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# Trade Policy & Labor Standards

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## INTRODUCTION

The trade/labor linkage has a long history.<sup>1</sup> It has become one of the most contentious contemporary issues in trade and labor policy circles and debates.<sup>2</sup> The idea of using international labor standards to protect workers from economic exploitation was first promoted by individual social reformers in Europe in the first half of the 19th century at the early stages of the Industrial Revolution. The work of these reformers was later taken over by various nongovernmental organizations. Calls for international labor legislation increased dramatically during the second half of the 19th century and found expression in various international organizations that were formed (often international associations of trade unions).

Intergovernmental action for international labor legislation began to be reflected in international conferences beginning in 1890. Many of these early efforts were motivated by the concern that in the absence of international labor standards, international competition in an environment of increasingly freer trade would precipitate a race to the bottom. The Treaty of Versailles

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1. See Steve Charnovitz, *The Influence of International Labour Standards on the World Trading System: An Historical Overview*, 126 INT'L LAB. REV. 565, 565 (1987); Virginia Leary, *Workers' Rights and International Trade: The Social Clause (GATT, ILO, NAFTA, U.S. Laws)*, in 2 FAIR TRADE AND HARMONIZATION 177, 182-83 (Jagdish Bhagwati & Robert E. Hudec eds., 1996); Baatlhodi Molatlhegi, *Trade and Labour Interface in the Context of Economic Integration: The Case of the Southern African Development Community* (2000) (unpublished Ph.D. dissertation, University of Toronto Faculty of Law) (on file with author).

2. See generally Brian Langille, *Eight Ways to Think About International Labour Standards*, 31 J. WORLD TRADE 27, 27-53 (1997). Langille discusses the arguments and motives of eight major debates regarding international labor. *Id.* at 33.

in 1919 established the International Labour Organization (ILO).<sup>3</sup> The preamble of the ILO Constitution notes that “the failure of any nation to adopt humane conditions of labor is an obstacle in the way of other nations which desire to improve the conditions in their own countries.”<sup>4</sup> Under Article 33 of the ILO Constitution, the governing body may recommend that the Conference take “such action as it may deem wise and expedient to secure compliance” with recommendations of commissions of inquiry or where the matter has been referred to the International Court of Justice with the recommendation of the Court.<sup>5</sup> Some commentators have suggested that this does not completely rule out the question of trade sanctions, as is contemplated as a possibility in the case of recent adverse ILO determinations against Myanmar (Burma) with respect to forced labor.<sup>6</sup> The ILO, a tripartite organization of government, employers and worker representatives, however, has mostly pursued its mandate by setting minimum international labor standards through Conventions and Recommendations, subject in the former case to ratification by member states and promoted by investigation, public reporting and technical assistance, but not formal sanctions.

The ILO formally entered the trade/labor interface debate in 1994 at the time of discussion of a possible inclusion of a social clause in the General Agreement on Trade and Tariffs (GATT), the establishment of a link between trade and labor in differing forms within the North American Free Trade Agreement (NAFTA) and the European Union (EU), and the conditioning of trade preferences and concessions by some developed countries on respect for labor standards. The ILO set up a Working Party on the social dimensions of the liberalization of international trade, but in 1995, the ILO’s governing body concluded that the Working Party would not pursue the question of trade sanctions and that further discussion of a link between international trade and social standards or a sanction-based social clause mechanism would be suspended.<sup>7</sup> In 1998, however, the

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3. See <http://www.ilo.ru/about/ilo/htm> for information on the origins of the ILO.

4. ILO CONST. preamble, available at [www.ilo.org/public/english/about/iloconst.htm#a1p2](http://www.ilo.org/public/english/about/iloconst.htm#a1p2) (last modified May 2, 2001).

5. *Id.* at art. 3.

6. See Press Release, ILO, Forced Labour Persists in Myanmar: ILO Applies Extraordinary Constitutional Procedures (Mar. 29, 2000), available at [www.ilo.org/public/english/bureau/inf/pr/2000/9.htm](http://www.ilo.org/public/english/bureau/inf/pr/2000/9.htm) (last modified Mar. 29, 2000).

7. See Bill Brett, Editorial, *Social Linkage Remains on the ILO Agenda*, FIN.

ILO adopted a Declaration of Fundamental Principles and Rights at Work (Declaration) providing that all members have an obligation to respect and promote certain core labor standards (CLS): 1) freedom of association and the right to engage in collective bargaining, 2) the elimination of forced labor, 3) the elimination of child labor, and 4) the elimination of discrimination in employment.<sup>8</sup> This Declaration parallels in many respects references to core international labor standards in the United Nations (UN) Universal Declaration of Human Rights (1948), the UN Covenant on Civil and Political Rights, and the UN Covenant on Economic, Social and Cultural Rights that came into force in 1976.<sup>9</sup> The ILO membership, however, rejected a proposal by its Director-General in 1997 that the ILO promote and administer a country-based certification and labeling program for products from countries complying with core labor standards.<sup>10</sup>

The 1948 Havana Charter that was intended to embody the framework for a new world trading system declared that "Members recognize that unfair labour conditions, particularly in production for export, create difficulties in international trade and accordingly each member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory."<sup>11</sup> The Havana Charter, however, was never adopted because of opposition in the U.S. Congress,<sup>12</sup> and the GATT in Article XX refers only to measures relating to products of prison

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TIMES UK, May 10, 1995, at 18.

8. See ILO Declaration on Fundamental Principles and Rights at Work, art. 2, June 18, 1998, 37 I.L.M. 1233, 1237 (1998).

9. See Molatlhegi, *supra* note 1, at ch. 2; Patricia Stirling, *The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization*, 11 AM. U. J. INT'L L. & POL'Y 1, 16-17 (1996) (noting the various provisions of the Universal Declaration of Human Rights).

10. See Christopher McCrudden and Anne Davies, *A Perspective on Trade and Labour Rights*, 3 J. INT'L ECON. L. 43, 47 (2000) (noting that the attempt to link certain labor issues to a labeling scheme was not accepted by the main decision-making body of the ILO); see also Holly Cullen, *The Limits of International Trade Mechanisms in Enforcing Human Rights: The Case of Child Labour*, 7 INT'L J. CHILD. RTS. 1, 15 (1999) (noting that developing countries protested "any linkage of trade and core labour standards" that "disguised protectionism" even if the system was voluntary).

11. Havana Charter for an International Trade Organization, Mar. 24, 1948, 1948 Can. T.S. No. 32, at art. 7(1), available at [http://www.wto.org/english/docs\\_e/legal\\_e/prevto\\_legal\\_e.htm](http://www.wto.org/english/docs_e/legal_e/prevto_legal_e.htm) (last visited Feb. 27, 2005).

12. See John Evans, *The Trade Union View on International Labour Standards*, Background Note for ITGLWF Conference on International Trade (Oct. 5, 1995), available at [www.tuac.org/statement/communiq/itglwifj.htm](http://www.tuac.org/statement/communiq/itglwifj.htm).

labor (Article XX(e)), measures necessary to protect public morals (Article XX(a)), and measures relating to human life or health (Article XX(b)).<sup>13</sup> The Ministerial Declaration following the first WTO Ministerial Conference in Singapore in 1996 appears to have removed labor issues from the WTO agenda and remitted them to the ILO. The 2001 Doha Ministerial Declaration re-affirms this position.<sup>14</sup>

A number of international commodity agreements, starting with the International Tin Agreement of 1954, contain labor standards provisions, but no dispute settlement or enforcement mechanisms.<sup>15</sup> According to critics, the inclusion of such clauses was intended to protect industries in developed countries from competition from developing countries.<sup>16</sup>

Under 1984 U.S. Generalized System of Preferences (GSP) legislation, the U.S. President, in determining eligibility for GSP status, must take into account, amongst other things, whether the concerned country is taking steps to ensure internationally recognized workers' rights.<sup>17</sup> The Caribbean Basin Economic Recovery Act of 1983 was the first U.S. legislation in recent history to condition trade on foreign labor standards.<sup>18</sup> The U.S. Omnibus Trade and Competitiveness Act of 1988 expanded the provisions of the 1974 Trade Act to cover cases involving alleged violations of internationally recognized labor rights: if investigations by the U.S. Trade Representative show that U.S. trade rights have been violated, his or her office may authorize retaliatory measures, including imposition of restrictions on imports from the concerned country.<sup>19</sup>

13. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT], art. XX(a), XX(b), XX(e).

14. Doha Ministerial 2001: Ministerial Declaration, Nov. 14, 2001, 41 I.L.M. 746, 747 (2002) (noting that out of fifty-two declarations only one dealt with labor issues). "We reaffirm our declaration made at the Singapore Ministerial Conference regarding internationally recognized core labor standards. We take note of work under way in the International Labor Organization (ILO) on the social dimension of globalization." *Id.* at 747.

15. See Joan M. Smith, *North American Free Trade and the Exploitation of Working Children*, 4 TEMP. POL. & CIV. RTS. L. REV. 57, 89-90 (1994).

16. Molatlhegi, *supra* note 1, at ch. 2.

17. 19 U.S.C.A. §2462 (b)(2)(G) (West 1999).

18. Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67, 97 Stat. 384 (codified at 19 U.S.C. §§ 2701-2706, 16 U.S.C. § 7652 (Supp. 1983)).

19. See generally Drusilla K. Brown et al., *International Labor Standards and Trade: A Theoretical Analysis*, in 1 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE 234-36 (Jagdish Bhagwati & Robert E. Hudec eds., 1996) (providing a useful review of the evolution of labor standards in U.S. trade policy legislation).

The EU first mooted the possibility of linking labor standards to trade preferences by proposing the introduction of labor standards into the Lomé Convention in 1978 to ensure that developing countries with labor conditions which met the requirements of international labor conventions should not be penalized in their trade with the EEC by being out-competed by countries that do not comply with such conventions.<sup>20</sup> This proposal was not implemented in the face of intense opposition from developing countries.<sup>21</sup> In 1994, the EU finally established a link between trade and labor standards in the context of its relationship with developing countries through its GSP system, in which additional GSP preferences were offered to countries committing themselves to respect international labor standards.<sup>22</sup>

With respect to trade and labor standards linkages in regional trading arrangements, within the European Union, the social dimension of European integration took concrete form in 1991 when eleven of the twelve member states (excluding the United Kingdom) signed the community's Charter of Fundamental Social Rights.<sup>23</sup> Another important step in the development of EU social policy was the adoption by the eleven members (excluding the UK) of the Protocol on Social Policy at Maastricht in 1991.<sup>24</sup> The content of the Social Chapter is fundamentally the same as that of the Charter and contains a number of guarantees of basic labor rights. Under NAFTA, the North American Agreement on Labor Cooperation (NAALC) requires the NAFTA parties to effectively enforce their own labor laws, and they are subject to specialized dispute settlement processes and ultimately fines enforceable through trade sanctions in the event of findings of non-enforcement.<sup>25</sup>

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20. See Memorandum on the Linking of Economic Aid and Human Rights, COM(78)47 final, at 9-10 (1978).

21. *Id.*; Demetrios James Marantis, *Human Rights, Democracy, and Development: The European Community Model*, 7 HARV. HUM. RTS. J. 1, 6 (1994).

22. See Cullen, *supra* note 4, at 12; Molatlhegi, *supra* note 1, at ch. 2.

23. See Standing Committee of the Hospitals of the European Union, available at <http://www.hope.be/07publi/leaflet/socdial/eucomp.htm>.

24. Treaty on European Union and Final Act, Feb. 7, 1992, reprinted in 31 I.L.M. 247, 357-58; see also G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, n. 393 (1995) (citing John T. Addison & W. Stanley Siebert, *Recent Developments in Social Policy in the New European Union*, 48 INDUS. & LAB. REL. REV. 5, 5-6 (1994)).

25. North American Agreement on Labor Cooperation, Sept. 14, 1993, 32 I.L.M. 1499.

As noted above, the 2001 Doha Ministerial Declaration launching a new multilateral Round, confirms the 1996 Singapore Ministerial Decision to remit all international labor standards issues to the ILO. The issue of a trade/labor linkage, however, seems unlikely to go away. Regionally, the potential expansion of NAFTA into a Free Trade Area of the Americas (FTAA) will raise the scope and status of the NAFTA Labor Side Accord in this broader context. Furthermore, unilateral trade actions by states on account of labor practices prevailing in other states may well provoke trade disputes that will require adjudication by international trade dispute settlement bodies.

## I. THE CHOICE OF POLICY OBJECTIVE

Reviewing both contemporary and historical debates about the case for a trade policy-labor standards linkage, several normative rationales for a trade policy-labor standards linkage emerge and are often largely elided in debates, which then greatly complicates the task of evaluating the appropriate choice of instrument and choice of institutional arrangement for vindicating the chosen policy objectives.

### A. UNFAIR COMPETITION

It is often argued that countries that sell goods into export markets that are produced by processes that fail to respect or comply with internationally recognized labor standards are engaging in an unfair form of competition that deprives domestic producers in export markets and producers and exporters in third country markets who comply with these standards of legitimate market share. Countries in which internationally recognized labor standards are not complied with are often accused of "social dumping," or indirect or implicit and illicit subsidization. These economic activities, entailing either lax labor laws or ineffective enforcement of nominally compliant laws (or both), are analogized to economic dumping and direct subsidization that may attract anti-dumping duties or countervailing duties under Article VI of the GATT and current WTO Agreements on anti-dumping and subsidization and countervailing duties.<sup>26</sup>

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For the text of NAALC, see <http://www.naalc.org/english/agreement.shtml>.

26. See generally Dani Rodrik, *Labor Standards in International Trade: Do They Matter and What Do We Do About Them*, in EMERGING AGENDA FOR GLOBAL TRADE: HIGH STAKES FOR DEVELOPING COUNTRIES 35-79 (1996); Adelle Blackett,

Without further and careful specification, this rationale for linking international trade policy and/or sanctions with labor standards is largely incoherent. From the perspective of importing countries, generically lower labor costs in exporting countries enhance consumer welfare in importing countries, and by more than reductions in producer welfare in the latter. From the perspective of exporting countries, particularly developing countries, the latter rightly argue that in the early stages of industrialization, entailing mass production of low technology products (e.g., textiles, clothing, footwear, processed agricultural products), low-cost and low-skilled labor is one of the principal sources of their competitive advantage. To deny them the ability to exploit this advantage is to consign them forever to low value-added commodity production for developed country markets ("hewers of wood and drawers of water").

However, it is crucial not to overstate the significance of this source of comparative advantage. While it is true that the earnings of low-skilled workers relative to high-skilled workers in the United States and other developed countries have declined in recent years (or unemployment levels increased), most empirical studies show that increased trade with low-wage developing countries may account for at most twenty per cent of this reduction, and most of the increase in the wage gap between skilled and unskilled workers is attributable to technological change and, in the case of the United States, also to rapidly declining rates of unionization.<sup>27</sup> More importantly, there is almost no evidence that the reduction in relative earnings of unskilled workers in developed countries that is reasonably attributable to increased trade with developing countries relates to noncompliance with core labor standards rather than simply lower wages. Even in this latter respect, as Paul Krugman and many other economists have pointed out, the growth rate of living standards essentially equals the growth rate of domestic

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*Whither Social Clause? Human Rights, Trade Theory and Treaty Interpretation*, 31 COLUM. HUM. RTS. L. REV. 1-80 (1999).

27. For extensive reviews of the empirical literature, see generally Drusilla K. Brown, *International Trade and Core Labour Standards: A Survey of the Recent Literature*, (OECD Occasional Papers No. 43), available at [http://www.oilis.oecd.org/OLIS/2000DOC.NSF/4f7adc214b91a685c12569fa005d0ee7/c125692700623b74c125696e0056ca76/\\$FILE/00083851.PDF](http://www.oilis.oecd.org/OLIS/2000DOC.NSF/4f7adc214b91a685c12569fa005d0ee7/c125692700623b74c125696e0056ca76/$FILE/00083851.PDF) (Oct. 4, 2000); Keith E. Maskus, *Should Core Labor Standards Be Imposed Through International Trade Policy?*, (World Bank, Policy Research Working Paper No. 1817) available at <http://www.worldbank.org/html/dec/Publications/Workpapers/WPS1800series/wps1817/wps1817.pdf> (Aug. 1997).

productivity.<sup>28</sup> In the case of the United States, exports are only ten percent of the GNP, which means the United States is still almost 90 percent an economy that produces goods and services for its own use. Data show almost a one-to-one relationship between labor productivity and labor costs in manufacturing in a wide range of developed and developing countries.<sup>29</sup> Labor productivity, or total factor productivity, is a function of many factors, including public investments in education and training, health care, infrastructure, and law and order. Thus, it is a fallacy to assume that low wages are the principal driving force behind today's global trade or foreign direct investment flows. This relationship between labor productivity and labor costs explains why internationally most firms are not seeking to relocate to e.g. Bangladesh despite its low wages, and why most international trade and foreign direct investment flows are still dominated by developed countries as countries of origin and countries of destination.

Economic theory strongly suggests that the immediate imposition of common international labor standards across-the-board, based on developed country standards, would substantially reduce total economic welfare as conventionally measured in importing countries, exporting countries, and globally.<sup>30</sup> This theory is of course a mischaracterization of what those who favor linkage are "demanding," which is at most a gradual progressive movement towards higher standards as appropriately contextualized to the situation of individual developing countries. Besides, at least with respect to CLS, the welfare effects of compliance are likely to be positive in developing countries themselves. Price effects in importing countries are likely to be minor. An important study by the Organisation for Economic Co-Operation and Development (OECD), published in 1996, concluded that compliance with CLS is likely to have no negative

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28. See PAUL KRUGMAN, *Competitiveness: A Dangerous Obsession*, in POP INTERNATIONALISM 3, 9 (1997).

29. DANI RODRIK, HAS GLOBALIZATION GONE TOO FAR? 76 (1997) (noting that "wages in a poor exporting country that are one-tenth the U.S. level do not disadvantage workers in the United States when labor productivity in that country is also lower by a factor of 10")

30. See Brown, Deardorff & Stern, *supra* note 19, at 240 (noting that a common standard set by all countries would lead to a rise in world price). "If the standard is imposed in the labor-intensive sector, then workers in all sectors of the economy are made worse off." *Id.* at 255; Brown, *supra* note 27, at 41 ¶237 and at 42 ¶242; Maskus, *supra* note 27, at 14 ("The imposition of CLS may or may not improve welfare and may not be the first-best approach . . . . Political imperfections strongly raise the likelihood that CLS will not be adequately provide in distorted economies.")

implications for exporting countries in terms of export and growth performance.<sup>31</sup> There remain some skeptics about the welfare implications of particular CLS.<sup>32</sup> A recent ILO study, however, using state of the art techniques of economic modeling, predicts that substantial welfare gains from the elimination of child labor over a two decade period will net the required investment in education and related programs.<sup>33</sup> Another study, by Morici and Schultz, echoes the OECD 1996 conclusions, finding a significant positive correlation between improvements in respect to CLS and economic growth and development in Southern countries.<sup>34</sup>

Even stated in fairness rather than welfare terms, if it is unfair for firms and workers in developed countries to have to compete with firms and workers in developing countries with access to low-paid, low-skilled labor, by the same token, it is equally unfair for developing countries to have to compete with firms and workers in developed countries that depend on highly-skilled labor forces, highly-developed infrastructure, large public investments in education and research and development, extensive health care systems, effective law and order, and superior institutions, in most cases reflecting collective or public investments on a scale that far exceeds the capacity of most developing countries. Thus, this unfair competition argument, in and of itself, is totally indeterminate and carries high risks of the trade policy-labor standards linkage being exploited for protectionist ends. In this respect, it is important to emphasize that the unfair competition argument focuses principally on the welfare implications of non-compliance with international labor standards for citizens or interests in *importing countries*.

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31. See OECD, TRADE, EMPLOYMENT AND LABOUR STANDARDS: A STUDY OF CORE WORKERS' RIGHTS AND INTERNATIONAL TRADE 98 (1996); see generally Rodrik, *supra* note 26, at 52–59 (noting that although labor costs tend to increase as standards become more stringent, low labor standard do not necessarily create comparative advantages nor do they encourage foreign direct investment).

32. For example, the scope of the collective bargaining entitlement, or the peremptory termination of child labour without pre-empting inferior substitution effects through rendering basic education more accessible. See generally Brown, *supra* note 27, at 28 ¶145 (noting that there is evidence that employment of older children can be productive and humanely combined with schooling); Maskus, *supra* note 27.

33. International Labour Office, International Programme on the Elimination of Child Labour, *Investing in Every Child: An Economic Study of the Costs and Benefits of Eliminating Child Labour*, at 4, available at [http://www.ilo.org/public/english/standards/ipecc/publ/download/2003\\_12\\_investingchild.pdf](http://www.ilo.org/public/english/standards/ipecc/publ/download/2003_12_investingchild.pdf) (Dec. 2003).

34. See PETER MORICI & EVAN SCHULTZ, LABOR STANDARDS IN THE GLOBAL TRADING SYSTEM, 57 (2001).

## B. THE RACE TO THE BOTTOM

As the brief historical exegesis of the trade/labor linkage in the introduction to this Article makes clear, a major motivation for promoting international labor standards in the first place and then subsequently a trade policy-labor standards linkage<sup>35</sup> is that low labor standards (including low wages) in exporting countries may undermine higher labor standards in importing countries and precipitate a so-called “race to the bottom”—a form of prisoner’s dilemma—that can only be pre-empted by international agreement on and enforcement of minimum labor standards.<sup>36</sup>

This argument is a variant on the unfair competition argument reviewed above. But rather than assuming that importing countries will maintain the status quo with respect to their more stringent labor standards and accept a loss of market share, it instead assumes that such countries will progressively dilute them in order to avoid losing market share to imports from countries in which these standards are not adhered to. This will result in a low level equilibrium trap where all countries relax their labor standards to what many regard as suboptimal levels, yet all countries simply retain their preexisting share of trade or investment after the race to the bottom has run its course.

Despite the durability of this concern, for reasons given above there is little reason to suppose that liberal trade and investment regimes will precipitate a race to the bottom. Moreover, the empirical evidence provides no support for the claim that liberal international trade and investment regimes are leading developed countries to relax their CLS or labor standards generally, or that foreign direct investors (FDI) are investing in countries with weak CLS.<sup>37</sup> Indeed, the evidence suggests that, with the notable exception of China, countries with weak CLS attract very little FDI either in general or specifically in the sectors where CLS are weak. Even Export Processing Zones (EPZs) typically provide superior employment conditions to sur-

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35. As, for example, reflected in the preambles to the ILO Constitution and Havana Charter.

36. See Elissa Alben, *GATT and the Fair Wage: A Historical Perspective*, 101 COLUM. L. REV. 1410, 1410–47 (2001).

37. See generally Robert Flanagan, *Labour Standards and International Competitive Advantage*, in INT’L LAB. STANDARDS (Robert J. Flanagan & William B. Gould IV eds., 2003).

rounding markets.<sup>38</sup> Some commentators, while conceding that weak CLS in some developing countries have not caused a weakening of labor standards generally in developed countries, argue that developing countries with weak CLS that compete against each other in export markets may be stuck in a low-level equilibrium trap with respect to efforts to enhance CLS vis-à-vis each other.<sup>39</sup> If the OECD and later findings discussed above are well-founded, this concern is not warranted. It is important to emphasize that race-to-the-bottom concerns, like unfair competition concerns, largely emanate from the perceived welfare implications of non-compliance with international labor standards for citizens and interests in *importing countries*.<sup>40</sup>

### C. CORE LABOR STANDARDS AS HUMAN RIGHTS

Various core labor standards have been characterized as human rights in the United Nations Universal Declaration of Human Rights, the subsequent International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. The ILO's 1998 Declaration of Fundamental Principles and Rights at Work enumerates a short list of core international labor standards which are defined more fully in eight background Covenants that are incorporated by reference: freedom of association and collective bargaining, the elimination of forced labor, the elimination of child labor, and the elimination of discrimination in employment.<sup>41</sup> These rights are consistent with the characterization of certain core labor standards or rights as human rights, especially those that guarantee basic freedom of choice in employment relations.

As Amartya Sen argues in his recent book, *Development As Freedom*,<sup>42</sup> the basic goals of development can be conceived of in universalistic terms where individual well-being can plausibly

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38. See Maskus, *supra* note 27, at 11 (noting that "the preponderance of evidence indicates that firms in EPZs pay higher wages and offer less onerous working conditions than do firms in the remainder of the country."; see generally Brown, *supra* note 27 at 50 (noting that wages in EPZs are higher than the rest of the economy)..

39. See generally Maskus, *supra* note 27 at 16; Kaushik Basu, *The View from the Tropics*, in *New Democracy Forum: Stepping Up Labour Standards*, BOSTON REV. (Feb/Mar 2001).

40. See Rodrik, *supra* note 26 at 81.

41. *Fundamental Rights at Work: Overview and Prospects*, International Labor Organization Doc. 122, at 67 (2001), available at <http://www.ilo.org/public/english/dialogue/actrav/publ/122/122e.pdf> (last visited February 24, 2005).

42. See generally AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 10-11 (1999).

be viewed as entailing certain basic freedoms irrespective of cultural context: freedom to engage in political criticism and association, freedom to engage in market transactions, freedom from the ravages of preventable or curable disease, freedom from the disabling effects of illiteracy and lack of basic education, and freedom from extreme material privation. According to Sen, these freedoms have both intrinsic and instrumental value.<sup>43</sup> Importantly, in contrast to the unfair competition and race-to-the-bottom rationales for linking international trade policy and international labor standards, the human rights perspective focuses primarily on the welfare of citizens in *exporting*, not *importing* countries. The assumption underlying this concern with basic or universal human rights is that failure to respect them in any country either does not reflect the will of the citizens but rather decisions of unrepresentative or repressive governments, or alternatively majoritarian oppression of children, women, racial or religious minorities, or alternatively again paternalistic concerns that citizens in other countries have made uninformed or ill-advised choices to forego these basic rights.<sup>44</sup>

In our view, the linkage of international trade policy, including trade or other economic sanctions, with core labor standards that reflect basic or universal human rights, is a cogent one. When citizens in some countries observe gross or systematic abuses of human rights in other countries, the possible range of reactions open to them include diplomatic protests, withdrawal of ambassadors, cancellation of air landing rights, trade sanctions or more comprehensive economic boycotts, or, at the limit, military intervention. Arguing that doing nothing is always or often the most appropriate response is inconsistent with the very notion of *universal* human rights. In extreme cases, such as war crimes, apartheid, the threat of chemical warfare in the case of Iraq, genocide in the case of Serbia, or the Holocaust in the case of Nazi Germany, excluding *a priori* economic sanctions from the menu of possible options seems indefensible. Whether it is the most appropriate option may, of course, be context-specific and depend both on the seriousness of the abuses and the likely efficacy of the response (choice of instrument issues to which we turn next). But it is sufficient for present purposes to restate the point that to the extent that core labor standards are appropriately characterized as basic or uni-

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43. See *id.*

44. See Rodrik, *supra* note 26 at 66 (“Authoritarian regimes cannot make the claim that their labor standards are reflective of broad social preferences.”).

versal human rights, a linkage between trade policy and such labor standards is not only defensible, but arguably imperative, in contrast to the other two rationales for such a linkage which, despite their much longer historical lineage, are largely spurious and inconsistent with the central predicates of a liberal trading system. Core labor standards viewed as basic or universal human rights, however, by promoting human freedom of choice, are entirely consistent with a liberal trading regime that seeks to ensure other human freedoms, in particular the right of individuals to engage in market transactions with other individuals without discrimination on the basis of country of location.<sup>45</sup>

Having said this, the scope and definition of the class of human rights viewed as sufficiently universal as to warrant potentially the imposition of trade sanctions for their violation is problematic in various respects. Even CLS are not susceptible to non-contentious understandings of their scope. Should child labor be defined only in terms of a minimum working age or should some subset of exploitative child labor practices be targeted? What practices exactly constitute discrimination in the workplace? What constitutes forced labor beyond slavery? When is freedom of association and the right to engage in collective bargaining fully respected, given that most countries deny or limit the right to strike in various contexts? Beyond CLS, while civil rights (e.g., to be free from genocide, apartheid, torture, detention without trial) may be reasonably well-understood and commonly subscribed to (at least in principle), political rights (e.g., to engage in political association, criticism or dissent or even to vote) are much less widely recognized.<sup>46</sup> Economic, social and cultural rights, are even less universally accepted.<sup>47</sup> These issues have major implications for the choice of instrument and choice of institutional arrangements for structuring the trade policy-labor standards linkage, to which we turn below.

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45. See Molatlhegi, *supra* note 1, at ch. 3; see generally Sarah H. Cleveland, *Human Rights Sanctions and International Trade: A Theory of Compatibility*, J. INT'L ECON L. 133; McCrudden & Davies, *supra* note 10.

46. See generally Stirling, *supra* note 9.

47. See generally *The Politics of Human Rights*, ECONOMIST MAG., Aug. 18, 2001, at 9; "Human Rights" 18 et seq; MICHAEL IGNATIEFF ET AL., HUMAN RIGHTS AS POLITICS AND IDOLATRY (2001).

## II. THE CHOICE OF INSTRUMENT

### A. ILO CONVENTIONS AND "SOFT" OR VOLUNTARY INITIATIVES

The ILO's promulgation and promotion of Conventions on minimum international labor standards are the most prominent form of law in this context, in that they depend on ratification by individual member states and are subject only to investigation and reporting by ILO organs and the provision of technical assistance to enable countries to build capacity to implement them. Thus, compliance with ILO norms depends on a combination of public identification, embarrassment and shaming (a mild stick), and technical assistance to promote compliance (a mild carrot). The ILO has been widely criticized by proponents of a trade/labor linkage for ineffective enforcement of its norms and indeed variable ratification of its Conventions by many countries, including major developed countries such as the United States (which has, of course, been a prominent proponent of a trade/labor linkage).<sup>48</sup> Many of the "soft" market-driven mechanisms described below have emerged in part out of frustration by non-governmental organizations (NGO) and other interest groups with the ineffectiveness of the ILO.

One class of "soft" instruments entails a range of certification, labeling, and voluntary code of conduct mechanisms that purport to identify firms or products that conform to core international labor standards and hence are responsive to information market failures if consumers in importing countries derive private disutility from consuming goods produced in violation of CLS.<sup>49</sup> The efficacy of these mechanisms turn largely on market reactions to the signals that they entail, principally by consumers and to a lesser extent by investors. These instruments are attractive in some respects in their focus on consumer (not producer) welfare in importing countries in that they depend on consumer preferences and a willingness to pay to vindicate those preferences and hence are consistent with the normative predicate of liberal trade theory, which largely focuses on the

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48. See Maskus, *supra* note 27, at 55 ("The ILO has resisted the notion of international enforcement of its convention on grounds that doing so could severely limit ratification and push many countries out of the organization altogether.")

49. See generally Richard Freeman, *A Hard-Headed Look at Labour Standards*, in INTERNATIONAL LABOUR STANDARDS AND GLOBAL ECONOMIC INTEGRATION: PROCEEDINGS OF A SYMPOSIUM at 32 (U.S. Department of Labor, Bureau of International Labour Affairs ed. 1994).

potential for free trade to enhance consumer welfare. Typically, such mechanisms are either self-initiated by firms or industry associations or are initiated by NGOs of various kinds, who negotiate them with firms or trade associations. The most ambitious initiative of this kind to date is the Global Compact, launched by UN Secretary-General Kofi Annan in 1999 and entailing voluntary corporate endorsements of nine principles, including CLS.<sup>50</sup> Among the most prominent scholarly advocates of voluntary approaches are Archon Fung, Dara O'Rourke, and Charles Sabel, who argue for a strategy which they refer to as "Ratcheting Labor Standards."<sup>51</sup> This strategy would entail an ambitious program of information gathering and monitoring of firms, which would be systematically compared with their peers operating in the same part of the world in terms of labor rights performance. Assuming that consumers in rich countries will reward firms that do better than their competitors and engage in "best practices," Fung, O'Rourke and Sabel argue that if the monitoring and evaluation program is credible, firms will start to compete with each other with respect to labor standards performance, thus ratcheting up those standards.<sup>52</sup>

In August 2003, the United Nations Sub-Commission on the Promotion and Protection of Human Rights unanimously adopted the "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights," which seeks to provide a universal framework for corporate responsibility, guiding the many uncoordinated existing voluntary initiatives.<sup>53</sup> In respect of rights of workers, the norms prohibit forced or compulsory labor, economic exploitation of children (which notably falls short of a prohibition of child labor as such), the obligation to provide a "safe and healthy working environment," and to provide workers "with remuneration that ensures an adequate standard of living for

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50. The Global Compact, at <http://www.unglobalcompact.org/Portal/Default.asp?> (last visited Feb. 24, 2005).

51. Charles Sabel et al., *Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace*, (2000), at <http://www.law.columbia.edu/sabel/papers/ratchPO.html> (last visited Feb. 24, 2005).

52. See Archon Fung et al., *Realizing Labor Standards*, 26 BOSTON REV., Feb./Mar. 2001, at 4. But see Robin Broad et al., *A Step Up for Workers?*, 26 BOSTON REV., Feb./Mar. 2001, at 11 (responding critically to Fung's article by, among others, Mark Levinson and Ian Ayres).

53. Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-fifth session, Agenda item 4 available at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.12.Rev.2.En?Opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En?Opendocument) (last visited February 24, 2005).

them and their families," and freedom of association and collective bargaining.<sup>54</sup> The content of these rights is linked to various binding international human rights instruments, both of the ILO and the United Nations.

"Soft" or voluntary approaches suffer from a number of limitations. Currently, they apparently apply to a small percentage of exports in a number of sectors where non-compliance with core labor standards is thought to be common (e.g., about five percent of exports in the textile and clothing industries), and they vary widely in various dimensions: for example, i) which core labor standards are recognized; ii) how these core labor standards are defined, if at all; iii) and how effectively adherence to these standards is monitored, if at all.<sup>55</sup> In explaining the low, inconsistent, and often ineffective application of these mechanisms, a number of explanations suggest themselves which in turn raise serious questions about attaching primacy to consumer preferences in importing countries in this context, despite the initial appeal of mechanisms that depend on consumer welfare as their reference point and the compatibility of this reference point with the normative predicates of free trade.<sup>56</sup> First, consumers, even if fully informed about conditions under which imports are being produced and violations of core international labor standards that particular modes of production may entail, in fact do not care enough about the intrinsic values reflected in these core labor standards (viewed as basic or universal human rights) to put their money where their mouth is. However, even if this were to be the case, the fact that the process of production and exchange may entail production or consumption externalities for other citizens in exporting or importing countries, as is largely inherent in the notion of universal human rights, suggests that consumer preferences cannot be decisive in a human rights context.

A second explanation is that consumers in importing countries do care about these human rights values but are poorly in-

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54. *Id.*

55. See generally Adelle Blackett, *Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct*, 8 *IND. J. GLOBAL LEGAL STUD.* 401, 410-23 (2001) (comparing perfect costless monitoring and imperfect monitoring); Janelle Diller, *A Social Conscience in the Global Marketplace? Labour Dimensions of Codes of Conduct, Social Labelling and Investor Initiatives*, 138 *INT'L LAB. REV.* 99 (1999); Drusilla K. Brown, *Can Consumer Product Labels Deter Foreign Child Labour Exploitation?* (1999) (unpublished manuscript, on file with the Department of Economics, Tufts University).

56. See Basu, *supra* note 39.

formed about the conditions under which the goods they are consuming are produced in exporting countries. The cost of acquiring this information exceeds the value that they place on this information. In this respect, the voluntary and decentralized nature of the soft law mechanisms currently employed in this context almost certainly exacerbates the information problems faced by consumers in importing countries. As noted above, the proposal by the Director-General of the ILO in 1997 that the ILO should promote an integrated scheme for increasing the effectiveness of consumer choice by labeling exports as having been produced in countries that conform to core international labor standards was rejected by the main decision-making body of the ILO, in large part because of strenuous opposition from developing countries.<sup>57</sup>

Yet a further explanation for the low, inconsistent, and often ineffective application of these mechanisms is that consumers in importing countries do care about these intrinsic human rights values but confront serious collective action problems. For instance, individual consumers who may be prepared to pay a premium for goods produced in conditions that meet core labor standards will be concerned that other consumers who share their concerns may opportunistically purchase lower-priced goods while relying on other consumers to bear the financial costs of vindicating their collective preferences. If, however, every consumer suspects every other consumer of being likely to behave opportunistically, an effective voluntary collective response may not emerge.

A recent major World Bank study examined the relatively modest results attained so far through voluntary corporate responsibility.<sup>58</sup> The study came to the following conclusion, based on consultations with the various stakeholders in such schemes, including businesses:

Overall, the consultations, and subsequent analysis, indicate that while meaningful progress has been made in apparel, and to a lesser degree in agriculture, the existing 'system' of implementation may be reaching its limits in terms of its ability to deliver further sustainable improvements in social and environmental workplace standards. This in some ways is natural when one considers that current approaches are not the result of a systematic effort to marshal the forces of the public and private sectors, trade unions and NGOs, and workers. In-

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57. See *supra*, note 10.

58. WORLD BANK GROUP, CORPORATE SOCIAL RESPONSIBILITY PRACTICE, STRENGTHENING IMPLEMENTATION OF CORPORATE SOCIAL RESPONSIBILITY IN GLOBAL SUPPLY CHAINS (2003).

stead, it is clear from the consultations that current efforts are the result of a series of steps often taken through ad hoc and isolated decisions.<sup>59</sup>

Beyond these reasons for not according primacy to consumer preferences in this context, a further serious limitation is associated with soft law mechanisms that link consumer responses to imports of offending goods, e.g., goods made with child or forced labor, conflict diamonds. These mechanisms are unresponsive to violations of either core labor standards viewed as universal human rights or universal human rights defined more broadly that are occurring in non-traded goods sectors. For example, it is widely agreed that most child labor is not employed in export sectors (between five and ten percent) but rather, in domestic agriculture, services, retail and the informal sector generally.<sup>60</sup> Many abuses of civil and political human rights are not related in any direct way to traded goods sectors, such as civil rights abuses in Sudan and Burma, to take two current examples.

## B. HARD LAW OPTIONS

The first and most fundamental issue that arises in choosing hard law instruments is the scope of the trade policy-labor standards linkage. If we conceptualize at least core labor standards as universal human rights, how can we justify privileging these particular human rights over at least some subset of universally proclaimed universal human rights (subject to the definitional issues noted above)? Surely genocide, torture, and detention without trial warrant at least as serious concern from the international community, and at least as serious a set of legal sanctions, as violations of core international labor standards. To privilege core labor standards over these other human rights is quite overtly to elide the various normative rationales for intervention reviewed earlier in this paper and to risk a protectionist rationale for trade or other economic sanctions.

Related to this point, a further issue arises relating to the scope of the linkage between trade policy and core labor standards: Why should trade or other economic sanctions be contingent on imports of offending goods? As in the discussion of market-driven soft law instruments and limitations thereof,

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59. *See id.*

60. *See* PETER MORICI & EVAN SCHULZ, LABOR STANDARDS IN THE GLOBAL TRADING SYSTEM 34 (2001).

why should child labor in non-tradable goods sectors or human rights violations in non-tradable goods sectors warrant any less concern, or any less severe sanctions, than such abuses in tradable goods sectors?

It follows from these two points that in our view, trade or other economic sanctions should not be confined to core labor standards, but should extend to at least some subset of universally accepted rights more generally, and that such sanctions should not be limited to imports of goods directly produced by the offending practices. This in fact suggests a very broad domain for linking trade and other economic sanctions with universal human rights. It also suggests, however, some significant constraints on their invocation. In particular, both the substantive rules governing their invocation and the procedures by which they may be invoked should be consistent with the human rights rationale for intervention and should exclude the unfair competition and race to the bottom rationales for intervention.

In terms of substantive rules, this requirement assigns considerable significance to rules of non-discrimination and consistency. For example, suppose hypothetically that it is the case that the United States has no textile sector but a significant clothing sector and that child labor is employed in producing exports for the U.S. market in India in both sectors but the United States seeks to impose trade sanctions only against clothing imports from India and not textile imports. Alternatively, even if the United States seeks to apply trade sanctions against both clothing and textile imports from India, it may not seek to do so against similar imports from Pakistan made with child labor for geopolitical or other reasons. While it is important to screen out cases of disguised protectionism in cases where trade sanctions have been unilaterally invoked, ostensibly on human rights grounds, this should not require sanctioning countries either to apply sanctions to all countries in violation of CLS (or human rights), or none—an all-or-nothing requirement that is likely to make “the perfect enemy of the good.” In other words, as a matter of international trade law there should be a negative duty not to discriminate for protectionist reasons, but there should be no positive duty to take affirmative action.

While a sanctioning country may choose not to sanction all violations of CLS (or human rights) everywhere in the world, this form of trade sanction “under-reach” should surely not be a legitimate concern of an international trade body, which cannot

plausibly be transformed into a global human rights crusader. In contrast, the problem of sanction "under-reach" may be a legitimate concern of other international organizations (such as the ILO, or UN Human Rights Committees), but this calls for action on their part (such as by adopting a regime like the Convention on International Trade in Endangered Species, *requiring* multilateral sanctions by members in particular cases).

For the WTO, the principal concern is sanction "over-reach," where the sanctioning country's actions in targeting some imports and not others seems principally explicable on the basis that in the former case it has a domestic industry to protect and in the latter case it does not. Where it imposes trade sanctions in the latter case, they entail no costs to the domestic producers of competitive products (who are nonexistent), but costs to domestic consumers. Such action can be viewed as an action against material interest that can only be explained by the sanctioning country's genuine concern with CLS (or human rights) violations in exporting countries (similarly in the case of bans on exports or foreign direct investment), where the government of the sanctioning state, by taking action, is seeking to solve collective action problems among its own consumers or citizens. On this approach, as indicated in the hypothetical example above, the differential treatment of clothing and textile imports from India would be suspect, but the failure to sanction similar imports from Pakistan, for non-trade related reasons, would not.

In terms of procedural requirements for the invocation of trade or other economic sanctions against violations of universal human rights in other countries, a number of options present themselves. First, a basic choice has to be made (although often overlooked in debates over the trade/labor standards linkage) between sticks and carrots. Rather like the European Community's GSP regime, it is not difficult to imagine developed countries offering developing countries significant trade concessions if they commit themselves to an accelerated phase out of offending labor or other human rights abuses. Unlike the Uruguay Round Agreements, which entailed for the most part a single undertaking by Member States, such an arrangement in this context might more appropriately take the form of a plurilateral agreement, in which trade concessions are an option offered to developing countries and for those who choose it developed countries would bind their trade concessions. The commitments made by countries to observe core international labor standards and other universal human rights would have to be reasonably

precisely defined in terms of ILO or UN Conventions or Covenants, so that violations of these commitments could be rendered reasonably justiciable through an appropriate international dispute settlement process. One of the limitations of the carrot option, as pointed out by Howard Chang,<sup>61</sup> however, is that it creates moral hazard problems in that countries may persist in violations or engage in more egregious violations in order to attract larger concessions (or carrots).

A second option would be to require all countries that are parties to either a regional or multilateral arrangement like the WTO to commit themselves to effectively enforcing their own existing labor laws (as under the NAFTA Labor Side Accord), with enforcement provided through supranational or international dispute settlement processes and penalties. The limitations of this option are obvious enough: first, it addresses only violations of core international labor standards and not other universal human rights; second, it assumes that member countries have already enacted substantive laws that reflect these standards and that the only problem is ineffective enforcement, which in many cases may not be the central problem.

A third option is to allow private party-initiated petitions for trade sanctions under domestic law analogous to anti-dumping duties and countervailing duties. We unequivocally reject this option as espousing in its most naked form the two rationales for a trade/labor standards linkage that we regard as illegitimate and as carrying the highest risk of protectionist abuse of this linkage.

A fourth option would be unilateral *state* action against imports from offending countries. This option is possible based upon the Article XX exceptions in the GATT,<sup>62</sup> as will be explained in the next section of this paper. Article XX contains important disciplines to prevent measures that are disguised protectionism or have arbitrary elements. It would be expected, that were a WTO Member to justify such action under Article XX, the dispute settlement organs of the WTO would rely heavily on the judgment of the ILO and/or UN human rights organs in determining the seriousness of the situation to which the unilateral sanctions are a response. This would also be expected in determining whether the sanctioning state—and the international community—have exhausted less trade restricting alter-

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61. See Howard F. Chang, *Carrots, Sticks, and International Externalities*, 17 INT'L REV. L. & ECON. 309, 312–15 (1997).

62. See generally GATT, Oct. 30, 1947, art. XX, 55 U.N.T.S. 194, 262.

natives.

An example of how such an option might work is the current ban by the United States on all trade with Burma, based upon grave labor and human rights abuses by the current military junta.<sup>63</sup> In 2000, in response to the complete failure of the Burmese regime to respond to the recommendations of an ILO Inquiry into labor rights abuses, for the first time in its history, the ILO invoked Article 33 of its constitution, which allows the membership collectively to authorize or encourage compliance measures against a member by other members. In this case, ILO Members were

to review, in the light of the conclusions of the Commission of Inquiry, the relations that they may have with the member State concerned and take appropriate measures to ensure that the said Member cannot take advantage of such relations to perpetuate or extend the system of forced compulsory labor referred to by the Commission of Inquiry, and to contribute as far as possible to the implementation of its recommendations.<sup>64</sup>

In 2003, the United States Congress adopted the Burmese Freedom and Democracy Act (2003), and cited in the preamble the above recommendation of the ILO.<sup>65</sup> This Act banned all trade with Burma, but gave the President discretion to modify or lift the ban in the case of adequate progress towards the respect of core labor rights, *inter alia*.<sup>66</sup> Notably, the legislation requires the President to consult with the Secretary General of the ILO in exercising his discretion under the Act;<sup>67</sup> the assumption is that the future of U.S. sanctions should be linked to multilateral judgments about the situation in Burma.

After the legislation passed virtually unanimously in both Houses and was signed into law by President Bush, very little international criticism was directed at the United States for its ban, including among delegates at the WTO. The legislation was not even mentioned by name in the recent Trade Policy Review of the United States in the WTO.<sup>68</sup> The absence of criti-

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63. See Burmese Freedom and Democracy Act of 2003, Pub.L. 108-61, §§ 1 to 9, 50 U.S.C.A. §1701 (amended 2003) [hereinafter BFDA].

64. International Labor Organization, *International Labor Conference: Provisional Record, Eighty-eighth Session, Geneva, 2000*, available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc88/pr-4.htm> (last visited Feb. 27, 2005).

65. See generally BFDA, *supra* note 63.

66. See *id.* at §3b.

67. See *id.*

68. See generally World Trade Organization, *Trade Policy Review: United States*, available at [http://www.wto.org/english/tratop\\_e/tpr\\_e/tp226\\_e.htm](http://www.wto.org/english/tratop_e/tpr_e/tp226_e.htm) (Jan. 16, 2004).

cism suggests that there is tolerance of unilateral action by the international community where that action is preceded by a clear multilateral determination that the country concerned is an egregious violator of core labor rights and that cooperative approaches for addressing the situation have been exhausted. Another factor is that the activist community within Burma, including the opposition leader, who had been put once again under house arrest, strongly supported the sanctions; they could thus not be characterized as the imperialistic imposition of "Western" values.

A fifth option would be for all member states who are parties to either regional or multilateral trading arrangements to negotiate a comprehensive set of rules setting out commitments to observe core international labor standards and other universal human rights. On this approach, which is analogous in some respects to that entailed in the Uruguay Round TRIPS Agreement,<sup>69</sup> trade sanctions would come at the end of the dispute settlement process and not at the beginning. In other words, a country complaining that another country was in violation of its core labor standards or other human rights commitment would have to demonstrate a breach of these commitments and would carry the burden of initiating a complaint and proving such violations, and only if the complaint is upheld by the dispute settlement body could retaliatory trade sanctions be authorized in the event that non-compliance continued. This approach has several virtues: first, trade sanctions cannot be imposed until there has been a multilateral judgment that a violation of relevant core international labor standards or other human rights has occurred, and the country seeking to impose such sanctions bears the initial burden of initiating a complaint and proving a *prima facie* case. Second, it has the virtue of any rule-based system of laying out the substantive ground rules with some precision in advance and thus minimizes the potential for protectionist abuse of the regime. Third, and relatedly, it renders problems of justiciability more tractable.

### III. THE CHOICE OF INSTITUTIONAL REGIME

Having discussed the choice of objectives and the choice of

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69. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter TRIPS], Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUARY ROUND vol. 31, 33 I.L.M. 81 (1994).

instruments in the light of those objectives in shaping a trade/labor standards linkage, the remaining question is the choice of institutions to administer this linkage in the light of choice of objectives and choice of instruments. Two important and related considerations are relevant here: first, institutional specialization, as in many other domains, has many virtues in vindicating desired policy objectives;<sup>70</sup> second, because human rights, not trade effects, motivate the trade/labor linkage that we advocate, vesting exclusive or even primary jurisdiction in an international trade body risks compromising the normative rationale for the linkage, e.g., by giving primacy to adverse trade effects in either importing or exporting countries.

In cases of egregious abuses of universal civil human rights, such as apartheid or genocide, it is difficult to imagine as plausible the vesting of this function in a trade organization like the WTO. Rather, following current international practices, one would imagine that the appropriate international organ for authorizing or perhaps requiring such sanctions is the UN Security Council. In other less egregious cases, there will still obviously be questions of institutional legitimacy and competence in vesting the administration of such a regime in a trade organization. One option here entails a sharp and exclusive institutional division of labor. For example, with respect to core labor standards, the authorization or requirement for the imposition of a trade or other economic sanctions could be vested in the ILO by way of elaboration of its sanctioning power under Article 33 of the ILO Constitution. This would follow, by way of analogy, the example of regimes such as CJTES, which requires signatory states to ban imports of endangered species. Critics of the ILO, however, are skeptical of the willingness or capacity of the ILO to implement and administer effectively such a regime. Defenders of the ILO, on the other hand, may worry that the attachment of economic sanctions to the powers of the ILO may destabilize the organization, causing states to withdraw from membership or to withhold ratification of its Conventions to an even greater extent than is the case at present.

Another option is to imagine some form of horizontal coordination among international agencies, whereby the ILO would be wholly or largely responsible for determinations of systematic

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70. See T. N. Srinivasan, *International Trade and Labour Standards from an Economic Perspective*, in CHALLENGES TO THE NEW WORLD TRADE ORGANIZATION 219, 221–22 (Pitou van Dijk & Gerrit Faber eds., 1990) (describing creation of agencies that set the rules governing international economic transactions).

and persistent violations of core labor standards, UN Committees on Human Rights determinations of systematic and persistent violations of other universal human rights (other than the most egregious abuses), and the WTO would be responsible for overseeing the implementation of sanctions and ensuring that arbitrary and unjustifiable forms of discrimination and disguised protectionism are avoided, as well as proportionality in the scale of the trade sanctions imposed. A variant on this option would be to have international organizations such as the ILO or UN Human Rights Committees nominate members to dispute settlement panels or the Appellate Body of the WTO in cases involving complaints of violations of core labor standards or other universal human rights, and at the same time take steps to render WTO dispute settlement process both more transparent and more inclusive in terms of admissibility of *amicus curiae* briefs from interested members of civil society.<sup>71</sup>

Our preference would be for some form of horizontal coordination with specialized international agencies with expertise and legitimacy in the labor standards or human rights fields which would make determinations of systematic and persistent violations of relevant norms despite whatever carrots and sticks (assisting and shaming) that the agency typically first brings to bear on violators. Thus, the "necessity" test under Article XX would largely fall within these agencies' domains, although such determinations may be precipitated by unilateral state trade action under one of the options reviewed in the previous section and a complaint by the targeted country. A reference under the Dispute Settlement Understanding (DSU) (Article 13) by the WTO panel seized with the complaint, should be made to a relevant specialized international agency for findings on violations of relevant international norms. The WTO panel should accept these agencies' determination as presumptively dispositive of the referenced issues. Indeed, this option becomes much more attractive with this form of horizontal co-ordination. Such determination may also go some distance toward meeting the non-discrimination/disguised discrimination conditions in the chapeau to Article XX of the GATT.<sup>72</sup> With respect to the proportionality of the proposed trade response, the WTO for its part should again be influenced by the nature of the horizontal

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71. See MICHAEL TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* ch. 4 (3d ed. 2005).

72. See generally General Agreement on Tariffs and Trade, Oct. 30, 1947 [hereinafter GATT Art. 1].

agency's findings as to the seriousness and persistence of violations.

Because adverse trade effects are irrelevant in our proposed framework of analysis, trade sanctions cannot be quantified in these terms. Here, more imaginative fashioning of trade remedies is called for. For example, the NAFTA Labor Side Accord provides for a system of fines, ultimately enforceable by trade sanctions, if a member state is found by a specialized panel to have engaged in a systematic and persistent practice of not enforcing its own labor laws, with the fine payable to the offending country to enhance its labor law enforcement.<sup>73</sup> This form of sanction suggests one option. Another option may entail denial of access to the dispute settlement process of the WTO as a complainant for so long as a member state is non-compliant. A yet further option is suspension of voting rights in the WTO while non-compliance persists. Crippling a non-compliant country, particularly a poor developing country, economically with trade sanctions should be reserved as the remedy of last resort.

#### IV. THE EXISTING AND EVOLVING LEGAL AND INSTITUTIONAL FRAMEWORK

##### A. THE WORLD TRADE ORGANIZATION

In the Havana Charter, which was to be the blueprint for the failed International Trade Organization (ITO), there was a stipulation that Members were to take measures against "unfair labour conditions."<sup>74</sup> The GATT contains no explicit provision either permitting or requiring trade action against labor rights violations. Article XX(e), however, permits otherwise GATT-inconsistent measures "relating to the products of prison labour."<sup>75</sup>

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73. Under Annex 39 of NAFTA, any monetary enforcement assessment shall be no greater than \$1 million (U.S.) for the first year of the Agreement and thereafter no greater than .007 percent of total trade between the Parties during the most recent year for which data are available and must be paid into a fund to improve or enhance labor law enforcement in the Party complained against. See North American Agreement on Labor Cooperation, done Sept. 14, 1993, U.S.-Mex.-Can., Annex 39, 32 I.L.M. 1499,1516.

74. See generally Final Act and Related Documents of the United Nations Conference on Trade and Employment, Havana, Cuba, Mar. 24, 1948, U.N. Doc. ICITO/1/4 (1948) [hereinafter Havana Charter].

75. See GATT, *supra* note 72, at Article XX(e).

In determining the legality of labor-rights related trade measures under the WTO framework, it is important to distinguish between four kinds of measures: trade measures that condition imports on the labor conditions under which specific products are manufactured (for instance a ban on rugs manufactured with exploitative child labor); sanctions against a specific country or countries (the U.S. ban on trade with Burma, mentioned above); labelling, voluntary codes of conduct and associated monitoring mechanisms; GSP preferences linked to labor rights performance.

The first kind of measure treats products differently based upon circumstances surrounding their production. Under Article I of the GATT, every WTO Member is required to provide unconditional most favoured nation treatment to every other WTO Member, with respect to "like products."<sup>76</sup> The *Belgian Family Allowances* ruling is often cited for the proposition that this requirement of unconditionality excludes the possibility of distinguishing between products based upon labor conditions.<sup>77</sup> The *Belgian Family Allowances* case, however, dealt with conditionality based on the system of social protection adopted by particular countries. It was thus not origin-neutral and, in fact, closer to the second kind of measure identified above. In the adopted *Canada-Autos* report, the panel held that non-discriminatory, i.e., non-origin based conditions were permissible even with respect to "like" products under Art. I:

We therefore do not believe that, as argued by Japan, the word 'unconditionally' in Article I:1 must be interpreted to mean that making an advantage conditional on criteria not related to the imported product itself is *per se* inconsistent with Article I:1, irrespective of whether or not such criteria relate to the origin of the imported products.<sup>78</sup>

On the other hand, a more recent panel, the EC-GSP panel, discussed in more detail below, without even so much as a citation to *Canada-Autos*, took a very different approach to unconditionality in Art. I:1, holding that it excluded even origin-neutral conditions;<sup>79</sup> this ruling is now on appeal to the Appellate Body. On the *Canada-Autos* approach, a genuinely (both *de jure* and

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76. See GATT, *supra* note 72, at art. I, 55 U.N.T.S. 194, 262.

77. See generally *Belgian Family Allowances*, Nov. 7, 1952, GATT B.I.S.D. (1st Supp.) at 59 (1953).

78. *Canada—Certain Measures Affecting the Automotive Industry*, Report of the Panel, Feb. 11, 2000, WTO Doc. WT/DS142/R (2000) [hereinafter *Canada-Autos*].

79. *EC GSP Scheme Under Debate and Review*, BRIDGES WEEKLY, Jan. 21, 2004, available at <http://www.ictsd.org/weekly/04-01-21/story1.htm>.

*de facto*) origin-neutral condition related to respect for core labor rights in the production of a product might well be found not to violate Art. I:1, even if products produced in violation of such rights were found to be “like” those that are not (an issue we will explore in more detail below, when we discuss National Treatment under the GATT).<sup>80</sup> On the EC-GSP panel approach, there would clearly be a violation of Art. I:1, thus requiring that the measure be justified under an exception in Art. XX of the GATT.

Art. III:4 of the GATT requires that imported “products” receive treatment no less favorable than that to be afforded to “like” imported products (the National Treatment principle).<sup>81</sup> A longstanding issue in GATT and WTO jurisprudence is whether products may be considered “unlike” based upon process and production methods. In the *Asbestos* case the WTO Appellate Body set forth a framework for evaluating whether products are “like” under Art. III:4;<sup>82</sup> this framework neither explicitly endorses nor rejects the idea that process and production methods are relevant to the assessment of likeness. However, the Appellate Body’s reasoning strongly suggests that products may be considered “like” or “unlike” based on consumer tastes and habits. Thus, if there is sufficient evidence that consumers distinguish between products produced in conditions violating CLS and those produced in conditions consistent with CLS, or *would* distinguish these products if they had perfect information, then the former products might well be found to be “unlike” the latter. It should be noted that in the *Asbestos* case the Appellate Body emphasized that the principle of avoiding protectionism stated in Art. III:1 should inform determinations of “likeness.”<sup>83</sup> Thus, in evaluating factors such as consumer preferences, the dispute settlement organs will be attentive to the possibility of protectionist manipulation or abuse as ingredients in product-based labor-rights trade measures.

However, even if products produced in conditions that violate CLS were found to be “like” products not produced in such conditions, in order to establish a violation of Art. III:4 it would

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80. See *Canada-Autos*, *supra* note 78.

81. See GATT *supra* note 72, at Art. III:4.

82. See WTO Appellate Body Report: *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, Mar. 12, 2001, available at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/135ABR.doc> [hereinafter *Asbestos AB Report*].

83. *Id.*

be necessary to show that the difference in treatment between “like” products leads to less favorable treatment of the “group” of imported products in relation to the “group” of like domestic products.<sup>84</sup> In the case of CLS, it might well be difficult to show such less favorable treatment of imports, since all ILO Members, and thus essentially all WTO Members, are equally obliged to conform with CLS; thus, such a condition is not, by definition, “less favorable” to exports, since exporting countries are just as bound to ensure such rights are respected as importing countries.

By contrast to product-related measures of the kind just described, sanctions targetted at particular countries that violate CLS are very likely to be found to contravene Art. I of the GATT, since they discriminate based on the country of origin of the goods; it might be argued the discrimination is nevertheless based on origin-neutral *criteria*, namely CLS themselves. This argument, however, would only be persuasive if the importing country were to ban trade from all countries that run afoul of CLS, regardless of other factors, including geo-political considerations, which, as argued above, it would be unrealistic to expect. Further, a general import ban would be a violation of Art. XI of the GATT, which outlaws prohibitions and quantitative restrictions on trade. Thus, such an import ban would need to be justified by the importing country under Art. XX.

The possibility has been raised that Article XX(a), which permits otherwise GATT-inconsistent measures “necessary to protect public morals,” might be invoked to justify trade sanctions against products that involve the use of child labor or the denial of basic workers’ rights.<sup>85</sup> In its ruling in *Shrimp/Turtle I* that Art. XX can be, in principle, used to justify measures that condition imports on other countries’ policies, the AB went beyond the case of Art. XX(g) (“exhaustible natural resources”) which was at issue in that case and explicitly mentioned, *inter alia*, Art. XX(a).<sup>86</sup> There is no GATT or WTO jurisprudence on the interpretation of Art. XX(a), and the reference to prison labor in Art. XX(e), as well as the fact that explicit language on

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84. *Id.* at para. 100.

85. See generally C.T. FEDDERSEN, *DER ORDRE PUBLIC IN DER WTO: AUSLEGUNG UND BEDEUTUNG DES ART. XX. LIT. A) GATT IM RAHMEN DER WTO-STRETBELLEUNG* (Duncker and Humbolt, Berlin 2002).

86. WTO Appellate Body Report: *United States- Import Prohibition of Certain Shrimp and Turtle Products*, WT/DS58/AB/R, Oct. 12, 1998 (adopted Nov. 6, 1998), 38 I.L.M. 118, available at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/58ABR.doc> [hereinafter *Shrimp AB Report*].

labor rights was in the failed Havana Charter, arguably suggests that if the GATT Art. XX had been designed to encompass sanctions with respect to labor rights, explicit language would have been used to articulate such an exception. This being said, the interpretation of public morals should not be frozen in time, and with the evolution of human rights as a core element in public morality in many post-war societies and at the international level the content of public morals should extend to universal human rights, including labor rights. This view is consistent with a dynamic interpretation of Art. XX of the kind which the Appellate Body gave to Art. XX(g) in the *Shrimp/Turtle* case. Furthermore, in early 2004 the Office of the UN High Commissioner for Human Rights was preparing a study on “public morals” and human rights.<sup>87</sup> In the modern world, the very idea of public morality has become inseparable from the concern for human personhood, dignity, and capacity reflected in fundamental rights. A conception of public morals or morality that excluded notions of fundamental rights would simply be contrary to the ordinary contemporary meaning of the concept.

As interpreted by the AB in *Shrimp/Turtle*, the chapeau of Art. XX provides an important check against protectionist or other abusive implementation of trade bans for ostensible labor rights purposes.<sup>88</sup> In determining whether measures in question are applied so as to constitute arbitrary or unjustified discrimination or a disguised restriction on international trade, the AB would examine factors such as whether a trade ban inappropriately singles out the target country, whereas other countries might, against the objective criteria in question, merit similar treatment. Here it would be important to determine whether the labor rights situation in the particular countries in question has been singled out as especially grave or warranting particular attention by the international community, including the ILO and the UN human rights organs.<sup>89</sup> Here, it should be emphasized that the chapeau only prohibits arbitrary and unjustified discrimination against countries where the same conditions prevail—not *all* discrimination. Thus, a sanctions-imposing state might still justify singling out one target country and not including others where the labor rights situation is similarly grave, by citing geo-political or other principled policy

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87. See Charnovitz, *supra* note 1; Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 EUR. J. INT'L L. 753 (2002).

88. *Shrimp* AB Report, *supra* note 86, at paras. 148–186.

89. It will be recalled that this was clearly the case with Burma.

reasons why it would be inappropriate to ban trade from the other countries in question.

Further, the import ban must be “necessary” for the protection of public morals, according to the terms of Art. XX(a).<sup>90</sup> The concept of “necessity” as elaborated by the AB in the *EC Asbestos* and *Korea Beef* cases in relation to other paragraphs of Art. XX where the word “necessary” appears, has a bifurcated structure. A measure may be necessary if it is “indispensable” to achieving the objective in question, which entails an examination of whether there is any reasonably available less trade restrictive alternative. Since, as discussed above, often a range of less restrictive alternative instruments might exist to address non-compliance with CLS, it would be up to the state seeking to justify its ban to show that these instruments have proven, or are likely to prove ineffective. To return to the example of Burma again, such a requirement might well be met where the ILO itself has essentially declared that other available alternatives to induce a country to engage with the international community concerning its labor rights practices have failed. A second version of the “necessity” test applies where the measure in question cannot be shown to be indispensable, but nevertheless has a close relationship to the given objective, here protection of public morals. In this latter instance, a further requirement is imposed, namely to show that the trade restricting effect of the measure is not out of all proportion to the achievement of its objective.

With respect to the third type of measure, voluntary labeling or other code of conduct based approaches to achieving CLS compliance through consumer action, generally the GATT itself does not apply where there is no element of mandatory government action (albeit GATT norms may extend to indirect mandatory action, such as “informal guidance” by governments to industry that they implicitly may face various kinds of informal sanctions for not complying with).<sup>91</sup>

These approaches, however, may be disciplined under the Technical Barriers to Trade Agreement (TBT), which requires

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90. GATT art. XX.

91. See WTO panel report: *Japan- Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, Mar. 31, 1998, available at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/44R00.wpf>; GATT Panel Report: *Panel on Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies*, L/6304, Mar. 22, 1988, available at <http://docsonline.wto.org/DDFDocuments/t/JCR/PANELS/85LIQUOR.wpf>.

WTO Members to ensure that voluntary standard setting exercises comply with a Code of Good Practice.<sup>92</sup> This Code, *inter alia*, entails that voluntary standards be based on relevant international standards, and that setting of standards and monitoring of compliance in voluntary systems not constitute protectionism, and be undertaken so as to avoid unnecessary obstacles to trade. While no clear definition of international standards is given in the TBT, an international standards setting body is defined as an organization open to all WTO Members.<sup>93</sup> Based on this definition, both ILO Conventions and the Declaration on Core Labour Standards would constitute “international standards” within the meaning of TBT, as would the recently proclaimed UN norms of corporate responsibility, discussed above.

The fourth kind of measure, GSP preferences conditioned on labor rights performance, is already used extensively by both the United States and the European Union. Recently, India challenged a relatively new aspect of the EU scheme, namely a provision that gave a further additional margin of preference to those developing countries able to certify that CLS were being effectively implemented in their domestic law and regulations.<sup>94</sup> India also challenged a related scheme for environmental performance, and drug enforcement. In the end, India dropped the claims about the labor (and environmental) preferences, limiting its argument to drug preferences. The Panel ultimately ruled that under Art. I:1 of the GATT, and also under the Enabling Clause, which provides an exception from Art. I:1 for GSP, developed countries must, with a few narrow exceptions, treat *all* developing countries the same in respect of GSP preferences (except for the least-developed, which may be offered a larger margin of preference).<sup>95</sup> This ruling would carry the implication that preferences conditioned on labor rights performance violate Art. I, and cannot be saved by the Enabling Clause, and thus would have to be justified under Art. XX. The panel ruling in question, however, is presently under appeal.

## B. INTERNAL TRADE LAW OF THE UNITED STATES AND THE

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92. Agreement on Technical Barriers to Trade, Apr. 15, 1994., available at [http://www.wto.org/english/docs\\_e/legal\\_e/17-tbt\\_e.htm](http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm). The Code of Good Practice can be found in Annex 3 to the Agreement.

93. *Id.* at Annex 1 para. 4.

94. See European Union – India – WTO India available at [http://europa.eu.int/comm/trade/issues/bilateral/countries/india/pr070404\\_en.htm](http://europa.eu.int/comm/trade/issues/bilateral/countries/india/pr070404_en.htm).

95. *Id.*

## EUROPEAN UNION

U.S. trade law provides for withdrawal of trade concessions with respect to countries that fail to respect international workers' rights. For example, Section 301 of the U.S. Trade and Tariff Act of 1974 as amended in 1988, provides the United States Trade Representative (USTR) with discretionary authority to recommend a wide variety of trade sanctions against countries which, *inter alia*, engage in acts, policies, and practices that "constitute a persistent pattern of conduct denying internationally recognized worker rights."<sup>96</sup> As already noted, the Burma Freedom and Democracy Act of 2003 bans all trade between the United States and Burma on, *inter alia*, grounds of egregious violations of core labor rights.

In addition, with respect to developing countries in particular, trade preferences granted under the GSP are denied to a country that is determined not to be "taking steps" to implement internationally recognized workers' rights.<sup>97</sup> These rights are defined as: the right of association; the right to organize and bargain collectively; freedom from any kind of forced or compulsory labor; a minimum age for the employment of children; and acceptable conditions of employment with respect to minimum wages, hours of work, and occupational safety and health.<sup>98</sup> Although application of trade sanctions against unfair labor practices involves a unilateral judgment by the U.S. authorities about the domestic policies of other countries, the language of the U.S. statute does suggest as a reference point certain widely accepted international norms, as reflected in the Conventions of the International Labour Organization. In other words, although the process is unilateral, it refers to rights recognized in international instruments. Section 301 measures, however, could include withdrawal of trade concessions bound in WTO schedules, and would therefore result in a conflict with WTO obligations as they currently stand.

In fact, while GSP preferences have been withdrawn numerous times, section 301 action has yet to be taken on the basis of consistent non-compliance with international labor rights. The relevant legislation with respect to GSP preferences allows interested parties to bring a petition before the GSP Subcom-

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96. Trade Act of 1974, 19 U.S.C. § 301 (2000).

97. See International Labor Rights Fund, *available at* <http://www.laborrights.org/projects/linklabor/gsp.html>.

98. *Id.*

mittee, an inter-agency group of U.S. trade officials, requesting review of the labor rights performance of a country with, or seeking, GSP status. The review may result in a recommendation to the President that a country's GSP status be withdrawn. The OECD notes:

In reviewing workers' rights petitions, the GSP Subcommittee undertakes a thorough investigation in order to obtain a balanced view using information from a variety of sources. The Subcommittee looks in particular for evidence of progress in the country's legislation and in its practices, and relies on ILO Conventions and Recommendations as benchmarks for interpreting progress.<sup>99</sup>

The OECD further notes that the pressure created by public exposure and scrutiny of labor practices in such reviews may have an impact on performance, even apart from the threat of actual sanctions through GSP withdrawal. According to the OECD as well, "[from] 1984 through 1995, 40 countries have been named in petitions citing labor rights abuses according to GSP law," with fewer than half these cases being pursued by the Subcommittee to the stage of a formal review.<sup>100</sup> According to Dufour, among the countries that have had their GSP status withdrawn by virtue of a recommendation of the Subcommittee are: the Central African Republic, Chile, Liberia, Myanmar, Nicaragua, Paraguay, Romania, and the Sudan. A later study of the effects of labor conditionality in U.S. GSP preferences by Elliott came to the conclusion that "[t]he U.S. experience in applying workers rights conditionality to trade benefits under the GSP suggests that external pressure can be helpful in improving treatment of workers in developing countries and that linkage of trade and worker rights need not devolve into simple protectionism."<sup>101</sup>

In 1995, the European Union amended its GSP programme so as to condition the granting of a margin of preferentiality in excess of a base rate upon, *inter alia*, respect for certain core labor rights; the relevant EU regulations refer explicitly to the

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99. See TRADE, EMPLOYMENT AND LABOR STANDARDS: A STUDY OF CORE WORKERS' RIGHTS AND INTERNATIONAL TRADE (Organization for Economic Cooperation & Development) (1996) [hereinafter OECD Study].

100. *Id.*

101. Kimberly Ann Elliott, Preferences for Workers? Worker's Rights and the U.S. Generalized System of Preferences, Speech for the Faculty Spring Conference at Calvin College, Grand Rapids, Michigan (last revised May 8, 2000), available at <http://www.iie.com/publications/papers/elliott0598.htm>; see also Lance Compa & Jeffrey S. Vogt, *Labor Rights in the Generalized System of Preferences: A 20-Year Review*, 22 COMP. LAB. L. & POL'Y J. 199 (2001).

ILO Conventions concerning freedom of association and collective bargaining, as well as child labor.<sup>102</sup> This provision came into force in 1998. In addition, GSP status may be withdrawn altogether where a country permits any form of slavery or the exportation of products made with prison labor.<sup>103</sup>

### C. NAFTA AND THE NORTH AMERICAN AGREEMENT ON LABOR COOPERATION (NAALC)

In the context of NAFTA, U.S. concerns in particular about Mexican labor practices led to the negotiation of a parallel accord on labor standards. Mexican labor laws do provide for most of the workers rights contained in the ILO Conventions, but are widely believed to be un- or under-enforced.<sup>104</sup> Some proponents of NAFTA attribute this un- or under-enforcement to a shortage of labor inspectors.<sup>105</sup> The problem, however, is likely much more deeply rooted, reflecting widespread corruption of politicians or public officials (especially at the regional or local level), and the use of intimidation and violence to keep workers from organizing in some parts of Mexico, such as the economically important *Maquiladora* zone.<sup>106</sup> Furthermore, as Morici suggests, there may be collusion between the Mexican government and the official Mexican trade union movement to keep workers unorganized in the *Maquiladoras* so as to attract more foreign investment into Mexico.

The North American Agreement on Labor Cooperation,<sup>107</sup> usually referred to as the NAFTA Labor Side Agreement, has two major components. The first is a hard legal obligation on the part of NAFTA Parties to enforce adequately their own domestic labor laws, particularly with respect to occupational safety and health, child labor and minimum wage standards (Articles 3, 27).<sup>108</sup> This obligation may be described as hard, in that a binding dispute settlement process may, where there is "persistent failure" to enforce these labor laws, lead to a mone-

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102. Citation needed.

103. Citation needed.

104. Citation needed.

105. Citation needed.

106. See Bruce Allen, *Auto Restructuring and Mexico's Maquiladora Zone*, available at <http://flag.blackened.net/blackflag/210/210nafta.htm> (last visited Feb. 28, 2005).

107. North American Agreement on Labor Cooperation, Sept. 14, 1993, 32 I.L.M. 1499 (entered into force Jan. 1, 1994) [hereinafter NAALC].

108. *Id.* at arts. 3, 27.

tary judgment against the offending Party. In the case of a successful action against Canada, the monetary judgment can be enforced through an order of a Canadian domestic court; in the case of the United States and Mexico, it may be enforced through withdrawal of concessions under NAFTA.<sup>109</sup> Another substantive obligation of the Side-Agreement is that “each Party shall ensure that its labor laws and regulations provide for high labor standards consistent with high quality and productivity workforces, and shall continue to strive to improve those standards in that light” (Article 2).<sup>110</sup> This obligation, however, is hedged by the qualifying language that it is subject to “the right of each Party to establish its own domestic labor standards,” and—unlike the Article 3 obligation—no means of legal enforcement is contemplated for this obligation.<sup>111</sup>

A Commission for Labor Cooperation is provided for, comprised of a Council and a Secretariat (Article 8), charged with, *inter alia*, promoting the collection and dissemination of data on labor issues, the production and publication of reports and studies, and the facilitation of consultation between the Parties on labor matters (Article 10).<sup>112</sup> Article 11 provides a list of specific matters regarding which the Council “shall promote cooperative activities between the Parties, as appropriate.” NAALC Annex 1 states that the Parties are “committed to promote” a range of labor principles, including freedom of association and the right to organize, prohibition of forced labor, “labor protections for children and young persons,” and elimination of employment discrimination.<sup>113</sup>

The primary avenue for complaints by interested Parties that a NAFTA Party is not enforcing its labor laws, is through the National Administrative Office of one of the other two NAFTA Parties.<sup>114</sup> Thus, the U.S. National Administrative Office (NAO) typically receives complaints about under-enforcement, or non-enforcement of Mexican labor law. The NAO may accept or reject the complaint for review, and in the

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109. *Id.* at arts. 41, 41A.

110. *Id.* at art. 2.

111. *Id.*

112. *Id.* at arts. 8, 10.

113. *Id.* at annex 1.

114. See U.S. National Administrative Office, Bureau of International Labor Affairs, U.S. Department of Labor, *North American Agreement on Labor Cooperation-A Guide*, available at <http://www.dol.gov/ilab/media/reports/nao/naalcgd.htm> (Apr. 1998) (explaining that a primary function of a National Administrative Office is the receiving and reviewing of public submissions).

case of rejection must furnish written reasons to the complainant.<sup>115</sup> Such a review produces a report, which may or may not recommend ministerial consultations. The sole avenue through which enforcement action may eventually be taken against a NAFTA Party is, however, through panel dispute settlement, and two of the three NAFTA Parties must consent to the striking of a panel. To date, a variety of complaints have been accepted for review by NAOs, with Mexico named as the offending Party in all but one.<sup>116</sup> Several of the submissions have resulted in Ministerial Consultations. In almost all cases, the complaints have concerned failure to enforce the right of free association and the right to organize.<sup>117</sup> An important exception is a recent complaint concerning pregnancy-based discrimination by Maquiladora employers. It has been claimed that the publicity effects of these complaints, and the reports and consultations which have resulted, have led to some positive adjustments in labor law enforcement; however, the Mexican and in one case the U.S. authorities have not surprisingly left unacknowledged the role of the NAALC in altering their dispositions on the matters at issue. Many of the cases have involved anti-union activity by major multinational corporations or their local affiliates, including General Electric, Honeywell, and Sprint. In these kinds of cases, it has been difficult to ascertain whether the NAO report had a positive impact on the practices of the corporation, even if it does not result in the government itself improving its enforcement of labor laws. In no case has a matter been taken to an arbitral panel.

In the ITAPSA case, workers in Mexico were subject to various kinds of intimidation and harassment surrounding a vote on the certification of an independent union.<sup>118</sup> The Ministerial Consultations actually resulted in a Ministerial Agree-

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115. See U.S. National Administrative Office, Bureau of International Labor Affairs, U.S. Department of Labor, *Revised Notice of Establishment of U.S. National Administrative Office and Procedural Guidelines*, available at <http://www.dol.gov/ilab/programs/nao/procguide.htm> (Apr. 7, 1994).

116. See U.S. National Administrative Office, Bureau of International Labor Affairs, U.S. Department of Labor, *Status of Submissions Under the North American Agreement on Labor Cooperation*, available at <http://www.dol.gov/ILAB/programs/nao/status.htm> (last visited Feb. 21, 2005) (summarizing and listing submissions filed with NAOs).

117. *Id.*

118. See U.S. National Administrative Office, Bureau of International Labor Affairs, U.S. Dep't of Labor, Public Report of Review 9703 EXECUTIVE SUMMARY, available at <http://www.dol.gov/ilab/media/reports/nao/execsum9703.htm> (last visited Feb. 21, 2005).

ment between the United States and Mexico, that Mexico would promote secret ballots and “neutral” voting places. Mexico, however, does not appear to have honoured this Agreement, and a complaint by U.S. unions to the U.S. Department of Labor concerning Mexico’s failure to comply with the Agreement was dismissed in 2001.<sup>119</sup> Based on these and other developments from the inception of NAFTA up to 2003, Compa presents a pessimistic overall assessment of the results from the NAFTA Labor Side Agreement: the NAALC has failed to achieve its high purpose.

Apparently more eager to maintain diplomatic niceties rather than tackle and solve worker rights violations, the three governments have demonstrated a lack of will to hold one another to their NAALC commitments. Some investigations and reports have led to significant findings and recommendations, but they have not produced change. Ministerial consultations resulted only in research projects and trilateral conferences. Although these are often informative, they have not directly addressed or resolved worker rights violations documented and proven in NAALC proceedings.<sup>120</sup> Because of the role of the provinces in labor matters under the Canadian constitution, Canada’s full participation in the NAALC process was subject to a minimum threshold of voluntary provincial involvement.<sup>121</sup> In 1997, the threshold specified in the NAALC was crossed, with the federal government and three provinces (Manitoba, Quebec and Alberta) having decided to participate.<sup>122</sup> Finally, there is an additional mechanism in the NAALC, as yet unused, which contemplates the striking of Evaluation Committees of Experts, which may be requested by a Party under certain conditions: a Committee may deal with “technical standards” in eight areas, which include, *inter alia*, prohibition of forced labor, labor protection for children and young persons, and elimination of employment discrimination.<sup>123</sup>

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119. See *Status of Submissions Under the North American Agreement on Labor Cooperation*, *supra* note 117 (describing a dismissed complaint filed by the AFL-CIO and PACE in 2001).

120. LANCE COMPA, JUSTICE FOR ALL: THE STRUGGLE FOR WORKER RIGHTS IN MEXICO: A REPORT BY THE SOLIDARITY CENTER 41 (Solidarity Center 2003), available at <http://www.solidaritycenter.org/document.cfm?documentID=346>.

121. See NAALC, *supra* note 109, at annex 3 n.1.

122. See Canadian Department of Human Resources and Skills Development, *Signatories to the Canadian Intergovernmental Agreement*, available at [http://www.hrsdc.gc.ca/en/lp/spila/ialc/nao/03signatories\\_canadian\\_intergovernmental\\_agreement.shtml](http://www.hrsdc.gc.ca/en/lp/spila/ialc/nao/03signatories_canadian_intergovernmental_agreement.shtml) (last modified Feb. 13, 2003).

123. See NAALC, *supra* note 107, at art. 23

#### D. BILATERAL AGREEMENTS

Labor rights provisions have been incorporated into at least two recent bilateral trade agreements, the U.S.-Jordan Free Trade Agreement<sup>124</sup> and the U.S.-Cambodia Textile Trade Agreement.<sup>125</sup> In the case of the U.S.-Jordan Agreement, the provisions (unlike NAFTA) are incorporated in the main treaty text, not a side accord.<sup>126</sup> Moreover, the obligations in question are subject to the general dispute settlement procedures of the Agreement. Nevertheless, by an exchange of letters, the United States and Jordan have agreed that disputes concerning the labor provisions of the Agreement shall not result in the imposition of sanctions.<sup>127</sup> The provisions in question are very similar to those in the NAFTA side agreement. Thus, "a party shall not fail to effectively enforce its labor laws . . . in a manner affecting trade."<sup>128</sup> In addition, "each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from [domestic labor laws] . . . as an encouragement for trade with the other Party."<sup>129</sup> The rather odd language "in a manner affecting trade" appears to be some sort of qualifier, suggesting that labor obligations only apply in sectors or situations where there is actual trade between the United States and Jordan.

The relevant provision in the U.S.-Cambodia Agreement is different. It reads as follows:

Cambodia shall support the implementation of a program to improve the working conditions in the textile and apparel sector, including internationally recognized core labor standards, through the application of Cambodian labor law . . . The Government of the United States will make a determination . . . whether working conditions in the Cambodia textile and apparel sector substantially comply with such labor law and standards.<sup>130</sup>

If the United States determines that the Cambodian gar-

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124. See Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, Oct. 24, 2000, U.S.-Jordan, 41 I.L.M. 63 (2002) (entered into force Oct. 24, 2000) [hereinafter U.S.-Jordan FTA].

125. See Establishment of a Bilateral Textile Agreement, Jan. 1, 1999, U.S.-Cambodia, available at <http://usembassy.state.gov/cambodia/wwwf0032.pdf> [hereinafter U.S.-Cambodia Textile Agreement].

126. See U.S.-Jordan FTA, *supra* note 124.

127. Jim Abrams, US Senate Passes Jordan FTA Bill, JORDAN TIMES, Sept. 25, 2001, available at <http://www.jordanembassyus.org/09252001001.htm>.

128. See U.S.-Jordan FTA, *supra* note 124, at art. 6.

129. *Id.*

130. See U.S.-Cambodia Textile Agreement, *supra* note 125, at art. 10.

ment industry is in substantial compliance, it could increase Cambodia's textile quota up to 14% per year, above the standard 6% quota increase.<sup>131</sup>

## CONCLUSION

Increasingly, discussion in the international policy community on the relationship between liberal trade and labor rights has focused on the issue of compliance with core universal rights, which have a close relationship to the rights contained in general international human rights instruments such as the UN Declaration and the UN Covenant on Civil and Political Rights. Competitiveness-based claims about "social dumping" have become less prominent, and the notion that the objective should be to achieve some kind of "level playing field" between developed and developing countries is now heard less frequently, even from labor rights advocates on the left of the political spectrum. In sum, contrary to the picture still painted by some free traders, the claim for a trade and labor rights link is not some fanatical or protectionist adventure to attempt harmonization of conditions of work across the world, regardless of different economic and cultural conditions, but rather an attempt to ensure respect for core labor standards conceived of as universal human rights.

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131. See Kevin Kolben, *Trade, Monitoring, and the ILO: Working to Improve Conditions in Cambodia's Garment Factories*, 7 YALE HUM. RTS. & DEV. L.J. 79 (2004); Regina Abrami, Harvard Business School Case Study, *Workers Rights and Global Trade: The U.S.-Cambodia Bilateral Textile Trade Agreement* (November 4, 2004), available at <http://www.harvardbusinessonline.com>.