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THE WORLD TRADE ORGANIZATION  
AND THE PROTECTION OF WORKERS' RIGHTS

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**I. INTRODUCTION**

The interrelationship between trade policy and labor rights is among the most contentious issues that the world trading system faces today. Many critics of free trade have argued that it is unfair that producers in the developed industrial world should have to compete with imports from countries with very low wage rates and poor labor standards. Advocates of free trade, by contrast, often view differences in countries' labor standards as a legitimate source of comparative advantage or disadvantage. They argue that low-wage competition benefits workers in developing countries and is, in many instances, an important element in the economic growth

that is needed to improve living standards and, ultimately, distributive justice in those countries. n2 Concern about labor policies in other countries, particularly developing countries, also has been characterized as inappropriately paternalistic or culturally patronizing. n3

At the same time increasing international attention has focused on the challenge of obtaining compliance with certain minimum labor standards, so-called "core" or fundamental labor rights; these standards reflect widely accepted international human rights norms. n4 In this respect a watershed was the adoption in June 1998 by the membership of the International Labour Organization (ILO) of the Declaration on Fundamental Principles and Rights at Work. The Declaration makes achievement of compliance with fundamental labor rights an obligation arising from the very status of membership in the ILO. n5 When the issue is egregious violations of these rights - such as violent suppression of collective bargaining, gender discrimination, forced or slave labor, or exploitive child labor - trade measures are not necessarily a protectionist attempt to level the playing field. Instead they may resemble the kinds of sanctions against gross human rights violations that have been imposed by many members of the world community against South Africa under apartheid and, more recently, against Serbia. The Declaration on Fundamental Principles and Rights at Work (ILO Declaration) itself reflects this distinction. n6 It provides that labor standards "should not be used for protectionist trade purposes, or to call into question a country's comparative advantage," n7 thus suggesting that trade measures as such are legitimate, except for those with "protectionist" purposes and particularly those directed to neutralizing comparative advantage (leveling the playing field, as it were). n8

Nevertheless, resistance within the World Trade Organization (WTO) to any formal linkage between trade and core international labor rights remains powerful, as is reflected in the declaration that emerged from the 1996 WTO Singapore Ministerial Conference, suggesting that this issue is a matter for the ILO. Yet, like the ILO Declaration, the Singapore Declaration itself does not condemn all labor-rights-related trade measures, but only those that are associated with "protectionist purposes" or that put into question the comparative advantage of, in particular, low-wage, developing countries. n9

The WTO's apparent rejection of a proactive role in disciplining or sanctioning violations of core labor rights by its members does not, however, close the issue of how the WTO ought to respond to attempts by members themselves - either individually or collectively - to impose trade sanctions on other members who are in violation of core labor rights or fail to enforce those rights within their domestic jurisdictions. The ILO, which concerns itself with international labor rights, does not possess the jurisdiction to determine whether trade sanctions undertaken by its members for labor rights reasons are consistent with trade rules under the General Agreement on Tariffs and Trade (GATT) or other WTO treaties, much less to waive or override such rules in the event of inconsistency. Indeed, according to the WTO Dispute Settlement Understanding, any determination concerning the violation of a WTO agreement must be taken within the ambit of the WTO's own institutional framework for settling disputes. n10

The idea that labor rights issues are simply a matter for the ILO, therefore, ignores the existing and continuing role the WTO has been playing in constraining one important instrument available to improve compliance with core labor rights: trade measures aimed at punishing noncompliance with core labor rights. At least until very recently GATT/WTO jurisprudence (albeit developed in other contexts, such as trade and environment) evoked constraints that may go far beyond what is needed to prevent abuse of labor rights for "protectionist purposes."

The International Court of Justice has ruled that absent commitments in treaties such as GATT, economic sanctions are not per se contrary to international law. n11 According to the WTO, many trade restrictions on goods that exceed "bound" or permitted levels of tariffs are likely to violate GATT, unless they fall within the ambit of some specific exception or "saving clause." n12 In a recent case concerning trade sanctions for environmental purposes, the Appellate Body of the WTO (AB) held that nothing in the basic structure of GATT would prevent the imposition of otherwise GATT-inconsistent trade measures directed at other countries' policies, provided that such measures could be justified under the one of the exceptions in GATT Article XX. n13 The exceptions include, inter alia, the broad rubric of "public morals." This has the effect of putting the ball squarely in the WTO's "court" with respect to the legal treatment of trade sanctions for labor rights purposes.

This Article examines the effect on labor rights of the WTO and the ILO. Part II provides an explicit treatment of the WTO's current role with respect to labor rights - for example, the manner in which trade sanctions for labor rights purposes are affected by the existing law and legal interpretation of the WTO. Part III considers the rationales for the use of trade sanctions as a means to force labor rights compliance, distinguishes between fair trade and human rights arguments for such measures, and responds to common criticisms of labor-rights-based trade measures. Part IV argues that the WTO's role in disciplining labor-rights- based trade sanctions should be limited to the identification and prohibition of sanctions that are forms of disguised protectionism or are unnecessary to enhance compliance with fundamental labor rights. Here I shall consider the relationship between this WTO role and the emerging place of the ILO in securing fundamental labor rights.

## **II. THE CURRENT ROLE OF THE WORLD TRADE ORGANIZATION**

The Havana Charter, which was to be the blueprint for the failed International Trade Organization (ITO), contained a stipulation that members were to take measures against "unfair labor conditions." n14 GATT itself contains no explicit provision permitting or requiring trade action against labor rights violations. Article XX(e), however, permits otherwise GATT-inconsistent measures "relating to the products of prison labor." n15 The WTO, which came into being in 1995, serves as the institutional framework for GATT and a range of other agreements, including the Agreements on Technical Barriers to Trade, Trade in Services, Trade and Intellectual Property Rights, and Government Procurement. GATT permits members to impose compensatory duties, under certain circumstances, against imports associated with two kinds of "unfair" trade practices: dumping and subsidization by the exporting country. As defined in GATT Article VI, dumping is the export of a product for a price lower than that for which it is sold in the market of the country of origin or, alternately, sale below the cost of production. n16 Unfair subsidization is defined in a complex manner in the WTO Code on Subsidies and Countervailing Duties. n17 Although the export of products manufactured with "unfair" labor practices is sometimes described rhetorically as "social dumping" or a "negative" subsidy, there is little question that the existing law on dumping and subsidization fails to provide legal justification for imposition of duties against products from countries with low labor standards on the basis of commercial unfairness. No country has, to my knowledge, ever attempted to implement such an interpretation of antidumping or countervailing duty law.

A much more complex issue, however, is raised by sanctions aimed not at the achievement of a "level playing field" or "commercial fairness," but at compliance with fundamental labor rights as an autonomous policy goal. To the extent that trade sanctions, particularly import restrictions, are imposed on WTO members whose labor rights policies are of concern, these sanctions may or may not be violations of one or more provisions of GATT, which regulates trade in goods. There also may come into play other WTO agreements, such as the Government Procurement Agreement, which makes adherence to certain labor rights or labor policies a condition for government contracting. n18 Although no case of this nature has been litigated in the WTO dispute settlement process, several cases concerning environmentally based trade sanctions have been decided by dispute settlement panels, and these cases raise parallel jurisprudential issues. n19

### **A. GATT Article I: Most Favored Nation Treatment**

GATT Article I provides for what is known in trade law as unconditional Most Favored Nation (MFN) treatment. Thus, with respect to tariffs, charges, and other measures, a member cannot provide more favorable treatment to some WTO members than to others with respect to "like products." This provision would seem to exclude from the outset one particular type of trade sanction - a sanction targeted at a particular country or countries by name. The more difficult question is posed by a measure that does not discriminate against a particular country, but still treats some subset of countries differently from others on the basis of whether they have adopted or are enforcing a particular set of policies.

In *Belgian Family Allowances (Allocations Familiales)*, n20 one of the first cases ever decided in GATT dispute settlement, a panel considered a Belgian measure that provided for an additional tax on products originating in countries without a system of family allowances if those products were procured by public bodies. n21 The panel found that the measure was a denial of MFN treatment to "like products" from Norway and Denmark, which did not have the required system of family allowances. The panel went even further and stated that the Belgian measures not only violated Article I (and perhaps Article III, as discussed below), but also were "based on a concept which was difficult to reconcile with the spirit of the General Agreement ...." n22 Typical of this early era of dispute settlement, the findings of the panel were stated as conclusions, with no accompanying legal reasoning. This absence of legal reasoning, however, has not prevented its citation as a kind of precedent or authority even as recently as last year by a WTO panel dealing with environmental trade sanctions. n23

While the purposes of Article I are not uncontroversial in the literature, they surely have much to do with the advantages of diffuse, over-specific reciprocity in the negotiation of tariff cuts. If a member could discriminate among members with respect to other measures, that discrimination could undermine the diffuse reciprocity provided through unconditional MFN in tariff negotiations. Thus, Article I not only applies to tariffs, but also prohibits discrimination among members with respect to other benefits as well. The language in Article I that all benefits, including advantage, favors, privileges, or immunities, are to be conferred "unconditionally" really means that they must be accorded "non-reciprocally." In the context of GATT, conditional MFN has meant that only members who themselves provide MFN treatment can benefit from it. Thus, it was often said that certain GATT Codes in the Tokyo Round were negotiated on a conditional MFN basis, in that not all members (at the time known as Contracting Parties) were

signatories to the codes and non-signatories could not take the benefit of them, even though among signatories MFN treatment applied. Certainly, the language "unconditionally" in Article I means that a denial of benefits contrary to Article I by one member to another does not authorize that other member to itself withhold MFN treatment in retaliation: The appropriate recourse is a dispute settlement complaint. What Article I is really about is circumscribing discrimination between countries; absent evidence of manipulation of the "like product" distinction to attain discriminatory effects, there should be some room to maneuver in making regulatory distinctions not based on the physical characteristics of products. n24

## **B. Article III, Section 4 National Treatment and Article XI Non-Tariff Border Restrictions**

Generally speaking, GATT allows the government of the importing country to impose its regulatory requirements on imported products, provided that these are treated no less favorably than similar domestic products. n25 This is known as the National Treatment standard. At first glance this would seem to permit a wide range of labor-rights-related measures, namely any measure that conditioned sale of a product, whether domestic or imported, on the product being produced in a manner consistent with the respect for labor rights. However, two unadopted GATT panels n26 introduced a distinction between regulatory measures on products and measures related to the manner in which the products are produced - for example, Process Production Methods (PPMs). n27 The panels reasoned that Article III dealt only with measures on products; thus, a United States ban on tuna produced in a manner resulting in high rates of dolphin mortality, even when connected to a scheme that prevented sale of U.S. tuna produced in a like manner, could not be considered a domestic regulation or requirement under Article III, but rather would be a border prohibition, illegal under GATT Article XI. n28 Had Article III applied, then the only issue would have been whether imported tuna produced in a dolphin-unfriendly manner was given a worse treatment than domestically produced dolphin-unfriendly tuna.

Related to this notion is the idea that within the meaning of Article III, "like" products applies to physical characteristics of products. Thus, even assuming that one neither considered Article XI nor treated domestic and foreign dolphin-unfriendly tuna equally, measures such as the tuna ban might still be violations of Article III because from the point of view of physical characteristics, imported dolphin-unfriendly tuna is identical to domestically produced dolphin-friendly tuna (an implication of the approach of the Tuna/Dolphin II panel to the PPMs issue). As Michael Trebilcock and I have argued elsewhere, n29 the distinction between products and PPMs has no basis in the text or the travaux (documented negotiating history) of GATT. Furthermore, an earlier adopted panel decision had applied the National Treatment standard when the measures in question related to the possible occurrence of intellectual property violations in the production of a product; clearly, these measures were based not on any physical characteristic of the products in question, but rather on the juridical characteristics of the production process. n30

While the PPM/products distinction is not based on economic theory, n31 an Organization for Economic Cooperation and Development (OECD) publication on PPMs nevertheless argued that such measures pose distinctive problems for international trade because unlike cases involving physical characteristics, border inspection will not be available as a means to determine compliance, and different countries possibly may impose different PPM requirements,

therefore requiring products to be adapted to different markets. n32 With respect to the trade impact of conformity assessment procedures, just the opposite may be the case: Physical inspection at the border has the potential to create very substantial administrative and customs costs for importers, and in some instances it may cause delay and risk to the goods themselves. By contrast, certification of compliance with the required PPMs may impose lower costs on exporters, apart from those associated with periodic monitoring and verification to ensure the bona fides of the certificate. In fact, for these very reasons, provisions on technical barriers to trade often encourage recognition of the country of origin's conformity assessment procedures, when these are equivalent. In the case of labor-rights-based PPM requirements, the conformity assessment costs both to producers and to the importing country might well be reduced considerably through reliance on the reporting and monitoring activities under the auspices of the ILO, a point to be elaborated in Part IV of this Article.

The second concern, related to the possible proliferation of conflicting requirements, seems just as apposite to measures based on the characteristics of products as to PPM-based measures. Adaptation of the means of production to the regulatory requirements of different markets is not intrinsically more complicated or costly than adaptation of a product itself. Obviously, much will depend on the product and the kind of adaptation required to satisfy demands of different markets. It must also be emphasized that in the case of labor rights PPMs, this concern is not really serious; by producing a product in accordance with core labor rights, a producer would hardly run the risk that another country would exclude the product. It is hard to imagine that any country would make it a requirement that imports be produced in a manner that violated core labor rights. Even if different countries had different thresholds for what constitutes core labor rights, a producer could satisfy the demands of all markets by making the product in a manner that conforms to the highest threshold. This contrasts, for instance, with a situation in which a manufacturer must make cars to be driven on the left side of the road in one country and the right in others or cars to comply with the requirement of one particular emissions control technology for the United States and with quite a different technical specification for Europe and Japan. As the examples suggest, the market segmentation issue raised in the OECD PPMs report may well often be more, not less, serious in the case of requirements that relate to the physical characteristics of products than the case with PPMs.

Significantly, outside the context of PPMs, the general jurisprudence of GATT with respect to the meaning of "like product" rejects the notion that only physical characteristics determine the likeness or unlikeness of products for purposes of Article III. In two important cases concerning Article III, section 2, as applied to internal taxes rather than regulations, it was suggested that whether like products were treated alike would depend on the regulatory purpose. n33 Thus, if the regulatory purpose was protection of labor rights, arguably if a measure treated products produced in a manner that respects such rights better than those that did not, the measure would be consistent with the Article III, section 4 obligation to treat "like" products equally favorably, because from the perspective of the regulatory distinction, the products are not "like." It has been suggested, however, that in the recent Japanese Alcohol case, the AB decisively rejected this purposive approach to the meaning of "like products." n34 What the AB rejected, however, was regulatory aims and effects as an overarching or exclusive approach to the meaning of "like products." The AB instead suggested:

No one approach to exercising judgement will be appropriate for all cases.... The concept of "likeness" is a relative one that evokes the image of an accordion. The accordion of "likeness" stretches and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term "like" is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply. n35

This allows, in the appropriate circumstances, the regulatory purpose of the measures to be taken into account; it also suggests that the approach to the meaning of "like product" in Article III, section 4, which deals with regulations, may well be different from the approach in Article III, section 2, which addresses internal taxes.

Moreover, the AB noted that Article III's "broad purpose" of "avoiding protectionism" must be borne in mind. n36 In many taxation contexts, when one is dealing with general fiscal measures, such as revenue-raising measures, the avoidance of protectionism may argue for an emphasis on objective criteria, such as substitutability given consumer preferences, in order to avoid manipulation of classifications simply to disadvantage imports. In other areas, when the measures are clearly aimed at regulating or influencing behavior for legitimate, noncommercial policy purposes, regulatory purpose may well play a much larger role; this might include not only "regulations" in the classic "command and control" sense, but also regulatory taxes - as was arguably the case with the U.S. environmental taxes at issue in the Taxes on Automobiles case. n37

### **C. Article XX(a) Public Morals and Article XX(b) Human Life and Health**

Even if the trade sanctions violated Article XI, possibly 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 workers' basic rights. n38 There is no GATT or WTO jurisprudence on the interpretation of Article XX(a). Moreover, the reference to prison labor in Article XX(e), as well as the fact that explicit language on labor rights was in the failed Havana Charter, n39 suggests that if GATT Article 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, there is an argument that the interpretation of public morals should not be frozen in time and that with the evolution of human rights as a core element in public morality in many post-war societies, the content of public morals extends to include disapprobation of labor practices that violate universal human rights. This argument now has much added strength after the approval of the ILO Declaration by the vast majority of the ILO membership, with only about twenty-five of approximately 175 members abstaining and the others voting for adoption. n40

The notion of treaty interpretation that takes account of international law as an evolving system is, in fact, already present in some of the canons of treaty interpretation in Article 31 of the Vienna Convention, which refers to subsequent practice and subsequent relevant agreements between the parties, as well as "any" relevant rules of international law, as sources of treaty

interpretation. n41 In *Turtles* the AB held that the meaning of one of the other exceptions under GATT Article XX ("conservation of exhaustible natural resources") had evolved in light of developments in international law and policy; even if it did not encompass living species at the time of drafting, it should be interpreted as so doing today. n42 The AB observed: "The words of Article XX(g), 'exhaustible natural resources,' were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment." n43 The AB then went on to interpret XX(g) in light of the preamble to the WTO Agreement, which refers to the objective of "sustainable development." n44 This same preamble also entails the recognition that "relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand...." n45 Thus, a parallel dynamic interpretation of Article XX(a) as including labor rights might be based on similar textual evidence of international law's evolving concern with the social dimensions of trade.

Writing before the *Turtles* appeal was decided, Feddersen suggested that other than Article XX(e), the provisions of Article XX encompass measures not with respect to PPMs, but only the physical characteristics of products: "The fact that Article XX(e) is the only provision explicitly addressing production methods strongly indicates that the other Article XX sections were not intended to include measures based on production methods." n46 This reasoning is very hard to follow. The fact that Article XX(e) was included leads to just the opposite inference: that nothing about the basic purpose or structure of Article XX renders it inapplicable to PPMs, provided the PPMs in question fall under one of the heads, such as "public morals." Indeed, Feddersen presumes that the PPMs/products distinction was present in minds of the drafters of GATT, a presumption for which there is no evidence whatsoever. n47

Even if one thinks that Article XX(a) is somehow limited to matters such as the regulation of pornography, imposing a limitation on its scope to measures on "products" would prevent a country from banning imports of pornographic films made with children or involving (but not necessarily depicting) involuntary acts of sex and other illegal violence. One has only to think of this example to see how unduly and irrationally restrictive of the ability of members to protect public morals Article XX(a) would be if it excluded PPM-based measures. Indeed, unless independently harmful, any product manufactured in the context of racketeering or organized crime would have to be given the full protection of GATT! Such considerations may explain the AB's strong language in *Turtles* rejecting the suggestion of the panel below that Article XX might be per se un-amenable to the justification of measures aimed at other countries' policies related to the manner of production of goods:

It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure a priori incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply.  
n48



In addition to being justified under a dynamic interpretation of "public morals" in Article XX(a), some labor-rights-related measures might also be justified under Article XX(b), which refers to measures "necessary" to protect human life and health. n49 If one considers certain rights referred to in the ILO Declaration, such as elimination of forced or compulsory labor or the abolition of child labor, practices violating these rights could conceivably involve threats to the life or health of the workers in question. Here, one would have to consider, using a dynamic approach, the evolving meaning of "health" in international law and policy. n50

To be justified under Article XX(a) or (b), measures must be shown to be "necessary" for the purposes in question. In the context of Article XX, the word "necessary" has been understood to imply a strict justification of the measures undertaken as the least trade-restrictive measure available to achieve the policy goal. In the Thai Cigarette case a panel interpreted this to mean that the mere existence of less trade-restrictive alternatives precluded justification of trade measures as "necessary," with out an inquiry into the real world effectiveness or feasibility of such measures in the particular context at issue. n51 As will be discussed in Part III of this Article, it is possible in the labor rights context to imagine that, in principle, less trade-restrictive alternatives to sanctions will be available. For example, the ILO could take direct action, or a process of social labeling could provide viable alternatives to sanctions. The real issue should be the relative effectiveness and feasibility of these alternatives. Such an analysis would, however, often be complex and delicate: how far must a member go, for instance, to exhaust avenues such as negotiation and representations at the ILO before it can show that sanctions have now become the least-restrictive alternative?

The "chapeau" (preamble) of Article XX states that the application of any measures to be justified under any paragraph of this Article must not constitute "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." n52 In *Turtles* the AB understood the first of these criteria as related to the even-handedness with which the measures are applied, taking into account different conditions that may exist in different countries. n53 In the labor rights context, if a sanctions scheme was not applied equally to all countries with similar labor rights compliance problems (for example, for reasons of commercial or political diplomacy), the sanctions might well be considered "unjustified discrimination" within the meaning of the chapeau. "Unjustified discrimination" may also constitute a failure to adapt the application of measures to relevant special circumstances in particular countries. For example, in the case of child labor, this might apply to make the application of sanctions "unjustified discrimination" if they were used in response to the traditional, nonexploitive use of under-age workers in small, family-based agriculture. "Arbitrary discrimination," again as understood in *Turtles*, will occur when the sanctions are applied in a manner that does not respect due process and transparency requirements - for instance, through unexplained, off-the-cuff decisions of customs officials, with no rights of appeal. The meaning of "disguised restriction on international trade" is as yet unclear from the jurisprudence. It is arguably an amplification of some dimensions of the prohibition of "arbitrary discrimination," particularly the concern for transparent and rules-based application of measures.

#### **D. Preferences for Developing Countries**

Through GATT waivers with respect to MFN treatment, developed countries have been able to afford preferential tariff treatment (for example, lower tariffs on some products than MFN bound rates) to developing countries. Because these are voluntarily conferred privileges, their withdrawal for labor-rights purposes normally would not pose any legal issue under GATT. Thus, it is hardly surprising that labor-rights-based trade sanctions to date have been largely based on the (legal) ability to withdraw preferences or on the threat to do so. n54

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 Act n55 provides the United States Trade Representative (USTR) with discretionary authority to recommend a wide variety of trade sanctions against countries that engage in acts, policies, and practices that "constitute a persistent pattern of conduct denying internationally recognized worker rights ...." n56 In addition, with respect to developing countries in particular, trade preferences granted under the General System of Preferences (GSP) are denied to a country that is determined not to be "taking steps" to implement internationally recognized workers' rights. n57 Although application of trade sanctions against unfair labor practices involves a unilateral judgment by 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 ILO conventions. n58 In other words, although the process is unilateral, it refers to rights recognized in international instruments. The GSP allows interested parties to bring a petition before the GSP Subcommittee, an interagency group of U.S. trade officials, requesting review of the labor rights performance of a country possessing 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. n59

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 to by the Subcommittee to the stage of a formal review. n60 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. n61

In 1995 the European Union (EU) amended its own system of preferences (based on the Lome Agreements) so as to condition the grant of a margin of preferentiality in excess of a base rate upon, inter alia, respect for certain core labor rights. n62 The relevant EU regulations refer

explicitly to the ILO conventions concerning freedom of association and collective bargaining, as well as child labor. n63 This provision came into force in 1998. In addition, preferences may be withdrawn altogether if a country permits any form of slavery or the exportation of products made with prison labor. n64

## **E. Summary**

Currently, the WTO's main role with respect to labor standards is, through interpretations of legal provisions, to constrain the use of trade measures as a means of putting economic pressure on countries or firms to comply with such standards. In some existing interpretations of a number of GATT provisions, the kind of obstacles to such measures appears to far exceed what is required to exclude purely protectionist or arbitrarily discriminatory measures. At the same time GATT itself and the emerging AB jurisprudence (particularly the Turtles case) provide greater interpretive room for the WTO system to deal with the issue in a principled fashion - excluding protectionist or arbitrarily discriminatory measures, while permitting justified human-rights-based sanctions. Finally, the WTO system has not operated to discipline withdrawal of voluntary tariff preferences accorded to developing countries on labor rights grounds. In this respect and obviously because of the voluntary nature of the preferences being withdrawn, the system has afforded room for at least one kind of trade sanction for labor rights purposes.

## **III. A CONCEPTUAL FRAMEWORK FOR UNDERSTANDING THE TRADE AND LABOR RIGHTS DEBATE N65**

To what extent the WTO's existing role is justified and to what extent it should be altered in the future depend upon an understanding of the implications of labor-rights-based trade measures for the fundamental interests and structure of the trading system. The system is based, first, on the notion that both domestic and global welfare normally are enhanced by the removal of trade protection and, second, on the fundamental necessity of being able to distinguish protectionist cheating on trade rules from various trade-impacting policies purported to have aims unrelated to commercial interests themselves, whether environment, human rights, or health and safety.

As already noted, neither the ILO Declaration nor the WTO Singapore Declaration rejects labor-related trade measures as such. Instead, both instruments reject those measures aimed at neutralizing the comparative advantage of low-wage countries - that is, "level playing field" measures that are intrinsically protectionist of domestic interests. n66 In fact, they respectively affirm the support of members of each organization for fundamental labor rights. Sanctions have purposes (changing behavior in the exporting country) very different from countermeasures for commercial fairness reasons. Therefore, even if some of the effects are different, a separate welfare analysis is necessary for sanctions as opposed to countermeasures based upon commercial fairness or "level playing field" concerns. This Article will deal first with sanctions, then proceed to discuss countermeasures based on commercial fairness arguments.

## A. Sanctions as a Means of Inducing Other States to Alter Their Labor Practices

Trade sanctions may be advocated as a means of inducing recalcitrant governments or firms to meet a given set of labor standards. n67 This may involve trade restrictions being imposed on a country violating labor agreements that it has already signed (such as ILO conventions). Sanctions also may be imposed to induce a country to adopt a standard or norm that it has not yet accepted as binding, even in principle. In this sense the trade measures at issue are little different from some states' responses to practices such as apartheid in South Africa and genocide in the former Yugoslavia. The embargo of Iraq is a further recent example of the use of economic sanctions in support of non-trade policy goals.

### *1. The Noncommercial Fairness Rationales for Labor Sanctions*

An initial issue is whether the ultimate goals of such sanctions can be justified. Here it is useful to identify the main reasons that concerns about labor laws and practices may legitimately extend beyond national borders.

#### a. Human Rights

Human rights are frequently and increasingly regarded as inalienable rights that, regardless of national affiliation, belong to individuals simply by virtue of being human. Such an understanding of rights is implicit in the Kantian understanding of human autonomy that has profoundly influenced contemporary liberal theory. Certain labor rights or standards have come to be widely regarded as basic human rights with a universal character. These include the right to collective bargaining and freedom of association, the right not to be enslaved, the abolition of child labor, and equality of opportunity in employment for men and women. n68 These rights are reflected in ILO conventions. n69 Some of the conventions have been ratified by a large number of countries; others by far fewer countries. n70 However, as noted above, through the ILO Declaration these core rights have now been recognized as placing obligations on all ILO members.

While labor rights are conceived of as universal in the ILO conventions themselves, they are not viewed as absolute. Thus, for example, in the case of the prohibition on child labor, the minimum age of fifteen years applies in most circumstances, but in many developing countries the applicable age may be twelve years; as well, child labor in agricultural contexts is generally permitted. n71 Respect for the universal normative content of international labor rights does not usually entail identical labor policies or standards. Precisely because universal human rights have important contextual dimensions, even these labor rights elicit quite different views as to their exact scope and meaning. For example, the extent to which collective bargaining and freedom of association rights should entail a right to strike, and in what circumstances, may be a matter of considerable controversy even among individuals who have a strong commitment to the idea of rights.

Whatever the balance between negative and positive liberty one subscribes to, there are certain practices that would be unacceptable on any reasonable interpretation of such rights,

whatever the balance between negative and positive liberty one happens to subscribe to - for instance, the use of violence and intimidation to prevent workers from organizing into an independent trade union. The fact that existing international labor law has been drafted such that these practices are not singled out and proscribed as "obvious" violations of rights may be a reason that some of the ILO labor conventions have not been ratified by a much larger group of countries; in other words, this uneven ratification record may understate the degree of existing or emerging normative consensus in the international community concerning a core minimum content or scope to core labor rights. n72 This emerging consensus in principle is reflected in the adoption of the ILO Declaration on Fundamental Labor Rights. n73

#### b. International Political and Economic Spillovers

Some human rights abuses and some labor practices, particularly violent suppression of workers' rights to organize or associate, may lead to the kind of acute social conflict that gives rise to general political and economic instability. As was recently noted in the Economist magazine, "There is growing recognition that a government's mistreatment of its own people may eventually make it unreliable or dangerous to other countries." n74 Increasingly (as the cases of Rwanda, the former Yugoslavia, and Somalia illustrate), "internal" conflicts are capable of raising regional or global security, economic, or social (e.g., immigration and refugee) issues.

#### c. Altruistic or Paternalistic Concerns

Even if they are not directly affected in any of the ways described above, citizens of one country may find the purely domestic labor practices or policies of another country to be misguided or morally wrong. Similarly, citizens of one country may believe that workers in another country would be better off if protected by higher labor standards. Such a belief may or may not be warranted. However, the provision of foreign aid, often with major conditions attached as to the recipients' domestic policies, by international agencies such as the World Bank and the International Monetary Fund, suggests that a welfare presumption against paternalism is hardly the prevailing norm in international economic relations. One version of the anti-paternalism argument draws on the notions of cultural relativism or cultural autonomy. n75 Thus, for instance, Bhagwati suggests that the "equation between culture-specific labor standards and universal human rights cannot survive deeper scrutiny." n76 This, on its own terms, however, is a very selective kind of argument for cultural autonomy because it entails an admission that some rights are genuinely universal, just not labor rights. Yet Bhagwati gives no rigorous explanation of the reason labor rights in particular lie on one side of the line between the universal and the culturally specific. For instance, the idea that minimum wages are appropriately set relative to a country's level of wealth and economic development has nothing to do with cultural specificity; it emanates from a perspective on economic regulation that is purportedly universal. Nussbaum has criticized the simplistic and opportunistic manner in which the idea of cultural determinism or autonomy has been invoked to force closure on trans-cultural dialogue about the relationship between the universal and contextual dimensions of rights. n77

Another fallacious but frequently heard notion is that rights are a luxury good, in which poor people in developing countries themselves have little interest. However, examining human rights struggles in a number of poor Asian nations, Sen concludes: "To the extent that there has been

any testing of the proposition that the poor Asians do not care about civil and political rights, the evidence is entirely against that claim." n78 A further notion that is sometimes advanced is that just as the West's own economic development occurred through oppressive labor practices (the Industrial Revolution), it is unfair for the West not to let the developing world have its chance, as it were. Aside from the monumental empirical assumption that lack of protection of workers' rights accelerated rather than menaced the industrial development of the West, its moral implications are very troubling. These become especially evident if we apply the same structure of argument to genocide - the developing world must have its fair opportunity to try out genocide before it arrives at the solution of multicultural liberal democracy.

In sum, given that there are several legitimate rationales for making compliance with core labor rights a matter for international concern and action, trade sanctions are one instrument among many that may be used to advance this goal. Although the strongest rationales for protecting core labor rights may be grounded deontologically in a conception of autonomy and do not necessarily sound in claims about welfare, this need not be a reason to be indifferent to the welfare effects of alternative instruments for vindicating these rationales. Of course, there is a coherent, if limited, point of view that suggests that once we characterize the practices in questions as violations of human rights, any truck or trade with the products or services produced through such violations is intrinsically immoral. From this perspective sanctions are an indicated policy, regardless of their welfare impacts more generally and regardless even of whether, as an empirical matter, they are likely to result in reduction or elimination of the offending practices. Thus, on this understanding, even if it were provable that sanctions against child labor actually made the children in question worse off, reducing them to starvation or illegal activity, the moral imperative to maintain sanctions would be unaffected. In practice, however, this sort of extreme, results-blind moralism is rare. International human rights activists usually are concerned about the real world situation of those whom rights are meant to protect, and even if the foundation of rights is not welfarist, their effective realization implies a concern with the actual conditions of people. Thus, if it were systematically true, as many free traders tend to suggest or assume, that trade sanctions for labor rights noncompliance reduce global or domestic welfare in the sanctioned state, this should not be a matter of indifference to rights activists in the real world, even though it might be for some Kantian ethicists. Hence, from the perspective of the debate on the relationship between labor rights and trade policy, it is still important to clarify the welfare effects that are at issue. The following discussion attempts to identify the kinds of potential welfare effects, both positive and negative, that would need to be considered in any analysis of environmental or labor-rights-based trade sanctions.

## *2. Scenario #1: Trade Sanctions or the Threat of Sanctions Succeeds in Inducing Higher Environmental or Labor Standards*

The first scenario is that the country or countries targeted by sanctions, or at least some firms within those countries, change their domestic practices and adhere to or accept the minimum standards.

#### a. Welfare Effects in Targeted Country

With respect to the domestic welfare of the country or countries that change policies, if the status quo before the alteration of the policies is welfare-maximizing (either in the Pareto or Kaldor-Hicks sense), then conforming to higher standards will reduce domestic welfare.

With respect to labor rights abuses, some of the practices that have been singled out as justifying trade sanctions - slave labor camps in China, for instance - would be difficult to characterize as the product of political or regulatory processes likely to maximize welfare based on the revealed preferences of individuals. Because the countries concerned are not genuine democracies, the domestic political process is simply not designed to take into account the preferences of all citizens. Indeed, in a state such as China, individual preferences - except for those of the ruling elites - may well count for very little.

In general, the domestic welfare gains from improved labor standards are most likely to exist when, in the first place, there is a strong case for regulation to correct specific instances of market failure<sup>n79</sup> (e.g., information asymmetries in the case of occupational health and safety)<sup>n80</sup> or when markets fail more radically because of, for instance, the presence of coercion (e.g., slave labor, child labor, or the use of violence to intimidate workers). Some recent empirical studies suggest that domestic welfare gains may well result from the enforcement of core labor rights, especially when trade liberalization and improved labor rights performance occur simultaneously. For example, a recent OECD study came to the conclusion that "the clearest and most reliable finding is in favour of a mutually supportive relationship between successfully sustained trade reforms and improvements in association and bargaining rights."<sup>n81</sup> This particular finding has special significance for the trade and labor rights debate because it tends to refute the notion that noncompliance with core labor rights is an important source of comparative advantage for poorer countries.

To understand the welfare effects of compliance with core labor standards, it is important to bear in mind a fundamental distortion in world labor markets: restrictive immigration policies that prevent most people from moving to locations where employment conditions and related government labor policies maximize their preferences.<sup>n82</sup> If labor were as mobile a factor of production as capital or technology, regulatory competition between jurisdictions might well ensure a close to optimal domestic policy equilibrium with respect to labor rights, given that trans boundary externalities are not nearly as pervasive in this area as, for example, with the environment. However, when workers cannot move and are disempowered domestically, labor rights policy outcomes may well not accurately reflect their preferences.<sup>n83</sup>

#### b. Welfare Effects in Sanction-Imposing Country

Depending on elasticities of supply and demand, when foreign producers are faced with higher costs because of higher labor standards, they may be able to pass on some of these costs to consumers in the country that imposed the trade sanctions. However, compliance with core labor rights may not result in significantly higher prices to consumers, when some producers in the targeted country are already in compliance within existing cost structures. When, for instance, a producer is located in a part of the country where political and social conditions have allowed trade unions to survive, it may already have had to measure up to basic levels of labor

rights protection. Through increasing the productivity of labor or better employment of technology, such a producer may have learned to be competitive with other producers who have not been meet ing minimum standards. n84 In fact, there is empirical evidence that many of the more successful export-oriented developing country enterprises do comply with core labor rights. n85

In many instances, the next-lowest-cost producer complying with minimum labor standards is likely to be not a domestic firm in the sanctions-imposing country, but a firm in another country. For this reason, compliance with core labor rights often will not confer substantial benefits on producer interests in the country that has imposed sanctions, although depending on supply elasticities, it is always likely to have some such effects.

### *3. Scenario #2: Trade Sanctions Fail to Induce Higher Standards*

#### *a. Welfare Effects in the Targeted Country*

Several studies have attempted to model the economic impacts of trade sanctions against states that are not enforcing compliance with core labor standards. n86 These suggest the complexity of the possible welfare effects from sanctions, particularly when the sanctions do not lead to the desired behavioral changes in either firms or governments. In the case of child labor, for example, an impact of a sanction (a tariff, in this case) imposed on a particular import produced with child labor may be to increase the supply of child labor to sectors producing goods for domestic consumption, where output cannot be affected by sanctions. As Maskus notes, depending on elasticities of supply and demand and certain other assumptions, the impact could be an actual increase in the number of underage children working and perhaps also a decline in the wages of the children actually working. n87 Maskus also notes, in the case of gender discrimination, the effects on women of a sanction against a particular country's exports. In the absence of any policy change being induced, the sanction's effects will differ depending on whether the export sector is male- or female-labor-intensive relative to the import-competing sector:

In the case where exports are intensive in female labor, [women workers] would be harmed by reducing wages even further [than has already occurred because of discrimination] and exacerbating the output effects. In the case where exports are intensive in male labor, the tariff would raise demand for female labor, causing female wages to place upward pressure on the female maximum wage. In this case, firms might prefer to relax the discrimination to some degree. n88

This effect occurs on the assumption that with the decline in export competitiveness because of the tariff sanction, productive resources will be shifted from the export sector to the import-competitive sector, with demand for labor shifting as well. Maskus's overall conclusion is that "the impacts of trade restrictions taken by foreign countries depend on the circumstances.... Much depends on issues such as whether the sector with weak rights is labor-intensive, whether it is the exportable sector, and what linkages there are to the informal or residual employment sectors." n89



## b. Global Welfare Effects

Even when sanctions fail to induce any policy change in the targeted country, there may be some positive effect on global welfare when sanctions result in a decline in the global sales of products that are manufactured in a fashion that entails labor rights abuses. If the country or group of countries imposing sanctions constitutes a major market for the products in question, then global demand will now be met through production that complies with the standards in question. But for this to happen, sanctions should be imposed consistently - against all producers or countries worldwide that do not comply with the rights in question. Otherwise, production may simply be shifted from one abusive firm to another.

Many product areas are characterized by the existence of a variety of rival producers in different countries, often with closely comparable cost structures. In such a case, and assuming that some of these companies will be in compliance with the labor rights in question, global welfare losses may not, in the end, be significant. Rivals from jurisdictions in compliance with fundamental labor rights obligations will simply expand their market shares. However, there are likely to be some price increases, assuming supply is not infinitely elastic.

With respect to the welfare effects of sanctions that fail to change government policy on those with pro-labor-rights preferences, the sanctions are still likely to be positive for three reasons. Two of the reasons will be evident from the above analysis. First, if the sanctions are properly targeted at firms, they may induce higher levels of labor rights protection even in the absence of a change in government policy. Thus, a rational sanctions policy may well exempt from sanctions firms in the exporting country that can show that despite the absence of the appropriate legal standards in that country, their practices are nevertheless in compliance with fundamental labor rights. <sup>n90</sup> Second, sanctions, because they reduce world demand for products made in ways that abuse workers' rights, will reduce the levels of these harmful activities. Third, sanctions will provide the moral satisfaction of resisting government policies or practices that violate environmental or human rights norms, even if the government does not change its policies. However, even those with pro-labor-rights preferences may find some of these utility gains offset by utility losses resulting from the knowledge that sanctions may well cause harm to "innocent" victims of the government's intransigence in the face of sanctions. Such victims may include workers who lose their jobs or persons who suffer from a country's reduced ability to purchase essential supplies because of a reduction in its convertible currency earnings.

Finally, possible longer term impacts of the reduction in oppressive labor practices may have positive impacts on global welfare, although these impacts are hard to quantify or study through the examination of short-term impact. These might include accelerated political liberalization as workers become less intimidated, better organized, and generally more capable of asserting their rights. <sup>n91</sup> Increasing liberalization of domestic political regimes was linked early on by the philosopher Immanuel Kant <sup>n92</sup> and much more recently in empirical work by Michael Doyle, <sup>n93</sup> to a reduced threat of global conflict, including a reduced likelihood of war. Resort to practices such as forced labor, child labor (which often amounts to the same thing because generally children in such regimes have little say about whether they work or not), and violent suppression of independent trade unions (e.g., the Solidarity movement in Poland) provides a means of resistance to pressures for political and economic reforms. These reforms, it has been suggested, may well in the medium or longer run produce regimes that are significantly less likely to threaten international peace and security.

### c. Welfare Effects in Sanction-Imposing Country

Welfare effects on consumers and producers in the sanction-imposing country are likely to be similar to those in Scenario 1. n94

#### 4. Summary

The above analysis has taken into account, for the most part, only the static effects of sanctions. A dynamic perspective could alter the analysis significantly. Restrictions on the use of child labor may, as with the Factory Acts enacted in Britain in the first half of the nineteenth century, n95 lead to political demands for enhanced access to public education, in which case the possible short-term negative impact of higher standards - greater impoverishment of some children - may be offset by the longer term dynamic impact.

The very general analysis of labor-rights-based trade sanctions outlined above suggests that little can be said in the abstract about the likely effects of such sanctions on global welfare or on aggregate domestic welfare in either the targeted or the sanction-imposing country. This clearly distinguishes trade measures of this kind from conventional protectionist trade restrictions, which formal analysis suggests result in overall net welfare losses, both domestic and global, when one considers the welfare effects of trade restrictions on consumers as well as workers and firms. n96

#### 5. When Are Sanctions Likely to Be Effective?

Clearly, as the above analysis suggests, the welfare effects of sanctions will differ considerably depending on whether or not sanctions are actually able to change policies or practices in the targeted country. This underscores the importance of examining whether and when sanctions are likely to be effective in achieving such policy changes.

There is limited formal evidence on the effectiveness of labor rights trade sanctions in particular. Dufour suggests there is some evidence that withdrawal of GSP trade preferences by the United States, or the threat thereof, has led to changes in labor law in Malaysia and Chile. n97 A similar threat, combined with activism by indigenous labor rights groups, may have led to the lifting of legal restrictions on collective bargaining in the Dominican Republic. n98 The OECD suggests that in most cases when a petition was made under U.S. trade law for withdrawal of GSP preferences on grounds of noncompliance with international labor rights, "progress in raising core standards has been made." n99 Moreover, the threat of withdrawal of preferences was usually sufficient to procure the result, without sanctions having to be put in place, which means that the gains in compliance were not mitigated by negative welfare effects from the actual implementation of sanctions. n100 As the OECD also suggests, "its effectiveness is clearly related to the fact that the US market is the largest for most of the GSP beneficiaries." n101 The most comprehensive empirical work on the effectiveness of economic sanctions in general remains the study by Hufbauer, Schott, and Elliott, n102 which examined 115 instances of the use of economic sanctions over a period of about forty years. The authors conclude that

these sanctions had an overall success rate of about thirty-four percent in altering the targeting country's conduct in the desired direction. n103

An issue closely related to the effectiveness of economic sanctions is the relative desirability of sanctions as opposed to other instruments for influencing the behavior of other countries and their producers. Several economic studies of the issue have advocated the use of financial compensation as an alternative to trade sanctions. n104 This proposal has the virtue of attaching a price to the invocation of such sanctions and thus providing some assurance that these higher standards truly are valued for their own sake in the country desiring the changes. This benefit is especially evident in cases of ostensible ad hoc paternalism or altruism, while trade sanctions, because they lack such an explicit price (beyond price effects on consumers), may be easily subverted by protectionists.

Compensation-based approaches, however, have their own complexities and drawbacks. For example, Maskus, who considers the use of compensation in the case of child labor as "in principle an effective route to reducing child labor employment," notes that there may be difficulty in raising the funds for compensation in developed countries. He notes:

Consumers in both the exporter and [the rest of the world] are likely to free ride on these gains [from higher labor standards], suggesting that revealing their preferences for higher standards could be problematic. Thus, extracting these compensatory taxes could be impossible. Moreover, costless transfer of the payments may not be possible; political failures and transactions costs in both countries could inefficiently absorb some or all of the revenues, with little impact on labor demands. n105

Discussing the issue of carrots versus sticks in the environmental context, Chang argues that subsidies, as opposed to sanctions, create a perverse incentive for countries to engage in or intensify the offensive behavior (or make credible threats to this effect) in order to maximize the payments being offered. n106

From a Kantian perspective on core labor rights, a principle that victims (or their supporters) should always pay ("bribe") violators to achieve compliance would seem impossible to defend either ethically or politically. However, in some cases financial assistance to enable poor Third World countries to meet higher labor standards may be warranted on distributive justice grounds; this is certainly the case with technical assistance and advice, which is an important element in the mandate of the ILO. It is sometimes suggested that aid transfers, for instance, could alleviate the poverty that is supposed to be the root cause of noncompliance with core labor rights. n107 Certainly, in the case of child labor, poverty is a crucial part of the picture in explaining why very young children go to work. But not all poor countries lack protections against exploitation of child labor, n108 and not all poor countries are in violation of core labor rights. Again, this is consistent with the OECD conclusions that not only can poor countries "afford" compliance with core labor rights, but such compliance interacts positively with a trade-driven, open-market-based growth strategy.

A further alternative n109 to trade restrictions is social labeling, which allows individuals as consumers to express their moral preferences for labor rights protection. n110 Products that are

produced in a manner that meets core labor standards would be entitled to bear a distinctive logo or statement that informs consumers of this fact. While labeling may enable individual consumers to avoid the moral "taint" of themselves consuming the product, if most consumers have a preference for terminating production altogether (rather than merely reducing consumption and production) by changing a foreign country's domestic policies, then a collective action problem arises as in any approach to influencing behavior that depends upon coordinating action among large numbers of agents. Unless she can be sure that most other consumers will do likewise, the individual consumer may well not consider it rational to avoid buying the product in question. n111

A key issue with respect to labeling programs is that of credible monitoring to ensure that claims made in association with the label are not fraudulent. This problem is acute with respect to self-labeling by multinational corporations that have made public undertakings to abide by voluntary codes of conduct. One promising development in this respect is the possibility that, with the consent of the regimes in question, the ILO itself would play a role in monitoring the credibility of social labeling. Thus, the 1997 ILO Director General's Report makes the following suggestion:

As far as the ILO is concerned, labelling should... aim... at promoting law and practice which meets the demands of fundamental standards (thus also benefiting workers whose products are not identifiable or exported)... But if these labels are to have any credibility at all, they must guarantee that legislation has been complied with in actual practice. However, neither spontaneous initiatives nor the present procedures of the ILO can provide such a guarantee because there is no way of carrying out an international inspection on the spot which is reliable and legally independent. But it would be perfectly feasible to provide for such a system of inspection under an international labour Convention which, because of its voluntary nature, would allow each State to decide freely whether to give an overall social label to all goods produced on its territory - provided that it accepts the obligations inherent in the Convention and agrees to have monitoring on the spot. n112

Unfortunately, as Langille documents, the Director General's proposal was rapidly and rather summarily rejected by many developing countries. n113

In sum, neither financial inducements nor labeling programs are self-evidently superior to sanctions as policy instruments for influencing other countries' environmental and labor practices. Each has its own drawbacks. However, it must be admitted that little concrete empirical evidence exists that would allow a rigorous comparison of these alternative instruments to sanctions. In addition, the greatest effectiveness might actually be achieved by a combination of more than one of these instruments. At a minimum, given the apparently positive results of the threat of unilateral sanctions (withdrawal of GSP preferences) by the United States, it is difficult to make out a clear-cut case for excluding the use of trade sanctions as an instrument for influencing the behavior of other countries' governments or firms.

## **B. The "Systemic" Threat to a Liberal Trading Order**

Even in the presence of indeterminate welfare effects, many free traders have still rejected labor-rights-based trade measures on the basis that such measures, if widely permitted or entertained, would significantly erode the coherence and sustainability of rule-based liberal trade. This is based on the notion that the legal order of international trade is best understood as a set of rules and norms aimed at sustaining a long-term cooperative equilibrium in the face of ongoing pressures to cheat on this equilibrium, given that the short-term political pay-offs from cheating may be quite high (depending, of course, on the character and influence of protectionist interests within a particular country and the availability of alternative policies to deal with adjustment costs).<sup>n114</sup> In the presence of fundamental normative dissensus as to what constitutes "cheating," on the one hand, and the punishment of others' cheating, on the other, confidence in the rules themselves could be fundamentally undermined and the system destabilized.

With respect to the systemic threat from labor-rights-related trade measures, it is important to distinguish between purely unilateral measures and those that have a multilateral dimension. The former measures are based upon a labor rights concern or norm that is specific to the sanctioning country or countries. Here, there is a real risk of dissolving a clear distinction between protectionist "cheating" and genuine sanctions to further non-trade values: The sanctioning country may well be able to define its labor rights causes so as to serve protectionist interests. Measures with a multilateral dimension, by contrast, will be based upon the targeted country's violation of some multilateral or internationally recognized norm, principle, or agreement - which is clearly the case with respect to core labor rights in general. It is true that protectionist interests will always be attracted by the possibility of sanctions for non-trade purposes; self-interested lobbying that invokes high-minded purposes is an endemic feature of any vigorous liberal democratic polity. As Langille observes: "Self-interested and opportunistic behaviour will colour all arguments where a question of distribution between capital and labour is involved."<sup>n115</sup> But the real issue is whether such behavior will necessarily subvert the integrity of the sanctions decision-making process. In this respect it should be recalled from the welfare effects analysis above that very often the next-least-cost producer will be another low-wage country not subject to sanctions, rather than a producer from the sanctions-imposing country. Therefore, apart from perhaps some scarcity rents resulting from the temporary contraction of overall supply, domestic interests will often have little to gain from such sanctions.

Part IV of this Article will consider how the jurisprudence of the WTO might be evolved to deal effectively with the systemic threat, distinguishing in a credible fashion legitimate labor-rights-based sanctions from protectionist cheating.

## **C. Commercial-Fairness-Based Arguments for Labor-Rights-Based Trade Measures**

Unlike the arguments for trade restrictions on labor rights grounds discussed to this point, which have a normative reference point external to the trading system itself, commercial fairness or competitiveness-based "fair trade" claims focus largely on the effects on domestic producers and workers of other countries' labor policies, and not per se on the effects of those policies on

workers elsewhere. Competitiveness claims are, in principle, indifferent to the improvement of labor practices in other countries and extend to differences in competitive conditions, such as wage rates, that do not reflect violations of widely recognized core labor rights. Hence, in the case of competitiveness claims, trade measures that protect the domestic market or "equalize" comparative advantage related to labor standards are a completely acceptable substitute for other countries' raising their standards.

Commercial unfairness claims usually refer to one of two kinds of supposed unfairness (and, it is often argued, welfare losses) that stem from trade competition with countries that have lower labor standards:

1) It is unfair (or inefficient) that our firms and workers should bear the "costs" of higher labor standards through loss of market share to foreign producers who have lower costs because of laxer labor standards in their own countries.

2) It is unfair that downward pressure should be placed on our labor standards by virtue of the impact of trade competition with countries with lower standards.

### *1. Commercial Fairness Claim #1*

The first kind of claim is largely incoherent and, in fact, is in tension with the basic theory of comparative advantage in trade. Assuming there is nothing intrinsically wrongful with another country's labor policies - that they are not violations of fundamental labor rights - then why should a cost advantage attributable to these divergent policies not be treated, like any other cost advantage, as part and parcel of comparative advantage?

Precisely because the implicit benchmark of fairness - a complete equalization of governmentally imposed labor protection costs among producers of "like products" in all countries - is so illusory, trade measures based upon this kind of fairness claim are likely to be highly manipulable by protectionist interests. Because, of course, protectionists are really interested in obtaining trade protection, not in promoting labor rights, the fact that the competitive fairness claim does not generate a viable and principled benchmark for alteration of other countries' policies is a strength, not a weakness: it virtually guarantees that justifications for protection will always be available, even if the targeted country improves its environmental or labor standards.

### *2. Welfare Effects of Commercial-Fairness-Based Trade Measures*

Trade restrictions will lead to reduced exports, with consequent welfare losses to firms and workers in the targeted country. Every foreign producer whose costs of labor rights compliance are less than those of domestic producers will be vulnerable to trade action; therefore, trade restrictions based on equalization of comparative advantage are likely to dramatically affect imports from a wide range of countries. Firms and workers engaged in the manufacture of like products to those imports targeted by trade restrictions will benefit when the restrictions in question make imports relatively more expensive than domestic substitutes, thereby shifting demand from imports to domestic production. Consumers will pay more, probably substantially more, as domestic producers will price up to the duty imposed by the trade restriction. Here, the welfare

effects essentially resemble those from the imposition of a tariff or countervailing duty. Inasmuch as production is shifted from lower to higher cost producers, there is also some loss of global allocative efficiency. Clearly, overall, these welfare effects entail a shift in wealth to firms and workers in the trade-restricting country from firms and workers in the targeted country, as well as consumers in the trade-restricting country. It is difficult to construct a theory of distributive justice to support the fairness of these transfers.

### *3. Commercial Fairness Claim #2*

Whereas the first commercial fairness or competitiveness claim presumes that governments will not respond to the competitive implications of higher labor standards, but will simply allow domestic firms to become uncompetitive, the second competitive fairness claim assumes just the opposite: that governments will respond by lowering domestic standards below the optimal level.

Generally speaking, lowering labor standards is not an appropriate response to competitive pressures. There is, in fact, a wide range of alternatives, such as better regulation, which reduces compliance costs without lowering standards, or investment in training and technology to increase the productivity of labor. n116 A variation of the claim about the effect of competitiveness pressures on domestic labor standards suggests the possibility of a form of beggar-thy-neighbor behavior that may, admittedly, leave all countries worse off. This is the "race to the bottom," in which countries competitively lower their environmental or labor standards in an effort to capture a relatively greater share of a fixed volume of trade or investment. n117 Much like the beggar-thy-neighbor subsidy wars that characterized agricultural trade among Canada, the United States, the EU, and other countries during the 1980s, competitive reduction in labor standards will typically result in a negative sum outcome, n118 as long as one assumes that before entering the race each country's environmental or labor standards represent an optimal domestic policy outcome for that country.

The "race to the bottom" claim has a different normative basis from the other competitiveness-based claims discussed above. The latter claims relate to the proper distribution of the competitiveness costs of maintaining higher labor standards than one's trading partners. The normative basis for concern over the race to the bottom, by contrast, sounds in the language of Pareto-efficiency. This point is easily illustrated by using a model of the prisoner's dilemma game. The race ends, literally, at the bottom: each country adopts suboptimal domestic policies, but no country in the end captures a larger share of the gains from trade.

Frequently, beggar-thy-neighbor regulatory competition is able to flourish much more easily if it is possible to reduce labor standards on a selective basis to attract a particular investment or support a particular industry or firm. It is more difficult and more costly to engage in these activities if the formal statutory framework of labor or environmental regulation must be altered across the board. Here, some of the provisions in the NAFTA Labor Side Agreement may create disincentives to beggar-thy-neighbor competition in that they oblige the signatories to enforce effectively those labor rights laws that are formally on the books. At the same time it must be acknowledged that effectively monitoring whether a country is fully enforcing its own laws is not an easy task, especially for outsiders.

Finally, it is possible simply to ban by international agreement beggar-thy-neighbor competition. Some versions of the proposed Multilateral Agreement on Investment are intended

to contain a provision that would commit member states not to reduce or abrogate labor rights protections in order to attract or retain foreign investment. n119 The WTO Agreement on Agriculture, which constrains a range of domestic support policies for agricultural producers, is a product of the recognition - albeit late in the day - by the major exporting states of the welfare losses from beggar-thy-neighbor competition. n120

#### **IV. THE FUTURE ROLE OF THE WORLD TRADE ORGANIZATION**

Insistence by the United States that the possibility of a WTO "social clause" be put on the post-Uruguay Round multilateral trade agenda led to an extremely tense Singapore WTO Ministerial in December 1996. In a notorious incident, an invitation for the ILO Director-General to address the Ministerial was withdrawn by the WTO in response to pressure from developing countries. n121 The communique that issued from the meeting reflected some abatement of the visceral hostility in the WTO even to engaging in discourse on the link between trade and labor rights. Thus, according to the Ministerial Declaration, Ministers "renew [their] commitment to the observance of internationally recognized core labour standards." n122 This clearly indicates the members' view that there is nothing inherently protectionist or contrary to the idea of comparative advantage in the obligation of all members to adhere to this set of standards. At the same time the ILO "is the competent body to set and deal with these standards ...." n123 As discussed in Part I of this Article, the Singapore Declaration states that the use of labor standards for "protectionist purposes" is rejected, which implies some openness to trade measures that are demonstrated to have non-protectionist purposes, i.e., measures aimed not at neutralizing the comparative advantage of developing countries, but rather at ensuring compliance with fundamental labor rights. n124 There is also a statement that suggests the WTO and ILO Secretariats should "continue their existing collaboration." n125 The incident at Singapore, however, suggests that what would be needed is not a continuation of existing collaboration, but far stronger and more cooperative relations.

In discussions concerning a possible WTO role in addressing the links between trade and labor rights, there is frequently considerable confusion or uncertainty about exactly what kind of role is at issue. One possibility would be for the WTO, through a discrete legal instrument or possibly an amendment to GATT or GATS, to involve itself in the taking of multilateral sanctions when a member has failed to comply with core labor rights. Such action might be made contingent on a judgment of the ILO that if a member is also a signatory to some relevant ILO instrument or convention, the member is in nonconformity or has refused to cooperate with ILO organs in addressing the problem. n126 If options entail the imposition of sanctions or taking of other action by the WTO itself in connection with labor rights violations, one difficulty is that the fundamental legal mandate of the WTO is to police trade; such an approach might then give rise to the implication that the practices in question are somehow unfair trade practices, a claim that has real potential to lead to protectionist abuse. The more coherent approach would be to envisage the role of the WTO as vetting for protectionism trade sanctions imposed by members, either unilaterally or multilaterally, for purported human rights compliance purposes.

An alternative would be for the ILO itself to authorize or, indeed, mandate trade sanctions for violations of fundamental labor rights, as is suggested by Charnovitz. n127 Such an approach would certainly be diametrically opposed to the ILO tradition, which emphasizes diplomacy and consensualism. A recent report by ILO research staff notes that discussions in the ILO Working



Party on Social Dimensions of World Trade indicate very strong resistance to any approach that contemplates the possibility of trade sanctions to enforce compliance with core labor rights, with the Workers' Group of the Governing Body having chosen to "suspend" its demand for an approach that includes sanctions. n128 One variant on this approach would be to evolve in the ILO better surveillance mechanisms and greater consensus with respect to the content of fundamental labor rights as defined in the Declaration. This variant is consistent with the WTO itself policing labor-rights-based sanctions for protectionism, using benchmarks and a factual record established at the ILO.

The above welfare analysis of commercial-fairness-based trade measures suggests that the rejection of such measures in the ILO Declaration and the Singapore Declaration is well justified: The main effect is to make other countries pay for higher labor standards in one's own country, an effect that is not grounded in a defensible conception of distributive justice. Finally, the one possible exception to this generalization, which concerns the possible occurrence of beggar-thy-neighbor regulatory competition to reduce labor rights guarantees for trade and investment purposes, might appropriately be addressed through negotiation of specific constraints on such acts, rather than authorization of retaliation, which may only lead to spiraling tit-for-tat behavior. The negotiated approach is already embodied in the Investment chapter of NAFTA and is reflected to an extent in the Labor Side Agreement as well (the North American Agreement on Labor Cooperation). However, it would be very difficult to obtain multilateral agreement on the appropriate minimum below which countries' standards may not be reduced to gain competitive advantages. Using a baseline derived from human rights concerns or, more specifically, from the ILO Declaration would not necessarily provide adequate assurance against those reductions in labor standards most relevant to commercial advantage. Here, it should be recalled that, generally speaking, respect for fundamental labor rights does not lead to a commercial disadvantage in relation to trading partners who fail to respect such fundamental rights. In the case of minimum wage, occupational health and safety, or employment security laws, this may not be true; however, the baseline of fundamental labor rights does not create a baseline for acceptable minimum standards for such laws.

The most promising short- and medium-term possibility is that WTO jurisprudence might evolve to allow a coherent approach to the vetting of individual and collective sanctions by members for protectionism. In this scenario the ILO would play an important role in establishing appropriate benchmarks for the existence of violations, as well as assisting the WTO dispute settlement organs in determining whether, on the facts, the record of noncompliance and non-cooperation toward resolving compliance issues is such that alternatives to sanctions are not feasible. Part II of this Article suggested that many of the interpretations of GATT that create obstacles to even non-protectionist sanctions were questionable textually or doctrinally. In fact, within the text and the basic doctrinal structure of GATT, there are various ways in which panels and the AB might address the protectionist and more general systemic threat from sanctions, while not closing the door to sanctions that are legitimate for human rights purposes.

In the environmental context panels have sought to exclude sanctions-type measures from the possibility of justification under GATT because of the specter that policy-based conditions on trade would start to proliferate, such that members would face the radical insecurity of having to meet various, multiple, and possibly conflicting requirements in order to exercise their trading rights. Part II of the Article suggested why, in the labor rights context, this danger is not inherently great, at least with respect to truly conflicting requirements. Nevertheless, it could be

further reduced by using the ILO Declaration as a kind of objective standard for labor-rights-based distinctions between products. Because in the Singapore Declaration WTO members committed to respect the rights now detailed in the ILO Declaration, sanctions linked to noncompliance with such rights do not impose a new and potentially various set of conditions on members' exercise of their trading rights. The "condition" is, in effect, something that they are all already committed to do, inasmuch as they are members of the ILO; indeed, the Singapore Declaration itself might have some status as what international lawyers call "soft law."

How might this be accomplished in WTO jurisprudence? First, measures linked to compliance with fundamental labor rights might well be presumed to be nondiscriminatory and thus not in violation of Article I and III, provided that they are not operated in a discriminatory manner. Because the fundamental labor rights are conditions that all members, including the member taking the measures, are equally bound to, their use as a condition for trading rights cannot as such constitute discrimination either between countries (Article I) or between domestic and foreign producers (Article III). Second, as Feddersen has argued, n129 the public morals exception in Article XX(a) risks being almost limitless if the content of public morals does not have a universal element. Fundamental Rights supply this content, so a WTO dispute panel could use as a primary test to determine whether sanctions come within the ambit of Article XX(a), if the sanctions have a basis in the Declaration on Fundamental Labor Rights or other international human rights instruments of a universal character (e.g., the Civil and Political or Social and Economic Covenants). n130

However, WTO panels must also ensure that, even if based on universal, nondiscriminatory conditions, trade measures are not applied or implemented in a discriminatory or arbitrary fashion, or to protectionist ends. For example, several countries could be in serious violation of the obligations of the Convention with respect to certain kinds of child labor. As noted earlier, sanctions would arguably violate Article I if they singled out only one or some of the violating countries, but did not touch other, equally serious offenders. They would also perhaps constitute arbitrary or unjustified discrimination, and thus, by virtue of the "chapeau" of Article XX, not be justifiable under Article XX(a).

A related issue is that while the rights in the Convention are universal, defining a consensus on the essential content of some of these rights is an ongoing process, quite properly centered in the ILO. A WTO panel then should take account not only of the universality of the rights that are being invoked by the trade-restricting member, but also of the extent to which ILO practice indicates a clear consensus that the practices being sanctioned represent unambiguous violations of the universal content of the right. For instance, the principle of "freedom of association and the effective recognition of the right to collective bargaining" might clearly entail a prohibition of state-sanctioned violence to suppress an effort to organize an independent trade union. However, ILO or WTO members would strongly disagree as to whether it might operate to prevent a country from placing limits on the right to strike of purportedly essential public sector workers, such as police and firefighters, or from placing other limits on the right to strike for broader social purposes.

It is desirable that WTO interpretation closely track evolving consensus at the ILO on the essential content of the fundamental labor rights, which all members are obligated to realize. It should also be borne in mind that the ILO Declaration envisages an obligation of progressive realization of the full content of fundamental labor rights, which may entail various kinds of technical cooperation and advisory services. Deter mining whether an ILO member's efforts to

realize fundamental labor rights are so inadequate as to constitute a failure of its obligations under the Convention, given the resources available to it and the specific circumstances of its economic and social development, is a difficult issue for a WTO panel or the AB to tackle. Here, it would seem appropriate for the WTO dispute settlement organs simply to defer to ILO practice itself.

Along similar lines, even when the ILO has identified a compliance issue, a WTO panel should be reluctant to consider as "necessary" under Article XX(a) sanctions against a member whom the ILO is satisfied is cooperating satisfactorily in the ILO context toward an adequate solution to the problem. For one thing, sanctions in such a situation may actually undermine delicate cooperative efforts to bring the member into compliance. For another, a judgment that sanctions are "necessary" in such a situation may be tantamount to interference of the ILO within its own jurisdiction, a fundamental jurisdiction recognized by WTO members themselves in the Singapore Declaration. On the other hand, if a country is singled out for noncompliance by the ILO, which is dissatisfied with its efforts to realize fundamental labor rights, a reverse assumption should apply: if the institutional mechanisms of the ILO have, on their own admission (and by the ILO's own definitions), failed to secure compliance, it is reasonable to assume that the principal less-trade-restrictive alternatives have been exhausted, and it should be up to the complaining party to show that there is some other practicable avenue of recourse, such as social labeling. Both the assumption against the "necessity" of sanctions when ILO avenues have not been properly exhausted and the reverse assumption when they have, create strong incentives for all members, whether they are contemplating sanctions or risking being subject to them, to cooperate with the ILO.

It might be objected, however, that the dynamic impact of this use of the ILO in WTO dispute settlement might be to increase reluctance within the ILO to monitor and clearly identify noncompliance (i.e., in order to avoid sanctions, which many members of the ILO might not view as desirable). A presumption, however, is rebuttable by its very nature. When ILO processes do not appear to be working in an effective and timely manner, a panel should be open to the responding party's claim that sanctions are "necessary." Moreover, when the violations of fundamental labor rights in question are also violations of universal human rights more generally, the ILO's jurisdiction is obviously shared with other international human rights regimes, and these other institutions and mechanisms may come into play. More attention needs to be paid to these interrelationships. n131

## **V. CONCLUSION**

The key to evolution of an appropriate role for the WTO with respect to labor rights is the dynamic relationship between the WTO and the ILO. The WTO needs the ability to distinguish justified labor-rights-based sanctions from protectionist cheating on liberal trading rules and to protect the integrity and legitimacy of the trading system. This ability depends on the evolution of the ILO as an organization capable of generating widespread consensus on at least the essential content of fundamental labor rights, with effective tools for monitoring and measuring compliance with this essential content. The June 1998 ILO Declaration is a significant advance in this direction, at least at the level of commitment in principle. The pressure for a trade response to noncompliance with fundamental labor rights has had a positive impact on moving the organization in this kind of direction. Preserving incentives for effective cooperative

approaches will depend on the WTO's crafting a role for itself that constrains unilateralism neither too tightly nor too loosely.

FOOTNOTES:

n1. See Raj Bhala, Clarifying the Trade-Labor Link, *37 Colum. J. Transnat'l L.* 11, 17 (1990) (describing various critical positions on the labor standards issue).

n2. *Id.* at 22-23.

n3. Peter S. Watson, The Framework for the New Trade Agenda, *25 L. & Pol'y Int'l Bus.* 1254 (1994).

n4. Janelle M. Diller & David A. Levy, Note, Child Labor, Trade and Investment: Toward the Harmonization of International Law, *91 Am. J. Int'l L.* 663, 664 (1997).

n5. These rights are "(a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation." Art. 2, ILO Declaration on Fundamental Principles and Rights at Work, International Labor Conference, 86th Session, Geneva, June 1998 [hereinafter ILO Declaration].

n6. *Id.*

n7. *Id.* art. 5 (emphasis added).

n8. William K. Wilcox, GATT-Based Protectionism and the Definition of a Subsidy, *16 B.U. Int'l L.J.* 129, 161 (1998).

n9. Ministerial Conference of the World Trade Organization (Sept. 13, 1996), Singapore Ministerial Declaration, adopted Dec. 13, 1996, *36 I.L.M.* 218 (1997) [hereinafter Singapore Declaration].

n10. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, art. 23, *33 I.L.M.* 1125, 1242.

n11. Military and Paramilitary Activities (Nicar. v. U.S.), 1991 I.C.J. 47 (Sept. 1986).

n12. Charles S. Kaufman, The U.S.-Japan Semiconductor Agreement: Chipping Away at Free Trade, *12 UCLA Pac. Basin L.J.* 329, 348 (1994).

n13. United States-Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, 12 Oct. 1998, WT/DS58/AB/R [hereinafter *Turtles*]. At issue were United States measures banning the import of shrimp that had been fished in a manner that threatened sea turtles, an endangered species. As will be discussed later in this Article, although the Appellate Body found that the scheme itself could be justified in principle under the "conservation of natural resources" exception in Article XX, its manner of application did not meet certain criteria in the "chapeau," or general preambular provision, of Article XX.

n14. Steve Charnovitz, The Influence of International Labor Standards on the World Trading System: A Historical Overview, *126 Int'l Lab. Rev.* 565 (1987).

n15. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3 (pts. 5 & 6), 55 U.N.T.S. 188 [hereinafter GATT].

n16. *Id.* art. VI, 2.

n17. *Id.* art. VI, 1.

n18. See Christopher McCrudden, *International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of "Selective Purchasing Laws" Under the WTO Government Procurement Agreement*, *J. Int'l Econ. L.* (forthcoming). I have not discussed the Government Procurement Agreement here, because McCrudden does a splendid job of it.

n19. Robert Howse & Michael J. Trebilcock, *The Fair Trade-Free Trade Debate: Trade, Labor, and the Environment*, 16 *Int'l Rev. L. & Econ.* 61 (1996).

n20. *Belgian Family Allowances*, Nov. 6, 1952, GATT B.I.S.D. (1st Supp.) at 59 (1953).

n21. *Id.*

n22. *Id.* at 61.

n23. *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Panel, 37 *I.L.M.* 834, 850 (May 15, 1998), rev'd in part *Turtles*, *supra* note 13.

n24. A recent WTO panel ruling held that Article I excludes any measure that makes MFN treatment conditional on criteria that do not relate to the imported product, emphasizing identity of physical characteristics and end uses. However, conditions that concern how a product is produced are clearly related to that product, even when they do not affect its physical properties; given the nature of the specific scheme at issue, offering tax rebates as part of a sectoral industrial policy, the panel's context-specific focus on physical characteristics and end uses was nevertheless not unreasonable. *Indonesia-Certain Measures Affecting the Automobile Industry*, Report of the Panel, July 2, 1998, WT/DS54/R, paras. 14.143-147 [hereinafter *Indonesian Autos*].

n25. See, e.g., GATT, *supra* note 15, art. III, para. 4.

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

*Id.*

n26. Until the creation of the WTO system in 1995, GATT reports were considered to require adoption by consensus of the entire membership (including the losing party) in order to attain the status of a legally binding settlement of the dispute. In the WTO system there is now a rule of negative consensus - in order for a dispute settlement report not to be adopted, a consensus of the membership (including the winning party) must vote against adoption. Clearly, this new approach amounts to something like automatic adoption. Under the older system the parties to the dispute might also agree never to submit a report for adoption, so as to facilitate a diplomatic solution to the dispute. World Trade Org., *About the WTO: Settling Disputes* (visited May 27, 1999) <<http://www.wto.org/wto/about/dispute0.htm>>.

n27. GATT Dispute Panel Report on U.S. Restrictions on Imports of Tuna, 30 *I.L.M.* 1594, 1603 (Aug. 16, 1994) [hereinafter *Tuna/Dolphin I*] (Mexico suggesting that the Marine Mammal

Protection Act was not a PPM because it was designed to protect dolphins, not to regulate tuna production); Restrictions on Imports of Tuna, 33 *I.L.M.* 839, 885 (June 16, 1994) [hereinafter Tuna/Dolphin II] (Venezuela suggesting that the United States should not be able to impose import restrictions based on the manner in which a product is produced).

n28. GATT Article XI bans most nontariff forms of border restrictions, such as embargoes, quotas, and import licenses. See GATT, *supra* note 15, art. XI.

n29. Michael J. Trebilcock & Robert Howse, Trade and Environment, in *The Regulation of International Trade 1995* (2d ed. forthcoming 1999).

n30. United States Section 337 of the Tariff Act of 1930, Jan. 16, 1989, GATT B.I.S.D. 345 (36th Supp.) at 345 (1989).

n31. Markus Schlagenhof, Trade Measures Based on Environmental Processes and Production Methods, 29 *J. World Trade* 123, 128 (1995) (noting that "economic theory does not distinguish whether the externality arises from the product itself or from the method of production.").

n32. Organization for Econ. Cooperation & Dev., Processes and Production Methods (PPMs): Conceptual Framework and Considerations on Use of PPM- Based Trade Measures 21 (1994).

n33. United States-Measures Affecting Alcohol and Malt Beverages, June 19, 1992, GATT B.I.S.D. (39th Supp.) at 206 (1993) (suggesting that the purpose of Article III, section 2 should factor into the "like product" determination); United States-Taxes on Automobiles, Oct. 11, 1994, available in 1995 *WL 910937* at \*23 [hereinafter Taxes on Automobiles] (noting that "the purpose of Article III would be subverted if contracting parties were allowed to promulgate artificial and contrived tax categories in order to target like imported products for higher taxes.").

n34. William J. Davey & Joost Pauwelyn, MFN-Unconditionality: A Legal Analysis of Concept in View of its Evolution in GATT/WTO Jurisprudence with Particular Reference to the Issue of "Like Product" (paper presented at the World Trade Forum, Neuchatel, Switzerland, on file with author).

n35. Japan-Taxes on Alcoholic Beverages, Report of the Appellate Body, Oct. 4, 1996, WT/DS8/AB/R, at 13 [hereinafter Japan Alcohol].

n36. *Id.* at 17.

n37. Taxes on Automobiles, *supra* note 33.

n38. Christoph T. Feddersen, Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(a) and "Conventional" Rules of Interpretation, 7 *Minn. J. Global Trade* 75, 76 (1998) (suggesting that GATT Article XX(a) could be invoked to avoid compliance with obligations that offend the state's public morals); see also Steve Charnovitz, The Moral Exception in GATT, 38 *Va. J. Int'l L.* 689, 742-43 (1998) ("The moral exception could validate trade actions based on international norms while rejecting trade actions based on nationalistic aims.").

n39. GATT, *supra* note 15, art. XX(e).

n40. Thus, in my earlier work on this issue, I tended to the view that Article XX would have to be amended to encompass exceptions for labor-rights-based trade measures. The development

of a conception of fundamental labor rights sufficiently universal in character to fall plausibly within the meaning of "public morals" in XX(a), as well as the increasing emphasis on violation of labor rights that infringe other universal human rights (forced or slave labor, for instance), have led me to change my views on this matter.

n41. Turtles, *supra* note 13.

n42. *Id.* para. 129.

n43. *Id.*

n44. *Id.*

n45. Final Act Embodying the Results of the Uruguay Round of Multilateral Negotiations, Apr. 15, 1994, Legal Instruments - Results of the Uruguay Round (1994), 33 *I.L.M.* 1143, 1144 [hereinafter WTO Agreement].

n46. Feddersen, *supra* note 38, at 109.

n47. The author has searched in vain the preparatory material for GATT (Havana and other meetings) for any reference to something like this distinction, with respect either to the like products concept in Articles I and III or to Article XX.

n48. Turtles, *supra* note 13, para 121.

n49. GATT, *supra* note 15, art. XX(b).

n50. Thus, the World Health Declaration, resolved by the members of the World Health Organization in May 1998, explicitly endorses the incorporation of concepts of equity, solidarity, and social justice in the strategy of "health for all" in the 21st century. World Health Org., Health for All - Policy (visited Apr. 29, 1999) <<http://www.who.int/hfa/policy.htm>>. These concepts are, of course, central to the fundamental labor rights affirmed in the ILO Declaration. A comment by Jim Hathaway in relation to McCrudden, *supra* note 18, first alerted me to the relevance of the human life and health exception to labor rights.

n51. See Michael J. Trebilcock & Robert Howse, Trade Liberalization and Regulatory Diversity: Reconciling Competitive Markets with Competitive Politics, 6 *Eur. J.L. & Econ.* 5, 33 (1998).

n52. GATT, *supra* note 15, art. XX(b).

n53. Turtles, *supra* note 13, paras. 161-76.

n54. For example, the United States has threatened the denial of MFN status to China in order to effectuate labor rights compliance. See Organization for Econ. Cooperation & Dev., Trade, Employment and Labor Standards: A Study of Core Workers' Rights and International Trade (1996) [hereinafter OECD Study].

n55. *19 U.S.C. 2411* (1994 & Supp. III 1997).

n56. Jagdish Bhagwati, The Current Enforcement Authority and Procedures: 301, Super 301 and Special 301, in *Aggressive Unilateralism: America's 301 Trade Policy and the World Trading System* app. at 40 (Jagdish Bhagwati & Hugh T. Patrick eds., 1990).

n57. Internationally recognized workers' rights include:



- (A) the right of association;
- (B) the right to organize and bargain collectively;
- (C) a prohibition on the use of any form of forced or compulsory labor;
- (D) a minimum age for the employment of children; and
- (E) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

19 *U.S.C.* 2467(4) (1994 & Supp. III 1997).

n58. Francis Wolf, *Human Rights and the International Labour Organisation*, in *2 Human Rights in International Law: Legal and Policy Issues* 274, 275 (Theodor Meron ed., 1984).

n59. OECD Study, *supra* note 54.

n60. *Id.*

n61. Sophie Dufour, *Accords commerciaux et droits des travailleurs* 65 (1998).

n62. *Id.* at 50-51.

n63. *Id.* at 54.

n64. *Id.* at 49-54.

n65. See generally Howse & Trebilcock, *supra* note 19, at 61. We have also learned much from conversations with Brian Langille and Sophie Dufour.

n66. Wilcox, *supra* note 8, at 161.

n67. See Howard F. Chang, *Trade Measures to Protect the Global Environment*, 83 *Geo. L.J.* 2131 (1995).

n68. See generally Bob Hepple, *Equality: A Global Labor Standard*, in *International Labor Standards and Economic Interdependence* (Werner Sengenberger & Duncan Campbell eds., 1994).

n69. *Convention Concerning Minimum Age for Admission to Employment*, ILO Convention C138 (1973) (adopted June 26, 1973).

n70. *Id.*

n71. *Id.*

n72. I owe this point to Brian Langille.

n73. See *supra* Part I.

n74. *The World Is Watching: A Survey of Human Rights Law*, *Economist*, Dec. 5, 1998, at 16.

n75. See Jagdish Bhagwati, *Policy Perspectives and Future Directions: A View from Academia*, in *International Labor Standards and Global Economic Integration: Proceedings of a Symposium* 57 (U.S. Dep't of Labor 1994).

n76. *Id.*

n77. Martha C. Nussbaum, *Cultivating Humanity: A Classical Defense of Reform in Liberal Education* 139-45 (1997).

n78. *Id.* at 139 (quoting Amartya Sen).

n79. Some economists have a generally skeptical view of the possibility that minimum standards - for instance in the case of occupational health and safety - can adequately correct for market failure. However, once this skepticism is put to the test through economic modeling, the results are ambiguous. Under some assumptions, minimum standards may be effective in correcting for market failure; under others (e.g., considerable heterogeneity in workers' risk preferences), minimum standards may actually result in greater market distortion. See Drusilla K. Brown et al., *International Labor Standards and Trade: A Theoretical Analysis* (July 1994) (paper prepared for the Fairness-Harmonization Project Meeting).

n80. See generally Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (1990).

n81. OECD Study, *supra* note 54, at 40.

n82. Thus, I would agree with some critics of labor-rights-based trade sanctions, such as Srinivasan, that derestricting immigration may well be a first-best solution, a position consistent with that developed in the "Movement of People" chapter in Michael J. Trebilcock & Robert Howse, *The Regulation of International Trade* (forthcoming 1999). However, this derestriction is unlikely to occur anytime soon. Cf. T.N. Srinivasan, *International Trade and Labor Standards*, in *Report of the Conference: Challenges to the New World Trade Organization* (Pitou van Dyck & Gerrit Faber eds., 1995).

n83. See Albert O. Hirschman, *Exit, Voice, and Loyalty, Responses to Decline in Firms, Organizations, and States* (1970).

n84. In the case of Mexico, for example, it is often suggested that gross violations of basic international labor rights norms are concentrated in the Maquiladora region, while basic labor rights are respected throughout much of the country, particularly in unionized workplaces. See Peter Morici, *Implications of a Social Charter for the North American Free Trade Agreement*, in *Ties Beyond Trade: Labor and Environmental Issues Under the NAFTA* 137-38 (Jonathan Lemco & William B.P. Robson eds., 1993). Morici notes that even within the maquiladoras, "many employers... provide workers with a wide range of benefits and a safe working environment, and they adhere closely to strict environmental standards." *Id.* at 138; see also USITC, *Review of Trade and Investment Measures by Mexico* (USITIC Report No. 2326, Oct. 1990).

n85. Mita Aggarwal, *International Trade, Labor Standards, and Market Conditions*, *International Economic Review* (United States Int'l Trade Comm'n, Aug. 1995).

n86. Keith E. Maskus, *Should Core Labor Standards Be Imposed Through International Trade Policy?* 19-21 (1997).

n87. *Id.*

n88. *Id.* at 26.

n89. *Id.* at 50.

n90. When sanctions are targeted at firms and some firms within the domestic economy are able to comply with the standards in question, these firms might seem to lose an incentive to lobby the regime to change its labor law, thereby reducing pressure to bring the entire country's standards up to the level dictated by international labor rights norms. Moreover, if most exporting firms meet standards that are a condition of market access, a country need not worry about improving its own labor law in order to have market access abroad, with the possible result that labor rights abuses will continue by firms that produce largely or exclusively for the domestic market. However, if firms that produce for export also produce for the domestic market, then they may well seek to have those that produce for domestic customers subject to the same standards, if they think that the latter gain a price advantage in the domestic market by abusing labor rights. In order for this last effect to occur, sanctions targeted at firms must be targeted at all their production, whether for export or for the domestic market. Otherwise, the firms that produce both for export and for the domestic market may simply fail to meet standards in those facilities used to produce for the domestic market. When, however, as in many developing countries, some firms produce almost entirely for export and others entirely for the domestic market, there is clearly a downside to be reckoned with in sanctions targeted at firms rather than policies - the absence of pressure to correct labor rights abuses in firms producing for the domestic market.

n91. In the case of Poland, for instance, the beginnings of liberal revolution are found in the gradual recognition of an independent trade union movement, which was able to mobilize broader social forces against the Soviet-bloc regime. See Alex Pravada, *The Workers, in Poland: Genesis of a Revolution 68-91* (Abraham Brumberg ed., 1983).

n92. Immanuel Kant, *Perpetual Peace*, in *Kant's Political Writings 93-130* (Hans Reiss ed., H.B. Nisbet trans., Cambridge University Press 1970).

n93. See Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, 12 *Phil. & Pub. Aff.* 205 (1983); Michael W. Doyle, *Liberalism and World Politics*, 80 *Am. Pol. Sci. Rev.* 1151 (1986).

n94. *Supra* Part III.A.2.

n95. See generally Herbert L. Peacock, *A History of Modern Britain 1815-1981*, at 49-52 (4th ed. 1982).

n96. Michael J. Trebilcock et al., *Trade and Transitions: A Comparative Analysis of Adjustment Policies* 45 (1990); see also Robert E. Baldwin, *The Ineffectiveness of Trade Policy in Promoting Social Goals*, 8 *World Econ.* 109 (1985).

n97. Dufour, *supra* note 61, at 65 nn.159, 161.

n98. Lance Compa, *Labor Rights and Labor Standards in International Trade*, 25 *Law & Pol'y Int'l Bus.* 165, 170 (1993).

n99. OECD Study, *supra* note 54, at 186.

n100. See *supra* Parts III.A.2.a and III.A.3.a.

n101. See *supra* Parts III.A.2.a and III.A.3.a.

N102. Gary Clyde Hufbauer et al., *Economic Sanctions Reconsidered: History and Current Policy* 35 (2d ed. 1990); see also David A. Baldwin, *Economic Statecraft* (1985); Makio Miyagawa, *Do Economic Sanctions Work?* (1992).

n103. Hufbauer et al., *supra* note 102, at 93.

n104. See Maskus, *supra* note 86; Srinivasan, *supra* note 82.

n105. Maskus, *supra* note 86, at 20.

n106. See Chang, *supra* note 67, at 19-25.

n107. See Srinivasan, *supra* note 82.

n108. For instance, the OECD notes: "There are cases where the authorities, either at the national level (Korea, Singapore and Chinese Tapei) or at the local level (Kerala state in India) have given high priority to school enrollment and this has resulted in a drop in the levels of child labor." OECD Study, *supra* note 54, at 47.

n109. A possible further alternative, akin to labeling, is that individual consumers by their investment choices can attempt to discipline socially irresponsible corporate behaviour. The phenomenon of socially responsible investing (SRI) refers to making investment choices according to financial and ethical criteria. For instance, individuals can choose to put their investments in a firm that acts in a manner consistent with their ethical values, or they may choose to refrain from investing in a firm believed to be behaving in a socially unacceptable fashion. The two primary claims advanced by SRI adherents, which distinguish it from other strategies of investment, are (1) that social screening does not entail a financial sacrifice (i.e., that advancing one's social agenda can be as profitable as investment for purely financial gain) and (2) that SRI can later sway corporate behavior insofar as it seeks to channel funds away from firms acting in a socially unacceptable way.

While this phenomenon has become quite popular, there is good reason to be skeptical about its ability to deliver on its claims. Specifically, Knoll has suggested that, at best, only one of the claims can be true because each implies the negation of the other. As he explains, "If markets are efficient, the first might be true but the second is false. If markets are inefficient, the second might be true but the first is false." Michael S. Knoll, *Socially Responsible Investment and Modern Financial Markets* (Mar. 18, 1994) (unpublished manuscript, on file with author). With respect to the second claim, Knoll found that "regardless of the efficiency or inefficiency of the market, the impact of an investor's decision not to invest in a company will have little or no impact on the firm's ability to raise capital and therefore on its activities." *Id.*

n110. On labeling and related consumer-choice-based approaches, see Katherine Van Wezel Stone, *To the Yukon and Beyond: Local Laborers in a Global Labor Market*, 3 *J. Small & Emerging Bus. L.* 93 (1999).

n111. This kind of collective action problem and its general implications for regulatory choice is discussed in Robert Howse, *Retrenchment, Reform or Revolution?: The Shift to Incentives and the Future of the Regulatory State*, 31 *Alta. L. Rev.* 455, 462, 485-86 (1993). The fact that moral principles such as those prohibiting murder and theft are inherently sound does not, however, obviate the need sometimes to impose sanctions for noncompliance with them.

n112. International Labour Office, *The ILO, Standard Setting and Globalization*, Report of the Director General 17 (1997), available in <<http://www.ilo.org/public/english/10ilc/ilc85/dg-rep.htm>> (visited May 27, 1999).

n113. Brian Langille, *The ILO and the New Economy: Recent Developments* 34 (Oct. 29, 1998) (unpublished manuscript, on file with author).

n114. Michael J. Trebilcock et al., *supra* note 96. This view of the legal order of liberal trade has been greatly influenced by the liberal internationalist perspective of Robert Axelrod and Robert Keohane. According to Axelrod and Keohane:

The principles and rules of international regimes make governments concerned about precedents, increasing the likelihood that they will attempt to punish defectors. In this way international regimes help to link the future with the present. This is as true of arms control agreements, in which willingness to make future agreements depends on others' compliance with previous arrangements, as it is in the General Agreement on Tariffs and Trade, which embodies norms and rules against which the behaviour of members can be judged. By sanctioning retaliation for those who violate rules, regimes create expectations that a given violation will be treated not as an isolated case but as one in a series of interrelated actions.

Robert Axelrod & Robert O. Keohane, *Achieving Cooperation Under Anarchy: Strategies and Institutions*, in *Neorealism and Neoliberalism: The Contemporary Debate* 91, 94 (David A. Baldwin ed., 1993).

n115. Brian Langille, *Eight Ways to Think About International Labor Standards*, 31 *J. World Trade* 27, 33 (1997).

n116. See Werner Sengenberger, *Protection-Participation-Promotion: The Systemic Nature and Effects of Labor Standards*, in *International Labor Standards and Economic Interdependence*, *supra* note 68.

n117. See Brian Langille, *General Reflections on the Relationship of Trade and Labor (Or: Fair Trade Is Free Trade's Destiny)*, in 2 *Fair Trade & Harmonization: Prerequisites for Free Trade* 231, 246 (Jagdish Bhagwati & Robert E. Hudec eds., 1996).

n118. See Richard Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race to the Bottom" Rationale for Federal and Environmental Competition*, 67 *N.Y.U. L. Rev.* 1216 (1992); Brian Langille, *A Day at the Races: A Reply to Professor Revesz on the Race for the Bottom* (Mar. 18, 1994) (unpublished manuscript, on file with author).

n119. Langille, *supra* note 118.

n120. Trebilcock & Howse, *supra* note 29.

n121. Stephanie Nebehay, *ILO Chief Rebuffed by WTO on Trade-Labor Spat*, *Reuters Fin. Serv.*, Dec. 5, 1996.

n122. *Singapore Declaration*, *supra* note 9, at 221.

n123. Id.

n124. Id.

n125. Id.

n126. A proposal along these lines is discussed in Dufour, *supra* note 61, at 337.

n127. Steve Charnovitz, *Trade, Employment and Labor Standards: The OECD Study and Recent Developments in the Trade and Labor Standards Debate*, 11 *Temp. Int'l & Comp. L.J.* 131, 162-163 (1997).

n128. International Labour Org. Cross-Departmental Analysis & Reports Team, *The Social Dimension of the Liberalization of International Trade* 6 (1998).

n129. See Feddersen, *supra* note 38.

n130. In terms of treaty interpretation applicable to WTO agreements, the approach sketched here is based strongly on Article 31 of the Vienna Convention. Article 31 is applicable by virtue of the WTO Dispute Settlement Understanding, Article 3(2), as interpreted by the Appellate Body in *Japan Alcohol*, *supra* note 35. See David Palmetier & Petros Mavroidis, *The WTO Legal System: Sources of Law*, 92 *Am. J. Int'l L.* 398 (1998). The Singapore Declaration, which affirms the members' respect for the fundamental labor rights now elaborated in the ILO Declaration, is arguably "subsequent practice" within the meaning of Article 31 of the Vienna Convention, if not a subsequent "agreement between the parties" related to treaty interpretation or application. Moreover, Article 31(c) of the Vienna Convention refers to the requirement to interpret a treaty in light of relevant international law applicable to the parties. The broadness of the language suggests that this should entail "soft law" such as the ILO Declaration; this is especially true in that some elements of the rights in the Declaration - nondiscrimination, for instance - are subject to more general hard law obligations, such as those in the Civil and Political Covenant. Id.

n131. McCrudden suggests, with respect to the public order exception in the Government Procurement Agreement, "Both the peremptory norms of international law (such as that against slavery), and those norms which the parties in dispute have both agreed to (such as the provisions of the International Covenant on Civil and Political Rights) could serve as an emerging 'international public policy' of human rights." McCrudden, *supra* note 18, at 45.