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# IMPORTING PRISON LABOR PRODUCTS FROM THE PEOPLE'S REPUBLIC OF CHINA: RE-EXAMINING U.S. ENFORCEMENT OF SECTION 307 OF THE TRADE AND TARIFF ACT OF 1930

Sarah A. Thornton

*Abstract:* Since 1989, the United States has engaged in a heated debate with the People's Republic of China over products manufactured in Chinese prisons which enter U.S. markets. Human rights advocates argue that conditions in China's prisons violate human rights principles, and therefore, the United States should not extend Most Favored Nation trade status to China. Others argue that human rights conditions will only improve if the United States continues to extend MFN privileges. Forgotten is section 307 of the Trade and Tariff Act of 1930, which prohibits imports of products made from prison labor. To effectively address the prison labor issue with China, the United States should remove the issue from the human rights debate and focus on improved enforcement of section 307.

## I. INTRODUCTION

After the 1989 massacre of Beijing residents in Tiananmen Square, prisons in the People's Republic of China ("PRC") swelled with political dissidents.<sup>1</sup> The increased number of people imprisoned for their opposition to the PRC's political regime led to an outcry from the United States and the international community, and to closer scrutiny of official conduct in Chinese prisons.<sup>2</sup> Under this increased scrutiny, the U.S. government and international human rights groups found that Chinese prisoners, including political prisoners, were working in a prison system which profited by exporting prison labor products to foreign countries, including the United States.<sup>3</sup> Companies which imported these products into the U.S. violated section 307 of the Smoot-Hawley Tariff Act of 1930 (hereinafter section 307).<sup>4</sup> These findings led to calls for sanctions against China for human rights abuses, and for increased enforcement of section 307.

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<sup>1</sup> *Prison Labor in China*, Asia Watch, Apr. 19, 1991, at 1, 3; LAWYERS COMMITTEE FOR HUMAN RIGHTS, CRIMINAL JUSTICE WITH CHINESE CHARACTERISTICS: CHINA'S CRIMINAL PROCESS AND VIOLATIONS OF HUMAN RIGHTS 73 (1993) [hereinafter LAWYERS COMMITTEE].

<sup>2</sup> See *Prison Labor in China*, *supra* note 1.

<sup>3</sup> *Id.*

<sup>4</sup> 19 U.S.C. § 1307 (1989).

At the same time, the Chinese economy was rapidly expanding and the Chinese government was opening its doors to foreign investors. The PRC was becoming an important Pacific economy, playing a large role as a supplier of manufactured goods.<sup>5</sup> Between 1980 and 1991, Chinese merchandise exports quadrupled, surpassing \$70 billion.<sup>6</sup> In order to stay competitive in the global economy, it was necessary for the U.S. to enter and remain in the Chinese market.<sup>7</sup> The political climate, however, made this task very difficult.

After the Tiananmen Square massacre, the Bush administration began a "constructive policy of engagement with China".<sup>8</sup> Congressional opposition to this policy led to an intense debate over whether the U.S. should continue to extend Most Favored Nation ("MFN") trading status to China.<sup>9</sup> Opponents of MFN cited the import of prison labor products in violation of U.S. law as a key reason not to renew MFN.<sup>10</sup> In 1991 the Bush administration negotiated a Memorandum of Understanding ("MOU") with China, which called on the PRC to take steps to halt the export of prison labor products.<sup>11</sup> At the same time, the administration hoped that the MOU would appease opponents of China's MFN status. Despite token concessions, the PRC did not for the most part comply with the MOU, and the battle over MFN for China continued through June of 1994.

In 1993, President Clinton renewed China's MFN status on a conditional basis.<sup>12</sup> The Clinton administration maintained that it wanted to see improvement of human rights abuses in China before MFN would be granted again.<sup>13</sup> Among other things, the extension required that the PRC comply with the bilateral MOU negotiated by the Bush administration before MFN would be renewed.<sup>14</sup> The battle over this conditional status

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<sup>5</sup> OECD DEVELOPMENT CENTRE, CHINA AS A LEADING PACIFIC ECONOMY 25 (Organisation for Economic Co-operation and Development Working Paper Vol. 1, No. 11, 1993) [hereinafter OECD].

<sup>6</sup> *Id.* at 11.

<sup>7</sup> Diane F. Orentlicher & Timothy A. Gelatt, *Public Law, Private Actors: The Impact of Human Rights on Business Investors in China*, 14 J. INT'L L. & BUS. 66, 76 (1993).

<sup>8</sup> *Id.* at 73.

<sup>9</sup> *Id.* at 74.

<sup>10</sup> *Id.*

<sup>11</sup> Arnold Kanter, Prohibiting the Import and Export of Chinese Prison Labor Products, Statement at the Signing of the Chinese Prison Labor Memorandum of Understanding (Aug. 7, 1992), in 3 U.S. DEP'T ST. DISPATCH 660 (1992).

<sup>12</sup> Exec. Order No. 12,850, 3 C.F.R. 606-607 (1994).

<sup>13</sup> Statement on Most-Favored-Nation Trade Status for China, 29 WKLY. COMP. PRES. DOC. 982 (May 28, 1993).

<sup>14</sup> Exec. Order No. 12,850, *supra* note 12, at § 1(a).

was fierce, with China demanding that the U.S. not interfere with its internal affairs.<sup>15</sup> The U.S. business community also launched a very strong lobby in favor of MFN status for China.<sup>16</sup> During these debates, China went on a "buying frenzy" and placed over \$2 billion dollars of orders with U.S. industries.<sup>17</sup> This made it very clear to the U.S. government that despite concerns with prison labor and human rights, China was an extremely important trading partner, and the fragile U.S. economy could ill-afford to jeopardize that relationship.

During the summer of 1994, China's MFN status was again considered for renewal. Despite evidence of little improvement in areas listed in the 1993 Executive Order, President Clinton elected to separate human rights issues from the issue of MFN renewal, and granted MFN status to the PRC.<sup>18</sup> While this decision departed sharply from the administration's position in 1993, the president believed that it would be in the best interest of both countries if the issue of MFN was not linked to human rights.<sup>19</sup> Yet despite claims that the PRC has complied with the MOU, the problem of prison labor imports into the U.S. remains. As recently as October 1994, reports have been made of PRC prisoners manufacturing goods intended for U.S. markets.<sup>20</sup> Importing these products into the U.S. still violates U.S. laws. This Comment argues that the prison labor issue should be divorced from the human rights issue entirely, but that enforcement of section 307 should still be a top U.S. priority.

First, this Comment will examine the production system in the PRC prisons. It will outline the organization and hierarchy of that system, discussing the unique profit motive operating within the system. The organization of PRC prisons allows the material well-being of prison administrators to depend on the prisoners' level of production.

Next, this Comment will discuss section 307 of the Smoot-Hawley Tariff Act of 1930 and the various measures the U.S. has used to enforce it. Imports of prison labor products from the PRC violate the letter and spirit of

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<sup>15</sup> Orentlicher & Gelatt, *supra* note 7, at 72.

<sup>16</sup> *Id.* at 75-76.

<sup>17</sup> *Id.*

<sup>18</sup> H.R. DOC. NO. 266, 103d Cong., 2d Sess. (1994); The President's News Conference, 30 WKLY. COMP. PRES. DOC. 1167 (May 26, 1994).

<sup>19</sup> Elaine Sciolino, *Clinton and China: How Promise Self-Destructed*, N.Y. TIMES, May 29, 1994, at A1.

<sup>20</sup> See Pamela Burdman, *Made in China can be Made in Jail*, S. F. CHRON., Oct. 5, 1994, at A10.

section 307, yet Customs enforcement, the MOU, and MFN have been unsuccessful in stopping the practice and the imports.

Finally, this Comment will argue for an alternative to the use of MFN as a means of enforcing section 307. While prison labor production in the PRC has been linked to human rights abuses in the public's eye, prison labor itself is not per se illegal.<sup>21</sup> International law provides that prisoners should in fact perform work.<sup>22</sup> However, U.S. law that prohibits importing prison labor products was intended to protect U.S. industries, not further human rights goals. Because of the profit motive present in PRC prisons, enforcement of section 307 is a legitimate concern of the U.S. While the U.S. has been unsuccessful in changing practices within the PRC, the government could be more successful if it focused on policies and areas within its direct control. This Comment will argue that the enactment of a voluntary code of conduct would greatly assist U.S. agencies to enforce section 307.

## II. FORCED LABOR EXPORT PRODUCTION IN CHINA

The Chinese prison labor system is a complex, confusing organization. Before a person may be sentenced to perform labor, they must go through either a criminal or administrative process. Criminal offenders receive a sentence from a judge, according to PRC criminal laws.<sup>23</sup> In contrast, administrative sentences are approved by the "Committee on Reeducation through Labor", which consists of personnel from the judiciary, Civil Administration, Public Security Bureau, and provincial labor departments.<sup>24</sup> Yet both the criminal system and the administrative system are similar in that people punished under either system must produce goods in a Labor Reform Enterprise ("LRE").<sup>25</sup>

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<sup>21</sup> See generally Jonathan M. Cowen, *One Nation's "Gulag" is Another Nation's "Factory within a Fence": Prison-Labor in the People's Republic of China and the United States of America*, 12 PAC. BASIN L.J. 190, 194 (1993) (for a general comparison of prison systems in the U.S. and PRC); *Prison Labor in China*, *supra* note 1.

<sup>22</sup> *Prison Labor in China*, *supra* note 1.

<sup>23</sup> Joseph Zhou, *The Chinese Correctional System and its Development*, 15 INT'L J. COMP. & APPLIED CRIM. JUST. 15, 17 (1991).

<sup>24</sup> *Id.* at 17-18.

<sup>25</sup> LAWYERS COMMITTEE, *supra* note 1, at 71. Goods produced include manufactured goods from factories, mining, and farm production. HONGDA HARRY WU, LAOGAI: THE CHINESE GULAG 5, 44 (Ted Slingerland trans., 1992).

Although there are no exact numbers, between sixteen and twenty million people work in these labor camps.<sup>26</sup>

The guiding principles behind both systems emphasize reform first and production second.<sup>27</sup> However, in recent years the goal of profit has come to guide the Labor Reform Enterprise system. Despite professing an emphasis on reform, the PRC government has encouraged LRE's to embrace the goal of profit and expand into foreign markets.<sup>28</sup> These Enterprises now play an important role in the Chinese export economy and national economic planning.<sup>29</sup>

A. *Organization and Hierarchy of the Chinese Prison Labor System.*

Labor Reform Enterprises are divided into three distinct units: Convicted Labor Reform ("CLR"),<sup>30</sup> Reeducation Through Labor ("RTL"), and Forced Job Placement ("FJP").<sup>31</sup> The Enterprises follow military organization and are grouped into detachments.<sup>32</sup> The Detachments are comprised of any combination of RTL, FJP, or CLR units.<sup>33</sup> Detachment leaders are responsible for production, as well as political education and reform of prisoners.<sup>34</sup> Detachments follow the broad economic and reform policies of the central Chinese government, but they are independently responsible for their own financing, production schedules, accounting, and

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<sup>26</sup> Wu, *supra* note 25, at 6. But see Zhou, *supra* note 23, at 19 (placing the figure at a much more conservative 2 million).

<sup>27</sup> The criminal process emphasizes "reform first and production second" whereas the administrative process emphasizes "reeducation first and production second." Both philosophies are central to the Chinese corrections system, where rehabilitation is a primary objective, and every citizen is capable of being reformed into a useful member of society. Zhou, *supra* note 23, at 17, 18.

<sup>28</sup> *Prison Labor in China*, *supra* note 1, at 3; see also Ding Banghua, *Thoughts on Developing a Foreign-oriented Economy by Labor Reform Enterprises*, ASIA WATCH, Apr. 19, 1991 at 8, 9 ("[A]s the express aim is to improve reform work and increase economic benefits, it becomes all the more reasonable for the labor reform enterprises to develop a foreign-oriented economy.") (Banghua was a member of the Labor Reform Bureau, Jiangsu Province); *Forced Labor Exports from China: Update No. 1*, ASIA WATCH, Sept. 19, 1991, at 1, 2.

<sup>29</sup> Wu, *supra* note 25, at 5.

<sup>30</sup> *Id.* at 1. This is also called "reform through labor." Zhou, *supra* note 23, at 17. For purposes of clarity, in order to distinguish this unit from "reeducation through labor", it will be referred to as CLR throughout this comment.

<sup>31</sup> Wu, *supra* note 25, at 6; Cowen, *supra* note 21, at 194.

<sup>32</sup> Wu, *supra* note 25, at 10; He Liang, *The Path is Under Our Feet*, ASIA WATCH, Apr. 19, 1991, at 12 (an "obvious advantage" of RTL units is that workers are "young, concentrated; they cost less and they follow a military routine.").

<sup>33</sup> Wu, *supra* note 25, at 12.

<sup>34</sup> *Id.* at 10.

other day-to-day operations.<sup>35</sup> The Enterprises "should be established according to the needs of provincial, autonomous regional, and municipal people's governments . . . however, records must be filed with the Public Security Bureau."<sup>36</sup> They have been given this free reign by the central government to encourage economic success of the Enterprises.<sup>37</sup>

While prisoners from any LRE unit work together in the detachments, there are significant differences between prisoners in CLR, RTL, and FJP units. CLR units include prisoners who have gone through the criminal process and have been sentenced to disciplinary production camps.<sup>38</sup> CLR units are reserved for serious criminal offenders who are serving sentences imposed on them by a court.<sup>39</sup> The prisoners work in "reform through labor"<sup>40</sup> and receive no wages for their work.<sup>41</sup> While the most serious offenders are committed strictly to prisons, there is virtually no difference between a prison and a disciplinary production camp.<sup>42</sup> Eighty-seven percent of convicted criminals go to production camps, of which there are approximately 600.<sup>43</sup> There are an unknown number of secret prisons as well.<sup>44</sup>

In contrast, Reeducation Through Labor is an administrative sanction, involving "extrajudicial punishment [and] imprisonment for up to three years."<sup>45</sup> The purpose of the RTL units is to educate and reform people who violate the "social order."<sup>46</sup> While these units are portrayed as "educational organizations," they are actually under the direction of the Chinese Public Security Bureau.<sup>47</sup> There is no judicial process for people

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<sup>35</sup> *Id.*

<sup>36</sup> WU, *supra* note 25, at 11 (quoting Experimental Methods in Reeducation Through Labor (Chinese Communist Party internal doc., Jan. 21, 1982)).

<sup>37</sup> *Prison Labor in China*, *supra* note 1, at 1.

<sup>38</sup> Zhou, *supra* note 23, at 17; WU, *supra* note 25, at 8.

<sup>39</sup> WU, *supra* note 25, at 13; *Prison Labor in China*, *supra* note 1, at 4.

<sup>40</sup> This is different than re-education through labor. Reform is applied to convicted criminals, while reeducation applies to people who aren't considered serious criminals, but who have resisted social reform. See WU, *supra* note 25, at 81; see also LAWYERS COMMITTEE, *supra* note 1, at 71. Emphasis on Reform Through Labor comes from the Chinese belief that "every person is capable of being reformed" under certain conditions." Zhou, *supra* note 23, at 17.

<sup>41</sup> Cowen, *supra* note 21, at 195.

<sup>42</sup> WU, *supra* note 25, at 8.

<sup>43</sup> *Id.* at 8, 11.

<sup>44</sup> *Id.* at 8.

<sup>45</sup> *Prison Labor in China*, *supra* note 1, at 4 n.5; LAWYERS COMMITTEE, *supra* note 1, at 71; Zhou, *supra* note 23, at 17.

<sup>46</sup> Zhou, *supra* note 23, at 17.

<sup>47</sup> WU, *supra* note 25, at 12, 13.

assigned to these units, and they are referred to as "personnel," not "criminals."<sup>48</sup> Early RTL policies recognized the sentence as "job placement" and not as punishment.<sup>49</sup> Officially there is a three year term limit on RTL personnel, but this is seldom adhered to.<sup>50</sup> Personnel may also remain in RTL for "poor behavior."<sup>51</sup> The biggest difference between CLR and RTL is that RTL "personnel" do receive a salary for their work.<sup>52</sup> The government, however, deducts food, clothes, shoes, and necessities, leaving the RTL personnel in a financial position similar to CLR prisoners.<sup>53</sup>

The last unit in the system is Forced Job Placement. FJP means that at the end of an RTL term, a prisoner must continue to perform forced labor, usually in a Labor Reform Enterprise.<sup>54</sup> Before 1980, FJP was only applied to CLR prisoners because RTL sentences had no fixed term; now, because RTL terms are limited to three years, FJP is applied to prisoners in both units.<sup>55</sup> The length of FJP terms is indefinite.<sup>56</sup> FJP is usually attached to sentences of prisoners who are "unrepentant." The dual purpose of FJP is to remove people from society at large, and to maintain the productivity in Labor Reform Enterprises.<sup>57</sup>

Labor Reform Enterprises are not easily distinguished from regular production facilities.<sup>58</sup> All LREs have a prison designation and an alternate production name.<sup>59</sup> Normally, only the name of the production unit, not the

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<sup>48</sup> *Id.* at 94.

<sup>49</sup> *Id.* at 97.

<sup>50</sup> For example, personnel at the Tuanhe Farm (LRC-03-11) were told by the Beijing Public Security Bureau after serving their terms that it was "a political necessity" that they be kept as RTL personnel until higher authorities allowed their release. The length of extension was not specified, and the personnel were later moved into Forced Job Placement. *Id.* at 97-98; see also LAWYERS COMMITTEE, *supra* note 1, at 74.

<sup>51</sup> This includes "refusing to acknowledge guilt, resisting reform, violating rules, not submitting to discipline, passive work attitude, etc." WU, *supra* note 25, at 98 (citing Article 58 of the CCP internal document "Experimental Methods in Reeducation Through Labor").

<sup>52</sup> Zhou, *supra* note 23, at 18; WU, *supra* note 25, at 99.

<sup>53</sup> In China's prison labor system, CLR prisoners receive only 2-5 yuan a month in bonuses, which are not given to each worker. The prison provides food and clothing. In contrast, RTL prisoners receive between 13 and 47 yuan a month in salary, and 3 to 5 yuan a month in bonuses. However, food, clothing, sick leave, and other expenses are deducted from this salary. WU, *supra* note 25, at 100.

<sup>54</sup> *Id.* at 14.

<sup>55</sup> *Id.* at 13, 14.

<sup>56</sup> Cowen, *supra* note 21, at 199; WU, *supra* note 25, at 113. "'Reeducatees' are often held in the same camps as formal criminals . . . [and] as in the case of individuals sentenced criminally to 'Reform Through Labor,' they may be subject to de facto extension of their sentences beyond the formal period." LAWYERS COMMITTEE, *supra* note 1, at 74.

<sup>57</sup> *Prison Labor in China*, *supra* note 1, at 1, 2.

<sup>58</sup> WU, *supra* note 25, at 9.

<sup>59</sup> *Id.*

Enterprise, is displayed.<sup>60</sup> The production unit name is used externally, especially for business purposes and with foreign visitors. The prison designation is used internally, by the government.<sup>61</sup> This dual designation makes it very difficult for outside observers to know if what they are seeing is an independent production facility, or a Labor Reform Enterprise using prison labor.

### B. *Production in Labor Reform Enterprises*

Labor Reform Enterprises are an important part of the national export economy in China.<sup>62</sup> During the 1954 Communist General Assembly, Public Security Ministry chief Luo Ruiqing stated that labor reform was an "effective method of purging and eliminating all criminals," while at the same time it "aid[ed] in the development of the nation's industries," saved money, and was a "dependable source of wealth."<sup>63</sup> The central PRC Government has encouraged LREs to enter foreign markets and establish joint ventures with international businesses. LREs are considered successful if they earn foreign currency.<sup>64</sup> In 1991, the low estimate of prison labor exports per year was \$100 million.<sup>65</sup>

The national government has encouraged LREs to be more effective economically, which has lead to the practice of attaching reform success to profit.<sup>66</sup> In 1980, the national government created a dual responsibility system for prison labor. Under this system, LREs must meet individual achievement indexes for both prisoner reform and production. While profitable, this has lead to an increased emphasis on production and a demphasis on the well-being of prisoners.<sup>67</sup>

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<sup>60</sup> *Id.* at 41-42.

<sup>61</sup> *Id.*

<sup>62</sup> John M. Klofas, *Considering People in Context: The Case of the People's Republic of China*, 15 INT'L J. COMP. & APPLIED CRIM. JUST. 175, 177 (1991); WU, *supra* note 25, at 35; *Prison Labor in China*, *supra* note 1, at 3. China's emergence in the world market can be seen as that of a major supplier of labor intensive products. OECD, *supra* note 5, at 13.

<sup>63</sup> WU, *supra* note 25, at 34.

<sup>64</sup> *Id.* at 32, 34; *Prison Labor in China*, *supra* note 1, at 3. With the growth of merchandise exports, foreign investment has come to play a key role in economic development. OECD, *supra* note 5, at 13.

<sup>65</sup> *China's Ugly Export Secret: Prison Labor*, BUS. WEEK, Apr. 22, 1991, at 42 [hereinafter *China's Ugly Export Secret*].

<sup>66</sup> WU, *supra* note 25, at 32.

<sup>67</sup> *Id.* at 30.

In the LREs, the quality and quantity of a prisoner's output indicates the level of reform a prisoner has achieved.<sup>68</sup> Under regulations, prisoners may receive praise or rewards for good work.<sup>69</sup> They may also receive punishment for bad work.<sup>70</sup> Not meeting a daily quota means that the prisoner is guilty of not following directions, or of having a "lazy attitude towards work."<sup>71</sup> Often, prisoner's food rations and wages are linked to quality and quantity of production.<sup>72</sup> These rations are directly controlled by security personnel.<sup>73</sup> Other sanctions include denying visits, withholding wages, and confinement and punishment.<sup>74</sup>

Because of this organization and the relative autonomy of the LREs, the material well-being of the security personnel and the prisoners is directly linked to the profitability of the LRE.<sup>75</sup> An undisclosed percentage of money earned by the LRE goes to the central government in the form of taxes and fees.<sup>76</sup> After that, money is allocated at-will by the LRE.<sup>77</sup> Usually, over forty percent of the money goes in the form of bonuses to security personnel and other management; prisoners receive little or no material benefit from the earnings of the Enterprise.<sup>78</sup>

Thus, under this system, the more merchandise a worker produces, the more money the Enterprise makes. The enterprise earnings then benefit the security personnel, giving them direct incentive to get more and better quality products out of prisoners. With the implementation of FJP, and the virtual ability to keep a prisoner in a LRE indefinitely, there is much more incentive to keep a good, talented worker in production once his or her term is complete.<sup>79</sup> This system has, therefore, led to cheaper labor for foreign businesses, cheaper products for consumers, and increasing abuse of prison

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<sup>68</sup> *Id.* at 35. The principles behind the corrections system combines punishment and control with thought reform, and labor and production with political education. Prisoners learn new skills which might assist with their rehabilitation and contribute to their own keep by producing goods of economic value. Zhou, *supra* note 23, at 17.

<sup>69</sup> Wu, *supra* note 25, at 36.

<sup>70</sup> *Id.* at 36-37.

<sup>71</sup> *Id.* at 36.

<sup>72</sup> *Id.* at 37.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 128.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Prison Labor in China*, *supra* note 1, at 2; Zhou, *supra* note 23, at 74.

laborers by forcing them to work in LRE's beyond their prescribed sentences.<sup>80</sup>

C. *Exports and Imports to the United States*

On a larger scale, it is the prerogative of the LREs to establish relations with foreign businesses for export. They are encouraged to do so, although the PRC has denied this.<sup>81</sup> The areas of China in which economic reform is most advanced are also the areas which are most actively engaged in prison labor export, especially in the coastal provinces.<sup>82</sup> The LREs in these regions "are allowed to take advantage of their location in the coastal areas . . . to gather information [from foreign companies]."<sup>83</sup>

In the past few years, there have been several instances where the U.S. discovered that products made by Chinese prison labor were entering its borders.<sup>84</sup> For example, in 1990, Joseph E. Seagram & Sons, Inc. discovered that prison labor was being used to assemble boxes for wine coolers.<sup>85</sup> Additionally, it was discovered that grapes for Dynasty Wine were harvested by prison labor between 1982 and 1985, and found their way into the U.S. market.<sup>86</sup> In 1992, the U.S. Customs Service banned Red Star Tea Farm products because they were made with prison labor.<sup>87</sup> The Shanghai Laodong Steel Pipe Works, also Shanghai No.7 Labor Reform

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<sup>80</sup> See Cowen, *supra* note 21, at 225-226; see also Wu, *supra* note 25, at 110.

<sup>81</sup> In an October 5, 1990 letter to the New York Times, Chen Defu, Press Counselor of the Chinese Embassy in Washington wrote, "Labor reform departments are not allowed to engage in foreign economic and trade activities, and China has never granted any labor reform department a permit to engage in foreign trade. No products made in prison are exported." Yet an article in a "restricted circulation" journal for Chinese prison officials says, "Since 1987, when production and export became integrated, the export authorities have energetically helped our mill develop into a base for export." *Prison Labor in China*, *supra* note 1, at 1. The transformation of China to a market economy has given local authorities and firms increasing opportunities for making economic decisions on their own initiative. OECD, *supra* note 5, at 16.

<sup>82</sup> *Prison Labor in China*, *supra* note 1, at 3. The 1984-1985 trade reforms opened trade in 14 coastal cities. Foreign direct investment (FDI) is heavily concentrated in coastal cities. OECD, *supra* note 5, at 17, 20.

<sup>83</sup> *China's Ugly Export Secret*, *supra* note 65, at 42; *Prison Labor in China*, *supra* note 1, at 3. Attracting FDI has been a main objective of China's economic reforms since 1978. OECD, *supra* note 5, at 19.

<sup>84</sup> Orentlicher & Gelatt, *supra* note 7, at 74.

<sup>85</sup> *China's Ugly Export Secret*, *supra* note 65.

<sup>86</sup> Wu, *supra* note 25, at 38, 39; *China's Ugly Export Secret*, *supra* note 65.

<sup>87</sup> James Gerstenzang & Rone Tempest, *China Opens Prisons to U.S. Inspection to Help Resolve Trade Conflict*, L.A. TIMES, Jan. 21, 1994, at A12.

Detachment, presented a promotional brochure in 1991, describing how their "product has been exported to regions in South-east Asia, Middle Asia, South America . . . U.S.A., Japan and West Germany."<sup>88</sup>

The nature of the production system makes it very difficult for the U.S. government and businesses to know if import products are being supplied by an LRE or a legitimate business. U.S. companies often place orders with foreign buying agents for goods made in China. These agents then make deals with a Chinese shipper, who contacts a different supplier. The supplier in China then hires subcontractors, and prisons usually make the lowest bid.<sup>89</sup> Thus, it is difficult for U.S. companies to know who actually manufactures the products they order. In addition to this problem, LRE's have double names; one is a prison designation, and one is used to conduct business.<sup>90</sup> Combined with the fact that "other Chinese factories are also making goods identical to those in the prison factory,"<sup>91</sup> it is very difficult for the government and businesses to identify where their products originate.

### III. APPLICABLE U.S. LAW AND ITS ENFORCEMENT

U.S. law requires that the government address the problem of prison labor imports from China. The Smoot-Hawley Tariff Act of 1930 expressly prohibits the importing of prison labor products into this country. Businesses which knowingly violate this law are subject to penalties and fines.

#### A. U.S. Law: Section 307 of The Smoot-Hawley Tariff Act of 1930

The Smoot-Hawley Tariff Act of 1930 was enacted to create a level playing field between U.S. industries and foreign competitors.<sup>92</sup> Section 307 of the Act applies directly to the import of prison labor products from abroad. It states: "All goods, wares, articles, and merchandise mined,

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<sup>88</sup> *Forced Labor from China: Update No. 1*, *supra* note 28, at 2; *see also* *Forced Labor from China: Update No. 2*, ASIA WATCH, Nov. 15, 1991, at 1, 1-9 (giving more examples of LRE products being offered to or having entered the U.S.).

<sup>89</sup> *China's Ugly Export Secret*, *supra* note 65, at 42.

<sup>90</sup> *Prison Labor in China*, *supra* note 1.

<sup>91</sup> *Id.*; *China's Ugly Export Secret*, *supra* note 65.

<sup>92</sup> H.R. REP. NO. 2590, 71st Cong., 3d Sess. (1931); *see also* 19 U.S.C. § 1307 (1989).

produced, or manufactured wholly or in part in any foreign country by convict labor under penal sanctions shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited . . . ."<sup>93</sup>

As applied to this section, the act defines "forced labor" as "all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily."<sup>94</sup> Products manufactured in LREs fit under the definitions in this act, as the prisoners are "under penal sanction," goods are produced "under menace of penalty," and prisoners do not offer themselves voluntarily to perform the work.<sup>95</sup>

Section 307 was not intended to address human rights issues. The "principle of the legislation is that the free labor of America shall not be subjected to the burden of competition with non-free labor abroad."<sup>96</sup> Further language in section 307 reads: "[I]n no case shall such provisions be applicable to goods, wares, articles, or merchandise so mined, produced, or manufactured which are not . . . manufactured in such quantities as to meet the consumptive demands of the United States."<sup>97</sup> This language indicates that Congress did not want cheaply produced prison labor goods competing with U.S. products. These goods are allowed to enter only if U.S. industry cannot meet the demand. Thus, this statute was designed to promote fair trade competition between the U.S. and other countries. However, recent invocation of section 307 has been in the context of human rights violations in prisons, as well as fair trade.<sup>98</sup>

Persons within the jurisdiction of the U.S. face criminal penalties if they violate section 307. Whoever knowingly transports into the United

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<sup>93</sup> 19 U.S.C. § 1307 (1989).

<sup>94</sup> *Id.*

<sup>95</sup> It is arguable that the sentences handed down through the administrative process are not "penal" because there is no criminal judicial process involved. However, administrative sanctions should be considered "penal" under section 307 because the sentences are punishment and their goal is reform of the prisoner. In addition, because prisoners with both criminal and administrative sentences work in the same production units, it would be impossible to differentiate between goods for section 307 enforcement purposes.

<sup>96</sup> H.R. REP. NO. 2590, *supra* note 92.

<sup>97</sup> 19 U.S.C. § 1307 (1989).

<sup>98</sup> See generally *Prison Labor in China*, *supra* note 1; sources cited *supra* note 88; *Acting Commissioner Outlines Strategy for Clinton Goal of 'Level Playing Field'*, 10 Int'l Trade Rep. (BNA) 409 (Mar. 10, 1993) (continued enforcement efforts against China to bar importation of prison made goods would implement the Clinton administration's goal of "ensur[ing] a level playing field.").

States any goods, wares, or merchandise produced by convicts from any foreign country can be fined up to \$50,000 and be imprisoned up to two years.<sup>99</sup> Customs is in charge of enforcing these provisions by turning violators over to the U.S. Attorney for further proceedings.<sup>100</sup>

U.S. efforts to enforce section 307 have been largely unsuccessful. The U.S. has tried direct enforcement, negotiating with China, and threat of withdrawal of MFN, but none of these tactics has worked. The U.S. needs to establish a new policy to effectively deal with the problem and address U.S. interests.

### B. *Applying U.S. Law and Defining the U.S. Interest*

The prison labor issue is complicated for the United States because Congress and the public view it as both a trade and a human rights issue. The imprisonment of political dissidents, the punishment and torture, and the indefinite length of sentences make it a human rights issue, and it is presented to the American public as such.<sup>101</sup> Yet section 307 is a trade law, designed to level the playing field for U.S. industries, and it is the one unquestionably legitimate ground that the U.S. has for becoming involved in the prison labor problem.<sup>102</sup> The prison labor problem is a trade issue, in that prisoners receive low wages, and the incentive system used in the LREs makes prison labor products extremely cheap to produce.<sup>103</sup> This incentive system goes to the heart of what section 307 was intended to prevent. Yet the rationale given by the U.S., both at the legislative and executive level, for application of these fair trade laws on the prison labor issue has been

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<sup>99</sup> 18 U.S.C. § 1761 (1989).

<sup>100</sup> 19 C.F.R. § 161.3 (1994).

<sup>101</sup> *Chinese Forced Labor Exports: Hearings Before the House Foreign Aff. Comm.*, 103d Cong., 1st Sess., reprinted in Fed. News Serv., Sept. 9, 1993 (statement of Rep. Gejdenson), available in LEXIS, ASIAPC Library, FEDNEW File ("[T]o subject these prisoners of conscience to forced labor and to export these products to the United States is a violation of internationally recognized human rights, as well as U.S. law."); see also Mike Jendrzeczyk, *No Waffling on China*, WASH. POST, Feb. 16, 1993, at A13 ("[President Clinton] should send a strong, unambiguous signal to China's leaders that they can expect a renewal of MFN trade status only if there are substantial human rights improvements."); Gerstenzang & Tempest, *supra* note 87.

<sup>102</sup> 19 U.S.C. § 1307 (1989); see also Acting Commissioner Outlines Strategy for Clinton Goal of 'Level Playing Field', 10 Int'l Trade Rep. (BNA) 409 (Mar. 10, 1993).

<sup>103</sup> Many countries around the world, including the U.S. make products with prison labor which are exported. Those prisoners, however, are guaranteed a certain standard of living in the penal system, regardless of the success of production. Prisoners are also guaranteed procedural safeguards. These are the key factors which differentiate the system in China. Cowen, *supra* note 21, at 235.

human rights.<sup>104</sup> This has led to a very unclear definition of what the U.S. interest is in this situation, and what the proper policy should be.

### 1. *Section 307 and Customs Regulations*

The import of PRC prison labor products into the United States directly violates section 307 of the Trade Act of 1930.<sup>105</sup> The definition of prison labor products includes parts of entire products which may be made in China by prison labor and assembled elsewhere. The punishment for violation of this Act, however, falls on companies which "knowingly" import these goods.<sup>106</sup> Thus, the job of Customs to enforce this Act is twofold: first, it must determine which goods are made by prison labor and bar them from entering the U.S. Second, it must determine if the company importing the good did so "knowingly." With existing enforcement mechanisms, both tasks are nearly impossible to carry out.<sup>107</sup>

In order to determine if a product is made by prison labor, Customs must be able to determine the point of origin of the good, and inspect the production site. First, it is extremely difficult to determine point of origin. The web of agents, shippers, suppliers, and sub-contractors discussed in Section I easily hide a product's point of origin.<sup>108</sup> Second, as the LRE's have alternate production and prison names, it is difficult to know if a product is manufactured with prison labor simply by looking at the name of its point of origin.<sup>109</sup> Thus, in order to make accurate determinations, Customs

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<sup>104</sup> Orentlicher & Gelatt, *supra* note 7, at 73; see also Exec. Order No. 12,850, *supra* note 12.

<sup>105</sup> Section 307 includes "all goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labor under penal sanctions." 19 U.S.C. § 1307 (1989).

<sup>106</sup> 18 U.S.C. § 1761 (1989).

<sup>107</sup> The procedure for Customs when dealing with section 307 violations is as follows: If a customs official *reasonably believes* a product entering the U.S. was produced by prison labor, he or she must submit a report stating (1) the reasons behind that belief, (2) a description or sample of the merchandise, (3) all *obtainable* facts as to the manufacture of the product abroad, and (4) detailed description of the consumption of the product in the U.S. 19 C.F.R. § 12.42 (a), (b) (1994) (emphasis added).

After the report is filed, the Customs Commissioner may order an investigation "as appears to be warranted by the circumstances of the case." The Commissioner may consider "any representations offered by foreign interests or domestic producers." 19 C.F.R. § 12.42(c) (1994).

"If information available reasonably but not conclusively indicates that merchandise [under section 307] is about to be imported, . . . district directors shall thereupon withhold release of any such merchandise . . ." 19 C.F.R. § 12.42(e) (1994). Customs reports violations of this law to the U.S. Attorney. 19 C.F.R. § 161.3 (1994).

<sup>108</sup> See discussion *infra* part II.

<sup>109</sup> WU, *supra* note 25, at 9.

must have access to facilities. Such access, however, has been strictly limited.

China has granted U.S. officials speedy access to some facilities, and has also invited inspectors to others, without a request of inspection.<sup>110</sup> But these are described as "model" facilities, and do not lead the inspectors to any violations.<sup>111</sup> The Chinese government often delays requested access to facilities or to documents which indicate a product's destination.<sup>112</sup> Without cooperation and access to these documents and facilities, Customs can not accurately determine whether or not a product is made with prison labor. From the thousands of LREs which reportedly exist, Customs only finds a handful of violations every year.<sup>113</sup>

Under the current system, Customs enforcement of U.S. law has had only a nominal effect on the problem. Without sufficient personnel, and adequate access to facilities, Customs is unable to stop the importation of these products. Recognizing the inadequacy of the current system, the U.S. has pursued other means of enforcement.

## 2. *Memorandum of Understanding and Diplomacy*

Besides direct implementation of section 307, the U.S. has sought to solve the prison labor problem through diplomatic means. In 1992, the U.S. and China signed a Memorandum of Understanding.<sup>114</sup> The MOU provides that each party promptly investigate suspected violations, and immediately report the result of the investigations.<sup>115</sup> It also calls for the exchange of information by both sides, and provides access to U.S. officials to "suspect

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<sup>110</sup> Gerstenzang & Tempest, *supra* note 87.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> See generally *Determination that Merchandise Imported from the People's Republic of China, Produced by Red Star Tea Farm, is Being Produced by Convict, Forced, or Indentured Labor*, 26 Cust. B. & Dec. 212 (1992); *Determination that Merchandise Imported from the People's Republic of China, Manufactured by Xuzhou Forging and Pressing Machine Works is being Produced by Convict, Forced, or Indentured Labor*, 26 Cust. B. & Dec. 251 (1992); *Determination that Merchandise Imported from the People's Republic of China is being Produced with Convict, Forced, or Indentured Labor by the Qinghai Hide and Garment Factory*, 27 Cust. B. & Dec. 25 (1992); *Determination that Maintenance of Determination/Finding of July 7, 1992, Pertaining to Certain Socks Imported from the PRC is no Longer Necessary*, 27 Cust. B. & Dec. 52 (1993).

<sup>114</sup> Kanter, *supra* note 11.

<sup>115</sup> *Id.*

Chinese facilities."<sup>116</sup> The MOU makes it easier for Customs to determine first-hand if suspected goods were made with prison labor.

The MOU was intended to supplement and aid current customs enforcement of section 307. Yet the MOU has not been successfully implemented. There has been no "swift and open verification" and members of Congress have criticized the agreement as "meaningless."<sup>117</sup> Since the MOU was signed, Customs presented thirty-one cases to the PRC for investigation.<sup>118</sup> Of sixteen reports that China later provided, China maintained that eleven facilities do not export their products, or do not export to the U.S.<sup>119</sup> On August 25, 1992, Customs requested visits to five sites, under the MOU, but was able to visit only one.<sup>120</sup> While requests to visit the others have been rejected, China has provided access to two facilities Customs did not request to inspect.<sup>121</sup> In January 1994, U.S. Treasury Secretary Lloyd Bentsen said China agreed to allow five more sites to be inspected, but that oral agreement has not yet been put in writing.<sup>122</sup>

Further diplomatic efforts have been unsuccessful in substantively implementing the MOU. A Chinese delegation visited the U.S. in the Fall of 1993. Secretary of the Treasury Bentsen traveled to China in January 1994, as did Secretary of State Warren Christopher in March 1994.<sup>123</sup> While Bentsen's visit did result in the oral agreement of five inspections, Christopher's visit was not nearly as successful.<sup>124</sup> The visit was characterized as "frosty" and the PRC declared that it would not take "orders on human rights."<sup>125</sup> During the visit, however, China signed a joint statement

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<sup>116</sup> *Id.*

<sup>117</sup> *U.S.-China Trade Relations: Prepared Testimony of Christopher H. Smith Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 103d Cong., 2d Sess., reprinted in *Fed. News Serv.*, Feb. 25, 1994, available in LEXIS, ASIAPC Library, FEDNEW File.

<sup>118</sup> *Chinese Forced Labor Exports: Hearings Before the House Foreign Aff. Comm.*, *supra* note 101 (testimony of Winston Lord, Assistant Secretary of State for East Asia and Pacific Affairs).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*; see also Rich Miller, *Bentsen Says China Agrees New Prison Labour Checks*, *Reuter Asia-Pacific Bus. Rep.*, Jan. 20, 1994, available in LEXIS, ASIAPC Library, REUAPB File.

<sup>122</sup> Miller, *supra* note 121; *China Filing to Meet MFN Prison Labor Conditions*, *Agence France Presse*, Mar. 10, 1994, available in LEXIS, ASIAPC Library, AFP File.

<sup>123</sup> *Christopher Offered Easier Terms to China in Return for MFN Compliance*, *Agence France Presse*, Mar. 14, 1994, available in LEXIS, ASIAPC Library, AFP File.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

with the U.S., again agreeing to implement the MOU which was signed two years earlier.<sup>126</sup>

Despite slow progress implementing the MOU, President Clinton found that China's compliance was sufficient to warrant extension of MFN trading privileges.<sup>127</sup> Yet the history of its problematic enforcement and recent allegations of non-compliance indicate that China is not implementing the MOU.<sup>128</sup> In Congressional hearings, the role of this "quiet diplomacy" has been criticized as ineffective.<sup>129</sup>

The overall effect of the MOU, therefore, has been face-value cooperation from China. The agreement has not been substantially implemented, almost two years after being signed. In March 1994, China agreed to implement the MOU, with the intent that this might give the U.S. government enough political leeway to renew MFN during the summer. The success of the MOU has been only as a token effort, and has not led to any substantial end to the export of prison labor products.

Although the MOU has been largely ineffective, it should not be abandoned. While not directly enforceable, it has symbolic value, and can serve as a backbone to further agreements. In addition, it does provide the U.S. with an additional basis for demanding that China stop manufacturing prison labor products intended for U.S. markets. However, on its own, the MOU is not effective. In order to be successfully implemented or have any value at all, it must be supported by other actions.

### 3. *MFN as a Sanction*

On May 28, 1993, President Clinton signed an executive order which placed China's Most Favored Nation trading status on conditional one year extension.<sup>130</sup> In order to have MFN renewed in July of 1994, China would have to make significant progress on human rights, and the use of prison labor.<sup>131</sup> In order to secure MFN, China made some human rights conces-

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<sup>126</sup> H.R. DOC. NO. 266, *supra* note 18, at 5-6.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 6.

<sup>129</sup> *Chinese Forced Labor Exports: Hearings Before the House Foreign Aff. Comm., supra* note 101 (testimony of Winston Lord, Assistant Secretary of State for East Asia and Pacific Affairs).

<sup>130</sup> Exec. Order No. 12,850, *supra* note 12; *President Clinton Extends MFN to China, but Sets Conditions on Renewal Next Year*, 10 Int'l Trade Rep. (BNA) 886 (June 2, 1993).

<sup>131</sup> *President Clinton Extends MFN to China, but Sets Conditions on Renewal Next Year, supra* note 130, at 886.

sions, including the release of ten political dissidents from prison, and also purchased \$2 billion of U.S. goods.<sup>132</sup> On June 2, 1994, Mr. Clinton renewed MFN trading status for China.<sup>133</sup>

The conditional renewal in 1993 and 1994, followed an intense debate between law makers, human rights organizations, and business leaders over whether or not the use of MFN was proper to address this problem. The conditional renewal followed years of Congressional fights with the Bush administration, who did not place any conditions on China's MFN. President Bush maintained that, "adding broad sanctions to China's MFN renewal would not lead to faster progress in advancing our goals."<sup>134</sup> That policy was followed in order to "permit the United States to exercise greater influence over China, while not causing economic disruption for reform-minded Chinese or U.S. workers who depend on China trade for employment."<sup>135</sup> While President Clinton purported to support human rights goals, in 1994 he could not gamble on the importance of China to the U.S. economy.

There is a split of opinion among policy makers (even within the Clinton administration itself) over whether MFN should be used to secure human rights improvements.<sup>136</sup> Some policy makers believe that MFN should not address human rights issues. The Jackson-Vanik Amendment to the Trade Act of 1974 specifically states that non-market economies must meet freedom of emigration requirements, or have them waived by the president, in order to have MFN status renewed every year.<sup>137</sup> The President may waive the conditions, but he must report his decision to Congress.<sup>138</sup> Yet the preamble to this statute says that a purpose of conditional MFN is "[t]o assure the continued dedication of the United States to

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<sup>132</sup> *Id.*

<sup>133</sup> H.R. DOC. NO. 266, *supra* note 18, at 13.

<sup>134</sup> *President Vetoes Bill to Condition China's MFN Status*, 9 Int'l Trade Rep. (BNA) 1682 (Sept. 30, 1992).

<sup>135</sup> *Id.*

<sup>136</sup> See S. CHINA MORNING POST, Jan. 9, 1994, (Sunday Edition), at 10, available in LEXIS, ASIAPC Library, SCHINA File.

<sup>137</sup> *President Clinton Extends MFN to China, but Sets Conditions on Renewal Next Year*, *supra* note 130, at 886; Barry E. Carter, *International Economic Sanctions: Improving the Haphazard Legal Regime*, 75 CAL. L. REV. 1159, 1204 (1987); Trade Act of 1974 § 402, 19 U.S.C. § 2432 (1989). Most Favored Nation trading status is governed by this section of the Trade Act of 1974, known as the Jackson-Vanik Amendment. This section dictates the terms under which the President may extend MFN to non-market economies.

<sup>138</sup> Carter, *supra* note 137, at 1205.

fundamental human rights . . .”<sup>139</sup> The preamble suggests that furtherance of human rights is a goal of the policy. However, despite the language of the preamble, the statute only grants specific power to address emigration issues, not human rights.

Consistent with the language of the preamble and the statute, China’s MFN was conditioned subject to both emigration and improvement in human rights issues. It was also conditioned on an improvement in the export of prison labor products, but it is unclear if prison labor was considered an economic issue, or if it was tied in to human rights improvements. Some members of Congress continue to feel very strongly that MFN should not be renewed if China violates human rights (including the use of prison labor), while others believe that revoking MFN would hurt the U.S. and its workers too much, and is the wrong way to address the problem.<sup>140</sup> There have also been apparent disagreements within the Clinton administration over whether or not MFN should be revoked for these reasons.<sup>141</sup>

Regardless of whether or not prison labor is also a human rights concern for the U.S., the U.S. could never afford revoking MFN for China. Before renewal in 1993, China spent billions of dollars on airplanes, cars, oil exploration equipment, and telecommunications contracts with firms all over the country.<sup>142</sup> In return, China expected businesses to “display your impact in the U.S. government . . . to maintain the MFN status with an aim to . . . avoid the loss of bilateral interests.”<sup>143</sup> The threat of retaliation over loss of MFN status is very real; the U.S. could lose billions of dollars in investments, as well as many American jobs if China were to retaliate in some way.<sup>144</sup> President Clinton virtually had no choice other than to renew MFN in 1994.<sup>145</sup> Yet the president was bound by the language of conditional renewal, which Congress and the public did not forget. This scenario created a political dilemma for the administration, who tried to

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<sup>139</sup> 19 U.S.C. § 2432(a) (1989).

<sup>140</sup> S. CHINA MORNING POST, *supra* note 136.

<sup>141</sup> *Id.*

<sup>142</sup> See Michael Weisskopf, *Backbone of the New China Lobby: U.S. Firms*, WASH. POST, June 14, 1993, at A1.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*; see also S. CHINA MORNING POST, *supra* note 136.

<sup>145</sup> S. CHINA MORNING POST, *supra* note 136.

soften the language of conditional renewal in order the give themselves room to renew MFN in 1994.<sup>146</sup>

Since the massacre in Tiananmen Square, the debate over MFN and human rights, including the prison labor issue, has surfaced every year. MFN has either been renewed, or renewed with conditions. Circumstances have indicated, however, that the government needs to renew MFN no matter what, regardless of the position it wants to take on human rights. Thus, taking MFN away from China was an empty threat, damaging the credibility of the U.S. in the eyes of the PRC. If the U.S. were ever to revoke MFN, the American public would feel the economic effect. Therefore, the government has backed away from using MFN as a sanction, leaving China with no incentive for reforming the prison labor system in order to secure MFN renewal.

The battle over MFN was costly to U.S. credibility and policy making. Events during 1993 and 1994 have shown that the threat of withdrawal has not lead to any concrete results in prison labor reform. The only results have been deteriorating trade relations between the U.S. and an important trading partner. The U.S. needs to clarify its policy towards China, on whether the U.S. sees prison labor as a human rights or a trade issue. As a trade issue, the U.S. has a much greater chance of securing cooperation from the PRC, because the U.S. has legal footing in section 307. In contrast, when prison labor is tied to human rights issues, the U.S. concern is rooted in general international principles with no grounds of enforcement. As President Clinton has indicated,<sup>147</sup> the U.S. should abandon the MFN route completely and continue normal trade with China. Instead, the U.S. needs to implement new policies that will have a more direct effect of enforcing U.S. law, and not involve the country in an emotional, circular debate. These solutions must be more than just surface-level agreements meant to appease Congress and the public. They must substantially improve enforcement of section 307, which means in turn that they must have a substantive effect on the prison labor system. This approach might end the emphasis China puts on prison labor exports in its economy and curtail prison labor exports to the U.S.

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<sup>146</sup> *Id.*

<sup>147</sup> The President's News Conference, May 26, 1994, 30 WKLY. COMP. PRES. DOC. 1167 (May 30, 1994).

#### IV. A CASE FOR A VOLUNTARY CODE OF CONDUCT AND OTHER SOLUTIONS

In order to resolve the prison labor imports issue, Congress should adopt a voluntary code of conduct tailored specifically to enforce the provisions of section 307, as well as better enforcement through existing channels as a way to curtail the prison labor import problem. This policy would take advantage of the changing roles of international business, while taking the pressure off of a government that inconsistently enforces sanctions.

##### A. *Existing Proposals For a Voluntary Code of Conduct*

The idea that businesses should adopt a voluntary code of conduct applicable to their behavior in ventures abroad has circulated among Congress, academics, and businesses since the adoption of the Sullivan Principles in 1977.<sup>148</sup> A voluntary code of conduct is a non-binding set of principles which govern the conduct of U.S. companies in their ventures overseas, in this case in the PRC. The code would govern their investments and give them more responsibility for curbing human rights violations in their interests abroad.<sup>149</sup>

In the wake of President Clinton's decision to separate the human rights debate from the MFN debate, human rights groups have recently proposed a voluntary code of conduct advocating five principles which should be applied to China.<sup>150</sup> The first is that companies will try not to use or purchase prison labor products because conditions in PRC prisons violate human rights standards. Second, companies should not permit compulsory political indoctrination in the workplace. Third, companies should adopt non-discriminatory hiring practices in the PRC, meaning that worker's political beliefs should not be considered regarding employment. Fourth, while operating in the PRC, companies should adopt policies of free

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<sup>148</sup> For a discussion of the applicability of the Sullivan Principles, see Orentlicher & Gelatt, *supra* note 7, at 83 n.45. The article discusses the emerging responsibility of private businesses to help enforce human rights policies. The Sullivan Principles were adopted by Congress and businesses in reaction to apartheid in South Africa. *Id.* at 83. While effective in that situation, many people argue that similar principles could not be adopted in regards to China because of political and cultural differences. Edward A. Gargan, *Business Objects to Code in China*, N.Y. TIMES, May 24, 1994, at D2.

<sup>149</sup> Orentlicher & Gelatt, *supra* note 7, at 83.

<sup>150</sup> Gargan, *supra* note 148.

expression and association relating to work issues. Finally, senior American executives should discuss human rights issues with local Chinese officials.<sup>151</sup> A key part of the voluntary code states that businesses who adopt it must only adhere on a "best efforts" basis.<sup>152</sup> Proponents of this code believe that it would effectuate positive changes in China by asserting U.S. businesses' interest in supporting American policies in favor of human rights.<sup>153</sup>

Considering the legislative intent behind section 307 and the U.S. interest in imports of prison labor products from the PRC, the current proposal for a voluntary code of conduct is misguided. A code specifically tailored to enforcing section 307 would be more effective, more palatable for businesses to adopt, and more legitimate in the eyes of the PRC.

### 1. *The Benefits of the Proposed Code*

Several aspects of the proposed code would be useful in curbing prison labor imports into the U.S. Unlike using sanctions like revoking M.F.N., the code does not involve any sanctions or alienation of the PRC from U.S. businesses. Instead, it would be voluntary, and the U.S. government would not be compelling businesses to take any action they did not wish to take.<sup>154</sup> It would be left to the discretion of the company to determine if the local Chinese officials would be cooperative with the companies' adherence to the code. The code also gives businesses a way in which they can address issues important to American consumers, without discouraging investment.<sup>155</sup> Several businesses, such as Sears, Roebuck and Co. and Levi Strauss and Co. have already adopted their own codes.<sup>156</sup>

### 2. *Problems with the Proposed Code*

Businesses also object to the voluntary code for several reasons. First, businesses fear that adopting a voluntary code would undermine their competitiveness in the PRC, labeling them as agents of the U.S. govern-

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<sup>151</sup> *Id.*

<sup>152</sup> Orentlicher & Gelatt, *supra* note 7, at 83.

<sup>153</sup> Gargan, *supra* note 148.

<sup>154</sup> Orentlicher & Gelatt, *supra* note 7, at 83.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 107; *see also* Gargan, *supra* note 148.

ment.<sup>157</sup> Businesses are also leery of creating the notion for the public that they are morally responsible for the human rights situation in China.<sup>158</sup> Business do not want the U.S. government dictating how they should handle their investments in China.<sup>159</sup>

Besides the general objections to the voluntary code, the current proposed code would not be useful in addressing section 307 concerns for several reasons. The code as proposed is not tailored to the meaning of section 307. It addresses prison labor only as a human rights issue and not as a trade issue in which the U.S. and its businesses have a legitimate economic interest.<sup>160</sup> Other problems include the voluntary nature of the code. There is no guarantee that businesses will adopt it or adhere to it. In addition, adopting the code might expose businesses to increased liability under section 307. The trade act requires that businesses have knowledge that they are importing products made by prison labor. If a business adopts the code, then is found in violation of section 307, actions the business took in order to implement its code (such as inspection of production facilities) could be used against them.

#### *B. Modification of the Voluntary Code Tailored to Section 307 Enforcement*

Because the U.S. has a very limited ability to enforce section 307, Congress should create another means by which companies can abide by the law. As discussed earlier, enforcement from within U.S. borders is nearly impossible.<sup>161</sup> Through enforcement of the MOU, the U.S. has secured access to inspect some production facilities, but this has been a very slow process with few positive results.<sup>162</sup> A voluntary code of conduct, while objectionable to some in a strict human rights context, is ideally suited to address the problems inherent in enforcing section 307. Businesses' adherence to a voluntary code of conduct would give the U.S. another direct path to production facilities in order to ensure compliance with existing U.S. law.

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<sup>157</sup> Gargan, *supra* note 148.

<sup>158</sup> *Id.*

<sup>159</sup> Orentlicher & Gelatt, *supra* note 7, at 84-85.

<sup>160</sup> For a discussion of the human rights applications of a voluntary code of conduct, see *id.* at 84.

<sup>161</sup> See discussion *infra* part III.B.1.

<sup>162</sup> *U.S.-China Trade Relations: Prepared Testimony of Christopher H. Smith Before the Subcomm. on Trade of the House Comm. on Ways and Means*, *supra* note 117.

While the current proposals for a voluntary code of conduct would not succeed in this area, a modified code would add much needed assistance.

A reformed code should not invoke the debate over business interests versus human rights concerns. In the current proposed code, the language indicates business should prohibit the use of prison labor because of human rights concerns. The language should instead focus on adherence to section 307, a law which has governed businesses since 1931. Businesses have a legitimate interest in asserting that they may engage in enterprises abroad only if they do not subject the company to liability under domestic laws with which they are required to comply. With this type of revision in the code, businesses would run a smaller risk of alienating PRC officials. The focus should be on concrete U.S. policies instead of "universal rights" which some see as a form of "cultural imperialism".<sup>163</sup> As section 307 only addresses the economic issues behind prison labor production and imports, this should be the sole focus of the code. The code should concentrate the economic issues related to prison labor production, such as wages and hours, but any other human rights language should be eliminated.

Businesses have also objected to a human rights code of conduct because the government would be dictating to them that they advance a social policy, thus taking away their independence and undermining their competitiveness.<sup>164</sup> In the human rights context, that argument may have some merit. Yet in adhering to a reformed code focussing on section 307, businesses would only be agreeing to abide by a law to which they are already subjected. The companies would be protecting themselves from liability at home instead of trying to change a situation abroad where U.S. interest is somewhat debatable.

Even if a reformed code were adopted to enhance section 307 enforcement, the problem of potentially increased liability would remain. The code would still be voluntary and adhered to on a "best efforts basis."<sup>165</sup> Yet a company which agrees to a code may increase the grounds

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<sup>163</sup> Human rights are considered by many to be universal values, not American values. Orentlicher & Gelatt, *supra* note 7, at 102. China argues, however, that although the Universal Declaration of Human Rights was adopted internationally, "the issue of human rights falls by and large within the sovereignty of each country. . . . The evolution of the situation in regard to human rights is circumscribed by the historical, social, economic and cultural conditions of various nations . . . ." *White Paper on Human Rights in China*, Xinhua General Overseas News Service, 1991, available in LEXIS, ASIAPC Library, XINHUA File.

<sup>164</sup> Gargan, *supra* note 148.

<sup>165</sup> See Orentlicher & Gelatt, *supra* note 7, at 83.

by which they "knowingly" use prison labor because they will arguably have more access to that information. A mechanism is needed which would protect businesses from increased liability if they adopted the code.

Human rights groups would object to a reformed code because it would not be addressing human rights issues directly. Yet when specifically targeting section 307 violations, prison labor should not be viewed mainly as a human rights issue. This is not to say that other means of addressing human rights violations in China should not be pursued. Yet because the prison labor issue is grounded in U.S. trade law, it should be treated as a trade issue, not a human rights issue. The concept of a code of conduct is beneficial to section 307 enforcement and should be pursued.

On a practical level, adoption of a section 307 voluntary code of conduct would work because it would help alleviate the chronic problem of identifying products which come from prison labor factories. Companies adhering to the code would be required to make a bona fide effort to determine if prison labor was used in their products. As a condition to forming a contract, companies wanting to do business with China could require that inspections be part of the deal. With direct economic incentive to give inspections, the PRC might be more willing to do so. This would put U.S. companies where the PRC has been extremely reluctant to let U.S. Customs officials go.

Adopting a voluntary code of conduct is not the ultimate solution to the prison labor import problem. The code would still be voluntary, meaning there would be no guarantee it would be implemented. Thus, the effectiveness of the code could be severely limited. In addition, there is no real economic incentive for businesses to adhere to the code. Adherence might limit the amount of cheap labor available, thus discouraging investment. While this consideration has not stopped other companies from adopting their own codes,<sup>166</sup> it must be considered.

### C. *The Solution: A Combination of Efforts*

The best solution to the problem of enforcing section 307 would be a combination of new and existing efforts. Because section 307 needs to be enforced on many levels in order to be effective, the best solution should address the problem on all those different levels.

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<sup>166</sup> See *id.* at 107; see also Gargan, *supra* note 148.

First, section 307 and its implementing regulations should be retained. To improve U.S. enforcement of these regulations, more inspections are needed. Because it is now well-recognized by the U.S. that many imports from China are in flagrant violation of section 307, there should be a targeted crackdown on products coming in. Improvement in existing enforcement policies is an important first-step to over-all effective enforcement.

Second, the MOU should be retained, and other diplomatic efforts to end the problem should be pursued. Keeping the diplomatic channels open will keep dialogue between the two countries going, and will be an important tool in preventing any retaliatory actions. The U.S. should also explore more fully ways in which it can successfully use applicable international principles to gather international diplomatic support.

In addition, policies like using MFN to pursue undefined U.S. goals should be abandoned. To be able to stand firmly behind its policies, the U.S. must use laws that are specifically targeted at certain policy goals. The U.S. must clearly define what its policy is regarding prison labor. The political dilemma stemming from the debate over MFN and human rights is a lesson that leaders should not have to learn twice.

Third, a voluntary code of conduct should be enacted to help enforce section 307. The legislation should specifically target section 307 concerns. While the code should not dictate behavior to businesses, it should provide some incentive to encourage compliance. The code should also contain a provision that assures a company's liability under section 307 would not be increased. The code would be the best, most effective way to increase and improve enforcement of section 307.

## V. CONCLUSION

The United States has had little success effectively enforcing section 307 of the Smoot-Hawley Tariff Act of 1930. The organization of the prison labor system in China makes it difficult for Customs to determine if products are manufactured by prison labor. In addition, Customs does not have the resources to fully implement section 307. As a result, products produced by prison labor in China enter the U.S. every day, in violation of U.S. law. The best solution to this problem would address the problem on many levels. First, the U.S. should allocate more resources to Customs so

that the department may enforce section 307 more actively. Second, it should continue to pursue diplomatic means of solving the problem. And third, the solution should include a voluntary code of conduct by which U.S. businesses would limit their use of prison labor in business ventures in China. The problem is a very complex one, and this proposed solution is not the complete answer. It may, however, be more effective than the policies that are currently being pursued.

