CHAPTER 9

# THE INFLUENCE OF INTERNATIONAL LABOUR STANDARDS ON THE WORLD TRADING REGIME*

In June 1986, the United States raised the question of "worker rights" at the Preparatory Committee of GATT (General Agreement on Tariffs and Trade) for the next round of international trade negotiations to be launched later that year. The American delegation requested the other parties to "consider possible ways of dealing with worker rights issues in the GATT so as to ensure that expanded trade benefits all workers in all countries".[1]

Unfortunately, that initiative failed. The subject of worker rights was not included in the Ministerial Declaration that launched the Uruguay Trade Round. Nevertheless, American officials have indicated that they will continue to press the matter and other countries may decide to follow suit. In September 1986, the European Parliament endorsed the concept of a GATT "social clause" in a resolution concerning the new Round.

The linking of international fair labour standards (IFLS) with trade policy is not a new idea.[2] Its origins go back to the consideration of labour treaties during the late nineteenth century. Yet, despite that history, worker rights still tend to be treated as a novel concept. When the issue of IFLS was raised by a few governments during the Tokyo Round of trade negotiations, many parties denied that labour standards had any connection with trade policy. During the brief debate last year in the GATT Preparatory Committee, it was evident that the American proposal had been misconstrued as an attempt to cancel out the comparative advantage of the developing countries. Even today, there are some who suspect that the push for worker rights is simply a political response to the United States' huge trade deficit.

The purpose of this article is to provide some background material for the Uruguay Round debate on worker rights that was not available during the Tokyo Round. While excellent treatments of the issue have appeared in these pages,[3] there is still a gap in our understanding of past initiatives in this field. This

*International Labour Review, Vol. 126, September/October 1987. A factual error has been corrected.

[1] GATT doc. PREP. COM(86) W/43, 25 June 1986.

[2] The terms "international fair labour standards", "worker rights" and "social clause" will be used synonymously here.

[3] The three landmark studies are H. Feis: "International labour legislation in the light of economic theory", in *International Labour Review*, Apr. 1927, pp. 491-518; "Labour cost as a factor in international trade", ibid., May 1964, pp. 425-446; and G. Edgren: "Fair labour standards and trade liberalization", ibid., Sept.-Oct. 1979, pp. 523-535.

study will attempt to fill the gap. Rather than follow a strictly chronological approach, I will present a taxonomy of the various precedents that could be helpful to trade negotiators—and, I hope, of interest to the general reader too. The title "world trading regime" is used very broadly. It encompasses not only GATT and international treaties, but also national trade laws and proposals to reform trade rules.

I should note at once that there are several tasks that this article does *not* attempt. First, it is not an exercise in intellectual history, but rather a historical overview. It deals with the "what" and "when", rather than the "why". Second, it is not a comprehensive exposition of the sort found in law reviews but focuses on specific provisions of statutes without discussing the legislative history or judicial decisions. Third, there is no systematic attempt to evaluate the implementation of the laws discussed. Fourth, the article confines itself to the trade aspects of international economic policy. Labour standards have also influenced development aid, international lending, and codes of conduct for multinational enterprises, but these connections would require separate treatment. Fifth, the discussion is limited to laws regarding *foreign* labour. There are domestic labour laws that influence the trading regime (e.g., provisions on plant shutdowns), but they are not discussed.

Although it is written from an American perspective, the article also deals with the way other nations have pursued fair labour standards in trade policy. The heavy reliance on American precedents reflects, in part, the author's inability to obtain additional details about the initiatives of other countries. But the main reason for focusing on American history is that most of the worker rights initiatives have originated in the United States. One explanation for this is the relatively large size of its economy, which makes labour conditionality more practicable.

## 1. General Statements

While the bulk of this article is devoted to an analysis of specific regulatory provisions or proposals, it may be useful to begin by highlighting some general commitments and declarations concerning worker rights. The problem of "social dumping", i.e., the export of products that owe their competitiveness to low labour standards, was considered as early as the World Economic Conference convened by the League of Nations in 1927. That Conference attempted to reach international agreement on the coordination of national trade policies. In its recommendations, it urged governments to encourage producers to apply methods of remuneration giving the worker "a fair share in the increase of output".[4]

[4] League of Nations: *Report and Proceedings of the World Economic Conference* (Geneva, 1927), p. 49.





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One of the most important commitments dates back to the creation of the present international trading system in 1947, when the issue of labour standards was dealt with by the United Nations Conference on Trade and Employment. Article 7 of the Charter of the (stillborn) International Trade Organization (ITO) adopted by that Conference provides that "the Members recognise that unfair labour conditions, particularly in production for export, create difficulties in international trade, and, accordingly, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions *within its territory*" (emphasis added).[5]

The issue arose again in the 1950s when, with the advent of European integration, the ILO commissioned a study (known as the "Ohlin Report") that looked at the link between differing labour conditions and unfair competition. While declaring that it was not necessary to eliminate international differences in wages, the report found that it might be desirable to "harmonise" policies—e.g., those affecting labour's ability to bargain collectively—so that a high-standard country would not have to compete against a lower-standard one. In such cases the goal would be "to eliminate international competition based on a country's failure to respect internationally agreed standards, and not to bring about a maximum of uniformity between countries".[6]

A number of declarations have been adopted that recognise the link between labour conditions and trade. In the Covenant of the League of Nations of 1919, for example, the member States agreed to endeavour to secure fair and humane conditions of labour, both at home and "in all countries to which their commercial and industrial relations extend".[7] In 1937, an ILO technical conference suggested that "in framing their commercial policies, governments should take account of social conditions prevailing in countries with which they have trade relations".[8] In 1942, a joint meeting of the Latin American foreign ministers recommended that increased production of wartime strategic materials should be ensured by the adoption of international agreements "in which producers are protected against competition from products originating in areas where real wages are unduly low".[9]

[5] United Nations Conference on Trade and Employment: *Final Act and related documents* (Havana, 1948), Article 7.
[6] ILO: *Social aspects of European economic co-operation* (Geneva, 1956), p. 91.
[7] Treaty of Versailles, Part I, Article 23 (a).
[8] ILO: *Record of Proceedings*, Tripartite Technical Conference on the Textile Industry, Washington, DC, 2-17 April 1937, First Part, p. 42.
[9] Pan American Union: *Report of the Third Meeting of the Ministers of Foreign Affairs of the American Republics* (Washington, DC, 1942), Appendix D, p. 33.

Under the first International Sugar Agreement of 1953, the parties agreed that "in order to avoid the depression of living standards and the introduction of unfair competitive conditions in world trade, they will seek the maintenance of fair labour standards in the sugar industry".[10] Similar undertakings were included in later agreements on tin, cocoa and rubber.

Many of the declarations in favour of IFLS argued that such standards could facilitate freer trade. In 1950, for instance, the United States House of Representatives approved a bill stating that international trade between the underdeveloped and advanced areas "can be promoted through agreements ... to establish fair labour standards of wages and working conditions".[11] Although this provision did not become law, it seems to have been the first congressional action regarding IFLS negotiations.

In 1980, the Independent Commission on International Development Issues (the Brandt Commission) urged that "fair labour standards should be internationally agreed in order to prevent unfair competition and to facilitate trade liberalisation".[12] This recommendation, like many others put forward by the Commission, had little impact on government policy.

## 2. DOMESTIC STANDARDS

Labour standards for trade can be divided into two types—domestic and international. By *domestic* standards I do not mean standards that are propounded by a single government rather than multilaterally; I mean standards that compare the working conditions in the exporting country with those in the importing country. For example, if country A were to forbid imports made by foreign workers who were not paid A's minimum wage, that would be a domestic standard.

The earliest attention to labour standards in trade concerned foreign wages. When it was established in 1881, the Federation of Organized Trades and Labor Unions, the predecessor of the American Federation of Labor (AFL), urged the United States Congress to adopt laws necessary to give "American industry full protection from the cheap labour of foreign countries".[13] The most popular proposal for providing such protection was known as "cost equalisation". This

[10] United Nations: *Treaty Series*, 1957, Vol. 258, No. 3677: International Sugar Agreement, Article 6, p. 160.
[11] H.R. 7797, 81st Congress, 2nd Session, section 302(d), 3 Apr. 1950.
[12] *North-South: A programme for survival (the Brandt Report)* (Cambridge, Massachusetts, MIT Press, 1980), p. 186.
[13] Proceedings of the American Federation of Labor, 1881, Platform, point 11.





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principle was incorporated into the Tariff Acts of 1922 and 1930. Under the latter law, the President was empowered to adjust tariffs in order to equalise the differences in the costs of production between a domestic article and a similar foreign article from the principal competing country.[14] Although this provision applied to all inputs, not just labour, the legislation was intended to deal with the problem of low-wage foreign production at a time when labour costs accounted for a high proportion of production costs. After extensive use in the early 1930s, the provision was made inapplicable to imports covered by trade agreements.[15] The most recent recommendation for a tariff increase occurred in 1962 in regard to brooms, but it was turned down by President Kennedy.[16]

When Congress passed the National Industrial Recovery Act of 1933, it gave the President the authority to impose codes of "fair competition" on industries. Because these codes could be rendered ineffective by foreign imports, the President was permitted to impose duties or quotas and to forbid the entry of foreign goods.[17] Import duties were used three times and "voluntary" quotas five times before the law was declared unconstitutional (for other reasons) in 1935. In one case, that of red-cedar shingles, Canada agreed to increase wages.[18]

During the debate on the first Fair Labor Standards Act in 1937, the Senate considered a provision directing the government to deny entry to foreign goods produced under "oppressive" or "substandard" labour conditions, as compared with the "fair" labour standards to be achieved under the new law.[19] It was voted down. Thirty years later, the House of Representatives passed an amendment to the Fair Labor Standards Act that would have authorised the President to take action against imports produced under local conditions detrimental to a "minimal standard of living".[20] This House-approved provision also failed to become law.

The connection between labour legislation and imports was recognised in many of the reciprocal trade agreements negotiated after 1936. For example, the United States agreement with Honduras declared that either country was permitted to impose quantitative restrictions in conjunction with its own governmental measures tending to increase labour costs.[21] In 1955, a group of Republican congress-

[14] See 19 USC § 1336.
[15] See 19 USC § 1352.
[16] US Tariff Commission: *Forty-sixth Annual Report*, 1962, pp. 29-30.
[17] See 48 (Part 1) Stat. 195, 197 (1933). The President could act only after a positive recommendation by the Tariff Commission.
[18] US Tariff Commission: *Eighteenth Annual Report*, 1934, pp. 43-45.
[19] *Congressional Record*, 31 July 1937, pp. 7921-7926.
[20] ibid., 28 Sept. 1967, pp. 27186-27214.
[21] See 49 (Part 2) Stat. 3855 (1936).

men proposed an (unsuccessful) amendment to a trade law that would have denied further tariff concessions to foreign goods made under conditions that would be "substandard" in the United States.[22]

Other countries have also acted. In 1925, Czechoslovakia defined unfair competition to include the "introduction of longer hours of labour or less favourable social conditions of labour".[23] That year, too, the British Board of Trade issued regulations that provided for anti-dumping duties to combat unfair and damaging competition stemming from "inferior conditions of employment" of foreign workers as compared with those of British workers. The employment conditions included remuneration and hours of work.[24] In 1935, Cuba passed a law authorising anti-dumping duties on foreign goods produced by a "lower level of wages".[25]

### 3. INTERNATIONAL STANDARDS

The other type of labour standard for trade gauges foreign working conditions with reference to a universal benchmark applying to all countries. These are called *international* standards because they are intended to reflect a worldwide norm for the treatment of labour rather than a single country's local standards applied extraterritorially. For example, if country A were to forbid imports made by workers who were not paid a "living" wage related to the level of development of the producing country, that would be an international standard.[26]

#### *a. Trade in Slaves*

Although the subject we are concerned with here is the conditions of labour engaged in producing for foreign commerce, the slavery issue merits a brief mention because the stamping out of the slave trade established a precedent for regulating international trade on moral grounds. The first treaty to prohibit the importation of slaves was signed at the Brussels Conference of 1889-90.[27]

[22] *Trade Agreements Extension Act of 1955*, House Report No. 50, Feb. 1955, p. 33.
[23] Act of 12 October 1925.
[24] Anti-dumping legislation and other import regulations in the United States and foreign countries, US Senate, doc. 112, Jan. 1934, exhibit 5.
[25] Act No. 14 of 16 March 1935.
[26] There are other ways to categorise these standards. See R. B. Schwenger: "Fair labor standards for world trade", in *Monthly Labor Review* (Washington, DC), Nov. 1967, pp. 27-31.
[27] General Act for the Repression of African Slave Trade, Article LXII, 1890.





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*b. Prison and Forced Labour*

Competition resulting from goods made by prison labour was one of the earliest issues of unfair trade. At least eight countries have restricted such international trade. The first legislation came in 1890 when the United States banned imports of all foreign goods, wares, articles and merchandise manufactured by "convict" labour.[28] In 1930, the law was broadened to forbid imports made by "forced labour" or "indentured labour under penal sanctions". These new restrictions do not apply to items whose domestic production fails to meet the consumption needs of the United States.[29]

The 1930 law is still in effect, but the only products that have been banned in recent years are furniture, clothes hampers, and palm-leaf bags from Tamaulipas in Mexico.[30] The lax enforcement of this law has drawn criticism from many members of Congress. In April 1987, the House of Representatives passed a bill on trade and competitiveness—the Trade and International Economic Reform Bill—which includes several provisions relating to worker rights. One of them calls on the President to "instruct the Secretary of the Treasury to enforce [the 1930 law] without delay".[31]

There have been cases in the past when the threat of using this provision to block imports into the United States precipitated action by other nations. In 1974, for example, the United Mine Workers of America and the State of Alabama asked the United States Government to prohibit the importation of low-sulphur coal from South Africa on the grounds that it was produced by indentured labour under penal sanctions.[32] In response to this complaint, the South African Government repealed several penal provisions from its labour legislation.[33] The case was closed after the United States determined that its domestic sources of low-sulphur coal were insufficient to meet American needs.

In 1897, the British Parliament prohibited the entry of goods produced in "any foreign prison, gaol, house of correction or penitentiary", except for types

[28] See 26 Stat. 624 (1890).
[29] See 19 USC § 1307.
[30] See 19 CFR § 12.42.
[31] H.R. 3, 100th Congress, 1st Session, section 880(c), 8 May 1987.
[32] C. Armstrong: "American import controls and morality in international trade: An analysis of section 307 of the Tariff Act of 1930", in *New York University Journal of International Law and Politics* (New York), Spring 1975, pp. 20 and 36-37; US International Trade Commission: *International practices and agreements concerning compulsory labor and US imports of goods manufactured by convict, forced or indentured labor*, Publication 1630, Dec. 1984, pp. B-7 and B-8.
[33] Second General Law Amendment Act, No. 94 of 1974. See also "SA foils ingenious US coal lawsuit", in *The Star* (Johannesburg) 8 Nov. 1974.

of goods not manufactured in the United Kingdom.[34] That law remains on the books. In 1901, Australia prohibited imports of goods manufactured or produced by "prison labour".[35] Last year, this provision was repealed following an attempt to import stereo loudspeakers whose cabinets had been made in Dartmoor Prison in England.[36] Three other countries—Canada (1907), New Zealand (1908) and South Africa (1913)—have also passed legislation banning prison-made imports. These provisions are still in force.

Forced labour has also been a target of anti-dumping regulations. In 1931, Argentina included "forced labour" in the definition of foreign practices that justify measures to increase duties.[37] In 1934, Spain included "prison or forced labour" in its definition of dumping.[38]

At the international level, the issue was raised at the Paris Peace Conference in 1919 by the American delegates to the Commission on International Labour Legislation (commonly known as the Labour Commission). They proposed that a provision be incorporated into the Peace Treaty to prohibit any article from being shipped or delivered in international commerce if convict labour was employed or permitted in its production.[39] That proposal was not accepted.

The prison labour issue came up next in the various multilateral conferences that tried to establish international trade rules. In 1927, a League of Nations conference agreed to exempt import prohibitions applying to prison-made goods from the stipulations of a proposed Convention for the abolition of import and export prohibitions and restrictions. That exemption was later included in Article XX(*e*) of GATT in 1947. At the ITO Conference of 1947-48, the United States sought to have included an express limitation on "involuntary" forms of labour, but was unsuccessful.[40] In 1956, it tried again, this time at the ILO Conference. The amendment it proposed to the draft Abolition of Forced Labour Convention, 1957 (No. 105), provided that international trade in goods produced by any forced or compulsory labour would be prohibited.[41] After other governments failed to support the proposal, citing the difficulty of enforcement, the United States withdrew its amendment the following year.

[34] Foreign Prison-Made Goods Act, 60 and 61 Vict., c.63, 1897.
[35] Customs Act, Part IV, Division 1, No. 52, 1901.
[36] Customs Notice No. 86/197, 1986.
[37] Presidential Decree No. 1933, section 1, 8 August 1931.
[38] *Gaceta de Madrid* (Madrid), section 1 (2), 13 Mar. 1934.
[39] J. T. Shotwell (ed.): *The origins of the International Labor Organization* (New York, Columbia University Press, 1934), Vol. II, Documents 37 and 47.
[40] W. A. Brown, Jr.: *The United States and the restoration of world trade* (Washington, DC, The Brookings Institution, 1950), p. 138.
[41] ILO: *Record of Proceedings*, International Labour Conference, 39th Session, Geneva, 1956, p. 724.

The most recent affirmation of the GATT rule on prison-made goods came from the "Leutwiler Group" report (to the Director-General of GATT) in 1985, which found that "there is no disagreement that countries do not have to accept the products of slave or prison labour".[42]

*c. Child Labour*

Proposals for restricting imports made by child labour go back to the AFL Convention of 1917. The AFL declared that the Peace Treaty should include a provision stating that "no article or commodity shall be shipped or delivered in international commerce in the production of which children under the age of 16 have been employed or permitted to work".[43] The AFL President, Samuel Gompers, took this proposal to the Labour Commission, but failed to obtain its inclusion.

*d. Hours of Work*

Austria was the first nation to combat trade competition resulting from excessive hours of work. In 1924, it authorised increased duties on industrial products from countries that had not ratified the Hours of Work Convention, 1919 (No. 1), and "whose current regulations on the subject fall substantially short of the requirements of that agreement".[44]

At the World Economic Conference of 1927, the Cuban delegate proposed, unsuccessfully, that any nation which had adopted an eight-hour day in industry should be permitted to increase its maximum tariffs by an additional 10 percent *ad valorem*.[45]

*e. Occupational Safety and Health*

The first international Convention on occupational health was adopted at the Berne Conference of 1906. That Convention obliged the parties to prohibit the manufacture, sale *and importation* of white phosphorus matches.[46] Although there was some danger to the user of matches, the main reason for this treaty was to prevent matchworkers from contracting the dreaded "phossy jaw".

[42] GATT: *Trade policies for a better future. Proposals for action* (Geneva, 1985), p. 29.
[43] S. Gompers: *American labor and the war* (New York, George H. Doran Company, 1919), p. 337.
[44] Customs Tariff Act of 5 September 1924, section 4.
[45] J. T. Shotwell: "Memorandum on international labor legislation and international trade", May 1937, p. 7, Shotwell papers, Columbia University library.
[46] International Convention respecting the Prohibition of the Use of White (Yellow) Phosphorus in the Manufacture of Matches, 1906, Article 1.

After that landmark Convention, the issue of worker health in relation to trade lay dormant for many years, and it was not until the Tokyo Round that it was brought up again. In 1978, the International Confederation of Free Trade Unions (ICFTU) recommended that Articles XIX and XX of GATT be so revised as to "make it possible to prohibit the importing of goods produced under conditions which endanger workers' health and lives".[47] In 1979, the United States proposed a minimum labour standard for GATT that was directed at "certain working conditions which are dangerous to life and health at any level of development".[48] Only Norway, on behalf of the Nordic countries, supported the proposal. After the Reagan Administration came into office in 1981, the United States Government abandoned the initiative.

### *f. Wages*

There are several kinds of wage standards. The idea of an *absolute* standard can be traced back to 1927, when the Cuban Government proposed that any nation having "a minimum wage equivalent to one gold dollar per day" should be able to increase its maximum tariff by 15 percent *ad valorem*.[49]

Another kind of standard pertains to *wage adequacy*. Although it was not explicitly linked to trade, the principle of a wage adequate to maintain a "reasonable standard of life" was included in the Treaty of Versailles.[50] About ten years ago, the idea of a universally applicable living wage was briefly revived by the United States Secretary of Labor Ray Marshall.[51]

A related standard is *fair* wages, which first surfaced in international commodity negotiations. In 1943, an ILO study recommended that labour employed in the production of controlled commodities receive "fair remuneration".[52] During the 1950s and 1960s, several attempts were made to clarify what such "fairness" meant. For example, one type of standard measured whether compensation was increasing with the average productivity of the country. The search for a definition of "fair" wages continues to this day.

The most influential wage concept, however, has been that of *substandard* wages. In 1954, the United States Commission on Foreign Economic Policy

[47] ICFTU: *Towards a new economic and social order*, The ICFTU Development Charter (Brussels, 1978).
[48] G. Hansson: *Social clauses and international trade* (London, Croom Helm, 1983), p. 27.
[49] B. Lasker and W. L. Holland (eds.): *Problems of the Pacific, 1933* (Chicago, University of Chicago Press, 1934), p. 115.
[50] Treaty of Versailles, Part XII, Article 427.
[51] See "The wages of trade", in *New York Times* (New York), 6 June 1977, editorial.
[52] ILO: *Intergovernmental commodity control agreements* (Montreal, 1943), p. xxix.

defined these as wages for a particular commodity that are "well below accepted standards in the exporting country".[53] The Eisenhower Administration endorsed that definition. Nevertheless, a group of Republican congressmen objected, declaring that it was unfair to American workers "to say that labour in Japan, at 10 or 11 cents an hour, is 'fair' competition simply because it is not substandard in Japan".[54]

*g. Omnibus standards*

The last category consists of the "baskets" of standards that go beyond single issues. Some of these omnibus standards have been imposed by one country, while others have been put forward as a basis for international discipline.

One of the earliest uses of ILO-based standards goes back to a Spanish decree of 1934, which included, in its definition of dumping, lower prices caused by the fact that "international regulations in respect of social matters and especially as regards wages and working conditions have not been observed".[55] Although the idea of using ILO standards as the benchmark did not disappear, it was partially eclipsed over the next few decades by plans seeking "fair" wages and working conditions. During the Governing Body's consideration of labour standards for trade in the early 1970s, it was suggested that "a country might be considered to apply fair labour standards if it was applying certain selected international labour Conventions to the satisfaction of the supervisory bodies of the ILO".[56] Since then there has been a swing back to ILO standards.

In 1978, the Commission of the European Communities proposed that the trade benefits under the Lomé Convention be made subject to the implementation by beneficiary governments of several "minimum labour standards" drawn from ILO Conventions, the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (1977), and the United Nations International Covenant on Economic, Social and Cultural Rights (1976).[57] That proposal was turned down by the EC Council of Ministers. In 1983, the European Parliament called for a new GATT article requiring members "to respect ILO Conventions on freedom of association and collective bargaining, on dis-

[53] US Commission on Foreign Economic Policy: *Report to the President and the Congress*, Jan. 1954, p. 62.
[54] *Trade Agreements Extension Act of 1955*, op. cit., p. 33.
[55] *Gaceta de Madrid*, section 1 (2), 13 Mar. 1934.
[56] ILO: *Minutes of the 184th Session of the Governing Body*, Geneva, 16-19 November 1971, Appendix II, para. 106.
[57] Commission of the European Communities: *Development co-operation and the observance of certain international standards governing working conditions*, doc. COM (78) 492 Final, 10 Nov. 1978.

crimination in employment, and on forced labour".[58] This position was reiterated in 1986,[59] but the EEC so far has not come out in support of the American initiative mentioned at the beginning of this article.

During the past few years, the United States has attached ILO-related standards to three laws. In the Caribbean Basin Initiative (CBI) of 1983, the President was directed to consider 18 eligibility criteria, including the degree to which workers in a country are afforded "reasonable" workplace conditions and enjoy "the right to organise and bargain collectively".[60] Eligibility for this programme provides countries with duty-free access to the American market for many products. Although the law does not specifically refer to ILO Conventions, the CBI was implemented with those standards in mind.[61]

In 1984, the Generalised System of Preferences (GSP) was amended to require that countries meet a new labour standard in order to retain eligibility. Under that standard, countries must be "taking steps" to afford "internationally recognised worker rights", including: (1) freedom of association, (2) the right to organise and bargain collectively, (3) a prohibition against forced labour, (4) a minimum age for child labour, and (5) "acceptable" conditions of work with regard to minimum wages, hours, and safety and health.[62] In January 1987, the Reagan Administration removed three countries from the programme for alleged labour rights violations—Nicaragua, Paraguay and Romania. The President based his decision on a statutory provision *permitting* the termination of benefits after a country fails to take steps to ensure worker rights, rather than on the provision *requiring* the termination of benefits in such cases.[63]

In 1985, the law establishing the Overseas Private Investment Corporation (OPIC) was amended to require that its investment insurance be withheld from projects in countries not taking steps to "adopt and implement laws" that extend internationally recognised worker rights.[64] In January 1987, OPIC withdrew coverage from the three countries dropped from GSP as well as from one country, Ethiopia, that had not been receiving GSP benefits.

In 1987, the House of Representatives passed a provision authorising trade countermeasures against nations not taking "steps that demonstrate a significant

[58] Resolution of 28 October 1983, para. 12.
[59] Resolution of 9 September 1986, paras. 64-65.
[60] See 19 USC § 2702 *(c)* (8).
[61] S. Charnovitz: "Caribbean Basin Initiative: Setting labor standards", in *Monthly Labor Review*, Nov. 1984, pp. 54-56.
[62] See 19 USC §§ 2462 *(a)* (4), 2462 *(b)* (8) and 2464 *(b)*.
[63] See Proclamation 5617, *Weekly Compilation of Presidential Documents*, 6 Mar. 1987.
[64] See 22 USC § 2191 *(a)*.





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[66] ILO: *Labour condi*
1943), pp. 55-57.
[67] US Commission
[68] ibid., p. 438.

and measurable overall advancement" of worker rights throughout the country.[65]

There are also some standards that fall outside the ILO framework. In 1942, the United States Board of Economic Warfare included a "labour clause" in procurement contracts for strategic materials from abroad whereby the seller agreed to several conditions: (1) to comply with all local laws and regulations affecting labour; (2) to pay wages not lower than those paid either for comparable operations by the seller or for comparable work in the foreign country, whichever were *higher*; and (3) to provide workers with suitable shelter and an adequate supply of food. According to the Board, it was "the first time in history that one nation, in negotiating for the products of another, has given an express guarantee against the exploitation of labour".[66]

## 4. International Enforcement

### *a. Additional Provision to GATT*

Almost all of the governmental support for adding a labour standard to GATT (beyond that provided for in Article XX) has come from the United States. The earliest American proposal, made in 1953, was to include a provision stating that unfair labour standards, particularly in production for export, "create difficulties in international trade which nullify or impair benefits under this Agreement". Unfair standards were defined as the "maintenance of labour conditions below those which the productivity of the industry and the economy at large would justify".[67] Two features of that proposal are especially significant. First, it contains a very broad (albeit vague) definition of unfairness. Second, the words "nullify or impair" refer to Article XXIII of GATT, which empowers the contracting parties to allow a nation that considers that the benefits it enjoys under GATT are adversely affected ("nullified or impaired") by the practices of another to take action against that country. Although the American proposal was not accepted in GATT, the United States made clear its position that trade problems stemming from unfair labour standards were *already* actionable under Article XXIII.[68] It should be noted, however, that this Article has never been invoked for that purpose.

[65] H.R. 3, 100th Congress, 1st Session, sections 121 and 124 *(a)* (2), 8 May 1987. (Author's note: This provision is now part of Section 301 of the Trade Act of 1974.)
[66] ILO: *Labour conditions in war contracts*, Studies and Reports, Series D, No. 23 (Montreal, 1943), pp. 55-57.
[67] US Commission on Foreign Economic Policy: *Staff Papers*, Feb. 1954, pp. 437-438.
[68] ibid., p. 438.

In 1971, the United States Commission on International Trade and Investment Policy recommended that the government actively support a multilateral effort to gain acceptance of an IFLS code that would include "realistic means for enforcing the code".[69] Under the Trade Act of 1974, Congress directed the President to seek the adoption of such a code in GATT.[70] In April 1987, the House of Representatives passed a provision which set American negotiating objectives for the Uruguay Round. One of these objectives is "to adopt, as a principle of GATT, that the denial of worker rights should not be a means for a country or its industries to gain competitive advantage in international trade".[71]

The idea of adding labour standards to international trade rules originated with the union movement. In 1943, Phillip Murray, President of the Congress of Industrial Organizations (CIO), proposed an "international fair labour standards Act or Treaty" that would prohibit the movement of goods produced in violation of labour standards covering the right to organise, hours of work, minimum wages, and child labour.[72] Two years later, Emil Rieve, the General President of the Textile Workers Union of America, recommended that the San Francisco Conference convened to adopt the Charter of the United Nations should include in it an "international code of fair labour practices", which all nations seeking the benefits of international trade would be required to observe.[73]

During the mid-1950s, the British Trades Union Congress (TUC) urged the British Government to press for a fair labour clause in GATT. The TUC also suggested that Article XXIII of GATT be used "to impose sanctions on countries which did not take steps to eradicate unfair labour standards".[74] In 1959, the ICFTU proposed a GATT reform to include a labour standards provision similar to that contained in the ITO Charter. The Trade Union Advisory Committee of the Organisation for Economic Co-operation and Development (OECD) has also called for GATT action. The most recent recommendation, in May 1987, was that "governments should include a social clause in GATT, linking participation in the multilateral trading system to the observation of minimum labour standards".[75]

[69] *United States international economic policy in an interdependent world*, Report to the President by the Commission on International Trade and Investment Policy (Washington, DC, 1971), p. 65.
[70] See 19 USC § 2131 *(a)* (4).
[71] H.R. 3, 100th Congress, 1st Session, section 111 *(b)* (10), 8 May 1987.
[72] UAW-CIO Twelfth Constitutional Convention, 10-15 July 1949, Resolution No. 18.
[73] E. Rieve: *International labor standards: A key to world security* (New York, Textile Workers Union of America, 1945).
[74] L. Murray: "Fair labour standards in international trade", in *Free Labour World* (Brussels), Mar. 1961, p. 103.
[75] Statement to the OECD's Ministerial Council and the Venice Summit, May-June 1987.





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*b. International Law*

When the ILO was created, there was some talk that the Organisation itself might call for economic sanctions. For example, an early British Government paper for the Labour Commission, drafted by Edward J. Phelan, proposed that when two-thirds of the delegates to the International Labour Conference found that a government had failed to implement a Convention, the signatory States "should discriminate against the articles produced under the conditions of unfair competition".[76] This concept partially survived in the first ILO Constitution. Under the original procedures, the Commission of Inquiry was directed to indicate "the measures, if any, of an economic character against a defaulting government which it considers to be appropriate, and which it considers other governments would be justified in adopting" (article 28). No such "economic measures" were ever recommended, however, and this provision was deleted in 1946. At the same time, another provision of the Constitution (article 33) was modified so that the Governing Body "may recommend to the Conference such action as it may deem wise and expedient to secure compliance" with the recommendations of the Commission.[77]

5. Penalties and Incentives

This section discusses governmental measures designed to influence or counteract the behaviour of other countries in labour matters.

*a. Import Prohibitions*

Several laws that prohibit imports made by prison labour have already been mentioned. Other proposals never got off the drawing board. In 1944, for example, Uruguay attempted to have labour standards included in the United Nations Charter. It proposed that governments "should reject the goods and products of countries which obtain the lower cost of the same at the expense of the right, the health and the liberty of the working masses".[78]

An interesting case arose in 1980 when a company making asbestos products filed a complaint under the Unfair Competition Act of the Federal Republic of Germany, alleging that a competitor, using imports from the Republic of Korea, was gaining a market advantage because of the unethical treatment of Korean workers. The complainant, noting that the Federal Republic had ratified the

[76] Shotwell (ed.), op. cit., doc. 25.
[77] E. A. Landy: *The effectiveness of international supervision: Thirty years of ILO experience* (London, Stevens and Sons, 1966), pp. 178-180.
[78] United Nations Conference on International Organization, Vol. 3, 1945, doc. 2, G/7 *(a)*.

Occupational Cancer Convention, 1974 (No. 139), asked the court to prohibit the sale of Korean asbestos yarn or alternatively to order that potential buyers be advised that the products were made under conditions that endangered the health of workers. The court rejected the plea for prohibition on the grounds that the Republic of Korea was not a Member of the ILO and the Convention, in the court's view, had not been ratified by a sufficient number of countries to reflect internationally recognised ethical rules. The court also rejected the plea for an obligation to inform customers on the ground that the conditions of production were not of essential importance to the buyer.[79]

### b. *Anti-Dumping Duties*

Several countries have provided for anti-dumping duties to combat social dumping. In 1924, Austria authorised penalty duties of up to one-third of the statutory rates on goods produced by labour working excessive hours. In 1931, Argentina's President decreed that duties could be increased when lower wages or forced labour in foreign countries threatened Argentine production. In 1934, Spain authorised higher anti-dumping duties, protective quotas and import bans on goods produced by prison labour or in cases where international labour rules were not observed. In 1935, Cuba authorised increased duties on low-wage goods that endangered Cuban commerce.

### c. *Countervailing Duties*

A countervailing duty is a tariff placed on certain imports to offset production or commercial advantages conferred by the government of the exporting country. The idea that depressed labour conditions should be considered a government bounty or subsidy subject to countervailing duties was put forward as early as 1902.[80] The only country to enact a duty that specifically referred to labour standards, however, was Czechoslovakia. In 1926, the Government authorised duties on goods produced under "unfavourable social conditions of labour" that threatened domestic production.[81]

### d. *Most Favoured Nation Clause*

The most favoured nation (MFN) clause is a form of trade agreement whereby a country automatically extends tariff reductions granted to one country to all countries covered by the agreement. There have been several proposals to link

[79] See A. H. Hermann: "Korean sweatshops are fair competition", in *Financial Times* (London), 18 Aug. 1980, p. 12.
[80] See S. and B. Webb: *Industrial democracy* (London, Longmans, Green and Company, 1902), p. 868.
[81] Act of 22 June 1926.

MFN benefits to working conditions. In 1919, the British Labour Party suggested that MFN benefits could be suspended by the League of Nations in respect of countries that did not observe their obligations under international labour Conventions.[82] In a 1943 proposal for a world economic union, O. T. Mallery suggested that MFN status be restricted to "nations that have adopted minimum labour standards".[83] In 1947, Uruguay submitted an amendment to the ITO Conference stating that nothing in the Charter would prevent a member from taking "reasonable and equitable measures to protect its industry from the competition of like products produced under substandard conditions of labour and pay".[84] Colombia and Mexico made similar proposals, but all were unsuccessful.[85] It seems that no country withdrew MFN benefits on account of an alleged curtailment of worker rights until 1982, when the United States suspended Poland from MFN status for several reasons, including the Government's action in "outlawing the independent trade union Solidarity".[86]

*e. Company Penalties*

Rather than being directed against all imports, the penalties can be aimed at the companies responsible for poor working conditions. For example, an ILO study in 1943 noted that compliance with certain international requirements "could appropriately be made a condition of the assignment to individual producers of shares of the export quota allotted to the country concerned".[87] The 1951 Treaty establishing the European Coal and Steel Community contains a provision stating that, if the High Authority finds that a reduction of wages is being used as a means of competition among enterprises, it shall address to the enterprise or government concerned a recommendation to ensure the payment of compensation to the workers. If an enterprise fails to abide by the recommendation, the High Authority may impose daily penalties on it.[88] No such penalties have ever been applied, however.

The recent trade bill passed by the United States House of Representatives includes "internationally recognised seafarers' rights" in its definition of un-

[82] Labour Party: *Memoranda on international labour legislation* (London, 1919), p. 26.
[83] O. T. Mallery: *Economic union and durable peace* (New York, Harper and Brothers, 1943), p. 83.
[84] Doc. E/CONF. 2/C.1/3/Add.2, 4 Dec. 1947.
[85] United Nations Conference on Trade and Employment: *Reports of Committees and Principal Sub-Committees* (Geneva, 1948), p. 13.
[86] US Proclamation 4991, 27 October 1982. MFN treatment was reinstated on 19 February 1987. See Proclamation 5610, *Weekly Compilation of Presidential Documents*, 19 Feb. 1987.
[87] *Intergovernmental commodity control agreements*, op. cit., p. xxxi.
[88] Treaty establishing the European Coal and Steel Community, Article 68.

fair ocean transport practices. Under the bill, a civil penalty could be imposed on foreign vessels from countries refusing to negotiate an end to certain unfair labour practices in shipping.[89]

*f. Export Restrictions*

All of the restrictions discussed so far have been directed at imports from countries responsible for unfair labour conditions. Another way to influence their behaviour is to restrict exports to those countries. In late 1981, the Reagan Administration imposed economic sanctions against the Soviet Union in reaction to the crackdown in Poland. These sanctions included a prohibition of American exports for the construction of the natural gas pipeline between Siberia and Western Europe. In 1982, the House of Representatives passed a provision tying the lifting of these sanctions to a certification by the President that the Soviet Union was not using forced labour in the pipeline's construction.[90] The House-approved provision did not pass the Senate, however, and the sanctions were later lifted without the certification.

*g. Bargaining Incentives*

As far as results are concerned, there is no rigid line between "penalties" and "incentives". In fact, almost all of the measures for enforcing labour standards were suggested as a way of improving labour conditions. Yet there is a difference between setting standards for imports that might lead to better labour conditions and putting labour problems squarely on the trade bargaining table. This difference was first perceived by James T. Shotwell who, in 1933, proposed a plan for the U.S. Government to make labour conditions one of the basic elements in tariff writing, not "by the method, tried and discarded, of measuring the labour content of goods", but by observing the conditions of labour under which the goods are produced.[91] The proposal, which Shotwell described as a "Trojan horse to get inside protectionist walls", was quickly rejected by the State Department, which doubted that such a policy could be applied in practice.[92]

Twenty-one years later, Shotwell's view was vindicated when President Eisenhower adopted the policy that "the United States withhold reductions in tariffs on products made by workers receiving wages which are substandard in the

[89] H.R. 3, 100th Congress, 1st Session, Title IX, 8 May 1987.
[90] *Congressional Record*, 29 Sept. 1982, p. H7927.
[91] J. T. Shotwell: *Memorandum on the tariff*, 8 Nov. 1933, State Department Archives 611.003/2916.
[92] idem: *The autobiography of James T. Shotwell* (Indianapolis, Bobbs-Merrill, 1961), p. 308.

exporting country".[93] In implementing this directive, the State Department reportedly followed a procedure of "considering" foreign labour standards without directly "discussing" them with other countries. There was one case, however, when the United States did discuss labour conditions: the tariff negotiation with Japan in 1955, when the Japanese were persuaded to establish a new system of minimum wages.[94]

*h. Boycotts*

Another method of exerting leverage is the boycott, which is one of the few non-governmental avenues available for the purpose. In 1918, the author Ordway Tead proposed that the working class boycott goods produced under "unfair conditions".[95] In 1925, the British Labour Party suggested that Members of the ILO might commit themselves to refuse to import goods from a country which had failed to observe the terms of a Convention (whether ratified by it or not).[96]

In recent years, a number of boycotts have been organised to oppose unfair labour conditions. Many of these have received international support. In 1973, the United Farm Workers of America announced a boycott of California table grapes in an effort to gain union recognition from the grape growers. The boycott lasted for about five years and was supported by unions in the United States and Europe. A new boycott of grapes was called in 1984 to oppose the way pesticides were being used. This boycott remains in effect.

Another international boycott occurred in 1976 when the transport unions of Denmark, Norway, Sweden and Finland objected to the practices of ships sailing under "flags of convenience". These ships did not give crews the wages and working conditions set by the International Transport Workers' Federation.

Because of persistent violence against labour leaders at the Coca-Cola bottling plant in Guatemala, the International Union of Food and Allied Workers' Associations in 1980 asked its unions in 58 countries to boycott Coca-Cola products. Another boycott was mounted in 1984 after the bottling plant was shut down. These boycotts were pressed by a coalition of church and labour groups.

In 1985, a series of violent incidents in South African coal mines triggered an international boycott against Royal Dutch, which maintains large coal and oil

[93] Special message to the Congress on foreign economic policy, 30 March 1954.
[94] *Organization for trade cooperation*, Hearings before the US House of Representatives, Committee on Ways and Means, 13 Mar. 1956, p. 888.
[95] O. Tead: *The people's part in peace* (New York, Henry Holt and Company, 1918), p. 84.
[96] Labour Party: *Sweated imports and international labour standards* (London, 1925), pp. 20-21.

investments in South Africa. This boycott is currently being carried out by consumers in Australia, Canada, the United States and nine European countries. The boycott of Shell products is also backed by the ICFTU and many anti-apartheid groups.

## 6. ASSESSING THE INFLUENCE

Compared with the significant influence that international labour standards have had on national legislation, as shown by numerous articles in this journal, the influence of labour standards on the world trading regime has been rather modest. The clearest successes occurred many years ago in the curbing of phosphorus match production and the exploitation of convicts. More recently, the CBI negotiations gave a boost to worker rights in several countries, the most notable being Haiti, which agreed to allow the first free labour federation in over 25 years. Still, the reader could not be blamed for concluding from the foregoing account that the history of IFLS is just one long string of false starts, hollow promises, and forgotten laws.

And yet there is room for optimism. The current resurgence of interest in worker rights may mark a watershed. So let me conclude by suggesting a few lessons that might be drawn from this history to assist ongoing efforts to secure better guarantees for worker rights in GATT.

First, the most striking feature is how little linkage there was between the various milestones discussed here. It is as if different generations have been returning independently to the same important ideas. While this may show the validity of IFLS, these recurrent efforts to "reinvent the wheel" have surely hampered progress in getting the idea accepted.

Second, there continues to be some tension between the two goals behind fair labour standards—promoting human rights and making trade rules fairer. The responsible authority will have to decide whether to attach the highest priority to the "worst" human rights abuses or to the cases that cause the greatest economic harm. Achieving a consistent treatment of countries with different political and economic systems will be difficult.

Third, the trend in recent years has been toward "international" rather than "domestic" standards. This is a positive development. Parochial labour standards will continue to be shunned by many countries.

Fourth, although labour conditionality can be implemented on a unilateral basis, promoting worker rights will be more successful if done multilaterally. From the American perspective, programmes like the CBI and GSP are voluntary.

This gives the grantor government the right to establish conditions for entry. As worker rights move from trade preferences to the mainstream rules of commerce, however, it will get harder for the United States to justify unilateral determinations.

Fifth, the carrot offers more chance of success than the stick. The United States was able to secure constructive action under the CBI because it had some concrete economic benefits to offer governments willing to make labour reforms. In addition to trade preferences, another economic benefit that might be granted is technical assistance in human resource development and labour-management relations.

Sixth, the ILO and GATT have a common interest in eliminating unfair labour conditions. If the two organisations collaborate more closely, it will be more difficult for the issue of worker rights to continue slipping through the cracks. For example, when three Latin American countries brought up IFLS at the conference held to establish an International Trade Organization, other nations stated that the subject should be discussed in the ILO rather than the ITO. When IFLS were considered at several ILO Governing Body meetings in the early 1970s, the United States suggested that the matter be referred to GATT or to the United Nations Conference on Trade and Development (UNCTAD). When the United States raised the issue in GATT last year, several countries, including Brazil, New Zealand and Singapore, maintained that the ILO was the proper forum for its discussion, not GATT.

The final lesson is that advocates of worker rights who see IFLS as a means of achieving freer trade must do a better job of communicating their intentions. Because some IFLS proposals were designed to be protectionist, it is too easy for critics to write off labour standards in trade as a "stupid idea".[97] Of course, the best way to disprove the charge of protectionism would be to couple IFLS with reduced trade barriers for complying countries.

Ironically, it may be that IFLS would have advanced further if they had been motivated more by protectionism than by moralism. For example, when the ITO Charter was being considered by the United States Senate in 1947, the labour provision (Article 7) was initially characterised by Senator Edwin Johnson as "the most wholesome provision in the Charter that I have come across...."[98] But when he was told that Article 7 would *not* permit the United States to impose its

[97] See D. Lal: *Resurrection of the pauper-labour argument*, Thames Essay No. 28, Trade Policy Research Centre, 1981. Lal is quoting Gottfried von Haberler.
[98] *International Trade Organization*, Hearings before the US Senate, Committee on Finance, Part 1, 1947, p. 119.

domestic standards on imports, Johnson quickly lost interest and dismissed the provision as "meaningless and of no effect".[99]

At its core, the idea of fair labour standards is not protectionist. It is anti-protectionist. While workers everywhere would benefit from the further division of labour made possible by international commerce, freer trade is stymied whenever any trading partner questions the underlying fairness of the labour practices used by another. Establishing a floor for worker rights has the potential of removing one of the chief justifications for import restrictions.

No one understood that better than Albert Thomas, the first Director of the ILO. In a debate on international economic policy during the 1930 Conference, he declared: "What a strange idea ... to find a contradiction between the 'labour protectionism' of the International Labour Office and the theory of free or freer trade for which the League [of Nations] stands. You talk of labour protectionism. Yet surely the attempt at nationalistic labour protectionism is in contradiction with the attempt to secure common labour standards which we are pursuing here".[100]

And surely he was right.

[99] ibid., p. 120.
[100] A. Thomas: *International social policy* (Geneva, ILO, 1948), p. 114.

# TRADE LAW AND GLOBAL GOVERNANCE

*by*

*Steve Charnovitz*

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INTERNATIONAL LAW & POLICY