals and other hazardous materials; suggests mandatory workplace safety and health committees with training for worker members; seeks to protect the right to organize and ban discrimination, including sexual harassment; and calls for fair wages, hours, and working conditions.⁷¹ The Code also would abolish barracks-style living quarters for workers, and establish a trust fund to improve housing, health care, sanitary services, and other infrastructure.⁷²

In addition to NGOs, some organizations, such as the United Electrical Workers (UE), the International Ladies Garment Workers Union (ILGWU), the Amalgamated Clothing and Textile Workers (ACTWU), and other trade unions active in organizing among Mexican-American workers in Southern California, Arizona, New Mexico, and Texas have created joint movements with independent Mexican unionists to support organizing in the *maquiladora* factories.⁷³ Women's organizations and environmental groups have forged similar movements.⁷⁴

Researchers in the legal field contributed analyses of labor laws and how they would affect the new trade agreement,⁷⁵ including a detailed

69. THE CORPORATE EXAMINER, INTERFAITH CENTER ON CORPORATE RESPONSIBILITY, MAQUILADORA STANDARDS OF CONDUCT (1991).

70. *Id.*

71. *Id.* at 3-5.

72. *Id.* at 5.

73. See, e.g., UNITED ELECTRICAL WORKERS, RADIO AND MACHINE WORKERS OF AMERICA AND FRENTE AUTENTICO DEL TRABAJO STRATEGIC ORGANIZATIONAL ALLIANCE, STATEMENT OF JOINT WORK (1991) (stating their intention to collaborate in organizing unions in *maquiladora* zone electronics plants).

74. See EQUAL MEANS, WHY IS FREE TRADE A WOMEN'S ISSUE? (1991) (noting the strides made by women in this movement); NATIONAL TOXIC CAMPAIGN FUND, BORDER TROUBLE: RIVERS IN PERIL (1991) (illustrating the environmental groups positions and actions); see generally TEXAS CENTER FOR POLICY STUDIES, NAFTA AND THE UNITED STATES/MEXICO BORDER ENVIRONMENT: OPTIONS FOR CONGRESSIONAL ACTION (1992) (listing the organizations involved in creating the NAFTA document).

75. See, e.g., Ann M. Bartow, Comment, *The Rights of Workers in Mexico* 11

study of women workers in the *maquiladora*.⁷⁶ Private sector activism on NAFTA culminated in a comprehensive Citizens' Analysis of NAFTA, released in December 1992.⁷⁷ At the same time, the Mexican Action Network published "Our Evaluation on the Formal Negotiations of the Free Trade Agreement," and the Canadian Center for Policy Alternatives issued its "Which Way for the Americas: Analysis of NAFTA Proposals and the Impact on Canada."⁷⁸

COMP. LAB. L.J. 182 (1990) (describing Mexico's Labor Code); Amy H. Goldin, Comment, *Collective Bargaining in Mexico: Stifled by the Lack of Democracy in Trade Unions*, 11 COMP. LAB. L.J. 203 (1990) (criticizing elements of Mexican labor law and practice); Susanna Peters, Comment, *Labor Law for the Maquiladoras: Choosing Between Workers' Rights and Foreign Investment*, 11 COMP. LAB. L.J. 226 (1990) (analyzing labor abuses in the *maquiladora* zone); Michael S. Barr et al., Comment, *Labor and Environmental Rights in the Proposed Mexico-United States Free Trade Agreement*, 14 HOUS. J. INT'L L. 1 (1991) (analyzing Mexican labor law, comparing labor clauses in the European Community Social Charter, and proposing a dispute-settlement mechanism for labor issues).

76. See Frances Lee Ansley, *U.S. Mexico Trade from the Bottom: A Postcard from the Border*, 1 TEX. J. WOMEN & L. 193 (1992) (describing the reaction of American women factory workers, who had lost their jobs when their factories relocated to the *maquiladora* region, at their meeting with the Mexican women who worked in the new Mexican factory zone). A University of Tennessee professor organized a delegation of women who lost their jobs to the *maquiladora* region to tour the Mexican factory zone and meet with the women workers there. *Id.* In addition to the written report, the nationwide public television program *NOVA* aired footage showing working conditions in the *maquiladora* and their effect on United States and Mexican women workers. Frances Lee Ansley, *North American Free Trade Agreement: The Public Debate*, 22 GA. J. INT'L & COMP. L. 329, 332 n.8 (1993) (noting filming of visits with women workers in the border region, aired by Public Broadcasting System on May 26 and 27, 1992).

77. See JOHN AUDLEY ET AL., U.S. CITIZENS' ANALYSIS OF THE NORTH AMERICAN FREE TRADE AGREEMENT[page] (1992) [hereinafter CITIZENS' ANALYSIS] (addressing labor rights, working conditions, employment and income, environment, agriculture, energy, economic development, consumer affairs, health and safety, dispute resolution and enforcement, human rights and democracy, and other NAFTA-related issues). Representatives of the following organizations coordinated the NAFTA analysis: the Sierra Club, United Auto Workers, Fair Trade Campaign, Institute for Policy Studies, National Lawyers Guild, Greenpeace USA, The Development Group for Alternative Policies, International Labor Rights Education and Research Fund, Economic Policy Institute, Institute for Agriculture and Trade Policy, and Public Citizen, and contained contributing materials from dozens of other citizens groups. *Id.*

78. See *supra* note 61 (describing NAFTA-related coalitions).

2. The Labor Agreement

During his successful campaign for the presidency, then-Governor Bill Clinton insisted that final approval of the NAFTA depended on further negotiation of a parallel agreement with Canada and Mexico on labor rights and labor standards.⁷⁹ Labor advocates opposed the side agreement that emerged, especially for its failure to include rights of association, organizing, and bargaining in the scope of independent review and enforcement mechanisms in the side agreement.⁸⁰

The NAFTA labor side agreement simultaneously preserves and breaches traditional sovereignty in labor matters. The side agreement affirms "the right of each Party [the United States, Canada, and Mexico] to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations."⁸¹

At the same time, the labor side agreement subjects eight areas of labor standards to the tripartite oversight system set up in the agreement.⁸² In addition, three of the eight areas come under the dispute settlement and enforcement provision of the side agreement that could result in fines of up to \$20 million⁸³ or a suspension of NAFTA trade benefits⁸⁴ against a country that has a "persistent pattern of failure . . . to effectively enforce its occupational safety and health, child labor or minimum wage technical labor standards."⁸⁵

79. See Gwen Ifill, *The 1992 Campaign: The Democrats; With Reservation, Clinton Endorses Free-Trade Pact*, N.Y. TIMES, Oct. 5 1992, at A1 (discussing then-Governor Clinton's stance on NAFTA's labor issues).

80. See JEROME I. LEVINSON, ECONOMIC POLICY INSTITUTE, *THE LABOR SIDE ACCORD TO THE NORTH AMERICAN FREE TRADE AGREEMENT: AN ENDORSEMENT OF THE ABUSE OF WORKER RIGHTS IN MEXICO* (1993) (stating the numerous possible flaws in the trade agreement and its negative effect on labor rights).

81. See North American Agreement on Labor Cooperation Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, Sept. 13, 1993, art. 2 [hereinafter Labor Side Agreement] (finalizing labor issues among the NAFTA parties).

82. The eight areas are: 1) forced labor; 2) child labor; 3) minimum wage and overtime pay; 4) employment discrimination; 5) equal pay for men and women; 6) occupational safety and health; 7) workers' compensation; and 8) protection of migrant workers. See *id.* art. 41 (defining "technical labor standards"). Section B, art. 23 of the Labor Side Agreement subjects "technical labor standards" to reporting by an Evaluation Committee of Experts. *Id.* section B, art. 23.

83. *Id.* art. 39(4)(b) and Annex 39.

84. *Id.* art. 41.

85. *Id.* art. 29(1).

The NAFTA labor side agreement fails to establish international standards that can be enforced under the agreement; to that extent, sovereignty in setting domestic labor standards is maintained. The agreement does permit, however, international oversight, and a measure of enforcement, over each country's administration of its own labor laws. This "half a loaf" disappoints advocates of binding international labor standards,⁸⁶ but sets the stage for continuing efforts to establish labor standards in international trade both in future changes in NAFTA, and in the General Agreement on Tariffs and Trade.⁸⁷

Future debates over NAFTA will continue to address such questions. Should countries limit themselves to a uniform set of minimum labor standards to be enforced separately by each government, or to a supra-national enforcement regime like that envisioned for the trade rules under NAFTA?⁸⁸ Will a lowest-common-denominator of the three country's labor laws serve as the basis for continental standards, or will the labor rights clauses of United Nations human rights instruments and human rights conventions of the ILO serve as the starting point, as recommended by labor rights advocates?⁸⁹ How will the disparity in levels of development between two advanced industrial powers and a Third World country be reconciled in matters of child labor or minimum wage requirements?⁹⁰ What standing will private parties — individual workers, trade unions, human rights organizations, and other private advocates — have to invoke labor rights protection under a NAFTA labor rights agreement?⁹¹ Will state and provincial laws be preempted

86. See LEVINSON, *supra* note 80.

87. See Steve Charnovitz, *Environmental and Labour Standards in Trade*, 15 WORLD ECONOMY 335-56 (1992) (discussing efforts to include labor and environmental standards in the GATT).

88. See Barr, *supra* note 75, at 47-49 (analyzing the structure of the European Community institutions as a possible model for enforcing policy options of NAFTA); see also CITIZENS' ANALYSIS, *supra* note 77, at 46-50 (discussing NAFTA dispute resolution provisions that alarm labor and environmental groups).

89. See CITIZENS' ANALYSIS, *supra* note 77, at 27-28 (showing how United Nations standards have obtained sufficient consensus to be adopted as standards to be included in NAFTA); Lance Compa, *International Labor Standards and Instruments of Recourse for Working Women*, 17 YALE J. INT'L L. 151 (1992) (noting that the specialized United Nations body called the International Labour Organisation is the primary forum for presenting international labor rights claims).

90. See Rothstein, *supra* note 33, at 1 (discussing the issue of standardized wages internationally).

91. See Terry Collingsworth, *American Labor Policy and the International Economy: Clarifying Policies and Interests*, 31 B.C. L. REV. 31 (1981) (noting the lack of

or permitted to stand undisturbed in the federal system of each country?⁹²

Whatever the answers to these and other issues involving labor rights and labor standards in North America, they pose direct challenges to traditional principles of sovereignty in domestic economic and development policies.⁹³ Taken as a whole, action by private labor rights advocates has opened up opportunities for new roles and new influence by workers and trade unions in the transnational economy of North America.⁹⁴

B. UNITED STATES AND GUATEMALAN LABOR RIGHTS ADVOCACY

Over the past four decades, suppression of organized labor has been a consistent feature of both open military rule and military-controlled civilian governments in Guatemala.⁹⁵ In the late 1980s and early 1990s, however, United States labor rights advocates targeted Guatemala's record through a systematic movement to expose worker rights violations and created new models for labor rights advocacy.⁹⁶ As with labor rights issues in NAFTA, these efforts initially seemed fruitless, if not

regulatory protections for workers in developing countries).

92. See CITIZENS' ANALYSIS, *supra* note 77, at 51 (discussing how federal preemption of state law becomes problematic in the application of international agreement); see generally John Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310 (1992) (concluding that national legal systems must take international institutions and treaty-making processes into account in order to preserve the validity of legal domestic application in addition to incorporating international legal norms).

93. See Theresa A. Amato, *Labor Rights Conditionality: United States Trade Legislation and the International Trade Order*, 65 N.Y.U. L. REV. 79 (1990) (discussing the goal of human rights advocates to create viable international mechanisms for the protection of labor rights).

94. See *id.* at 80 (noting that both governmental and NGOs are seeking to advance human rights via policy decisions); but see *id.* at 109 (discussing how a private party may be ineffective in gathering information due to possible inaccessibility to a particular country).

95. See JAMES A. GOLDSTON, *SHATTERED HOPE: GUATEMALAN WORKERS AND THE PROMISE OF DEMOCRACY* 5-9 (1989) (discussing the history of the repression of labor unions in Guatemala).

96. See International Commission for Central American Development and Recovery, *POVERTY, CONFLICT AND HOPE: A TURNING POINT IN CENTRAL AMERICA*, Feb. 15, 1989 (press conference) available in LEXIS, Nexis Library, Omni File (discussing how Commission members met with government officials and were able to create town meetings in certain countries, bringing together representatives of the government, private sector, labor, and church).

futile. Their innovative use of different forums in the United States for raising international labor rights claims on behalf of Guatemalans exploited the fissures in traditional doctrines of absolute sovereignty in labor relations matters, fissures that appeared under the pressure of global economic integration.⁹⁷

1. Background

A decade of blossoming for Guatemalan trade unions and popular organizations in the decade following the Second World War ended with a military takeover in 1954 sponsored by the U.S. Central Intelligence Agency (CIA) that eliminated the elected government.⁹⁸ Prior to the coup, one-fourth of the Guatemalan workforce belonged to the unions.⁹⁹ The majority of these workers were in stable, regular employment settings with minimum wage and social insurance legislation designed to protect employees.¹⁰⁰ For the past four decades, however, the military rule and military-controlled civilian governments in Guatemala have consistently suppressed organized labor.¹⁰¹ Enforcement of protective legislation languished as the wealthy land- and business-owning class, backed by the military, reasserted control over the country, its resources, and its workers.¹⁰²

97. See *AFL-CIO Report on Worker Rights Violations Abroad Submitted to Office of U.S. Trade Representative*, Daily Lab. Rep. (BNA) (July 2, 1987), available in LEXIS, Nexis Library, OMNI File (discussing how the AFL-CIO alerted the United States Trade Representative of the failure of Guatemala to abide by internationally recognized standards of worker rights based on the Generalized System of Preferences); *Excerpts From Speech of Administration Policy Toward Latin America*, NOTISUR-LATIN AM. POL. AFF., May 14, 1993, available in LEXIS, Nexis Library, OMNI File (reiterating the Clinton Administration's promotion and protection of human rights goals within the framework of a labor rights agenda).

98. See STEPHEN SCHLESINGER, *BITTER FRUIT: THE UNTOLD STORY OF THE AMERICAN COUP IN GUATEMALA* 28 (1982) (detailing Guatemala's history after the 1954 United States-backed coup); JAMES HANDY, *GIFT OF THE DEVIL: HISTORY OF GUATEMALA* (1984) (tracing the troubled political history of Guatemala from colonial times to the present).

99. See HANDY, *supra* note 98, at 124-25 (explaining the increase in tolerance and numbers of unions prior to the coup of 1954); GOLDSTON, *supra* note 95, at 7 (noting that 536 unions were registered with the Guatemalan Government at the time of the coup in 1954).

100. GOLDSTON, *supra* note 95, at 6.

101. See HANDY, *supra* note 98, at 5-9 (discussing Guatemala's repression of labor unions).

102. See Goldston, *supra* note 95, at 147-54 (discussing the failure of labor law

In the late 1970s and early 1980s, a brutal military campaign against a small guerilla movement resulted in massive human rights violations that were predominantly targeted against the indigenous peoples of the highlands.¹⁰³ Estimates of the persons killed by the army or "disappearances" exceeded 100,000.¹⁰⁴ In 1980, the police kidnapped seventeen members of the executive board of the national trade union federation who were never seen again.¹⁰⁵ Dozens of individual union leaders were assassinated, and many went into exile due to death threats.¹⁰⁶

International concern and revulsion towards these practices in Guatemala led to the inauguration of a nominally civilian government in 1986.¹⁰⁷ With the advent of the Christian Democratic government of Vinicio Cerezo came a new constitution that guaranteed the rights of workers to organize and bargain.¹⁰⁸ Guatemalan labor activists responded by increasing activity, forming new unions, and seeking to bargain with employers.¹⁰⁹ But physical assaults, threats, relaxed enforcement of labor laws, a hostile judiciary, and continued employer resistance to unions frustrated and wore down many labor activists.¹¹⁰ Trade unionists continue to face accusations of links to the guerilla movement as businesses employ tactics to frighten unionists and their co-workers to abandon union organizing.¹¹¹

enforcement to protect "a substantially illiterate working population, scarred by years of organized terror").

103. See AMERICAS WATCH, *GUATEMALA: A NATION OF PRISONERS* 104 (1984) (documenting the history and recent resurgence of human rights abuses in Guatemala with emphasis on the developments following the coup of August 1983, when General Mejia Victores seized power).

104. See *id.* at 16 (tabulating massive numbers of flagrant killings and disappearances); see also AMNESTY INTERNATIONAL, *GUATEMALA: INVESTIGATIONS INTO DISAPPEARANCES: THE INVESTIGATORY COMMISSION* (1987) (reporting on Guatemalan disappearances); AMNESTY INTERNATIONAL, *GUATEMALA TRADE UNIONISTS AND POLITICAL ACTIVISTS TARGETED UNDER THE NEW GOVERNMENT* (1991) (addressing trade unionists as targets in Guatemala); and AMNESTY INTERNATIONAL, *GUATEMALA IMPUNITY: A QUESTION OF POLITICAL WILL* (1993) [hereinafter *GUATEMALA IMPUNITY*] (documenting the continued of human rights abuses of workers and other civilians).

105. *GUATEMALA IMPUNITY*, *supra* note 104.

106. *GUATEMALA IMPUNITY*, *supra* note 104.

107. See GOLDSTON, *supra* note 95, at 11 (noting that the civilian government instituted in 1986 tolerates dissent).

108. See GOLDSTON, *supra* note 95, at 11 (discussing how the Christian Democratic Government is credited by most union leaders as easing constraints on unionizing).

109. *Goldston*, *supra* note 95, at 11.

110. See GOLDSTON, *supra* note 95, at 11 (noting that union participants continue to be persecuted, albeit to a lesser extent).

111. See GOLDSTON, *supra*, note 95, at 12 (discussing how many businesses in

In the 1990 elections, conservative businessman Jorge Serrano ousted the Christian Democratic administration and rose to the presidency in January 1991.¹¹² Serrano campaigned on promises of economic development, especially in the *maquila* sector of factories that exported apparel and electronics goods, predominantly to the United States.¹¹³ A program that began in the mid-1980s with just six factories employing fewer than 2,000 workers grew to more than 275 factories and 50,000 employees by 1992.¹¹⁴ Fierce employer opposition to union organizing, massive minimum wage and hour law violations, hazardous working conditions, and use of child labor characterized the industrial relations in this sector.¹¹⁵

2. Using the Labor Rights Clause of the GSP

United States labor rights advocates employed the Generalized System of Preferences (GSP) as a means of addressing worker rights violations in Guatemala.¹¹⁶ A 1986-87 General Review conducted by the United States Trade Representative yielded no actionable basis in Guatemala.¹¹⁷ The International Labor Rights Education and Research Fund and allied United States union, church, and human rights groups filed petitions every year to the United States Trade Representative calling for Guatemala's removal as a GSP beneficiary country unless it consistently respected labor rights.¹¹⁸

In connection with each petition, the United States coalition sent a

Guatemala view unions as being part of the government's overall plan to destroy the private sector); see also *Petition to the United States Trade Representative: Labor Rights in Guatemala* (USTR 1989); *Petition and Request for Review of the GSP Status of Guatemala* (USTR 1990); *Petition and Request for Review of the GSP Status of Guatemala* (USTR 1991); and *Petition/Request for Review of the GSP Status of Guatemala* (USTR 1992) [hereinafter *GSP Petitions*] (discussing Guatemala's troubled worker rights history and status with respect to the Generalized System of Preferences (GSP)).

112. See KURT PETERSEN, *THE MAQUILADORA REVOLUTION IN GUATEMALA* 3 (1992) (discussing the 1991 election of Jorge Serrano).

113. *Id.*

114. *Id.* at 32-33.

115. *Id.* at 3-4.

116. See 19 U.S.C. §§ 2461-66 (1988) (stating statutory rubric that United States follows with regard to Guatemala and the GSP).

117. GOLDSTON, *supra* note 95, at 156-57.

118. See *GSP Petitions*, *supra* note 111 (emphasizing the prevalence of flagrant human rights abuses in Guatemala).

delegation to meet with workers, union leaders, church leaders, United States embassy officers, and Guatemalan government officials (including, in 1988, then-President Vinicio Cerezo).¹¹⁹ United States delegations met with factory owners and plantation managers, with officials of the Guatemalan Chamber of Commerce, and with the heads of the *maquila* sector promotional group.¹²⁰ The labor rights delegation gathered information for its petition, and pressed for improved protection of worker rights.¹²¹ Similarly, invited by their United States counterparts, Guatemalan unionists sent delegations to the United States to meet with labor, church, human rights, community organizations, as well as United States Government officials to discuss labor rights and labor conditions in their country.¹²²

Although the first four GSP petitions filed by United States labor rights advocates from 1988 to 1991 carefully detailed assassinations, arrests and torture of trade union activists, repressive provisions of the Guatemalan Labor Code, and non-enforcement of worker protection laws, the interagency committee that considers GSP worker rights petitions failed to accept the petitions for review. Despite this failure, the cycle of delegations, petitions, and rejections created a dynamic of increasing pressure on the Guatemalan government and employers to avert trade sanctions for worker rights violations.¹²³ Allowing the Guatemalan

119. See *Labor Groups Say They Will Ask USTR to Deny GSP Benefits to Guatemala*, Int'l Trade Daily (BNA) (May 20, 1992), available in LEXIS, Nexis Library, OMNI File (discussing the actions of labor groups following a week-long visit to Guatemala).

120. See Trish O'Kane, *Vice President Moves to Take Power in Guatemala*, S.F. CHRON., June 3, 1993, at A8 (discussing how Chamber of Commerce leaders feared greatly the loss of United States trade benefits under the GSP equaling approximately \$160 million per year in tariff-free Guatemalan exports); see also *Charges Fly at Guatemala Trade Hearings; Labor Conditions Disputed at U.S. Government Hearings on Revoking Guatemala's Generalized System of Preference Trade Status*, WWD Capital Cities Media, Oct. 22, 1992, available in LEXIS, Nexis Library, OMNI File [hereinafter *Guatemala Charges*] (noting that Pharis Harvey, a member of the International Labor Rights and Education Research Fund, testified that violence and worker abuse mark Guatemala's *maquila* sector).

121. See *Guatemala Charges*, *supra* note 120, at 30 (discussing the actions of such United States labor groups as the AFL-CIO and the International Ladies Garment Workers Union, who pressed for United States and Guatemalan Government involvement to correct current problems).

122. *Guatemala Charges*, *supra* note 120, at 30.

123. See O'Kane, *supra* note 120, at A8 (emphasizing the importance of GSP trade benefits to Guatemala).

Government to recognize such pressure allowed the Government to claim that it was "taking steps" under the GSP to afford labor rights without making substantive changes.¹²⁴

The exchange of petitions and rejections in 1988 to 1991 also created embarrassment for the United States Government, which found itself having to devise increasingly contorted arguments to justify a refusal to accept these petitions for review.¹²⁵ Year after year, the Trade Policy Staff Committee (TPSC) pointed to the introduction of a labor code reform bill in the Guatemalan Congress as evidence of "steps" toward worker rights enhancement, despite the fact that each year the reform bill failed to pass and all parties acknowledged that it had no chance to pass.¹²⁶

In 1992, the persistent efforts of United States labor rights advocates who pursued the GSP strategy proved fruitful.¹²⁷ Following the submission of a new labor rights petition in June 1992, the Labor Rights Fund and related union, church, and human rights groups organized letter-writing campaigns among their grass roots members to the USTR urging acceptance of the petition for further review in public hearings.¹²⁸ At the urging of petitioners, over one hundred members of the United

124. See O'Kane, *supra* note 120, at A8 (noting how, in one Guatemalan analyst's opinion, meetings and negotiations that are beginning to take place between the Chamber of Commerce, political parties and the popular movement in Guatemala are only for the sake of appearances); see also PETERSEN, *supra* note 112, at 181 (discussing the requirement under the GSP that a country be "taking steps" toward worker rights to maintain beneficial tariff treatment).

125. See GOLDSTON, *supra* note 95, at 157 (discussing how the decision to reject the petitions violated the spirit of the law by not allowing information to flow to the U.S. Trade Representative as Congress intended). Furthermore, the refusal to review the petition allowed for GSP trade benefits to remain intact in the face of violations of labor rights, which clearly violated the statute. *Id.*

126. See, e.g., 1990 GSP Annual Review; Workers' Rights Review Summary; *Petitions Not Accepted for Review* (USTR 1990) (asserting that "the Government of Guatemala is actively pushing the passage of the code").

127. USTR Accepts 20 Petitions in 1992 Annual GSP Review, Int'l Trade Rep. (BNA) (Aug. 19, 1992), available in LEXIS, Nexis Library, OMNI File (denoting that the USTR accepted the GSP petition for 1992 to determine whether to suspend Guatemala's GSP benefits).

128. See Letter from Stephen Coats, Executive Director, U.S./Guatemala Labor Education Project, to Mickey Kantor, USTR (Mar. 26, 1993) [hereinafter Letter to USTR] (on file with the International Labor Rights Education and Research Fund) (urging the USTR to extend the review by six months in order to assess adequately whether the GSP benefits for Guatemala should be suspended based upon evidence that efforts to improve labor rights have been demonstrative and not substantive).

States Congress responded by writing to the USTR calling for acceptance and review.¹²⁹

Like its predecessors, the 1992 GSP labor rights petition cited continued attacks and threats against trade unionists, labor code provisions that run afoul of International Labour Organisation Conventions, non-enforcement of minimum wage and hour laws, widespread child labor abuses, and life-threatening health and safety hazards.¹³⁰ Much of the petition focused on conditions in the burgeoning *maquila* sector, with special attention given to the large number of Korean-owned apparel manufacturing factories.¹³¹ Evidence assembled by petitioners reflected massive minimum wage violations, use of child labor, health and safety hazards, and illegal crushing of efforts by workers to form unions.¹³²

The GSP petition created an uproar in Guatemala, shattering expectations that it would be treated, as in previous years, by being sloughed off with a few minor "steps" toward labor rights. Employers, government spokespersons, and the press complained of United States interference in the sovereign affairs of Guatemala, and warned of dire economic consequences if the United States sought to apply labor rights sanctions.¹³³ Guatemalan union leaders who had cooperated with United

129. See Letter from Members of Congress to Ambassador Carla Hills (July 30, 1992) (on file with the ILRERF, Washington, D.C.) (requesting the USTR to review the petition on labor rights in Guatemala).

130. See *GSP Petitions*, *supra* note 111 (noting that the 1992 petition was filed by the International Labor Rights Education and Research Fund (ILRERF), the United States/Guatemala Labor Education Project (U.S./GLEP), the United Electrical, Radio and Machine Workers of America (UE), the Amalgamated Clothing and Textile Workers Union (ACTWU), the International Ladies Garment Workers Union (ILGWU), the United Food and Commercial Workers (UFCW), the International Union of Food and Allied Workers' Associations (IUF), the International Union of Electronics Workers (IUE), the Washington Office on Latin America (WOLA), and the National Council of Churches of Christ in the U.S.A., Human Rights Office).

131. See PETERSEN, *supra* note 112, at 137 (noting that fifty of the largest *maquila* sector factories are owned by Korean investors). Promoters of export-led development in Guatemala held out the Korean "economic miracle" of the 1970s and 1980s as a model for Guatemala. *Id.*

132. See *Petition/Request for Review of the GSP Status of Guatemala Under GSP Worker Rights Provisions* 20-23, 26-28, 31-35 (June 2, 1992) (citing examples of labor violations in Guatemala).

133. See *Boicot al Gobierno o a los Guatemaltecos?* [Boycotting the Government or the Guatemalans?] EL GRAFICO (Guatemala City), June 16, 1992, at 8 (stating that "Eso es lo absurdo de los norteamericanos cuando meten sus narices en los asuntos internos de otros pueblos . . . Si hay un pueblo que ha sido a lo largo de su historia violador de los derechos humanos, ha sido los Estados Unidos.") [This is the

States labor rights delegations and had come to Washington to testify at the GSP hearing received renewed death threats.¹³⁴

Despite such fulminations, Guatemala was anxious to avoid sanctions. The government and employers moved quickly, settling a number of longstanding labor disputes and amending the labor code with provisions sought over time by trade unions.¹³⁵ Included in the reform was a simplification of union organization and strengthening of enforcement measure for violators.¹³⁶

There were three possible results from the petition/hearing process under the GSP labor rights clause. The first view determined that Guatemala was "taking steps" to afford internationally recognized worker rights, and thus would be entitled to remain in the GSP program.¹³⁷ In contrast, if Guatemala were not taking steps, it would be removed from GSP beneficiary status.¹³⁸ Lastly, Guatemala could be "pended," or placed on "continuing review" status.¹³⁹ In this last scenario, Guatemala would remain in the GSP program, but the United States would closely monitor it to ensure that Guatemala makes improvements in labor rights and working conditions.¹⁴⁰ If Guatemala failed to make such improvements, the United States would apply sanctions.¹⁴¹

Although there was progress in specific labor disputes, unions whose applications for legal recognition had been delayed for months were finding themselves quickly certified and permitted to function. Some

absurdity of the Americans, who stick their noses into the internal affairs of other countries If there is one country that has been throughout its history a violator of human rights, it has been the United States].

134. See Jared Kotler, *Keep the Economic Heat on Guatemala's Leaders*, MIAMI HERALD (int'l ed.), June 7, 1993 at 11A (claiming threats against union leaders).

135. See United States Department of State, Cable from United States Embassy in Guatemala, Labor Code Amendments: Review and Analysis (Dec. 22, 1992) (unpublished manuscript, on file with ILRERF) (listing changes in the labor code).

136. See *id.* (stating that reforms have clarified the union organization process and increased penalties for violators); see also *Guatemala: Labor Code Meets First Test*, BULL. DEPT. INT'L AFF., AFL-CIO, Feb. 1993, at 5 (reporting a case which tested positively the effectiveness of the stronger enforcement of the new labor code).

137. See Kantor *Underscores Workers Rights in announcing 1992 GSP Results*, Int'l Trade Daily (BNA) (June 28, 1993), available in LEXIS, Nexis Library, OMNI File (discussing requirements of GSP status).

138. *Id.*

139. See Nicholas Petcher, *Guatemala City*, UPI, Mar. 28, 1993, § Domestic News (discussing review options for the U.S. Government under the GSP).

140. *Id.*

141. *Id.*

difficult collective bargaining conflicts were settled with reasonable compromises and finally, labor code reforms were enacted.¹⁴² Insisting on strict, immediate application of the trade sanctions against Guatemala posed a danger to the lives of those trade unionists closely allied with United States petitioners.¹⁴³ In March 1993, petitioners and Guatemalan unionists jointly called for a six month "continuing review" in the forthcoming announcement by USTR of the decision on Guatemala,¹⁴⁴ dated April 1, 1993. For unrelated reasons, the USTR delayed the announcement of the GSP labor rights decisions. This delay, coupled with the subsequent dramatic turn of events in Guatemala, made the GSP labor rights petition a pivotal issue affecting the fate of constitutional order in Guatemala.¹⁴⁵

On May 25, 1993, President Jorge Serrano dissolved the Guatemalan Congress and Supreme Court and suspended constitutional rights.¹⁴⁶ He made charges of corruption in Congress and warned against "destabilizing" demonstration activity by trade unionists and popular organizations.¹⁴⁷ The Guatemalan military initially announced support for the *auto-golpe* (self-coup) and Serrano.¹⁴⁸ Union leaders, farmworkers, and community activists took extraordinary security measures, fearing a return to mass arrests or worse atrocities.¹⁴⁹

The Serrano self-coup only lasted one week, as domestic and interna-

142. Fabiana Frayssinet, *Guatemala: Workers Trapped in a Legal Labyrinth*, INTER PRESS SERVICE, Oct. 19, 1992.

143. See Jared Kotler, *Keep the Economic Heat on Guatemala's Leaders*, MIAMI HERALD (int'l ed.), June 7, 1993, at 11A (discussing threats to workers).

144. See Letter to USTR, *supra* note 128.

145. William I. Robinson, *Guatemala's Failed Coup d'Etat: Has the Clinton Administration Passed the Test?*, NOTISUR-LATIN AM. POL. AFF., July 9, 1993, § Summaries & Analysis.

146. Tim Golden, *Guatemalan Leader Is Pressed to Yield Power*, N.Y. TIMES, June 1, 1993, at A7.

147. Tim Golden, *Guatemala's Counter-Coup: A Military About-Face*, N.Y. TIMES, June 3, 1993, at A3.

148. *Id.*

149. David Scott Clark, *Guatemalans and the U.S. Put Pressure on President to Restore Democracy: Labor, Political and Religious Groups Mount Protests as U.S. Places Aid and Trade Benefits Under Review*, CHRISTIAN SCI. MONITOR, May 28, 1993, at 7. As one commentator reported: "Union leaders are cautious. They want to gauge how much international sympathy (and thus some measure of protection) there is for direct action against Serrano 'We're not all meeting together, and we're staying in different locations,' says Dino Arana of the Union of Guatemalan Workers." *Id.*

tional outcry forced him to abdicate.¹⁵⁰ On June 1, 1993, his vice president, Gustavo Espina Salguero, announced his intent to assume the presidency, again with the support of the military, but Espina lasted no more than five days.¹⁵¹ On June 5, 1993, the reconvened Guatemalan Congress elected Ramiro Deleon Carpio, an independent human rights special counsel and leading Guatemalan human rights advocate, as the new president.¹⁵²

While the timing may have been coincidental, the pending decision on Guatemala's GSP status proved to be a decisive policy tool for the United States in influencing the restoration of constitutional rule and the surprising accession of a promising human rights leader to the presidency.¹⁵³ At news of the coup, the United States labor rights petitioners immediately met with USTR and State Department officials and demanded a removal of Guatemala's GSP benefits unless it restored constitutional rule.¹⁵⁴ In response, the State Department issued a statement that "unless democracy is restored in Guatemala, GSP benefits are likely to be withdrawn."¹⁵⁵

Early press commentary cited the leverage in the GSP decision:

But perhaps more damaging to the local economy and Mr. Serrano's cause could be the call by U.S. labor rights groups to revoke Guatemalan industry's tariff-free access to the United States market for certain products Guatemala's labor practices are already under review by the United States Trade Representative's office Given Serrano's suspension of the right of public protest and strikes, analysts expect U.S. Trade Representative Mickey Kantor to consider terminating Guatemala's trade benefits.¹⁵⁶

150. Tim Golden, *Guatemala's Counter-Coup: A Military About-Face*, N.Y. TIMES, June 3, 1993, at A3.

151. *Guatemala: Serrano Ousted from Power, Congress elects Ramiro de Leon Carpio as President*, NOTISUR-LATIN AM. POL. AFF., June 11, 1993, § Party Politics & Elections.

152. *Id.*

153. William I. Robinson, *Guatemala's Failed Coup d'Etat: Has the Clinton Administration Passed the Test?*, NOTISUR-LATIN AM. POL. AFF., July 9, 1993, § Summaries & Analysis.

154. *See U.S. Aid Freeze on Guatemala to Stay for Now*, REUTERS, June 2, 1993, available in LEXIS, Nexis Library, CURRNT File (discussing the interruption of aid after the coup).

155. Jared Kotler, *Keep the Economic Heat on Guatemala's Leaders*, MIAMI HERALD (int'l ed.), June 7, 1993, at 11A.

156. David Scott Clark, *Guatemalans and the U.S. Put Pressure on President to Restore Democracy: Labor, Political and Religious Groups Mount Protests as U.S.*

The *New York Times* also noted the impending labor rights sanctions as critical to Serrano's fate, reporting that on the day before his abdication, "businessmen have panicked at a threat by the United States to withdraw Guatemala's trade benefits under the Generalized System of Preferences."¹⁵⁷ A controlling factor lending to Serrano's downfall was the concern of Guatemala's business leaders that rising exports to the United States and Europe could be devastated if the United States imposed the threatened sanctions. Within hours of the United States' threat to cut Guatemala's trade benefits, business leaders who had previously supported authoritarian rule began pressing government and military officials to reverse Mr. Serrano's action.¹⁵⁸

Continual pressure quickly ended the Espina presidency bid, facilitated a clean break with military-dominated governance of Guatemala's ruling elite, and resulted in the inauguration of Deleon Carpio as President on June 6, 1993.¹⁵⁹ On June 25, United States Trade Representative Mickey Kantor announced that Guatemala would remain a GSP beneficiary country at least during a six month "continuing review" period: "If countries fail to make substantial concrete progress in addressing worker rights concerns during this time, their GSP benefits will be in serious jeopardy."¹⁶⁰

In addition to the labor rights issue, the conclusion of Guatemala's Ambassador to the United States who opposed the coup is similarly important: "The true heroes of the drama are the Guatemalan people, who simply would not permit the trashing of their constitution — a constitution owed to thousands and thousands massacred, kidnapped, tortured and disappeared Their response to the coup was a virtual revolution."¹⁶¹ The GSP labor rights petition, however, was still a for-

Places Aid and Trade Benefits Under Review, CHRISTIAN SCI. MONITOR, May 28, 1993, at 7.

157. Tim Golden, *Guatemalan Leader Is Pressed to Yield Power*, N.Y. TIMES, June 1, 1993, at A7.

158. Tim Golden, *Guatemalan Counter-Coup: A Military About-Face*, N.Y. TIMES, June 3, 1993, at A3.

159. George Rodriguez, *Guatemala: Hunted Official Now Governs his Former Hunters*, INTER PRESS SERVICE, June 7, 1993, available in LEXIS, Nexis Library, CURRNT File.

160. See Office of the United States Trade Representative, Kantor Announces Results of 1992 GSP Reviews: Emphasis on Worker Rights Is Underscored, No. 93-42 (June 25, 1993) (press release).

161. Edmond Mulet, *The Palace Coup That Failed*, N.Y. TIMES, June 22, 1993, at A23.

tuitous policy instrument available at just the right time to have a pronounced effect on events in Guatemala.¹⁶² This effect demonstrated the potential power of international labor rights advocacy in a world marked by the intertwining of national and regional economies with continuing struggle for democracy and social justice.¹⁶³

3. Litigating Guatemala Labor Rights in United States Courts

As disputes over Guatemala's GSP status continued, United States labor rights advocates turned to a new strategy to help end one of the longest and most bitter labor disputes in Guatemala: using United States courts as a forum for asserting international labor claims.¹⁶⁴

The dispute arose when a United States owner of *Internacional de Exportaciones* ("Inexport", an apparel factory) fired the union leadership committee and more than one hundred union supporters after they formed a union in 1989 and demanded bargaining.¹⁶⁵ The owner claimed the unionists were communists and guerilla sympathizers¹⁶⁶ and hired armed guards to patrol the factory floor and frighten other workers into submission.¹⁶⁷ The guards also assaulted fired workers who staged a protest at the factory gate.¹⁶⁸

The Inexport owner's actions violated both international labor norms¹⁶⁹ and the Guatemalan labor code.¹⁷⁰ In proceedings before the

162. See William I. Robinson, *Guatemala's Failed Coup d'Etat: Has the Clinton Administration Passed the Test?*, NOTISUR-LATIN AM. POL. AFF., July 9, 1993, § Summaries & Analysis (discussing Washington's great influence on the Guatemalan political atmosphere).

163. *Id.*

164. See Memorandum from Kurt Petersen and Paul Sonn to Michael Ratner et al. (Dec. 11, 1991) (on file with ILRERF) (discussing Inexport case and possible jurisdictions).

165. PETERSEN, *supra* note 112, at 129. The factory was one of the largest garment making facilities in Guatemala, with over five hundred workers. *Id.* at 48. Established in the 1970s, the factory was later converted to *maquila* status under the special *maquila* incentive laws passed in 1984 to enhance export-led development in Guatemala. *Id.*

166. PETERSEN, *supra* note 112, at 129.

167. PETERSEN, *supra* note 112, at 129.

168. PETERSEN, *supra* note 112, at 128-35.

169. See ILO, INTERNATIONAL LABOR ORGANIZATION CONVENTIONS AND RECOMMENDATIONS 1919-1991 (1992) (including Convention No. 87 regarding freedom of association, and Convention No. 98 regarding the right to organize collectively). Guatemala had ratified ILO Conventions guaranteeing the right of association and the right to organize and to bargain collectively. *Id.*

170. PETERSEN, *supra* note 112, at 129-30 (stating that Guatemalan courts repeat-

Labor Court of Guatemala, the workers won judicial orders for reinstatement and back pay. On appeal, the Labor Court upheld these orders.¹⁷¹

The company owners, however, never complied with the court orders, and the courts never took steps to enforce their orders.¹⁷² Three years after the firings, the workers still remained unemployed.¹⁷³ United States labor rights supporters first cited the Inexport case in GSP petitions, but the TPSC argued that the case had not yet been adjudicated.¹⁷⁴

Labor rights advocates, therefore, attempted to "bring the litigation home" to courts in the United States.¹⁷⁵ Lawyers and law students from the International Labor Rights Education and Research Fund, the U.S.-Guatemala Labor Education Project, the Center for Constitutional Rights and the Lowenstein Human Rights Project at Yale Law School, with *pro bono* assistance from two Washington, D.C. law firms and attorneys in Miami, Florida, devised a plan to sue the United States owner of the Guatemalan factory on behalf of the fired workers.¹⁷⁶

The United States "Inexport Team" traced the owner's sales and distribution operations to find possible United States judicial forums which had jurisdiction.¹⁷⁷ They discovered that the company's distribution headquarters were based in Miami, Florida, and had substantial funds in Florida banks.¹⁷⁸ They also learned that Inexport's largest customers were in New York City, the site of accounts payable to the Miami sales office.

While the strategists examined the potential claims under international labor rights norms, they decided instead to adopt a more prosaic cause of action that arose often in the international business context: to enforce the judgment of the Guatemalan courts under established principles

edly have declared as illegal the retaliatory and violent actions taken by the owner of Inexport).

171. PETERSEN, *supra* note 112, at 129.

172. PETERSEN, *supra* note 112, at 129.

173. PETERSEN, *supra* note 112, at 130.

174. See USTR, *GSP Subcommittee of the Trade Policy Staff Committee, Worker Rights Review Summary: Petitions Not Accepted For Review* (Guatemala, 1990 & 1991) (on file with USTR and ILRERF) (indicating that the GSP subcommittee would not consider the Inexport case as long as it was still being adjudicated in the Guatemalan courts).

175. Memorandum from Paul Sonn and Kurt Petersen to Michal Ratner et al., Inexport Team (Dec. 22, 1991) (on file with ILRERF in Washington, D.C.).

176. *Id.*

177. *Id.*

178. *Id.*

of comity rather than a vague claim that still-evolving international labor rights norms were violated.¹⁷⁹ Although a United States court could not enforce a reinstatement order, it could satisfy the judgment of the Guatemalan courts by ordering back pay for the workers from the company assets in the United States.¹⁸⁰

In early 1992, the Inexport Team chose to pursue this route, and drafted pleadings for submission to a Florida state court that targeted the assets of the distribution company.¹⁸¹ Team attorneys also prepared pleadings to submit to a New York state court that would seek to garnish accounts payable to Inexport by New York customers of the company.¹⁸² Additionally, a delegation from the legal team visited Guatemala in March 1992, to secure certified judgment papers from the Guatemalan courts, to work with the union there to identify and consult with named plaintiffs in the case, and to take affidavits from fired workers.¹⁸³

In April 1992, the Guatemalan Ministry of Labor convened new, tripartite negotiations among the ministry, Inexport's owner, and the union in an effort to resolve the dispute.¹⁸⁴ The labor rights legal team delayed filing the lawsuit to await the results of these negotiations.¹⁸⁵ In July, the parties reached a settlement. The fired workers were reinstated, a schedule of back pay payments over a seventeen-month period was implemented, and the union was recognized as the bargaining agent for employees.¹⁸⁶

CONCLUSION

These case studies of strategies and tactics developed by labor rights advocates in the United States in connection with NAFTA, and in support of workers and trade unions in Guatemala, amount to a preliminary survey of the field.

179. *Id.*

180. *Id.*

181. Inexport Team, Draft Pleadings for the Inexport Case (Apr. 15, 1992) (on file with ILRERF in Washington, D.C.).

182. *Id.*

183. Memorandum from Paul Sonn and Kurt Petersen to the Inexport Team (undated) (on file with ILRERF in Washington, D.C.).

184. Memorandum from Kurt Petersen to the Inexport Team (July 27, 1992) (on file with ILRERF in Washington, D.C.).

185. *Id.*

186. Memorandum from Lance Compa to the Inexport Team (Sept. 1, 1992) (on file with ILRERF in Washington, D.C.).

These accounts of actions by United States labor rights advocates on behalf of workers and unions in the transnational economy, however, are not intended to overstate their results. First, although the Clinton Administration did sign the labor agreement,¹⁸⁷ critics contend that the NAFTA text as it stands contains serious flaws: a secretive dispute resolution process that shuts out labor, environmental, and human rights voices; imbalances in tariff reduction schedules that will accelerate United States and Canadian job losses; clauses that override efforts by state and local governments to protect their citizens,¹⁸⁸ and inadequate "side agreements" on labor rights and labor standards.¹⁸⁹

Similarly, notwithstanding a series of concrete victories in Guatemalan labor disputes, the military and the land- and business-owning elite continue to dominate Guatemala. Similarly, fewer than six out of the three hundred *maquila* factories in the export processing sector recognize unions.¹⁹⁰ United States and Guatemalan labor rights supporters, therefore, must continue to assist workers against what remains a constant, defensive struggle against great odds.

The importance of these case studies lies in their evocation of the *possibilities* for expanded labor rights advocacy in international trade. The growing volume of labor rights controversies outlined in Part I, and the growing number of arenas surveyed in Part II where labor rights claims can be asserted and adjudicated in some form, with varying degrees of effective enforcement, suggest how workers, unions, human rights proponents, and other private labor advocates can become potent actors in the transnational economy. The NAFTA and Guatemala labor rights case studies show how at least some of these arenas can be used to advance workers rights: labor standards in bilateral or multilateral trade agreements; use of labor rights clauses in United States trade statutes; creative litigation strategies; invocation of ILO Conventions and other international norms.

A strong, enforceable regime of international labor rights ensures, or

187. See Peter Behr, *Kantor Pitches Trade Pact on Hill; Official Says NAFTA Offers Many Benefits for United States Economy, Jobs*, WASH. POST, Mar. 10, 1993, at A9 (describing USTR's promotion of NAFTA to legislators).

188. See *NAFTA Supplemental Agreements: Hearings Before the Subcomm. on Trade of the House Ways and Means Comm.* (Mar. 11, 1993) (testimony of Pharis Harvey, Executive Director, International Labor Rights Education and Research Fund).

189. See LEVINSON, *supra* note 80 (discussing the shortcomings of the labor side agreement).

190. Interview with Stephen Coats, Executive Director, United States/Guatemala Labor Education Project (Mar. 20, 1993).

at least tends to ensure, that competitive advantage derives from genuine, natural trade flows without being accelerated by exploitation. With ample space for associating and organizing free of repression, workers can protect their interests through collective bargaining with multinational employers and by pressing their own governments through a democratic political process for fair labor standards under domestic law. Aggressive international labor rights advocacy can force governments and employers to take account finally for the interests, passions, and rights of workers and their unions in making policy and investment choices in the transnational economy.