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### Lives Lost to the Overseas Toy Industry: A Call for Action

Michael A. Pangelinan

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# Lives Lost to the Overseas Toy Industry: A Call for Action

## I. INTRODUCTION

On May 10, 1993, over two hundred women died in a fire while making toys for American children. The fire took place in a toy factory in Bangkok, Thailand, where governmentally imposed safety regulations are seldom enforced. The factory, owned by Kader Ltd. of Thailand, maintained no fire alarms, no sprinklers, only a few fire extinguishers, and virtually no means of escape. As a result, the only option available to the few workers not immediately burned to death was to jump out of windows from the third and fourth floors.<sup>1</sup>

In developing countries like Thailand, labor is cheap. As a result, it is considerably profitable for U.S. retailers to seek out such countries as suppliers.<sup>2</sup> The Kader toy factory, which failed to implement even minimal safety precautions to protect its workers, is prototypical of a manufacturing facility in a developing country. The circumstances surrounding the Kader fire serve as a concrete reference point for purposes of proposing overseas factory reform.

The blatantly hazardous conditions that contributed to the Kader fire have motivated U.S. and international organizations alike to call for stricter workers' safety measures in developing countries.<sup>3</sup> Unfortunately, companies based in the developing countries that own and operate factories like Kader often do not have the financial resources to compensate injured workers.<sup>4</sup>

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1. *20/20: Toys At Any Price* (ABC television broadcast, July 30, 1993) (transcript on file with author).

2. *U.S. Increases Imports of Foreign Toys, China Is Largest Exporter, ITC Study Says*, Int'l Trade Rep. (BNA) No. 8, at 306 (Feb. 19, 1992) [hereinafter *U.S. Increases Imports of Foreign Toys*].

3. *WHO: Asia Must Match Rapid Economic Growth with Worker Safety*, UPI, Sept. 13, 1993, available in LEXIS, News Library, UPI File. See also *20/20: Toys At Any Price*, *supra* note 1.

4. Jeffrey Parker, *Factory Lacks Money To Compensate Thai Fire Victims*, Reuter Libr. Rep., June 2, 1993, available in LEXIS, News Library, CURNWS File.

Moreover, governments in developing countries lack incentive to penalize inadequately maintained factories.<sup>5</sup> Therefore, in order to improve safety conditions in overseas factories, some means other than the creation of a civil or criminal remedy must be pursued.

This Comment proposes trade restrictions in response to a human rights crisis overseas. First, this Comment briefly describes the human suffering that U.S. toy companies bring about in developing countries. Second, this Comment recognizes an obligation on the part of the United States to reduce this suffering. Third, this Comment suggests that the United States, consistent with its often-stated governmental policy of opposing human rights violations, should ban the import of toys produced under conditions lacking certain basic safety precautions. Fourth, this Comment addresses possible objections to such a ban on imported toys based on the General Agreement on Tariffs and Trade ("GATT").<sup>6</sup> This Comment argues that, unlike the recent U.S. ban on imported tuna, which was found by a GATT Review Panel to have violated GATT provisions,<sup>7</sup> the proposed toy-ban would overcome GATT objections. Finally, this Comment concludes that a ban on imported toys produced under inhumane conditions should be pursued even in the face of an unfavorable GATT Review Panel decision.

## II. THE OVERSEAS TOY FACTORIES<sup>8</sup>

The Kader fire is not the only overseas factory fire to have resulted in substantial loss of life; this past year, there were at least three other well-publicized cases. On July 6, 1993, ten workers,

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5. 1993 *Was a Deadly Year for Southeast Asia Workers*, PLAIN DEALER, Dec. 30, 1993, at 8F.

6. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A11, 55 U.N.T.S. 187 (entered into force Jan. 1, 1948) [hereinafter GATT]. The most recent round of GATT negotiations, the Uruguay Round, which concluded on December 15, 1993, added nothing to the GATT in the area of worker safety. *Labor Leaders, Maintaining NAFTA Grudge, Blast GATT . . .*, NAT'L JOURNAL'S CONG. DAILY, Mar. 17, 1994. See also *GATT--Key Elements at a Glance*, Reuter Eur. Comm. Rep., Dec. 15, 1993, available in LEXIS, News Library, CURNWS File. This Comment, therefore, does not address the Uruguay Round.

7. General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, 30 I.L.M. 1594 (1991) [hereinafter GATT Panel Report]. See *infra* text accompanying notes 97-122.

8. This Comment uses the term "overseas factories" only in reference to factories in lesser-developed Asian countries.

mostly young women, died in a downtown Bangkok textile factory.<sup>9</sup> In November 1993, eighty-four workers died in a toy factory fire in Shenzhen, China.<sup>10</sup> The very next month, in the nearby Province of Fujian, sixty workers died in a factory fire.<sup>11</sup> Like the Kader factory, these factories had subjected their workers to conditions that would shock most Americans.<sup>12</sup> Overseas factories typically are crowded facilities with very little ventilation and with no means of escape in the event of an emergency.<sup>13</sup> Fire exits are often used for storage space, and fire hoses and fire doors are often inoperative.<sup>14</sup>

Unsafe construction also threatens the lives of overseas factory workers.<sup>15</sup> Buildings originally constructed to allow evacuation and adequate ventilation are often modified to create more rooms. This modification prevents escape access, reduces the reach of fire hoses, and renders fire alarms and sprinkler systems ineffective.<sup>16</sup> In the case of the Kader fire, poorly constructed steel beams collapsed quickly in the flames.<sup>17</sup>

Working conditions in overseas toy factories are intolerable by U.S. standards. Neither U.S. law nor American public opinion would permit U.S.-domiciled companies to manufacture their products under such inhumane conditions—statutory penalties would be imposed,<sup>18</sup> and public protests would be triggered.<sup>19</sup>

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9. *10 Workers Die in Thai Factory Fire*, CHI. TRIB., July 6, 1993, at N13. When the fire broke out, the victims were asleep on the top floor of the factory. They were unable to evacuate because the owner of the building had locked the door to the staircase. All of the victims were between the ages of fourteen and nineteen. *Id.*

10. *China Arrests Two HK Businessmen over Factory Fire*, Reuter Libr. Rep., Jan. 14, 1994, available in LEXIS, News Library, CURNWS File. Two Hong Kong businessmen and two Chinese factory officials were accused of locking the windows and doors of the Shenzhen Zhili Toy factory to keep workers inside during business hours. *Id.*

11. Andrew Quinn, *Fiery Deaths Spark China Call for Worker Rights*, Reuter Eur. Bus. Rep., Dec. 16, 1993, available in LEXIS, News Library, CURNWS File. Most of the sixty workers were asleep one floor above the factory in a dormitory that was also used to store textiles. The victims were smothered by poisonous gases from the burning textiles before they could save themselves from the fire. *Id.*

12. *1993 Was a Deadly Year for Southeast Asia Workers*, *supra* note 5.

13. *Building Safety in Asia: Sitting in a Tinder Box*, BUS. ASIA, Sept. 27, 1993, available in LEXIS, News Library, CURNWS File.

14. *Id.*

15. Reese Erlich, *Report Will Say Thai Government Culpable in Fatal Factory Fire*, CHRISTIAN SCI. MONITOR, July 8, 1993, at 9.

16. *Building Safety in Asia: Sitting in a Tinder Box*, *supra* note 13.

17. Erlich, *supra* note 15.

18. *See, e.g., Commonwealth v. Welansky*, 55 N.E.2d 902 (Mass. 1944) (manslaughter charge arising out of the "Cocoanut Grove" fire); *People v. Harris*, 134 N.Y.S. 409 (1911)

No such penalties or protests protect workers in overseas toy factories because U.S. toy retailers do not own these factories.<sup>20</sup> United States retailers purchase the toys produced in the overseas factories, thereby keeping the factories in business, but take no part in ownership or control of the factories, thereby avoiding legal liability for injuries to factory workers.

The appalling working conditions exist because they increase the profitability of the overseas factories.<sup>21</sup> Often, factory workers are purposely locked inside the factories to prevent them from leaving during business hours.<sup>22</sup> Cheap, and usually illegal structural alterations seriously jeopardize workers' lives.<sup>23</sup> In addition, factory owners find it cost-effective to bribe safety inspectors—what few there are<sup>24</sup>—into “looking the other way” when it comes to workers' safety regulations.<sup>25</sup> Even the cost and trouble associated with providing safety information to workers is more than factory owners are willing to incur.<sup>26</sup> In short, protecting the lives of factory workers, mostly women with no alternative sources of potential income, is not a concern for those in control of overseas factories.

To make matters worse, this inhumane state of affairs shows very little sign of improvement.<sup>27</sup> This is partially due to inadequate pressure, governmental or otherwise, from within the

(manslaughter charge arising out of the “Triangle Shirt Waist” fire).

19. Major disasters in the United States resulting from inadequate safety measures have led to urgent safety reform movements. See generally David Treadwell & John J. Goldman, *Blaze Kills 87 in N.Y. Social Club*, L.A. TIMES, Mar. 26, 1990, at A1. See also *Return of Sweatshops—They Flourish Anew*, U.S. NEWS & WORLD REP., Jan. 14, 1980, at 73.

20. Parker, *supra* note 4.

21. Mary Kay Magistad, *Fatal Thailand Hotel Collapse Was an Accident Waiting to Happen, Experts Say*, WASH. POST, Aug. 17, 1993, at A28.

22. Charlie Fidelman, *Filmmaker Focuses on Thailand's Sweat Shops*, GAZETTE, July 29, 1993, at G4. See also *Health Week: Thai Factories Often Unsafe Places to Work* (CNN television broadcast, Nov. 27, 1993) (transcript on file with the author).

23. Magistad, *supra* note 21.

24. In Thailand, approximately 35 inspectors are responsible for over 30,000 factories. *Building Safety in Asia: Sitting in a Tinder Box*, *supra* note 13.

25. *1993 Was a Deadly Year for Southeast Asia Workers*, *supra* note 5.

26. Sonya Hepinstall, *Nowhere To Turn for Tired Asian Workers*, Reuter Eur. Bus. Rep., June 9, 1993, available in LEXIS, News Library, CURNWS File.

27. Less than two years after the Kader fire, which has been reported to be the world's worst peacetime factory fire, Kader Ltd. has already constructed a new factory at a new location in Bangkok. To avoid delaying the operation of the factory, Kader has elected to ignore the local law requiring governmental approval prior to construction. *Thai Toy Firm in Fire Disaster Sets Up New Illegal Factory*, STRAITS TIMES, Jan. 5, 1994, at 13.

countries where the factories are located,<sup>28</sup> and partially due to desperate attitudes on the part of the workers in such countries.<sup>29</sup> Governments of developing nations make little or no effort to enforce their own safety regulations. Workers in these nations are so worried about earning decent wages that the issue of safety rarely even enters their minds.<sup>30</sup>

### III. ACCEPTING RESPONSIBILITY

The lack of safety precautions that led to the Kader fire is reminiscent of conditions that were prevalent in many U.S. factories prior to the labor reform movement of the 1930s.<sup>31</sup> The "industrial revolution" in the United States increased the demand for unskilled labor and gave rise to factories packed with women and children working under extremely hazardous conditions.<sup>32</sup> Although state and federal legislatures had passed laws to improve working conditions in the early 1900s, initially, the U.S. Supreme Court held such laws unconstitutional.<sup>33</sup> The Court, which began upholding "New Deal" legislation in 1937,<sup>34</sup> finally forced U.S. manufacturers to provide safer conditions for their workers.<sup>35</sup>

This shift in judicial and congressional attitude reflected a growing intolerance in this country toward the practice of

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28. A special commission appointed by Thailand's Prime Minister, Chuan Leekpai, recently reported that the Thai Government, after inspecting the Kader factory prior to the fire, approved the flawed construction and failed to follow up on known safety violations. Erlich, *supra* note 15.

29. Factory workers in Asian industrial areas, especially Bangkok, tend to be young girls from small villages who are desperate for money and willing to tolerate inhumane working conditions. Fidelman, *supra* note 22.

30. Hepinstall, *supra* note 26.

31. Philip F. Feldblum, *A Short History of Labor Law 1349-1967*, 44 LAB. L.J. 67, 73 (1993).

32. *Id.* at 72.

33. *See, e.g.*, *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adair v. United States*, 208 U.S. 161 (1908).

34. The Court's willingness to uphold President Franklin Roosevelt's "New Deal" legislation was largely a result of political pressure. The threat of President Roosevelt's court-packing plan is thought to have influenced the abrupt change in attitude on the Court, known as "the switch in time that saved nine." LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 449 (1978).

35. *See, e.g.* *United States v. Darby*, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding the National Labor Relations Act).

exploiting workers to maximize profits. Today, a U.S. corporation that fails to provide adequate safety precautions in its manufacturing process risks incurring substantial penalties.<sup>36</sup> Numerous state and federal agencies have been established to protect the welfare of factory workers by adopting and enforcing occupational safety regulations.<sup>37</sup> Labor unions provide bargaining strength, thereby placing the often conflicting interests of workers' safety and corporate profit on equal footing.

In light of the gradual evolution of working conditions that took place in the United States over the past century, it may seem as though the most effective approach for the United States to take vis-a-vis overseas toy factories is to sit back and allow developing nations to evolve in the same way. Such a *laissez faire* approach, however, would ignore the changes that have taken place in the world since the U.S. labor reform movement.

In the early decades of the twentieth century, U.S. industrial technology was unmatched by any other nation.<sup>38</sup> As a result, the relationship between industrial laborers and employers in the United States developed without pressure from foreign countries. At that time, there was simply no need for U.S. companies to secure cheap labor from developing nations.

Today, however, cheap labor is both in demand and available in nations throughout the world.<sup>39</sup> Governments of developing nations have little economic choice but to maintain the conditions

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36. For example, the California Corporate Criminal Liability Act authorizes state prosecutors to file felony charges against company managers who expose workers to a "serious concealed danger." Such an offense is punishable by imprisonment for up to three years, and a fine of up to \$25,000 if the manager is a single individual, or a fine of up to \$1,000,000 if the manager is a corporation. CAL. PENAL CODE § 387(a) (Deering 1993).

37. See generally Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 652(5), 653(b)(1), 668 (1970). See also California Occupational Safety and Health Act of 1973, CAL. LAB. CODE § 6300 (Deering 1993).

38. The early 1920s have been described as the time of the second industrial revolution in the United States. This era saw the emergence of "electric light and power, . . . the internal-combustion engine, . . . wireless communications, and synthetic, or human-made, chemicals." THOMAS P. HUGHES, AMERICAN GENESIS: A CENTURY OF INVENTION AND TECHNOLOGICAL ENTHUSIASM 296 (1989).

39. For example, Mexico is an excellent source of cheap labor, especially with the recent passage of the North American Free Trade Agreement ("NAFTA") on November 20, 1993. For a discussion of this increasingly attractive source of labor, see Tod Robberson, *Mexican Labor Shows Who's Boss; Workers Win Suit, Now Own Factory*, WASH. POST, Nov. 16, 1993, at A24.

that attract wealthy U.S. retailers.<sup>40</sup> Bringing about factory reform in developing countries, therefore, requires that the United States assume some responsibility for the toys that its retailers distribute.

Apart from any similarities between the former struggles of U.S. laborers and the current plight of workers producing toys overseas, the U.S. policy of opposing human rights violations<sup>41</sup> should, alone, be sufficient justification for a ban on toys produced under oppressive conditions. In the past, the United States has defended a wide range of human rights causes throughout the world, and has developed a worldwide reputation for being a human rights protector.<sup>42</sup>

By the same token, when the United States has turned its back on oppressed citizens of foreign nations, such indifference has caused widespread criticism and even outrage. For example, the media greatly criticized former President George Bush for vetoing legislation that tied China's "most favored nation" trading status<sup>43</sup>

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40. A foreign labor expert in Bangkok recently stated, regarding inhumane working conditions in Thailand, that the Thai Government is constantly concerned about being able to "compete with Indonesia, with Southern China, with Vietnam. There's no money spent on infrastructure, human or otherwise." Hepinstall, *supra* note 26.

41. Upon signing the Human Rights Week Proclamation of 1988, former President Ronald Reagan described the U.S. human rights policy as "an effective instrument for improving the lives of people, not an instrument for self-righteous self-satisfaction." Remarks on Signing the Human Rights Day, Bill of Rights Day, and Human Rights Week Proclamation, PUB. PAPERS (Dec. 8, 1988).

42. In a recent *Los Angeles Times* opinion, former Secretary of State, Henry Kissinger described the United States human rights tradition as follows:

The fundamental motivation of U.S. human rights policy rests deep within American tradition. No other nation has been so explicitly founded to vindicate liberty or been populated as extensively by refugees. This experience has infused U.S. foreign policy with a missionary quality. Other nations need to take this attitude seriously; to most Americans, the national interest cannot be separated from some concern for human-rights.

Henry A. Kissinger, *There's More To U.S.-China Ties Than Human Rights*, L.A. TIMES, Mar. 27, 1994, at M2.

43. The most-favored-nation principle is "a provision incorporated into commercial treaties whereby a country guarantees that it will grant to the other signatory, or signatories of a treaty tariff concessions or other commercial advantages equal to those given to the country to which it grants the most favorable treatment." Charles H. McLaughlin, *Most-Favored-Nation Principle*, in THE GUIDE TO AMERICAN LAW 378, 378 (1984).



to human rights conditions,<sup>44</sup> as well as for his arguably callous treatment of refugees fleeing Haiti in 1992.<sup>45</sup>

The Clinton Administration has made a greater effort to adhere to the U.S. pro-human rights tradition. In May 1993, President Clinton became the first U.S. President to attach human rights conditions, by executive order, upon future renewals of China's "most favored nation" trading status.<sup>46</sup> According to President Clinton, these human rights conditions mark "a new chapter in United States policy toward China."<sup>47</sup> The renewed vigor with which the United States now formulates its response to human rights violations must be applied to promote action to reform working conditions in overseas toy factories.<sup>48</sup>

There are three reasons for placing primary responsibility on the United States for reforming hazardous toy factory conditions overseas: (1) U.S. toy companies actively seek out developing nations as suppliers in order to benefit from reduced production costs; (2) the vast U.S. toy market places U.S. companies in a position to influence these suppliers; and (3) the suggested approach may simply be the only way to improve working conditions in labor-intensive overseas toy factories.

### A. Taking Advantage of Cheap Labor

Much of the public outrage in the United States resulting from the Kader fire has been directed at U.S. toy manufacturers.<sup>49</sup> American toy companies such as Tyco and Hasbro purchase most of their products from overseas suppliers. According to the International Trade Commission Industry and Trade Summary of November 1991,<sup>50</sup> the highly labor-intensive toy manufacturing

44. Susan Cornwell, *Bush Tells Congress He'll Renew China's Trade Status*, Reuters, June 3, 1992, available in LEXIS, News Library, CURNWS File.

45. David Haskel, *Bush Stance on Haiti Seen As Cruel, Ineffective*, Reuters, May 28, 1992, available in LEXIS, News Library, CURNWS File.

46. Exec. Order No. 12,850, 58 Fed. Reg. 103 (1993); Michael Chugani, *U.S. Spells Out MFN Renewal Conditions*, S. CHINA MORNING POST, Mar. 12, 1993, at 2.

47. *Clinton Extends China's MFN for Another Year*, Xinhua Gen. Overseas News Serv., May 28, 1993, available in LEXIS, News Library, CURNWS File.

48. Advancing a consistent set of human rights goals "can be a powerful foreign policy tool—one that buttresses American leadership and undermines American adversaries." Robert Cullen, *Human Rights Quandary; The Cost of Vagueness*, FOREIGN AFF., Winter 1992-93, at 79.

49. See 20/20: *Toys At Any Price*, *supra* note 1.

50. Industry and Trade Summary, Toys and Models, USITC Pub. 2426, GM-1 (Nov. 1991).

process has caused U.S. toy companies to shift production to lower-wage countries and focus their domestic operations on "development, design, engineering, distribution, marketing, and management."<sup>51</sup>

The Summary also identified a recent increase in the relative importance of Thailand, Macao, and Malaysia as U.S. toy suppliers. United States toy companies are afraid of placing themselves at risk by relying too heavily upon China.<sup>52</sup> As a result, to help satisfy the U.S. market, toy manufacturing facilities have emerged in other developing countries, where safety precautions are likely to be a low priority.<sup>53</sup>

### B. *The Power of the U.S. Market*

The influential position of the U.S. toy market is most noticeable as it relates to Chinese-made toys. In recent years, U.S. labor and consumer organizations have exerted a great deal of pressure, mainly in the form of highly-publicized boycotts, upon Chinese toy manufacturers to discontinue their oppressive labor practices.<sup>54</sup> Pressure has also been applied through the recent debate over whether to extend "most favored nation" status to China.<sup>55</sup> While the effectiveness of this pressure in decreasing human rights violations in China is unclear, it has caused at least some Asian toy manufacturers, including Kader, to move their production facilities from China to Thailand.<sup>56</sup>

The gradual emergence of Asian-owned production facilities in developing countries, coupled with an increased U.S. need for alternative lower-wage suppliers, has forced developing economies, such as that of Thailand, to work toward securing favorable trade

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51. *Id.* at 2.

52. *Id.* at 3.

53. Prompted by the Kader fire, the World Health Organization ("WHO") recently identified developing Asian countries as specifically in need of improved workplace conditions. *WHO: Asia Must Match Rapid Economic Growth with Worker Safety*, *supra* note 3.

54. Andrew Quinn, *Pressure from Chinese Toy Boycott Felt*, *L.A. TIMES*, Dec. 16, 1991, at D3; *AFL-CIO, Consumer Group Boycott Toys Made in China by Children*, *Daily Lab. Rep. (BNA) No. 228*, at A-1 (Nov. 26, 1991).

55. See McLaughlin, *supra* note 43. See also, *Battles in Toyland—Industry Fights in Favor of China Trade Status*, *SEATTLE TIMES*, June 12, 1991, at G1.

56. See Quinn, *supra* note 54. Expansion also increased in Malaysia and Macao between 1986 and 1990. *Industry and Trade Summary, Toys and Models*, *supra* note 50, at 3.

treatment from the United States.<sup>57</sup> These developing nations, which continue to thrive so long as they are called upon to meet the needs of U.S. consumers, stand to lose greatly if, through their inhumane labor practices, they fall into disfavor with the United States.<sup>58</sup> This heavy dependence of foreign suppliers upon the U.S. market has been a basis for criticism of U.S. companies. For example, Lane Kirkland, the president of the American Federation of Labor—Congress of Industrial Organizations (“AFL-CIO”), recently called for U.S. companies to assume responsibility for lives lost in the Kader fire. According to Kirkland, U.S. toy companies “profit off of the tragedy derived from the conditions to which those young women were exposed, and they are responsible.”<sup>59</sup>

The American public’s outrage at the inhumane working conditions that caused the deaths of two hundred women is justified regardless of whether the United States was, in any way, involved. The extent of the outrage should not depend on the fact that the victims were making toys specifically for the American market. This fact should, however, increase the sense of responsibility on the part of the American people, and motivate the United States to prevent such disasters from reoccurring.

### C. No Alternatives for Exploited Workers

The use of economic sanctions to protect human rights is not novel.<sup>60</sup> The United States has applied this approach most

57. Under the U.S. Generalized System of Preferences (“GSP”), designated developing countries are allowed to export certain products to the United States duty-free. 19 U.S.C. § 2461 (1984). In order to maintain its GSP status, Thailand is making an effort to accommodate U.S. human rights concerns. *Lessons from America*, ECONOMIST, Jan. 29, 1994, at 38. In 1989, Hong Kong, the Republic of Korea, and Taiwan all lost GSP status. In 1990, toy imports to the United States from each of these countries fell substantially. Industry and Trade Summary, Toys and Models, *supra* note 50, at 8. See also Quinn, *supra* note 54.

58. For example, since 1987, China has attempted to become a member of the GATT; however, the Tiananmen Square massacre of 1989, which strained relations between the United States and China, has greatly delayed further consideration of China’s GATT application. *GATT Panel To Weigh Taiwan Membership as China’s GATT Application Falts*, Int’l Trade Rep. (BNA) No. 15, at 635 (Apr. 14, 1993).

59. See 20/20: *Toys At Any Price*, *supra* note 1.

60. See, e.g., Generalized System of Preferences Renewal Act of 1984 § 503(b), 19 U.S.C. § 2462(b) (1988) (excluding from duty-free treatment under the Generalized System of Preferences developing countries that do not take steps to afford their workers internationally recognized worker rights); Caribbean Basin Economic Recovery Act § 212(c), 19 U.S.C. § 2702(c) (1988 & Supp. IV 1992) (authorizing the President to consider

notably to discourage prison and child labor practices in China. The restrictions imposed upon China, however, have had only marginal impact because they are tied to its "most favored nation" status rather than targeted at a particular product.<sup>61</sup> Furthermore, China, with its economic strength and historic sensitivity to foreign intervention,<sup>62</sup> is not inclined to bow to U.S. pressures. With respect to developing nations such as Thailand, however, restrictions targeted at a specific product may not only be effective, but may well be the only way to reduce loss of life due to hazardous working conditions.

Both legal and non-legal barriers prevent the victims of the Kader fire and their families from suing U.S. toy companies. American companies, after all, neither own nor operate the Kader factory.<sup>63</sup> As mere purchasers of Kader products, with no control over the physical details of the manufacturing process, U.S. companies owe no duty of care to the Thai factory workers.<sup>64</sup> This forecloses the possibility of the Thai workers or their families

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whether Caribbean countries have taken steps to afford their workers internationally recognized worker rights in deciding whether to grant these countries trade preferences under the Caribbean Basin Initiative). For a discussion of the above two U.S. trade statutes as they relate to worker rights, see Jorge F. Perez-Lopez, *Conditioning Trade on Foreign Labor Law: The U.S. Approach*, 9 COMP. LAB. L.J. 253, 259-274 (1988).

61. The United States and China have agreed not to import or export products of prison labor. Memorandum Of Understanding on Prohibiting Import and Export Trade in Prison Labor Products, Aug. 7, 1992, 31 I.L.M. 1071. Winston Lord, Assistant Secretary of State for East Asian and Pacific Affairs, recently stated that China's "most favored nation" trading status with the United States will only be continued if there is "satisfactory implementation of the MOU [Memorandum Of Understanding] and overall progress on human rights." *China Fails to Implement Pact with U.S. on Prison Labor Exports, Officials Say*, Int'l Trade Rep. (BNA) No. 36, at 1490 (Sept. 15, 1993).

62. According to former Secretary of State Henry Kissinger, "[a] prickly insistence on sovereignty is a particular attribute of the Chinese government. In China, Western intervention is perceived as an uninterrupted humiliation since the Opium wars." Kissinger, *supra* note 42.

63. Parker, *supra* note 4.

64. The most plausible tort theory in this situation is vicarious liability, based on the doctrine of respondeat superior, and the related doctrine of apparent authority. To owe a duty of care to injured factory workers under the former doctrine, a U.S. company would have to control the negligently maintained factory. That is, the factory would have to be, in effect, an employee of the U.S. company. *Murrell v. Goertz*, 597 P.2d 1223 (Okla. Ct. App. 1979). Under the latter doctrine, this duty would be premised on authority given by the U.S. company to the factory to act on its behalf. *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985). See WILLIAM A. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 460 (4th ed. 1971) (discussing the "control" requirement under the theory of vicarious liability).

bringing suit for negligence against U.S. companies in U.S. courts.<sup>65</sup> Furthermore, even if some novel theory of liability based on a *de facto* agency relationship between the U.S. companies and Kader were pursued, given the "hands off" policy that U.S. companies seem to cling to with respect to questionable labor practices in supplier countries, such *de facto* control would be extremely difficult to prove.<sup>66</sup> Moreover, imposing liability upon U.S. companies for injuries to Thai workers raises problems of sovereignty.<sup>67</sup>

Other types of barriers prevent victims and their families from suing the Thai factories. The company that owns the unsafe factory may not have the financial resources to pay the potentially massive damages associated with loss of life. This was precisely the problem the victims of the Kader fire faced.<sup>68</sup> Furthermore, the labor laws of the developing country may not be adequately enforced.<sup>69</sup>

Neither the U.S. importers nor the unsafe factories themselves face a significant threat of legal liability under U.S. law for the lives they place at risk. Therefore, it is necessary to improve the situation overseas by means other than civil litigation. In light of the added problem of inadequate legal pressure from the supplier country itself, the need for U.S. action becomes clear.

#### IV. THE PROPOSED BAN

The most obvious advantage of a ban on imports to improve workers' safety conditions is that such an approach is consistent with traditional notions of sovereignty. The concept of sovereignty

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65. See PROSSER, *supra* note 64, at 143. To bring suit for negligence against a U.S. company in a U.S. state court, the Thai workers or their families would have to show "[a] duty, or obligation, recognized by the law, requiring the [U.S. company] to conform to a certain standard of conduct, for the protection of others against unreasonable risks." *Id.* See also RESTATEMENT (SECOND) OF TORTS § 281 (1977).

66. David Miller, President of Toy Manufacturers of America, stated with regard to the Kader fire: "[T]he responsibility for those factories is in the hands of those who are there managing the factory." *20/20: Toys At Any Price*, *supra* note 1.

67. In *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949), the U.S. Supreme Court held that a U.S. law requiring overtime pay for work in excess of eight hours per day did not extend to a private contractor on construction projects for the United States in Iraq and Iran.

68. Parker, *supra* note 4.

69. W. Gary Vause & Nikom Chandravithun, *Thailand's Labor and Employment Law: Balancing the Demands of a Newly Industrialized State*, 13 NW. J. INT'L L. & BUS. 398, 402 (1992). See also Erlich, *supra* note 15.

necessarily includes the power to protect the interests of those within the sovereign's territorial limits.<sup>70</sup> With respect to a regulatory ban on toys, if the sovereign deems certain products to be manufactured in a way that violates minimal standards of human decency, it is well within its power to exclude such products from being sold and distributed within its territory.<sup>71</sup> Not so obvious, however, is whether there are valid reasons for singling out toys in particular as the object of the ban, and when such a ban should be triggered.

### A. A Ban on Toys in Particular

Directing the proposed ban specifically at toys is justifiable as a matter of both policy and practicability. The highly labor-intensive nature of the toy manufacturing process,<sup>72</sup> coupled with the fact that U.S. consumers are not willing to pay high prices for toys,<sup>73</sup> tempts U.S. companies to cut costs by seeking out cheap labor in developing nations.<sup>74</sup> Furthermore, when workers are

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70. See G.W. KEETON, *THE ELEMENTARY PRINCIPLES OF JURISPRUDENCE* 44 (2d ed. 1949). "Sovereignty, as conceived by Bodin, Hobbes, and Austin, has three main characteristics: (i) Sovereignty within a state is essential; (ii) Sovereignty is indivisible; (iii) Sovereignty is *unlimited and illimitable*." *Id.* (emphasis added). The concept of sovereignty is explored extensively by political philosophers such as John Locke, Jean-Jacques Rousseau, Immanuel Kant, and Thomas Hobbes. For a general discussion of this concept as it pertains to these philosophers, see J.W. GOUGH, *THE SOCIAL CONTRACT* (2d ed. 1957).

71. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 88-119 (1974).

72. Toy assembly requires a significant amount of handwork, which increases the cost of labor. Chris Kraul, *Toy Companies Bullish on Border Plants*, L.A. TIMES, Jan. 1, 1991, at 9D. In 1991, Japanese toy producer Tomy LTD. closed down its Singapore toy factory because further automation in Singapore was no longer feasible. According to Toshikuni Goto, Executive Director of Tomy Singapore, toy production is "very labor-intensive and seasonal, and requires new products every year." *Tomy Closes Singapore Plant, Lays Off Workers*, Japan Econ. Newswire, Nov. 14, 1991, available in LEXIS, News Library, ARCNWS File.

73. Donna Leccese, *Toy Manufacturers, Retailers Battle Profit Squeeze*, PLAYTHINGS, Jun. 1990, at 30. Leccese writes:

Consumers rely on their discretionary income to purchase toys and, therefore, manufacturers have traditionally tried to keep prices low. Since the retail price paid by the consumer ultimately reflects the plaything's production cost, toy makers must minimize their costs, including those for labor and materials, to keep prices low. This also helps protect manufacturers and retailers from severe losses suffered as a result of a product's sudden downswing.

*Id.*

74. Industry and Trade Summary, *Toys and Models*, *supra* note 50, at 3. "Foreign producers have a significantly competitive advantage over domestic producers in terms of labor costs for manufacturing and assembly. Toy production, especially of stuffed toys, is

desperate and corruption is rampant, there is little incentive to spend money on safety. Therefore, the very nature of the toy manufacturing process invites dangerous conditions. Given the stated U.S. policy of opposing human rights violations,<sup>75</sup> it seems natural to target the industry within which the identified evil, namely severely hazardous working conditions, is most blatant.

A ban on toys in particular is also consistent with public policy because toys are a non-essential item. Unlike restrictions on agriculture, fuel, or textiles, a ban on toys poses no threat to the welfare of U.S. consumers. While U.S. toy retailers may feel some economic impact from toy import restrictions, the negative consequences to consumers are limited to an increase in the price of toys. As disappointing as this may be for some American children, it is a small price to pay when weighed against the unnecessary loss of human lives.

In terms of practicability, singling out toys is likely to be effective simply because foreign toy suppliers are dependent upon the U.S. market.<sup>76</sup> In addition, by targeting a specific category of product, enforcement will be less burdensome, and minimum safety conditions less difficult to determine.<sup>77</sup> Furthermore, a ban directed at a narrowly defined category of imports such as toys is likely to encounter less political opposition than a ban applied to imports in general.<sup>78</sup>

### B. Triggering the Ban

In order to be effective, a ban on toys must be carefully structured. It should clearly identify the conditions that trigger the ban, and these conditions should be as specific as possible. Because the ban proposed in this situation is prompted by severe human rights deprivations, it should only be triggered when working conditions actually cause loss of human life. This limitation has the dual advantage of providing a convincing basis

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highly labor intensive. Pieces must be sewn together using a wide variety of patterns." *Id.*; *U.S. Increases Imports of Foreign Toys*, *supra* note 2.

75. See *supra* notes 41-42 and accompanying text.

76. See *supra* text accompanying notes 54-59.

77. Monitoring a single type of manufacturing process allows a certain predictability to emerge, making future violations easier to detect.

78. See Peter Overby, *Trading Favors; While Congress Debates Trade Policy, Members Quietly Lift the Barriers for Their Favorite Importers*, COMMON CAUSE MAG., Spring 1993, at 18 (discussing the influence of major toy retailers upon Congress' use of trade bills).

for the ban, namely actual loss of human life, and of providing easily applicable criteria for determining when the ban applies.

With this in mind, the ban on imported toys should take the following form: the Secretary of Treasury shall ban the importation of toys manufactured under conditions that result in accidental loss of human life in excess of X number of lives per year;<sup>79</sup> upon triggering the ban, the factory in which the loss of life occurred is presumed to have been negligently maintained. The burden is on U.S. toy retailers intending to purchase toys from such a factory to show, through documentary evidence, either of the following: (1) that the deaths were not the result of inadequate safety measures; or (2) that adequate safety measures have since been implemented.

The above formulation is consistent with the overall goal of the ban in a few important ways. First, it ensures that only blatant violations trigger the ban. The purpose of the ban, after all, is to save lives. Countries are not required, or even expected, to implement safety standards on par with those of the United States.<sup>80</sup> They are, however, expected to take certain basic steps to decrease the chances that their factory workers will die on the job.

Second, the above formulation ensures that only negligently maintained factories suffer the consequences of the ban. Basic safety precautions do not always prevent work-related deaths. Penalizing all factories that have accidents, regardless of the existence of basic safety precautions, would not adequately single out the facilities with truly inhumane working conditions.

Finally, the above formulation holds accountable the U.S. toy retailers that keep the overseas toy factories in business. Overseas

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79. The number of deaths designated by X will act as a "red flag," giving rise to a presumption of a lack of minimal safety measures. The specific number of deaths required to trigger the ban, while important, is not crucial for purposes of this Comment. This number may be based on statistical data that reflects the yearly average of work-related deaths that normally occur in factories with minimal safety measures in place. It may be necessary to consider certain variables, such as a factory's production rate or the number of workers a factory employs. Regardless of the specific calculations required, an unreasonable number of deaths, whether uniform or contingent upon certain variables, is obtainable.

80. In enacting the Generalized System of Preferences Renewal Act of 1984, Congress recognized that it is unrealistic to require that "developing nations come up to the prevailing labor standards of the United States and other highly-industrialized developed countries." H.R. Rep. No. 1090, 98th Cong., 2d Sess. 12 (1984), *reprinted in* 1984 U.S.C.A.N. 5101, 5112.



factories are often negligently maintained because of inadequate enforcement of safety regulations.<sup>81</sup> Placing the burden upon U.S. companies to provide evidence of adequate safety measures gives U.S. companies that are unable to provide such evidence two options. They can either obtain their supply elsewhere,<sup>82</sup> or urge the country in which the unsafe factory is located to enforce its own governmental safety regulations.

### C. Implementation

Recent Thai labor reform has established a model mechanism for implementing the proposed toy ban.<sup>83</sup> Although other developing countries may not have labor laws as advanced as those of Thailand, these countries will feel the economic consequences of inadequate safety measures once U.S. toy retailers are prevented from purchasing toys from unsafe factories. Such countries are then likely to develop regulations necessary to ensure that their factories avoid the ban.

The labor law reform in Thailand began in March 1992, when the Thai Cabinet created a Labor Welfare and Protection Department to enforce workplace regulations.<sup>84</sup> Such regulations, previously unenforced due to lack of an official Labor Ministry,<sup>85</sup> included general workers' safety measures.<sup>86</sup> Particularly relevant to the proposed toy-ban is a provision that requires facilities with 100 or more workers to be monitored by a work safety officer.<sup>87</sup> The work safety officer must have formal training in work safety,<sup>88</sup> and is responsible for the following duties:

- (1) insuring that employee safety is observed;
- (2) giving advice and suggestions to employer and employee regarding work safety;
- (3) supervising the use and operational condition of safety equipment;
- (4) inspecting and reporting, for purposes of

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81. Erlich, *supra* note 15.

82. Most major U.S. toy retailers already utilize low-cost Mexican labor. Chris Kraul, *Toy Makers Expanding Production in Mexico; Manufacturing: U.S. Companies Have Steadily Increased the Scope of Their Maquiladora Operations in Recent Years*, L.A. TIMES, Jan. 16, 1991, at D6.

83. Vause & Chandravithun, *supra* note 69, at 398.

84. *Id.* at 402.

85. *Id.*

86. *Id.* at 399.

87. *Id.* at 435.

88. *Id.* at 436.

improved safety, the working conditions and employee performance; (5) keeping records and making reports of accidents and diseases that occur in relation to work; and (6) promoting and supporting safety activities.<sup>89</sup>

Obviously, these measures are not currently enforced in a manner sufficient to prevent disasters like the Kader fire. Nevertheless, the fact that the Thai Government has adopted such extensive regulations suggests a strong desire to protect workers' safety. To ensure adequate enforcement, it may only be necessary to provide some added incentive, namely, the avoidance of U.S. import prohibitions.<sup>90</sup> Most significant for the purposes of the proposed toy-ban is the fact that Thailand, a developing country where factory conditions are extremely hazardous, already has a regulatory structure set up to enforce the type of safety regulations the toy-ban would be intended to promote. Avoidance of the ban would simply require enforcement of Thailand's own law.

#### V. PROBLEMS POSED BY THE GATT

The GATT<sup>91</sup> may present an obstacle to the proposed toy-ban, as it was founded on a policy that arguably prohibits this type of economic regulation. The objective of the GATT is to promote economic growth among member nations by reducing trade barriers.<sup>92</sup> When trade barriers fall, nations are free to take advantage of other nations' markets. This leads to increased specialization because nations are then able to rely upon one another for goods not efficiently produced at home. Increased specialization, in turn, leads to more efficient production of goods.<sup>93</sup> Considering this policy of trade liberalization, implementation of a ban on toys may seem, arguably, to defeat the very purpose of the GATT.

Specifically, one may argue that such a ban would violate the GATT National Treatment provision in Article III<sup>94</sup> and the

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89. *Id.* at 435.

90. *See generally supra* note 57 and accompanying text.

91. GATT, *supra* note 6.

92. John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227, 1231 (1992).

93. *Id.*

94. The National Treatment provision requires importing countries to treat imported products as favorably as they would if the same products had been produced domestically. GATT, *supra* note 6, art. III. A ban on toys would seem to do just the opposite. Because

prohibition of import and export restrictions in Article XI.<sup>95</sup> To comply with these requirements, the ban on toys must be shown to be consistent with the rationale behind Articles III and XI, or to qualify under one of the permissible exceptions listed in Article XX.<sup>96</sup> A recent GATT Panel Report concerning a U.S. ban on imported tuna addressed both of these issues in the context of environmental trade policy.

### A. *The Tuna Dolphin Dispute*

The "Tuna Dolphin Dispute"<sup>97</sup> provides a useful illustration of the specific GATT objections that the proposed toy-ban is likely to face. The dispute between Mexico and the United States, argued before a GATT Review Panel in 1991, involved Mexico's objections to a U.S. ban on imported tuna caught in "purse-seine" fishing nets.<sup>98</sup> This ban was aimed at reducing the number of dolphins killed in the process of catching tuna.<sup>99</sup> Mexico's objections to the tuna-ban would seem to apply equally to the proposed toy-ban, or, for that matter, to any ban that focuses on a production process.

#### 1. The Rationale for the U.S. Tuna-Ban

The stated purpose of the U.S. ban on imported tuna, at issue in the Tuna Dolphin Dispute, was to reduce "the incidental kill or incidental serious injury of marine mammals . . . in the course of commercial fishing . . ." <sup>100</sup> The tuna-ban targets the fishing technique that employs "purse-seine" nets because this technique, when implemented in regions where tuna and dolphins are commonly found together, results in the killing of dolphins in larger numbers than the United States is willing to tolerate. This problem is particularly severe in the Eastern Tropical Pacific

the ban would apply only to imported toys, the argument goes, it would treat imported products less favorably than products manufactured in the United States.

95. *Id.* art. XI.

96. *Id.* art. XX. For the relevant text of Article XX, see *infra* note 113.

97. For a detailed discussion of the arguments on both sides of the "Tuna Dolphin Dispute," see Elizabeth E. Krus, Comment, *The United States Trade Embargo on Mexican Tuna: A Necessary Conservationist Measure or an Unfair Trade Barrier?*, 14 LOY. L.A. INT'L & COMP. L.J. 903, 913-22 (1992).

98. The U.S. tuna-ban is part of the Marine Mammal Protection Act of 1972, Pub. L. No. 101-627, 102 Stat. 4467 (1990) (codified in part at 16 U.S.C. §§ 1361-1407 (1988)).

99. 16 U.S.C. § 1371(a)(2).

100. *Id.*

Ocean<sup>101</sup> and, as such, the tuna ban is primarily aimed at Mexican commercial fishing practices.

## 2. Mexico's Objections to the Ban on Tuna

Mexico based its arguments against the tuna-ban on Articles III, XI, and XX of the GATT.<sup>102</sup> The ban, according to Mexico, violates Article III because it discriminates against tuna imported from Mexico solely on the basis of the process by which that tuna was obtained.<sup>103</sup> While regulations on imports aimed at upholding product standards are allowed under Article III, regulations directed at specific production processes are not.<sup>104</sup> Furthermore, the ban also violates Article XI, which clearly forbids prohibitions on imports.<sup>105</sup> Finally, Mexico argued that the ban is not included in Article XX's list of general exceptions to GATT provisions.

## 3. The U.S. Response

The United States responded to Mexico's Article III objection by asserting that the ban on tuna does not discriminate against Mexico. Because tuna caught in "purse-seine" nets cannot lawfully be sold in the United States<sup>106</sup> regardless of whether it was caught by Mexican or American fishermen, the ban treats tuna obtained by Mexican fisherman the same as domestically-obtained tuna.<sup>107</sup> Furthermore, the ban on tuna declares the tuna itself to be unlawful and, therefore, counts as a regulation of a product under Article III, namely, unlawfully obtained tuna.

To Mexico's Article XI objection, the United States responded that only Article III covers the ban on tuna. The ban, according

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101. GATT Panel Report, *supra* note 7, ¶ 2.2.

102. *Id.* ¶¶ 3.1(a)-(b), 3.34, 3.35.

103. *Id.* ¶ 3.16.

104. GATT, *supra* note 6, art. III. Such regulation puts the Mexican fishing industry at a disadvantage and, thereby, undermines the National Treatment provision.

105. GATT Panel Report, *supra* note 7, ¶ 3.10.

106. Limited taking of dolphins is authorized when it is done pursuant to a permit issued by the National Marine Fisheries Service. 16 U.S.C. § 1371(a)(2). *See also* GATT Panel Report, *supra* note 7, ¶ 2.4.

107. The United States went even further in defense of its provisions, arguing that because of the 25% margin extended to foreign countries, and the maximum limit on dolphin killings imposed only upon domestic fisherman, the ban on imported tuna actually affords more favorable treatment to Mexican fishermen. GATT Panel Report, *supra* note 7, ¶ 3.20.

to the United States, is best classified as a regulation affecting the "internal sale, offering for sale, purchase, transportation, distribution or use" of tuna.<sup>108</sup> Article XI, therefore, does not apply.<sup>109</sup>

Finally, the United States argued that, even if the ban is not valid under Articles III or XI, it is clearly valid as one of the general exceptions in Article XX.<sup>110</sup> Article XX(b) allows import prohibitions "necessary to protect human, animal or plant life or health."<sup>111</sup> Because there is no other way to protect dolphins killed by "purse-seine" nets other than by prohibiting tuna caught using this technique, the prohibition is clearly "necessary" to protect the lives of dolphins.

#### 4. The Decision of the GATT Review Panel

The GATT Review Panel found the U.S. ban on tuna caught in "purse-seine" nets to be inconsistent with Articles III and XI,<sup>112</sup> and not allowed as an exception under Article XX.<sup>113</sup>

108. *Id.* ¶ 3.11.

109. *Id.*

110. *Id.* ¶ 3.33.

111. GATT, *supra* note 6, art. XX.

112. The GATT Review Panel focused primarily on ¶¶ 1 and 4 of Article III. Paragraphs 1 provides in pertinent part: "[Q]uantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production." GATT, *supra* note 6, art. III, ¶ 1.

Paragraph 4 provides in pertinent part: "The products of the territory of any contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use." *Id.* ¶ 4.

With respect to Article XI, the Panel focused primarily on ¶ 1 of the Article. Paragraph 1 provides:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

*Id.* art. XI, ¶ 1.

113. GATT Panel Report, *supra* note 7. Measures that qualify as Article XX exceptions are as follows:

(a) necessary to protect public morals; (b) necessary to protect human, animal or plant life or health; (c) relating to the importation or exportation of gold or silver; (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement . . . (e) relating to products of prison labour; (f) imposed for the protection of national treasures of artistic historic or archaeological value; (g) relating to the conservation of exhaustible natural resources . . . (h) undertaken in pursuance of obligations under any

The United States' Article XI argument was weak and unsupported, and the Panel rejected it with little explanation. The Panel's decision with respect to Article III, however, deserves some attention.

The Panel held that Article III allows regulations applied to products themselves, but does not allow regulations applied to production processes.<sup>114</sup> According to the Panel, a ban on imported tuna that is contingent upon the way in which the tuna is caught is not really a ban on the tuna itself, but a ban on a process. The Panel reasoned that the regulations "could not be regarded as being applied to tuna products as such because they would not directly regulate the sale of tuna and could not possibly affect tuna as a product."<sup>115</sup> Furthermore, the Panel decided that, even if the ban were to be classified as a ban on the tuna itself, such a ban would still violate Article III because it affords less favorable treatment to imported tuna than to the very same tuna obtained domestically.<sup>116</sup>

The Panel based its rejection of the ban as an exception under Article XX(b) on its conclusion that the Article XX(b) exception for regulations "necessary to protect human, animal or plant life or health" did not apply to humans, animals, or plants outside the importing country.<sup>117</sup> The Panel referred to an earlier draft of Article XX(b), which read: "For the purpose of protecting human, animal or plant life or health, if corresponding domestic safeguards under similar conditions exist in the importing country."<sup>118</sup> The Panel held that this language in the earlier draft reveals the

intergovernmental commodity agreement . . . (i) involving restrictions on exports of domestic material necessary to ensure essential quantities of such materials . . . (j) essential to the acquisition or distribution of products in general or local short supply . . . .

GATT, *supra* note 6, art. XX.

114. GATT Panel Report, *supra* note 7, ¶ 5.14. The Panel based this conclusion, in part, on the way in which Article III has been applied in the area of border tax adjustments. According to the Panel, "contracting parties may apply border tax adjustments with regard to those taxes that are borne by products, but not for domestic taxes not directly levied on products . . . ." *Id.* ¶ 5.13.

115. *Id.* ¶ 5.14.

116. *Id.* ¶ 5.16.

117. *Id.* ¶ 5.26.

118. GATT Panel Report, *supra* note 7, ¶ 5.26. The Panel referred to a proposed draft of Article XX(b) taken from the preamble of the New York Draft of the International Trade Organization Charter. *Id.*

drafters' intent for the exception to apply to conditions that exist within the importing country.<sup>119</sup>

Furthermore, the Panel found that the tuna-ban also failed as an Article XX(b) exception because it did not satisfy the necessity requirement in the provision.<sup>120</sup> This provision requires that the country invoking the exception exhaust all reasonably available options consistent with the GATT before adopting regulations contrary to the GATT.<sup>121</sup> Because the United States and Mexico had not entered into international agreements on dolphin protection, the Panel was not convinced that the tuna-ban was truly necessary.<sup>122</sup>

### *B. The Proposed Toy-Ban Overcomes GATT Objections*

The GATT Panel rejected the ban on imported tuna (1) because it was inconsistent with the GATT's overall goal of trade liberalization, (2) because it was explicitly prohibited by specific GATT provisions, and (3) because it did not qualify as an exception. While the ban on imported toys this Comment proposes is structurally similar to the tuna-ban, the purpose of the toy-ban allows it to survive the above GATT analysis.

In the Tuna Dolphin Dispute, the GATT Panel focused its Article III analysis on the principle of National Treatment and on the process-product distinction. The Panel focused almost exclusively on Paragraphs 1 and 4 of Article III, both of which are intended to promote National Treatment by prohibiting regulations "applied . . . so as to afford protection to domestic production."<sup>123</sup> The relevance of the process-product distinction, then, at least in the context of Article III, seems to be based on the idea that regulating products themselves (e.g., product quality standards) is legitimate under the GATT, but that regulating processes (e.g., fishing techniques) is a form of economic protectionism. In other words, the United States would be allowed, under the GATT, to regulate tuna quality. When, however, the United States implements measures that are not focused upon the characteristics of a product, but rather give the fishing practices of

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119. *Id.*

120. *Id.* ¶ 5.28.

121. *Id.*

122. GATT Panel Report, *supra* note 7, ¶ 5.28.

123. GATT, *supra* note 6, art. III. For the relevant text of Article III, see *supra* note 112.

its own fishing vessels an advantage over those of foreign vessels, such measures are "applied so as to afford protection to domestic production" and are, for this reason, invalid.

There is an obvious reason why the above Article III objection would not apply to a ban on imported toys triggered by severely hazardous manufacturing conditions. There is simply no danger of giving U.S. domestic manufacturing processes a competitive advantage because the major U.S. toy companies do not manufacture most of the toys they sell domestically.<sup>124</sup> There would, therefore, be no *de facto* economic protectionist concerns<sup>125</sup> and, thus, no violation of the National Treatment principles of Article III.

The proposed ban on toys would face a more serious Article XI obstacle. Section 1 of Article XI specifically states: "No prohibitions or restrictions other than duties, taxes or other charges . . . shall be instituted or maintained by any contracting party."<sup>126</sup> To avoid this objection, the proposed toy-ban would have to qualify as an Article XX exception. The failure of the tuna-ban to qualify as such an exception will not prevent the proposed toy-ban from successfully invoking Article XX.

The GATT Panel, in the Tuna Dolphin Dispute, rejected the tuna-ban as an Article XX exception because the ban sought to protect the lives of dolphins outside the jurisdiction of the United States. Furthermore, the tuna-ban was not shown to be "necessary" to accomplish this environmental goal. This criticism would not apply to a ban on imported toys manufactured under severely hazardous conditions.

The rationale for qualifying the proposed toy-ban as an Article XX exception is implicit in the Article XX(e) treatment of prison labor. Article XX(e) allows an exception to GATT provisions when the regulation targets "products of prison labor."<sup>127</sup> Prison labor is clearly a production *process* rather than

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124. Industry and Trade Summary, Toys and Models, *supra* note 50; *U.S. Increases Imports of Foreign Toys*, *supra* note 2.

125. Some major U.S. toy companies, such as Mattel, Fisher-Price, Tonka, and Ertl, own facilities in Mexico. Kraul, *supra* note 72. The ban would offer no economic protection to these companies, as it would apply to all toys manufactured outside the United States.

126. GATT, *supra* note 6, art. XI, ¶ 1. For the complete text of ¶ 1, see *supra* note 112.

127. GATT, *supra* note 6, art. XX(e). For the relevant text of Article XX, see *supra* note 113.



a product. Therefore, if not for the Article XX(e) exception, a trade measure aimed at prison labor would be prohibited by Article III.

The Article XX(e) exception would not make sense if it were interpreted to apply only to *domestic* prison labor. A regulation that outlaws domestic prison labor would not need to be included as an exception to GATT provisions because such a regulation would have no effect upon imports and, thus, would not violate GATT provisions in the first place. It is much more reasonable to interpret the prison labor exception as an approval of a specific type of process regulation, namely, one aimed at prison labor in an exporting country. The prison labor exception is a clear expression of intolerance on the part of the drafters toward production processes that violate human rights.

Like the prison labor exception in Article XX(e), the human, animal or plant life or health exception set forth in Article XX(b) is intended to allow for the regulation of *foreign* production processes of a certain type, namely, those that threaten human, animal or plant life or health. It would clearly be inconsistent with this purpose to withhold application of the Article XX(b) exception from regulations applied to foreign labor practices that actually kill people.

Unlike the tuna-ban, the proposed ban on imported toys satisfies the Article XX "necessity" requirement. To understand why this is the case, it is important to consider the differences between the purposes of the two bans—the lives of dolphins on one hand, and the lives of human beings on the other. It may be prudent, at least politically, to work toward the gradual reduction of incidental dolphin killings, rather than risk strained relations with foreign governments. In contrast, there is an extreme urgency about the protection of human lives that should outweigh concerns about offending foreign nations. Given the appalling conditions in overseas toy factories, immediate action is clearly necessary.

## VI. SETTING A POSITIVE EXAMPLE

The obstacles that the GATT presents to the proposed toy-ban are substantial. The underlying purpose of such a ban is strictly humanitarian and may, therefore, seem too idealistic to survive a GATT Panel review. There is, however, a solid argument in support of a toy-ban, even in the face of an unfavorable GATT Panel decision. Even if the proposed ban is blocked

by the GATT, an effort to get the ban through the GATT is likely to garner support from other countries, and this, alone, will have positive effects on factory conditions overseas.

Strong evidence of this trend in following the United States' lead in matters of economic activism can be seen in the response of the European Community ("EC") to the tuna dolphin controversy. Less than one year after the GATT Panel invalidated the U.S. tuna-ban, the EC Commissioner in charge of fishing issues introduced to the EC Commission a proposal for an embargo on "tuna imports caught in nets that endanger dolphins."<sup>128</sup> If the EC tuna-ban is adopted by the EC Commission, the Commission then plans to propose to the GATT member nations a worldwide ban on imported tuna caught in nets dangerous to dolphins.<sup>129</sup> Whether or not there is ever a tuna-ban that can survive a GATT Panel review, the very act of proposing such a ban for a worthy cause brings the issue to the attention of the international community.<sup>130</sup> Certainly, the proposal of a toy-ban would garner even stronger support, as this ban seeks to save human lives. A strong U.S. position on factory workers' rights sets a positive example for other nations to follow, and is the first step toward improving working conditions all over the world.

## VII. CONCLUSION

United States companies and consumers benefit from the continued operation of overseas toy factories. Because the U.S. market for cheaply manufactured toys makes it possible for overseas toy factories to operate in the first place, the United States should accept responsibility for improving working conditions in these factories. Without a way of attaching legal liability to U.S. toy retailers, and in order to avoid invading the sovereignty of developing countries, the most effective way for the United States to bring about safer conditions in overseas toy factories is simply to refuse to import toys unless they are manufactured under humane conditions.

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128. *EC Commission Delays Action on EC Tuna Embargo Proposal*, Int'l Trade Rep. (BNA) No. 30, at 1259 (July 22, 1992).

129. *Id.*

130. EC Commissioner, Manuel Marin, in a press conference, reported having received 3,000 letters urging the protection of dolphins from the fishing techniques that endanger their lives. *Id.*

While the toy industry is not the only industry that utilizes labor-intensive manufacturing, it does seem to involve inhumane working conditions more often than most other industries.<sup>131</sup> Aiming a ban at an industry that is already known to violate human rights is an important step in the right direction. A ban on toys identifies a specific category of imports. Such specificity allows it to avoid an overload of political opposition, and also to be implemented according to narrowly defined terms.

The proposed toy-ban, undoubtedly a trade restriction, is vulnerable to the objection that it is inconsistent with the trade liberalization rationale behind the GATT. The ban is likely to survive a GATT Panel review, however, because it is not proposed for economic protectionist purposes, and because the drafters of the GATT provided a specific exception to GATT prohibitions when trade restrictive regulations are "necessary to protect human . . . life or health."<sup>132</sup>

American toy companies, as well as toy consumers, will undoubtedly be asked to make some sacrifices. A willingness to endure some short-term setbacks, however, is necessary to prevent more serious long-term problems. With trade barriers falling throughout the world, it is crucial for the United States to ensure that its own labor standards become international labor standards. Failure to raise labor standards throughout the world may eventually force U.S. manufacturers in all industries to either relocate to foreign countries or relax their own standards to compete internationally.<sup>133</sup>

More significantly, a policy of intolerance toward human rights violations would enhance the U.S. international image. Regardless of whether overseas toy factories are owned by U.S. companies, or even whether the toys they produce are actually intended for U.S. consumers, these toys are symbols of America. The United States, as a nation, suffers permanent damage each time images of "Bart Simpson dolls"<sup>134</sup> together with burned-out buildings are broad-

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131. See *supra* notes 72-74 and accompanying text.

132. GATT, *supra* note 6, art. XX(e).

133. See Perez-Lopez, *supra* note 60, at 279. Prior to the opening of the Uruguay Round of GATT negotiations, "[c]oncern was growing in the United States that a competitive advantage in trade sometimes derived from repressing the rights of workers." *Id.*

134. "Bart Simpson dolls" were among the products that the Kader Factory produced before it burned down on May 10, 1993. *20/20 Toys at Any Price*, *supra* note 1.

cast on television screens around the world. The message conveyed to the world is that women and children of developing nations are losing their lives for America, and that America couldn't care less.

*Michael A. Pangelinan\**

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\* This Comment is dedicated to my entire family. Throughout my college and law school years, every member of my family has voluntarily assumed some type of burden on my behalf. I am extremely fortunate to receive such unconditional support. Special thanks to my brother Ray for his creative input, and for suggesting the topic of this Comment.

