U.S. GSP LABOR RIGHTS CONDITIONALITY: "Aggressive Unilateralism" OR a Forerunner to a Multilateral Social Clause?

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Introduction

When the Generalized System of Preferences (GSP) was first inaugurated by the U.S. in 1974, it was described as a development program, the intent of which was to substitute "trade" for "aid." In the wake of the general failure of import-substitution industrialization policies throughout the developing world, which had largely failed to achieve the economy of scale to compete successfully with lower-cost imports from advanced industrial economies, it was believed widely that countries could better pull themselves out of poverty by the growth of export markets, capitalizing on their competitive advantage in cheap wages and locally available resources to achieve niches in the global market for their products. On that basis, it was posited, developing countries could accumulate the capital needed for broader-based industrialization.

All of the OECD-member countries adopted various tariff-relief programs under the rubric of the GSP. In Europe the programs consisted of a sliding scale of below-MFN tariff rates for a broad list of goods, the rates based on competitive needs and other criteria. In the U.S., the GSP program provided tariff-free access for a narrower list of goods, also determined by competitive criteria and market share. A number of factors were established as entry criteria; countries were excluded from the program if they had a communist government, belonged to OPEC, had expropriated U.S. property without compensation or harbored terrorists. Products determined to be competitive with U.S. domestic products were excluded. This led to the exclusion of developing countries' most likely entry-level industrial good, namely, garments and textiles. Product graduation from GSP was determined by the share a particular product had in the U.S. market and its global market share. Country graduation was determined roughly by the GNP, although certain politically-favored countries such as Israel were kept in the program long after they exceeded the cut-off level of income.

It became apparent in examining the GSP program for renewal one decade later that it had contributed to export growth, but it was less clear whether the growth it had fostered was leading to broad-based development or whether it was primarily serving U.S. producers who took advantage of the tariff relief to move production of labor-intensive goods offshore to enclave production bases with little backward or forward integration in the host economies. Rather than aid the poorest of the poor to gain a toehold in global markets, it was serving almost exclusively to enhance the market share of the richest of the poor, the so-called "Newly

Industrializing Economies" (NIEs). Four countries -- Korea, Taiwan, Hong Kong and Singapore -- together accounted for as much as 80% of GSP imports in 1983. Of these, only Hong Kong had anything close to a free labor market, and its labor costs were held down by the constant flow of new immigrants from China. The other major recipients all used a variety of legal, political, police and military pressures to prevent workers from exercising their rights to organize, to protect themselves from unsafe working conditions or to bargain for fair wages.

Thus, in 1984 the program was amended to require, in addition to other entry-point demands, that countries be "taking steps to afford workers internationally-recognized workers rights" including freedom of association, the right to collective bargaining, a prohibition against forced labor, a minimum age for work, and acceptable conditions of work related to wages, hours and health and safety.

On January 3, 1985, the amended GSP program went into effect. The Reagan Administration immediately certified that every current Beneficiary Developing Country ("BDC") in the world met the requirements until a two-year general review was completed. The general review was passive; the GSP sub-committee examined only countries subject to a petition by a non-governmental organization, and took up these reviews with great reluctance and barely concealed hostility. Not surprisingly, only Nicaragua and Romania were excluded from the GSP program as a result of the general review. Following the general review's conclusion, from 1988 until 1993, annual reviews have been conducted. All together, some 80 labor rights petitions have been examined, and negotiations for improvement of labor rights conditions have been undertaken with well over two dozen countries.

While the advent of labor rights conditionality was welcomed by many human rights advocates, others attacked the measure as an unacceptable use of pressure by a powerful country which by many other means dominates the world of trade. Philip Alston, chair of the United Nations Committee on Economic and Social Rights labeled the program "aggressive unilateralism" and predicted it would be used primarily by organizations and economic interests with other, non-human rights oriented agendas such as protecting certain industries from competition.

Now, with ten years experience of labor rights conditionality, it is possible to draw some tentative conclusions about the effectiveness of this aspect of the GSP program in contributing to the goals of broad-based development, and in particular to the strengthening of observance of internationally-recognized labor rights in the BDCs. It is also possible to examine whether the program has lent itself to protectionist misuse.

In the first place it is important to note that earlier this year, the European Union established a similar set of labor rights conditionality in its GSP program. (All members of the European Union now participate in a single GSP program.) This step is a general recognition of the validity of concern for labor rights within a development-oriented trade initiative. Both the definition of labor rights and the mechanism to apply it vary slightly from the U.S. The relevant labor rights are limited to freedom of association, right of collective bargaining, freedom from forced labor and a good faith effort to eliminate child labor. With a sliding tariff rate rather than

a blanket tariff waiver, the EU has announced its willingness to reward countries with positive labor practices with an additional percentage of lower tariffs. This is being characterized in Europe as applying a carrot rather than a stick. (Since the U.S. already grants BDCs complete tariff relief, it might be more proper to describe the U.S. approach as a "withheld carrot" than a "stick"} Be that as it may, the European Union's having joined with the U.S. in pressing for labor rights protection in BDCs is a positive vote for the approach.

Turning to the particulars of the American approach, there is a need to divide the question between the administration of the program by the Reagan, Bush and Clinton administrations, and its impact on countries under review. Clearly these issues are related. A poorly or inconsistently administered program will have less positive impact on target countries than one which is transparent in its direction and administered with fewer exceptions or inconsistencies. But even poorly administered programs can have an effect on the BDCs, as we believe has been the case.

Scope of the Reviews

After the general review concluded in 1987, the GSP subcommittee conducted annual reviews from 1988 to 1993, again following the principle of examining BDC status only upon receipt of a private-sector petition. Including the general review, from 1985 to 1995, 101 worker rights petitions were filed. Of these 31 petitions were rejected without review, two have been deferred, and 63 petitions relating to 39 countries were accepted for review. Five petitions are pending a decision to review. Of the 63 cases reviewed for labor rights reasons, 12 ended in the withdrawal or suspension of GSP benefits for 10 countries, 51 resulted in a decision that the BDC was "taking steps" to afford workers rights, and 7 cases are still pending. One 1993 petition, relating to Malaysia, has been waiting for more than two years for a decision whether to accept it for review. (In comparison, of 16 intellectual property rights cases filed during the same period, the result was 75% acceptance [12 cases] , 25% withdrawals [4 cases] and **no** refusals to review.)

Administration of the Program

As an active participant in about 25 of the 80 cases, the International Labor Rights Fund has watched the process unfold for the past 10 years. The early years were marked by official hostility, arbitrary decisions unrelated to the level of labor rights abuses, and frequent manipulation of the labor rights issue to gain leverage on some trade matter of greater importance to the administration. In fact, the administration of the program was so arbitrary and capricious that in 1989, all 23 organizations that had filed labor rights petitions joined in a lawsuit charging the government under the Administrative Procedures Act with failure to administer the program in terms of the law and Congressional intent. This suit was ultimately unsuccessful due to a District Court ruling that the president had absolute discretion to administer GSP as a foreign policy initiative, and a divided appellate court that voted against by two to one on technical grounds that failed to address the substance of the complaint.

Following the filing of the suit, however, administration of the program improved

significantly if unevenly. Elements of arbitrary decisions continued, as in 1993 when the USTR refused to review Mexico and Colombia, two of the most serious abusers of workers' rights. Mexico was in negotiation for a labor side agreement to NAFTA and Colombia's president was the U.S. candidate to head the Organization of American States. It would appear that these considerations overtook the labor issues. In 1994, the review of Indonesia was allowed to lapse without a decision, due apparently to administration anxieties about Jakarta's hosting of the APEC conference in November 1994. A 1993 petition on Malaysia continues to languish today without even a decision to review for much the same reason, establishing an all-time record for indecision within the GSP context. Malaysia is an important ASEAN member nation, whose prime minister Mahathir has led a southern challenge to the whole concept of universal human rights, cowing western nations with would-be investors into timid acquiescence. It is not inconsequential that the major beneficiaries of GSP exports from Malaysia are U.S. multinational electronics firms such as Motorola and Harris, which have put immense pressure on the Malaysian government not to change its labor code to meet the criticism in the earlier GSP petitions.

However, negotiations with some target BDCs for labor law changes on the basis of GSP petitions, and communication with the petitioning organizations are noticeably improved. These improvements might be thought to be due to a change in administrations, but in fact they predate the election of a Democratic president.

A study of the GSP program by the U.S. General Accounting Office has identified a number of problem areas in its administration, the most notable of which is the rigid schedule by which country practice petitions are examined. The regulations promulgated by the government in 1985 called for an annual review cycle for both country practice and product eligibility hearings. Petitions filed by June 1 are subject to an initial screening for a July 15 announcement of acceptance or rejection. Hearings in the fall on petitions that have been accepted are followed by negotiations with the BDC to secure recommended improvements in time for a decision to be announced April 1. In practice, however, it has not worked out that way, as I have noted. The only deadline adhered to is that of the petitioners' for submission of the initial petition. Particularly in recent years, as a by-product of more serious examination of petitions, reviews have stretched out two, three sometimes four years without a decision. While this is intended to allow more substantive reviews, in the absence of regulations or certain schedules, it has instead tended to communicate indecisiveness. Guatemala, for example, amidst the pressures of a GSP deadline took important steps in late in 1992 to begin a labor law reform. However, when that reform ran into opposition and foundered the U.S. government failed to carry through with any negative measures. As a consequence, the Guatemalan government succumbed to domestic pressures which have led in the past year to increasing levels of violence against workers. Still the U.S. waits, pending its decisions interminably, losing day by day whatever leverage it might have had.

However, while the deadlines have been violated regularly by the government, their existence has made it impossible for new petitions to be filed when changes occur in a country. So, the one-sided flexibility has worked negatively both for countries under review and in preventing the initiation of reviews in response to developments. This was most dramatically

demonstrated by the coup in Sudan of June 1989, when all trade unions were declared illegal and massive arrests of labor leaders carried out. GSP action regarding this could not be initiated until June, 1990 and a decision was not made until mid-1991, almost two years after the coup. As a foreign policy tool to advance human rights, the GSP program lacks the element of timeliness.

Another major fault in the program has been the rigid requirement that new petitions regarding countries that have been rejected for review could not be taken up without providing "new information." This requirement was badly abused by the Bush and Reagan Administrations to reject petitions that documented ongoing violence against workers and unions, simply because the violence was similar to that which they had reviewed or refused to review in earlier years. Further, the "new information" requirement was utilized to reject petitions that alleged that promised improvements in response to earlier petitions had not been carried out, or that other measures taken subsequent to a GSP decision that a country was "taking steps" had canceled out the gains on which the earlier decision had been based. In recent years, this requirement has been used with less arbitrary capriciousness.

These last two points of ambiguity, "new information" and "taking steps", were intended to prevent frivolous or repetitive petitions and to allow flexibility in administering the program. These goals are laudable and necessary. However, without more concise definitions of what constitutes new information, particularly as it relates to a failure of a country to make progress, the requirement is -- as has been demonstrated in practice -- an invitation to administrative abuse. Likewise, "taking steps" is a reasonable requirement. But without further definition, this phrase can be -- and has been -- used to justify changes that in the aggregate set back the rights of workers rather than advance them. There is a clear need for more precise language.

Country Impact of Programs

Despite administrative and procedural problems, it is possible to recognize that the GSP labor rights conditionality has had an impact. One measure of impact is, of course, the number of countries removed from the GSP program as a result of a negative review that did not lead to reforms. Several countries have been removed, most of them of minor trade importance such as Mauritania[1] or ideologically at odds with U.S. policy, such as Nicaragua in the 1980s. (A full list of decisions is appended.) However, a few countries of considerable trade or diplomatic importance to the U.S. have also been taken out of the GSP program. Most notable was the decision in 1988 to remove Chile. The decision came at a time when various pressures were being exerted by the U.S. to force the Pinochet regime to step down or allow elections. GSP, as one of these tools, played a not insignificant role, according to colleagues in Chile. Paraguay at the time of the end of the Stroessner regime, was another similar example. The Central African Republic under Bokassa was another. In each of these cases, the GSP program was used successfully, not so much to get improvements in labor rights in a narrow sense, but to secure a change of regime that improved the potential protection of all human rights. In each of these

[1]This is not to criticize the Mauritania decision. The abominable and widespread practice of slavery in Mauritania made it difficult not to revoke their BDC status.

cases, incidentally, the subsequent regimes were readmitted to the program. In the case of Chile, this occurred after a new government had carried out a democratic reform that pointedly did not include improvement in labor law, which remains to this day considerably deficient in the protection of internationally-recognized workers rights.

Under the Clinton administration, there has been a slightly decreased tendency to use the GSP for other human rights or foreign policy goals, but also a marked decrease in decisions altogether. In the past two years only two countries, Mauritania and Maldives, have been removed from GSP. Parenthetically, this pattern of indecision is said to have so emboldened Thai generals (Thailand has been under review since before the last democratic government took office) that they have lately been traveling to Cambodia to tell the government there not to bother with labor reform because the Americans will never enforce the GSP law. Whether that story is based on fact or not, it is being widely circulated.

There is a tendency among our labor and human rights colleagues to judge the success of the GSP program by the number of countries removed from BDC status. The experience of the Labor Rights Fund suggests this is too narrow a gauge. While a program that never suspends a BDC is quickly perceived as toothless, it does not require too many actual suspensions for countries under review to get the point.

As long as countries perceive the possibility of sanctions, however remote or minor the economic impact might be, they tend to react in positive ways to a review. Repeatedly we have been told by trade unionists in countries under review that the government had responded to the criticism in the GSP petition more seriously than they had ever reacted to a negative judgment by the ILO's Committee on Freedom of Association or Committee of Experts. In Peru, for example, the filing of a petition in 1992 led the government of President Fujimori to open a dialogue with trade unions for the first time in his administration's history. Unfortunately, before promised legal reforms in Peru could be sealed by law, the review ended on the basis of a "commitment" to reform. Then, the review out of the way, labor rights violations increased and the reforms were put on hold. Now the situation in Peru has deteriorated sufficiently that the ILO has singled it out for special attention. The possible leverage of the GSP program, however, has been squandered.

The Dominican Republic represents another instance of negotiated improvement. Challenged in 1990 and 1991 by Americas Watch for the abominable practice of enslaving Haitian workers in the country's sugar plantations, the government was moved by the threat of loss of GSP access to the U.S. sugar market to crack down on the plantations with the worst abuses and to reform its labor laws to make it illegal to capture illegal workers by debt bondage. As a result, the DR never lost its GSP status. Workers in the plantations acquired the legal right to organize trade unions and to negotiate collective agreements. Today, however, new problems are being faced by these workers, as the plantation owners refuse to come to the bargaining table. Nevertheless, without the pressure of the GSP process, it is unlikely that the unions themselves would exist.

It is our perception that the petitions on Indonesia had a similar if less dramatic impact.

While the Suharto government in Indonesia has been able to persuade the Clinton Administration that the diplomatic and economic cost to the U.S. and its investors would be formidable if GSP benefits were actually deprived from so important an economic partner, the review of Indonesia's labor laws and practices generated by the 1992 petitions from the ILRF and Asia Watch have helped to create some social space for a broadened public dialogue in Indonesia over the future of the country's development policy. In the glare of attention caused by this trade pressure, the independent trade union SBSI was able to form. In the wake of the relaxation of that pressure due to the Clinton Administration's interest in a harmonious APEC meeting last November in Jakarta, government repression against the SBSI has become much harsher. It would be important to analyze the cause-effect relationship of these events.

Broader Impact and Implications

Finally, it would appear that the U.S. GSP labor rights conditionality has played an important role in reawakening a long dormant global debate over the place of social clauses in trade. It has long been argued by opponents of such linkage that while social clauses were admirable in intent, they would inevitably be used for protectionist purposes and therefore should be avoided. By establishing a trade-labor rights linkage within a program that was not subject to the restrictions of GATT rules, this GSP program became a laboratory for examining possible protectionist uses of labor rights-trade linkage, as well as for tracing possible beneficial effects. I have tried to indicate what we believe are the direct and indirect benefits of a program only half-heartedly and inconsistently administered. It remains to be examined whether there have been protectionist side-effects or misuses of it.

The best evidence I can offer that such is not the case is the testimony of the author of the 1995 World Development Report published by the World Bank.[2] This report, while mildly affirming the rights of working people to organize and bargain collectively at a local level, is primarily characterized by deep-seated antipathy toward any effort at linking trade to social issues. It goes to extraordinary lengths to argue that markets alone will generate improved social conditions and that efforts to legislate good practices as trade conditions will only lead to their being used for "protectionist" purposes. This argument, which resonates with southern authoritarian governments and northern economists and MNCs, is significantly belied by the U.S. GSP experience of the past ten years. Michael Walton, who headed the World Bank staff that drafted the report, admitted in a dialogue we held at the Council of Foreign Relations several months ago that despite his concern that social clauses would be "hijacked by protectionists," to use his phrase, he had found no evidence in the ten years of the U.S. GSP program of such hijacking. Nor have we. What should we look for to identify as protectionist misuse? Petitions frivolously filed and assiduously lobbied for by powerful interests? There are few examples of the former and none of the latter. Labor rights petitions filed by industry groups in the U.S. facing competitive challenges in the targeted country? There have been no such petitions. Petitions or decisions based primarily on lower wage competition? None. Petitions that target countries emerging to a competitive strength? Other mechanisms in the GSP program limit the

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[2] *Workers in an Integrating World*, June 29, 1995, World Bank, Washington DC.

ability of countries to dominate the U.S. or global market in various goods and automatically suspend GSP privileges for goods that overreach the limits. So, the labor rights conditionality in GSP has not been seized by domestic industries anxious to lower competition. In short, the GSP social clause has demonstrated a capacity to target practices that demean and repress workers rights without being misused to undermine developing countries' competitive advantage, except to the extent that advantage is derived from internationally unacceptable and illegal practices.

This unilateral experience can contribute solidly to the effort to design a multilateral social clause. Several aspects are worth noting.

1. **It targets violations of internationally-recognized labor standards, which have been codified in international law and are generally accepted by all ILO members. It does not target low wages *per se*.** The focus of the program is on maximizing the right of workers to negotiate within the economic realities of their own situation a fair wage and safe working conditions. Thus countries with low wages due to general economic conditions are not subject to challenge under this program, unless these low wages are kept low by disallowing workers the right to organize or bargain collectively.

2. **This program does not link labor rights requirements to specific products that are produced for trade.** It does not matter which goods are related to labor violations, or whether any goods-production is implicated at all. Labor rights violations in any sector can lead to a challenge. While it might seem logical to link this program specifically to production involved in trade, as do, for example, some aspects of the NAFTA labor side agreement, the generic approach of the GSP law has probably been instrumental in its not being "hijacked" for competitive reasons.

3. **It is part of an overall program that has other mechanisms to cope with "unfair competition" problems.** In principle, products admitted under the U.S. GSP program are limited to those not competitive with domestic products. Product challenges are constantly brought by domestic producers claiming that a good has been wrongly classified. However, because of these outlets for conflict over competition, the country practices review process can be kept separate and at least relatively unpolluted by domestic protectionist interests.

4. **It has provided a recognized role for "non-interested parties", that is NGOs without an economic stake in a particular conflict.** The ability of organizations to challenge country practices without having to demonstrate they are themselves injured by the practices challenged is a departure from standard trade law jurisprudence. The innovation, however, has enabled a broader expertise and objectivity to be injected into hearings than would otherwise be the case and has helped to insulate the process from "disguised protectionism," which is a charge levied against it by its detractors.

Whether these characteristics can be kept in a multilateral program or not will be a great challenge. But I believe that is part of what we must attempt if we are to develop an international mechanism that can be used by all the people of the world, and not just the most powerful trading nations, to assure that the rights of workers everywhere are protected within the international

trading regime.

Appendix I

US Generalized System of Preferences
Worker Rights Petition History, 1985-1995

I. Beneficiaries Found to Meet the GSP Worker Rights Standard

Country	Year(s) Petitioned	Years(s) Reviewed	Years(s) Review Rejected
Bahrain	92,93	92-93	
Bangladesh	90,91,92	90-91	92
Benin	90	90	
Colombia	90,93	90	93
Costa Rica	93	93	petition withdrawn
Dominican Rep.	90,91,93	93	90,91
El Salvador	90,91,92,93	90-95	
Fiji	92,93	92-93	
Guatemala	gr, 87,88,89,90,91	gr	87,88,89,90,91
Haiti	gr, 87,88,89,90,93	gr, 88-90,93	87 93 rev. suspended
Honduras	91		91
Indonesia	87,88,89,91,92,93	87,89,92-94	88,91, 93 review suspended
Israel	88	88	
Malawi	92,93	92,93	
Malaysia	88,90,91,93	88	90,91,93 dec. to review still pending
Mexico	91,93		91,93
Morocco	93		93
Nepal	90	90	
Oman	92,93	92-94	
Panama	91,92	91-92	
Paraguay	93	93	petition withdrawn
Peru	92,93	93	92
Philippines	gr, 88,89	gr	88,89
South Korea	gr,87	gr,87	
Sri Lanka	91,93	91	93
Surinam	gr,87	gr	87
Syria	90,91	90-91	
Taiwan	gr,87	gr,87	
Thailand	87,88,89,91,92,93	87,89,91-95	88
Turkey	87,88,90	87	88,90
Yemen	92		92
Zaire	gr	gr	

II. Beneficiaries Found Not to Meet the GSP Worker Rights Standard

	Year(s) Petitioned	Year(s) Reviewed	Removed
Burma	88	88	7/1/89(s)
Cent. Afr. Rep.	87,88	87-88	7/1/89(s)*
Chile	gr,87	gr-87	2/28/88(s)*
Liberia	88	88-89	7/1/90(s)
Maldives	93	93-95	7/1/95(s)
Mauritania	91,92	91-92	7/1/93(t)
Nicaragua	gr	gr	3/4/87(t)*
Paraguay	gr	gr	3/4/87(s)*
Romania	gr	gr	3/4/87(t)
Sudan	90	90	4/1/91(s)

(*=subsequently reinstated)

III. Countries Currently Under Review or Awaiting Review Decision

Country	Year(s) Petitioned	Year(s) Accepted
Colombia	95	
Guatemala	92,93	92,93
Honduras	95	
Indonesia	95	
Pakistan	93	93
Philippines	95	
Thailand	93	93