

2-15-2005

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Recommended Citation

Frank J. Garcia. "Trade-Based Strategies for Combatting Child Labor." In *Child Labor and Human Rights: Making Children Matter* Burns Weston, ed., Boulder, CO: Lynne Rienner Publishers, 2006.

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Chapter 16

Trade-based Strategies for Combatting Child Labor

Frank J. Garcia and Soohyun Jun

I. Introduction

From a regulatory standpoint, the problem of distinguishing between good and bad child work takes on special significance: which practices are appropriate targets for legal (and extra-legal) sanction and which are not? Many contributors to this volume have responded skillfully to this definitional challenge. We defer to that work and assume here that abusive and exploitative child work (hereinafter “child labor”) is the appropriate regulatory target.¹

While domestic strategies are central to any effective elimination or reduction of child labor, complimentary international strategies of cooperation and coordination are required as well. Given the competing interests and values involved, it cannot be assumed by the world community that child labor will be eradicated solely through domestic law mechanisms and procedures. Such is the nature of our Westphalian system of international relations. Yet, despite widespread recognition of human rights doctrines, principles, and rules, there currently is no effective multilateral regime requiring states to eliminate child labor in a manner that subjects them to binding, enforceable sanctions for failure to do so. The need for international

¹ In this chapter, we adopt the definition of “child labor” set forth in the first sentence of the Introduction to this volume, i.e., “work done by children that is harmful to them because it is abusive, exploitative, hazardous, or otherwise contrary to their best interests—a subset of a larger class of children’s work, some of which may be compatible with children’s best interests (variously expressed as ‘beneficial,’ ‘benign,’ or ‘harmless’ children’s work).”

cooperation and coordination to ensure that the rights of working children will be effectively enforced remains a global policy priority of the highest magnitude.

Recognizing such coordination and enforcement problems allows us to situate properly the role of trade-based strategies to address child labor. Reform-minded states can use trade to address extraterritorially the problem of child labor occurring within other jurisdictions. For example, they can offer trade preferences to child labor states that are conditioned on compliance with international labor standards pertinent to child labor (hereinafter “child labor standards”).² This approach alters the policy incentives of the target state, by linking its domestic enforcement of child labor standards to eligibility for attractive trade preferences. Alternatively, reform-minded states can follow a more punitive trade-based strategy by using trade sanctions to impose bans on the importation of products produced through the use of child labor.

Trade-based strategies can be seen as specific instances of a market-oriented regulatory strategy to child labor—in contrast to other regulatory strategies which subject perpetrators to criminal or civil penalties or private causes of action (in tort, for example).³ Manipulating information or incentives relevant to investment, production, and consumption decisions, market-oriented strategies operate indirectly to alter the commercial behavior of producers or consumers in relation to the manufacture or purchase of child labor products and thereby, it is hoped, discourage the demand for child labor. Trade sanctions are intended to eliminate or reduce producer incentives to use child labor by eliminating or reducing through law demand for their products. Social labeling, corporate codes of conduct, and other such private sector

2 This is the approach taken to labor rights generally in existing trade preference programs, such as the U.S. Generalized System of Preferences (GSP). Because such programs are discretionary under the law of the World Trade Organization (WTO), states are free to engage in such conditionality, although it raises problematic issues. See *infra* note 6.

3 A comprehensive regulatory approach would use all three strategies, rendering child labor illegal, subjecting perpetrators to civil liability for compensation of their victims, and interdicting the flow of their products.

initiatives likewise seek to alter commercial conduct, but in a voluntary manner.⁴ And conditional trade preferences, also a market-oriented approach but operating in the state-to-state market for trade advantages, use the promise of preferential trade terms to cause states to alter their behavior—in the present context, relative to the more aggressive domestic enforcement of child labor standards. By their very indirection, of course, trade strategies may play a limited role in combating child labor. Sanctions are effective only with child labor industries that export. Social labeling and other voluntary approaches rely on public good will. And conditional trade preferences depend on the degree to which the target state’s economy needs the preferences, supervisory and enforcement efforts are vigorous, and compliance is not waived for extrinsic political reasons. Nevertheless, trade strategies play an important role, offering readily available methods to address extraterritorial child labor problems in the absence of more effective transnational mechanisms.

In this chapter, we discuss the structure and legality of trade-based strategies for addressing child labor. In doing so, we focus primarily on unilateral trade sanctions, specifically import bans, as the most aggressive and therefore most controversial of the trade-based strategies.⁵ We do not argue for the effectiveness of trade sanctions in economic or political terms, however. Nor do we offer a moral argument favoring or opposing the use of unilateral sanctions. Though we touch upon both issues, we assume the desirability and propriety of this trade-based strategy and address its legality. By their very nature, trade sanctions interfere with the free movement of goods, so proponents of such measures must address their compatibility

⁴ See generally Schrage, *Promoting International Worker Rights . . .*

⁵ The most aggressive approach would be, of course, a total import ban or embargo, against all products of a child labor country. We deem this scenario highly implausible and so do not address it further here. Also, we focus on unilateral sanctions. While conditionality, i.e., the practice of linking trade and other economic benefits to changes in domestic policies, is certainly controversial as a policy, trade conditionality and labor rights, such as the U.S. practice of linking multilateral GSP to adherence to core labor rights is legal and therefore less controversial than unilateral sanctions. Other forms of human rights conditionality, such as linking WTO membership to ratification of core labor and human rights treaties, may be still less problematic. See Garcia, “Integrating Trade and Human Rights . . .”

with the international trade regulatory system. Does World Trade Organization (WTO) law permit this trade restrictive measure? At the core of the WTO system are two anti-discrimination principles: most-favored-nation (MFN) treatment (barring discrimination between exporting countries) and national treatment (barring discrimination between imports and domestic goods). As will be discussed further below, trade sanctions are *prima facie* violations of these two rules, and therefore must be justified through recourse to the policy exceptions listed in the General Agreement on Tariffs and Trade (GATT).⁶

This leads to a larger question regarding the role of the WTO in addressing child labor, and international human rights generally. Conflicting views reflect the ongoing tension between the goals of liberalizing trade and of protecting other social values such as human rights. We presuppose that there is a direct, fundamental, and appropriate relationship between international trade and the protection of human rights, including the rights of working children.⁷ The real question is not whether there is a linkage between human rights and trade, but how this linkage should be managed by the international community in theory and practice.⁸ Institutionally, this can be reduced to two questions: (1) Is the WTO as an institution capable of addressing child labor, or human rights issues more generally? (2) More specifically, does WTO case law offer interpretative room for allowing unilateral child labor-based trade sanctions? While we do not focus directly on the first question,⁹ we hope through our analysis of the second question to suggest both strategies for the reconciliation of trade liberalization and the protection of working

⁶ See *infra* note 56 and accompanying and subsequent text.

⁷ See generally Garcia, *Trade, Inequality and Justice*. See also Garcia, "Trade and Justice . . .," pp. 414-15. A justice perspective of the linkage discourse "requires recognition of the fact that conflicts between traditional trade policy and other areas of social policy involve branches of the same tree, and that this tree is the construction of a just society" (emphasis added). *Ibid.*, p. 425.

⁸ See Garcia, "The Global Market and Human Rights . . .," pp. 85-86.

⁹ For an overview of institutional issues raised by the WTO's general role in human rights enforcement, see Garcia, "Trade, Constitutionalism and Human Rights . . ." For a discussion of the political factors confronting any move to give the WTO a stronger standard-setting role, see Bachman, "Translating International Labor Standards . . .," ch. 5 in this volume.

children at the dispute resolution level and, more broadly, a general positive view on the question of the WTO's potential human rights contributions.

We begin by evaluating the legality of trade sanctions as a response to child labor. We first review, in Section II, the arguments for and against trade sanctions based on child labor practices in target countries, and consider the question of the effectiveness of such sanctions. We then introduce contemporary U.S. law banning the importation of forced child labor products as an example of a trade-based strategy.

Next, in Section III, we probe the compatibility of U.S. trade sanction law and WTO case law, reviewing major cases under GATT Article I (MFN treatment) and Article III (national treatment), and the general problem of production process method (PPM)-based trade measures (of which a child labor import ban is an example). We then examine cases under GATT Article XX, the provision setting forth exceptions under which deviations from other GATT obligations may be justified. In particular, we focus on the meaning and potential use of the Article XX(a) public morals exception and the Article XX(b) human life and health exception in justifying a trade-based strategy. Through a review of the interpretative techniques used by WTO dispute settlement panels and certain developments in the case law, we determine that there indeed may be room within trade rules for legitimate child labor sanctions, and make further proposals for a reform-oriented interpretation of the relevant provisions.

Finally, in Section IV, we conclude that the use of import bans to address child labor practices is in compliance with the WTO system if certain conditions are met. Thereafter, we recommend that trade-based strategies be accepted as a dynamic part of a comprehensive blend of public and private efforts to eliminate the worst forms of child labor.

II. Trade Sanctions Based on Child Labor Practices

The purpose of sanctions is to change the behavior of states.¹⁰ For this reason, if sanctions are to succeed in whole or in part, they must be recognized as legitimate in moral and legal terms.¹¹ In this respect, a multilateral trade sanctions regime is better than a unilateral one because of its enhanced legitimacy. If, for lack of a multilateral alternative, a state is driven to take unilateral trade action to modify another state's behavior—say, in its use or tolerance of forced child labor—it will have squarely to face contentious debate and potential retaliation.

A. Arguments For and Against Trade Sanctions Opposed to Child Labor

When is it justifiable to impose trade sanctions to prevent the exploitation of working children or otherwise protect them? The answer to this question depends in part on the normative traditions of the sanctioning state. In a liberal state favoring Kantian notions of human autonomy, children's rights will be seen as inalienable (belonging to them simply for being human), and trade sanctions in defense of children's rights therefore as moral (assuming a meaningful link between the sanction and the infringed right). Of course, the target state may have a quite different normative tradition than the sanctioning state. For this reason, sanctions critics argue on relativist grounds that a country should not restrict trade access for internal moral reasons. Bhagwati and Srinivasan, for example, find inappropriate "GATT sanctioning of the use of unilateral state action to suspend other countries' trade access, or . . . their trading rights under the GATT 'treaty,' unless one's choice of ethical concerns is adopted by others through implicit harmonization in one's direction . . ."¹²

¹⁰ See Cleveland, "Norm Internationalization and U.S. Economic Sanctions," p. 5.

¹¹ The use of trade sanctions may conflict with the principle of nonintervention, rules of territorial jurisdiction, and GATT trade liberalization principles. *Ibid.*, p. 6. On the other hand, as Cleveland further points out, the U.N. Charter does not bar the use of "nonforcible, economic measures to promote human rights adherence and the principle of nonintervention does not necessarily apply to economic sanctions to further human rights." *Ibid.*, p. 52.

¹² Bhagwati and Srinivasan, "Trade and the Environment . . .," p. 180.

Even granting this objection, however, sanctions opposing child labor cannot be easily condemned outright. Beyond the liberal community, international law ensures that certain human rights attain universal status as positive law because of their widespread recognition in consensual instruments such as International Labor Organization (ILO) conventions and other international agreements.¹³ Within international law, the goal of prohibiting certain child labor practices, e.g., indentured or exploitative child labor, is widely recognized in custom and treaties. This amounts to “explicit” harmonization and justifies sanctions even against cultural relativism objections.

Nevertheless, the cultural relativism/cultural autonomy objection to unilateral sanctions is frequently cited and thus deserves fuller consideration.¹⁴ Bhagwati and Srinivasan argue that the imposition of morally grounded sanctions is improper principally for two interrelated reasons: (1) the “culture specificity” of values and (2) asymmetries in power—the first of these resulting in acts of “unjustified moral militancy that is itself ethically offensive”; the second allowing the Global North to impose “idiosyncratic moral preferences” on the Global South, among others.¹⁵ These arguments, the second especially, highlight that the range of attitudes toward the regulation of child labor through externally imposed trade measures tends to divide along development lines. While some feel that the labor standards (including child labor standards) prevailing in the developing world can be improved only through sanctions, others maintain that cultural differences justify alternative standards and that concerns for labor rights in developing countries are “paternalistic or culturally patronizing.”¹⁶ Developing countries in particular have criticized the trade-labor rights linkage as “protectionist” and “imperialist.”¹⁷

13 See discussion *supra* Section II(C). See also Leary, “Workers’ Rights and International Trade . . .,” pp. 214-19 (claiming that the standards adopted by the ILO are the “best reference for defining ‘internationally recognized worker rights’”).

14 On the relativist-universalist debate generally, see Weston, “The Universality of Human Rights . . .”

15 Bhagwati and Srinivasan, “Trade and the Environment . . .,” p. 180.

16 Howse, “The World Trade Organization . . .,” p. 133.

17 Cleveland, “Norm Internationalization and U.S. Economic Sanctions,” p. 35. See also Leary, “Workers’ Rights and International Trade . . .,” pp. 180-97.

The international regulation of child labor requires more than emotive responses to the value systems shaping different societies' perceptions of the socioeconomic issues that are embedded in labor standards.¹⁸ To begin with, the debate surrounding sanctions on imports produced with child labor must address the degree to which the child labor policies in question actually implicate harmful child labor.¹⁹ Free trade advocates often contend that child labor sanctions are in fact competition-based, a subterfuge designed to "level the playing field"²⁰ (i.e., eliminate differences in labor standards among countries) so as to deprive developing countries of the comparative advantage they enjoy from low labor costs—in other words, rank protectionism.²¹ Of course, free traders are right to challenge any invocation of the rights of working children on purely protectionist grounds. Trade sanctions that are justified by reference to child labor but that in reality serve protectionist interests do not by virtue of their claims to legitimacy acquire genuine moral validity. Kantian liberalism requires, after all, that any trade measures that are geared to the protection of working children must strive to treat the children as ends in themselves, not as means to serve sanctioning country economic or political goals.²² Indeed, the 1998 ILO Declaration on Fundamental Principles and Rights at Work expressly provides that labor standards should not be used for protectionist purposes or for questioning a country's comparative advantage.²³

On the other hand, it must not be assumed categorically that all invocations of child worker rights are thus motivated. Nevertheless, if the Global North wants to escape the criticism that it is using child labor as a "moral shield" to disallow imports from developing countries that enjoy a competitive advantage through cheap labor, it needs to design regimes that are tailored

18 Cleveland, "Norm Internationalization and U.S. Economic Sanctions," p. 40.

19 See *ibid.*. See also Mehta, "Child Labour," pp. 41-42.

20 Howse, "The World Trade Organization . . .," p. 133.

21 Mehta, "Child Labour . . .," p. 40.

22 Garcia, *Building a Just Trade Order . . .*, p. 1025.

23 ILO Declaration on Fundamental Principles and Rights at Work, art. 5 [hereinafter "ILO Declaration"].

clearly to benefit the children and not the domestic industries of the sanctioning state.²⁴ Conversely, developing countries that seek to defend alternative labor standards relative to working children must take care that their justifications are grounded in cultural traditions that demonstrably benefit all the people involved: the children, their families, and their communities. Too often such relativist claims are trumpeted by authoritarian leaders whose policies do not serve as a whole the people they claim to benefit or by industry representatives whose motives and practices are often best explained via Western concepts of greed rather than by reference to other cultural traditions.²⁵

Some free traders argue also that an increased focus on reformist social policies will result automatically from rising incomes through market forces in international trade.²⁶ This economic determinism ignores, however, the historical political struggle that took place in industrialized countries to win the labor standards that exist today.²⁷ Others argue that contemporary free trade orthodoxy is itself the threat; workers would be much better off, it is argued, without the neo-liberal policies of trade liberalization, deregulation of the economy, privatization, and the free market ideology that force wages down and deny people work.²⁸ While this argument is a legitimate global economic policy debate, we cannot wait for its resolution to implement strategies to address child labor, a necessary response within any global economic paradigm, particularly in relation to child labor's "worst forms."

24 See Mehta, "Child Labour . . .," p. 41 (suggesting that it may be poverty and survival rather than choice that forces children to work and arguing that in some cases these children, though poverty-stricken, may be cared for with love and affection).

25 See, e.g., Weston, "The Universality of Human Rights . . .," p. 73 (citing criticisms of pretextual invocation of cultural relativism).

26 See Naiman, "'Rightsizing' the IMF . . .," p. 98; Howse, "The World Trade Organization . . .," pp. 132-33.

27 Naiman, "'Rightsizing' the IMF . . .," pp. 98-99 and n. 5 (repudiating economic determinism by reference to the fact that the United States took over 100 years of protracted social struggle to secure national legislation limiting the working day).

28 Bullard, "The World Workers Need Solidarity . . .," pp. 33-34.

Critics of a trade sanctions approach to child labor in particular perceive this strategy also as too simplistic; they believe that import bans only drive employed children from the formal to the informal sector where they are less exposed to scrutiny and more vulnerable to infringement of their rights.²⁹ At the opposite extreme is the argument that any trade sanction is justified once the child labor practice in question is deemed illegal or immoral, and regardless of its actual impact on the children or whether the sanction actually reduces the offending practice³⁰—a contention that raises the central question of the effectiveness of child labor sanctions, independent of their legitimacy. Before implementing measures that are designed to ensure that children’s interests are protected, one must consider whether linking labor rights to trade actually can improve the conditions of child workers (in the developing world especially) or can eliminate child labor where it should not exist.³¹ In other words, are sanctions effective or useful in protecting children against abusive and exploitative labor?³²

We do not undertake to answer this question definitively here. However, we do recommend some relevant considerations.

Generally it is agreed that for sanctions to be justifiable it must be possible to demonstrate that they can be more or less effective in addressing the root concern. There is less

²⁹ See Ray, “Child Labor, Child Schooling, and . . .,” p. 365. See also Alston, “Labor Rights Provisions in U.S. Trade Law,” pp. 76-77.(arguing that linking child labor with legislation is inadequate and citing ILO study on India that the application of legislation “may not be in the best interest of the families concerned and . . . of the nation at large”).

³⁰ Howse writes that such “results-blind moralism” is rare. Howse, “The World Trade Organization . . .,” p. 152.

³¹ See Bullard, “The World Workers Need Solidarity . . .,” p. 31.

³² Empirical studies on the effectiveness of trade sanctions for the protection of child workers are rare. However, for a general and theoretical analysis of welfare and other effects of the harmonization of labor standards in the trade context, see generally Brown, et al., “International Labor Standards and Trade”(concluding that the case for international harmonization of labor standards is weak and that the harmonization of standards will have negative consequences for those who are meant to be protected).

agreement as to the definition of effectiveness. A simple measure would be the elimination or substantial reduction of child labor practices in the target industry. However, this metric is by itself inadequate to measure the effectiveness of child labor trade sanctions because it fails to take a comprehensive view of the problem. Where the effect of an import ban is to increase the number of working children in the sector producing goods for domestic consumption rather than exports, or in the informal economy in which their rights are even less subject to protection, it could be argued that the sanction has failed.³³ Moreover, if the number of children in the sector producing for domestic consumers increases, the wages may dwindle, adversely affecting all workers.³⁴

These “static” effects must be considered along with “dynamic” ones, however.³⁵ A trade sanction alone may have some positive effects on improving the rights of working children in target countries, but these effects can be enhanced in a dynamic way if combined with such alternatives as providing children with education, social labeling, and other “grassroots” initiatives.³⁶ Conversely, if sanctions fail, poverty rates may be accelerated, as may also the rate of child workers shifting into less-supervised informal sectors.

Regardless of how one measures effectiveness, however, questions of “market leverage” and “industry leverage” are essential considerations (market leverage being the power the sanctioning state can exert over the target state; industry leverage being the power afforded by the ratio of child labor industries in the target state that are export-sensitive to child labor industries in the target states as a whole). In terms of market leverage, a trade sanction imposed consistently by a country with a large market for child labor products would have the strongest

33 Ibid., pp. 154-55.

34 Ibid., p. 155.

35 Ibid.

36 Ibid. See also the discussion in Section IV, *infra*.

effects,³⁷ although without multilateral support such a sanction might fail anyway because the target country can then easily find non-cooperating substitute markets.³⁸ In terms of industry leverage, if the majority of child labor industries are not export-sensitive, then a sanctions strategy will have limited, albeit potentially laudable, effects in addressing target state child labor practices.

B. Case Study: US Child Labor Trade Sanctions Law

To understand better the legal and policy issues raised by a trade-based strategy opposed to child labor, we explore here a particular trade sanctions law with child labor ramifications: Section 307 of the U.S. Tariff Act of 1930, also known as the U.S. “forced labor statute.”³⁹ Section 307 has been amended to include forced child labor, and is therefore the leading U.S. statute on point,⁴⁰ and, given the sway of the U.S. worldwide, of obvious significance to any trade-based approach to human rights enforcement.

Section 307 prohibits the importation of all goods produced wholly or in part in any foreign country by forced labor, and authorizes the Secretary of the Treasury to prescribe such regulations as may be necessary for the enforcement of the provision. Amendments to Section 307 in 1997 barred the use of customs service funds for the importation into the United States of any goods produced by forced or indentured child labor.⁴¹ Additional amendments in 2000 inserted a definition of forced labor, which explicitly included forced child labor.⁴² If a customs

³⁷ See *ibid.* (“global demand will . . . be met through production that complies with the standards in question”).

³⁸ See Stirling, “The Use of Trade Sanctions . . .,” p. 43.

³⁹ U.S. Tariff Act of 1930.

⁴⁰ For U.S. legislation concerning child labor linking it to trade introduced but not enacted, see Tsogas, *Labor Regulation in a Global Economy*, ch. 4 (“Unilateral Application of Labor Standards in Trade Relations”).

⁴¹ Treasury, Postal Service, and General Government Appropriations Act of 1998, Pub. L. No. 105-61, § 634, 111 Stat. 1272 (1997).

⁴² *Ibid.* The regulation does not speak only in terms of “child labor” per se; it includes “convict labor, forced labor and indentured labor under penal sanctions” and explicitly provides for “forced child labor or indentured child labor penal sanctions.”

officer has reason to believe that any merchandise being imported or likely to be imported into the United States is produced in any foreign country with the use of forced child labor, he or she must report this belief to the Commissioner of Customs.⁴³ If the Commissioner conclusively determines that the merchandise is subject to the import ban, the burden is on the importer to establish by satisfactory evidence that the merchandise was not produced in any part with the use of forced child labor in order to have the merchandise released from custody.⁴⁴

In conjunction with Section 307 of the Tariff Act of 1930, and in order to further enforce U.S. laws on forced labor, President Clinton, in 1999, issued an executive order to prevent federal agencies from buying products made with forced or indentured child labor.⁴⁵ “Forced child labor” is defined as involuntary work or service rendered by a person under the age of eighteen,⁴⁶ and under the Executive Order, the Department of Labor, in cooperation with the Department of Treasury and the Department of State, is required to publish a list of products that it reasonably believes might have been produced by forced child labor.⁴⁷ If the contracting officer of an executive agency reasonably believes that forced child labor has been used, the head of the agency will initiate an investigation.⁴⁸ If it is found that the contractor has furnished products produced by forced child labor or uses forced child labor and has submitted a false certification or has failed to cooperate, the head of an executive agency may terminate a contract or debar or suspend a contractor from eligibility for federal contracts.⁴⁹ This Order does show a

43 Moreover, any person outside the Customs Service with reason to believe that such merchandise is being or is likely to be imported into the United States may communicate this belief to the Commissioner. 19 C.F.R. § 12.42(a).

44 19 C.F.R. § 12.42(g).

45 Exec. Order No. 13126, 64 Fed. Reg. 32383, § 1 (June 12, 1999). This Executive Order speaks directly to the prohibition of acquisition of products produced by forced or indentured “child labor.”

46 *Ibid.*, § 6(c). Forced child labor in this section is defined as “all work or service exacted from any person under the age of 18 under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily.” The Executive Order does not apply to the countries party to NAFTA or the WTO. *Ibid.*, § 5(b)(1).

47 *Ibid.* § 2.

48 *Ibid.*, § 3(b).

49 *Ibid.*, § 3(c)(1)-(3).

determination on the part of the Executive Branch to enforce laws relating to child labor practices in foreign countries.⁵⁰

Application of Section 307 has been episodic and, from a child labor perspective, disappointing. During the 1990s, Section 307 of the Tariff Act was invoked to prohibit the importation of certain Mexican products produced with prison or forced labor and was used to ban the importation of leather imports and iron pipe fittings determined by the Customs Service to have been produced with convict or prison labor from China.⁵¹ However, since the 1997 amendment to Section 307 affecting child labor, petitions have been filed to halt importation of rugs from South Asia knotted by children, and cocoa picked by children in the Ivory Coast, with no action taken in either case.⁵²

III. WTO Case Law on GATT Articles I, III and XX: Room for Justifiable Child Labor Sanctions?

Those who claim the WTO downplays adult workers' rights may also conclude that the GATT contains nothing for working children.⁵³ In this section, we seek to demonstrate that WTO case law allows room for distinguishing nondiscriminatory and justified child labor measures from protectionist measures purportedly based on child labor and that therefore it can accommodate a trade-based strategy of import sanctions to protect working children's rights while also safeguarding core trade liberalization principles.

50 However, it does not grant any party rights against the United States, its agencies, or officers to compel enforcement of the Order itself. *Ibid.*, § 7. This means there is no judicial review for violation of this Order and that the United States is immune from suit by any party under it. Section 7 is explicit in that the Order is intended only to improve the internal management of the executive branch. *Ibid.*

51 See Cleveland, "Norm Internationalization and U.S. Economic Sanctions," p. 46 and nn. 280-81.

52 See *ibid.*, pp. 46-47. See also "Child Labor in the Cocoa Industry" (reviewing unsuccessful Section 307 enforcement efforts by the International Labor Rights Fund on behalf of working children).

53 In the words of George Becker, President of the United Steelworkers of America, "[t]here is nothing in it [GATT] for working people. Nothing. That law exists to support multinationals. It is not for workers. There is no way that you can put a comma here or change a word there to make it compatible. It not our law. Scrap it." Quoted in Bullard, "The World Workers Need Solidarity . . .," p. 34.

When the WTO was established in 1994, it incorporated into its governing agreements the original 1947 GATT supplemented by various agreements and understandings.⁵⁴ However, unlike the 1948 Havana Charter, the blueprint for the International Trade Organization, the WTO's stillborn predecessor, neither the WTO Agreement nor the GATT contained any explicit provision permitting trade sanctions against unfair labor conditions.⁵⁵ Furthermore, at their first meeting at Singapore in 1996, the WTO Conference of Ministers, in their Singapore Declaration, expressed their commitment to the observance of internationally recognized core labor standards and, in so doing, acknowledged the ILO as the competent body to set and deal with these standards and supported the ILO's work in promoting them.⁵⁶ In addition, they explicitly rejected any use of labor standards for protectionist purposes, particularly those directed at neutralizing comparative advantage (i.e., leveling the playing field), stating that comparative advantage in low-wage developing countries may in no way be questioned, thereby leaving room for trade measures of a legitimate, non-protectionist nature.⁵⁷ The Singapore Declaration does not formally assign the role of dealing with labor-related trade issues to the ILO, and it does note the importance of existing collaboration with the ILO,⁵⁸ Nevertheless, under the current division of labor, the WTO's chief role is to adjudicate all trade-labor disputes.

Ongoing experience with the WTO Dispute Settlement Understanding (DSU),⁵⁹ the system for panel and appellate body reports, and resulting case law have led to a more effective

54 Collectively, these instruments are referred to as GATT 1994 and comprise a separate Annex to the WTO Agreement. For present purposes and to minimize confusion, we refer to the agreement simply as "GATT."

55 The only possible exception to this is Article XX(e), permitting embargoes of prison labor products, but the emphasis here is on competitiveness concerns rather than unfair labor practices. See Charnovitz, "The Influence of International Labor Standards . . ." and the sources cited therein.

56 See Singapore Ministerial Declaration, ¶ 4.

57 Ibid.

58 Ibid. See also *ibid.*, ¶ 6 (rejecting all forms of protectionism).

59 WTO Understanding on Rules and Procedures . . ."

and credible system for resolving differences among WTO member countries.⁶⁰ We examine here how this improvement in WTO practice may be enhanced in the child labor context, particularly with reference to the exceptions of GATT Article XX. Despite the WTO's unwillingness to assume any policymaking role in respect of trade sanctions relating to labor rights, the WTO's positive impact in this realm would be substantial should a trade sanction based on child labor practices ever successfully come before it due to the preeminence of its dispute settlement mechanism.

A. Substantive GATT Rules

The GATT regime for reviewing the legality of trade-restrictive measures is bifurcated. A complaining party must first establish that a measure violates one or more GATT trade rules, such as articles I, III, or XI. If a violation is established, the responding party may then argue that the violation is permitted under one of a number of recognized exceptions to the GATT rules, most often those enumerated in Article XX. We proceed here accordingly.

1. Article I: MFN Treatment

GATT Article I provides for unconditional most favored nation treatment with respect to tariffs, charges, and other measures. In other words, a member may not provide more favorable treatment to some members than to others with respect to "like products,"⁶¹ a principle well established in WTO case law. Generally, WTO case law reflects a very rigid interpretation of MFN treatment, emphasizing likeness of product, rejecting differentiation based on other factors.⁶² In particular, WTO case law suggests that differences in the production and process

60 See Singapore Ministerial Declaration, ¶ 9 (in which WTO Members affirm satisfaction with operation of DSU). See also Hudec, "The New WTO Dispute Settlement Procedure . . ." (evaluating the success of the DSU).

61 GATT 1994, art. I.

62 The key to the interpretation of Article I is what constitutes "like products," which will depend on the physical characteristics and end uses of the product. A fairly recent panel ruling held that Article I excludes any measure that makes MFN treatment conditional on criteria unrelated to the imported product, again stressing physical characteristics and end uses. *Indonesia – Certain Measures Affecting the Automobile Industry* . . ., ¶¶ 14.143-14.147. Howse concedes that the panel's focus on physical characteristics and end uses was "not

method (PPM) used to manufacture the product in question (such as the use of child labor) is wholly irrelevant to a “like products” analysis.⁶³

2. Article III: National Treatment and Article XI: Elimination of Quantitative Restrictions

GATT Article III allows the importing country to impose its regulations and requirements on imported products as long as they are given treatment no less favorable than that accorded to like products of national origin. Article III covers internal taxation and measures affecting internal sale, offering for sale, purchase, transportation, distribution, or use. Therefore, if the U.S. bans the sale within the U.S. market of child labor products, such as imported rugs knotted by exploited children, and also prohibits the sale of domestically-produced child labor rugs, it would seem to follow that there would be no violation of the national treatment principle since like products are treated equally.

However, two unadopted GATT panel reports on tuna caught with dolphin-unfriendly methods (Tuna-Dolphin I and II ⁶⁴) created a distinction between regulatory measures on products and measures relating to the PPMs, removing the latter category from Article III. The reasoning in these cases was that Article III dealt only with measures on products, not measures

unreasonable” but states that “conditions concerning how a product is produced are *clearly related* to that product, even when they do not affect its physical properties.” Howse, “The World Trade Organization . . .,” p. 138 n.24.

⁶³ See Schoenbaum, “International Trade and Protection of the Environment . . .,” p. 291 (arguing that any attempt to allow panels to adopt a more lenient test by taking PPMs into consideration and to balance the legitimacy of the protected value with the disruption to trading interests is unsuited to WTO panels whose ad hoc judges would be delegated “extraordinary discretion”); Charnovitz, “The Law of Environmental ‘PPMs’ in the WTO . . .,” p. 101 (arguing the same). It may be that the *Asbestos* case’s holding that the health effects of a product are relevant to its likeness, might be a step towards broadening this analysis. See *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*.

⁶⁴ GATT Dispute Panel Report . . . [hereinafter *Tuna-Dolphin I* and “Tuna-Dolphin I” in text] and GATT Dispute Panel Report . . . [hereinafter *Tuna-Dolphin II* and “Tuna-Dolphin II in text].

based on PPMs, and that therefore the U.S. ban on tuna caught with dolphin-unfriendly methods could not be evaluated for simple evenhandedness as a domestic regulation under Article III, but instead constituted an embargo, prohibited in all cases under GATT Article XI.⁶⁵ Had Article III applied, the issue would have been whether imported tuna produced in a dolphin-unfriendly manner was afforded a less favorable or worse treatment than domestically produced tuna caught in a dolphin-unfriendly manner, and the U.S. measure might have succeeded.⁶⁶ Although unadopted pre-WTO panel reports have uncertain legal status, the product-process distinction has been both influential and controversial.

The status of the PPM distinction regarding the scope of Article III is critical to the viability of any trade-based social welfare legislation, including child labor measures. Such measures, if deemed reviewable under Article III and even-handed between domestic and foreign goods, might not violate Article III violation and therefore would survive a GATT challenge. If, however, Tuna-Dolphin's distinction between "product" and "PPM" were to be followed relative to a child labor import ban, such a ban would be held "GATT-inconsistent" at all times.⁶⁷

On account of this potentially broad preclusive effect, the subject of PPM-based measures has been the subject of much scholarly debate. Commentators have observed that WTO treaty law as a whole does not per se prohibit PPMs that impinge on trade⁶⁸ and have argued strenuously that the distinction between products and PPMs in the context of Article III has no basis, especially given that the two Tuna-Dolphin reports were not adopted, and therefore

65 GATT art. XI prohibits non-tariff border restrictions such as embargoes, quotas, and import licenses.

66 See Howse, "The World Trade Organization . . .," pp. 138-42.

67 Some have suggested that the WTO redefine "like products" in Article III so that products could be considered "unlike" on the basis of PPMs. See, e.g., Snape III and Lefkowitz, "Searching for GATT's Environmental Miranda . . .," pp. 782-92. The current interpretation of "like products" turns mainly on physical characteristics, end uses and tariff classifications. The case which details the factors that will be considered for the determination of "like products" is Japan – Taxes on Alcoholic Beverages [hereinafter "Japan Alcoholic Beverages"].

68 Charnovitz, "The Law of Environmental 'PPMs' in the WTO . . .," pp. 60-62.

not binding upon the states involved.⁶⁹ Moreover, a recent Appellate Body decision, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*,⁷⁰ seems to look beyond the narrow physical characteristics of the products, stating that “the health risks associated with a product may be pertinent in an examination of likeness under Article III:4.”⁷¹

Together, these lines of scholarly and legal development suggest that an import ban based on who makes the product might succeed to the extent it is origin-neutral, i.e., it applies to any foreign or domestic producer in any foreign country that employs forced or indentured child labor, and does not impose a policy standard on a foreign government.⁷² But given the current law, the more likely scenario is that these aspects of the regime would have to be analyzed under the exceptions in Article XX because, under traditional analysis, the product is not differentiated as a product by use of child labor, and the ban would therefore violate articles I, III, and/or XI.

B. Guiding a Trade Based Strategy Through GATT Article XX

Assuming that all efforts to reinterpret GATT principles in Articles I and III have failed, Article XX provides for situations in which a WTO member may deviate from its GATT obligations for certain designated policy reasons.⁷³ A three-step inquiry is required to determine whether an otherwise “GATT-illegal” measure is justified under Article XX.⁷⁴ First, the stated policy must come within the scope of one of the categories listed under Article XX—for example, as a measure to protect public morals, or human, animal, or plant life, or health. Second, the measure complained of must be either “necessary” or “related to” the policy

⁶⁹ Howse argues that this distinction between products and PPMs has neither a textual basis nor is supported by the legislative history of the GATT. Howse, “The World Trade Organization . . .,” p. 139.

⁷⁰ *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*.

⁷¹ *Ibid.*, ¶¶ 113, 192.

⁷² *Ibid.*, pp. 83-85.

⁷³ GATT, art. XX.

⁷⁴ See *United States – Standards for Reformulated and Conventional Gasoline* . . . The party asserting Article XX as a defense has the burden of showing that the exception applies. *Gasoline Standards* is the first case that provides an authoritative interpretation of the chapeau; also the first case where an environmental PPM could fit one of the exceptions in Article XX.

allegedly being furthered, depending on the paragraph. Finally, the chapeau (i.e., preamble or introductory clause) of Article XX requires that the application of any measure that otherwise meets the first two tests must not constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade. In other words, Article XX permits policy-driven discrimination between countries as long as it is not arbitrary or unjustifiable.

1. Finding the Right Exception

The first step in evaluating the legality of a child labor sanction under Article XX is to determine which of the enumerated exceptions best covers the regulatory goal of the measure in question, here child labor. There are three immediate possibilities: Article XX(a) for measures protecting public morals; Article XX(b) for measures protecting human life or health; and Article XX(e) for measures banning importation of the products of prison labor. Despite the obvious similarities between products of prison labor and products of forced child labor, Article XX(e) will not be developed here as a suitable exception under which to mount the defense of a child labor trade sanction. It is our judgment that the language and negotiating history of the provision are too narrowly tied specifically to prison labor to allow extension to other forms of forced labor.⁷⁵ This leaves two other options: articles XX(a) and XX(b).

a. Article XX(a): Public Morals Exception

Surprisingly there is no GATT or WTO case law on the public morals exception. Some have argued against interpreting this exception to cover labor rights violations on the grounds that both the reference to prison labor in Article XX(e) and the fact that the Havana Charter included explicit language on labor rights suggest that the drafters did not intend for Article XX

⁷⁵ See Stevenson, "Pursuing an End to Foreign Child Labor Through U.S. Trade Law," pp. 163-64. But see Diller and Levy, "Child Labor, Trade and Investment . . .," pp. 683-85; Stirling, "The Use of Trade Sanctions . . .," pp. 36-39 (arguing that Article XX(e) can serve as the basis for a human rights exception in the GATT).

to cover labor rights (or children's rights had they envisioned regulating child labor).⁷⁶ A powerful counter-argument to this view is that as in the case of constitutional interpretation, it is reasonable and appropriate not to be bound by the drafters' "original intent." Instead, altogether consistent with the international law of treaty interpretation, one should take into account the evolution of thinking about the intersection of trade and human rights in the years intervening, which has developed to include the prohibition of certain labor practices that violate universal human rights, e.g., the prohibition on child labor.⁷⁷

This being said, the hard question remains as to how to resolve what constitutes "public morals" and whose public morals count. It is clear that the provision is intended to protect the public morality of the importing/sanctioning country. Controversy arises, however, when that country, on the basis of its own sense of public morality, seeks, through "outwardly-directed" trade measures, to protect foreigners outside its jurisdiction.⁷⁸ The U.S. law banning goods made with forced child labor via "outwardly directed" trade measures is arguably illustrative in that it attempts to protect working children in other countries from practices the United States considers immoral and/or illegal.

Although there has been no case under the public morals exception in the 50-odd years of the GATT, there is relevant case law interpreting the rest of Article XX. With respect to the "outwardly-directed" problem, the Tuna-Dolphin cases once again raise issues, given that both panels objected to the measures in question as outwardly-directed and coercive. At the same time, it bears noting again that neither panel report was adopted. It also can be argued that the U.S. may be encouraging the target countries to design certain preferred child labor practices but is not coercing them to adopt a particular set of laws or regulations.

76 See, e.g., Howse, "The World Trade Organization . . .," p. 142.

77 This evolutionary interpretative approach in fact reflects the way in which WTO panels have treated the definition of "exhaustible natural resources" in the context of Article XX(g) determinations. See *ibid.*

78 See Charnovitz, "The Moral Exception in Trade Policy," p. 696.

If we view international law as an evolving system, then one could read into Article XX(a) the core labor rights stipulated in the ILO Declaration, including the elimination of child labor.⁷⁹ This reflects the Appellate Body's approach in *Shrimp-Turtle* in which it ruled that the meaning of "exhaustible natural resources" had evolved in light of developments in international law and policy and that even if the exception at issue did not include living species during the drafting stage, it should be interpreted as so now.⁸⁰ In addition, the Appellate Body took account of the preamble to the WTO Agreement which refers to the objective of sustainable development. The same preamble recognizes that trade relations and economic endeavor should be conducted with a view to raising standards of living and ensuring full employment.⁸¹

On this textual basis, a parallel could be used to elicit the meaning of public morals in Article XX(a), as including the protection of working children.⁸² The content of public morals should have a universal and evolutionary character as manifested by the increasing number of international agreements with widespread ratifications among states, and by the ILO Declaration setting forth core labor rights.⁸³

Finally, the drafting history of GATT between 1945 and 1948 shows little other than the possibility of covering alcohol.⁸⁴ Nevertheless, Charnovitz, examining other trade agreements containing moral exceptions prior to 1948,⁸⁵ concludes that public morals concerns were both outwardly-directed and based on "beliefs about morality and rectitude."⁸⁶

79 Howse, "The World Trade Organization . . .," pp. 142-43.

80 United States – Import Prohibition of Certain Shrimp and Shrimp Products, ¶ 129 [hereinafter "*Shrimp-Turtle*"]. The case concerned the U.S. import ban of shrimp caught in a manner threatening to sea turtles. See also GATT art. XX(g), an exception for the conservation of exhaustible natural resources.

81 Final Act Embodying the Results of the Uruguay Round . . .

82 The Appellate Body has stated that while not binding in subsequent disputes, adopted panel reports should be taken into account by panels where relevant. See *Japan Alcoholic Beverages*, p. 15.

83 Howse, "The World Trade Organization . . .," p. 169.

84 See Charnovitz, "The Moral Exception in Trade Policy," p. 704-05.

85 *Ibid.*, pp. 705-10 and n. 123 (listing trade agreements containing moral or humanitarian exceptions).

86 *Ibid.*, p. 713.

At a minimum, then, the protection of public morals outside the importing/sanctioning country is not precluded from Article XX(a). However, a stronger—and in our view equally valid—argument is that a trade sanction opposed to child labor is not outwardly-directed at all. Instead of basing a sanction against child labor on the theory that the child labor production process in the target country violates our sense of public morality, one could instead base the sanction on the theory that the presence of the child labor product in our own jurisdiction violates our public morality, in much the same way that the presence of pornographic material or illegal arms or drugs in our jurisdiction endangers our public morality. A child labor trade sanction thus would be no different from any of the other types of sanctions traditionally understood as falling within the ambit of Article XX(a). The difficulty with this argument lies in its novel interpretation of the child labor product as itself being “tainted” with the abusive practices underlying its production, or as representing a moral “temptation” to the consumer in the importing/sanctioning country to choose lower-cost products that are cheap due to the labor of children. This approach would represent a departure from the traditional view, although not without basis in the environmental cases that “dolphin-unfriendly” tuna should not be considered a “like product” to dolphin-friendly tuna.

b. Article XX(b): Human Life and Health Exception

It is not difficult to argue initially that a measure aimed at eradicating forced child labor would be a measure aimed at protecting human life or health. The case law interpreting Article XX(b), however, interposes some juridical hurdles on the way to this conclusion, such as the question of the provision’s jurisdictional scope and whether it covers only products harmful to human life and health or whether it includes processes and production methods as well.⁸⁷

87 See generally Diller and Levy, “Child Labor, Trade and Investment . . .”

In this connection, it is important to recall that the WTO panel in the Tuna-Dolphin litigation did not on final analysis limit the jurisdictional scope of the life or health to be protected by the trade-restricting measure involved in those cases.⁸⁸ Similarly, while the Appellate Body in Shrimp-Turtle also found the measure in question inconsistent with the GATT, it did not object to the extraterritoriality of the measure.⁸⁹

Thus, if a measure protecting the life and health of animals outside the jurisdiction of the importing country is covered by Article XX(b), there appears to be no reason for excluding an extraterritorial child labor measure for that reason alone. It was the discriminatory application of the U.S. measure in Shrimp-Turtle, not its extraterritoriality, that led the Appellate Body to find the import ban to be GATT-illegal.⁹⁰

2. The Necessity Test

Once it has been determined that a measure falls within the scope of an enumerated exception, the WTO panel would turn to examine what is usually termed the “trade-off” mechanism embedded in the particular exception. The GATT uses a variety of trade-off mechanisms—such as “rational relation” or “necessity”—which together indicate the weight or balance to be given to trade versus non-trade values at stake in the adjudication. Both paragraphs (a) and (b) of Article XX employ the “necessity” test.

The interpretation of “necessity” or “necessary” has been strict and has come to mean use by the state of the “least trade-restrictive measure available to achieve the policy goal.”⁹¹ In the Article XX(b) context, the panels in Tuna-Dolphin I and II first considered the meaning of

88 See GATT Dispute Panel Report . . . [Tuna-Dolphin II], ¶¶ 5.15-5.16.

89 United States – Import Prohibition of Certain Shrimp and Shrimp Products . . .,” ¶ 2.16. The case concerned the U.S. import ban of shrimp caught in a manner threatening to sea turtles.

90 Charnovitz, “The Law of Environmental ‘PPMs’ in the WTO . . .,” p. 94.

91 Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes, ¶ 74.

“necessary”⁹² and noted that the United States had not exhausted all options reasonably available to it in pursuit of its dolphin protection objectives. Additionally, they reasoned that a measure (the import ban) which depends for its success (protecting dolphins) on forcing changes in target state practices (such as tuna harvesting methods) could not by definition ever be “necessary” in itself to the protection of animal life.⁹³

In *Shrimp-Turtle*, the Appellate Body rejected this interpretation of “necessary,” reasoning that to deem measures requiring exporting countries to comply with certain policies prescribed by the importing country to be a priori incapable of justification under Article XX, would render most Article XX exceptions useless, a result which the Appellate Body characterized as “abhorrent to the principles of interpretation [the Appellate Body is] bound to apply.”⁹⁴ Accordingly, the fact that the success of a child labor import ban implicitly depends on exporting countries adopting measures to protect children or to ban child labor, does not automatically render the defense under Article XX(a) or (b) hopeless.

GATT application of the necessity test is subject to several additional criticisms. First, the word “necessary” is part of a purpose clause, with its object the protection of a social good, such as public morals.⁹⁵ However, the “least trade restrictive” construction of this language makes the provision incapable of relating to a social good such as the protection of “public morals” or “human life or health”; instead it asks whether the sanction would be a necessary departure from the GATT, seemingly a misconstruction of the text.⁹⁶ If this interpretation is taken literally, it suggests that there may be a less trade-restrictive alternative (for instance, in the child labor context, social labeling or compensation to the target exporting country for use of

92 See GATT Dispute Panel Report . . . [Tuna-Dolphin I].

93 Ibid., ¶ 5.28.

94 United States – Import Prohibition of Certain Shrimp and Shrimp Products . . .,” ¶ 121.

95 See Schoenbaum, “International Trade and Protection of the Environment . . .,” p. 276 (outlining criticisms of the panel’s “least trade restrictive” interpretation in the Article XX[b]).

96 See *ibid.*

educating children) and that therefore the import ban based on child labor practices would be “GATT-inconsistent” and not saved by the Article XX interpretive techniques thus far employed.

If this interpretative judgment is correct, then the best alternative approach (and the only one capable of rescuing a trade-based strategy) is for the Appellate Body to develop through its case law a requirement that, to give meaning to Article XX(a) and (b), panels inquire into the actual effectiveness or feasibility of alternatives for the protection of public morals or human life or health.⁹⁷ Instead of judging the necessity of such protection according to its effects on trade, a panel should find a “significantly less effective” alternative measure protecting public morals to be not “reasonably available,” thereby paving the way to validation of the measure.⁹⁸

This approach is confirmed in the context of human life and health, though the WTO Agreement on Sanitary and Phytosanitary Measures (SPS Agreement).⁹⁹ Under the SPS Agreement, members may take measures necessary to protect human and animal health¹⁰⁰ subject to the standard that the measures must “not be more trade-restrictive than required to achieve their appropriate level of protection”—thereby granting to members the right to choose their own level of protection.¹⁰¹ The measure would not be more trade restrictive than required unless there is another measure reasonably available or feasible that would achieve the same

97 See Howse, “The World Trade Organization . . .,” pp. 144-45. See also Garcia, “Building a Just Trade Order For a New Millennium,” p. 1058. This approach can be supported by reference to the necessity test in the WTO Agreement on Sanitary and Phytosanitary Measures, which explicitly requires such a comparative evaluation.

98 See Garcia, “Building a Just Trade Order For a New Millennium,” pp. 1058, 1060, 1061. A necessity test should require that a panel find a less-trade-restrictive alternative measure “equally effective” in protecting human rights to be disqualified as a justified measure. *Ibid.*, p. 1061. Therefore, if negotiation among countries, social labeling, private actors’ collective actions, or financial compensation for target countries are deemed not as effective as a trade sanction, the sanction would pass the necessity test.

99 WTO Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter “SPS Agreement”). The SPS Agreement deals with measures relating to additives, contaminants, toxins and disease-carrying organisms in imported food, seeking to protect life or health within the importing country, and thereby excluding any non-product-related PPMs from coverage.

100 *Ibid.*, arts. 2.1 and 2.2.

101 *Ibid.*, art. 5.6.

goal.¹⁰² Thus, if, for example, financial compensation, social labeling, or voluntary corporate codes of conduct would not do the job as effectively as the import ban on child labor products, the sanction would be held necessary.

Recent case law suggests moderation of the rigors of the necessity test where important social goals are at stake. In the Asbestos case, for example, the first to have found that a measure satisfied Article XX(b), the Appellate Body asked “whether there is an alternative measure that would achieve the same end and that is less restrictive of trade than a prohibition.”¹⁰³ It concluded in the negative, upholding the French ban, and in so doing, was highly concerned to respect France’s chosen level of protection from asbestos, thereby importing concepts more fully developed under the SPS Agreement. This deference to national regulatory autonomy in determining what possible “less-trade-restrictive” measures are deemed in fact “reasonably available” could bode well for the viability of a child labor import ban if such a ban is ever litigated.

3. The Chapeau

If a child labor measure survives the first two prongs of the Article XX analysis, it must surmount, finally, the chapeau test (which looks at how the measure is actually applied). Although “unjustifiable discrimination,” “arbitrary discrimination,” and “disguised restriction on international trade” seem to intermingle with each other, they have been construed as separate though interrelated. According to the Appellate Body in Shrimp-Turtle, for example, it is not necessarily “GATT-illegal” to impose a government policy extraterritorially provided one is “sensitive” to the conditions in each country and the resulting administrative process meets minimum standards of transparency and procedural fairness.¹⁰⁴ The Appellate Body stressed the

102 Ibid., art. 5.6 n.3.

103 European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, ¶ 172.

104 United States – Import Prohibition of Certain Shrimp and Shrimp Products, ¶¶ 177-82; Charnovitz, “The Law of Environmental ‘PPMs’ in the WTO . . .,” p. 96.

need to treat equally the countries where same or similar conditions prevail and to treat differently the countries where different conditions exist.¹⁰⁵

Following this logic, a U.S. sanction opposing forced or indentured child labor will be justified if it applies the definition of forced or indentured child labor evenhandedly to countries faced with similar situations. Also, the U.S. would have to take into account special circumstances in individual target countries. For example, a sanction based on forced and indentured child labor would be permissible where domestic equivalent practices are also prohibited. However, taking agriculture as an example, in view of the differences between the agrarian sectors of the U.S. economy and those in many developing countries, a sanction used in response to the “traditional, non-exploitive use of underage workers in small, family-based agriculture” could constitute unjustifiable discrimination, even if similar practices are prohibited in the United States.¹⁰⁶

Finally, several WTO panels suggest that the existence and extent of prior multilateral negotiations are important factors in determining whether a unilateral extraterritorial measure will survive the chapeau.¹⁰⁷ Given that labor conventions are typically negotiated internationally, including agreements covering child labor, this does not mean that fresh multilateral negotiations are necessarily an absolute requirement of a unilateral child labor sanction. However, when a country such as the United States has a poor record of ratifications of international human rights conventions (for example, only one of eight fundamental ILO conventions in the case of the United States), a dispute resolution panel might view the imposition of a unilateral labor-related import ban by such a country as inconsistent with its

105 See United States – Import Prohibition of Certain Shrimp and Shrimp Products, ¶¶ 161-76.

106 Howse, “The World Trade Organization . . .,” p. 145.

107 See Charnovitz, “The Law of Environmental ‘PPMs’ in the WTO . . .,” p. 108.

record of multilateral efforts.¹⁰⁸ Furthermore, any selectivity in the administration of a trade sanction by a country prone to unilateralism would likely undermine international respect because the sanction might be considered to be promoting only the “human rights du jour” of the sanctioning country.¹⁰⁹ Therefore, in the case of the United States at least, maintaining consistency is critical for the legitimacy and justifiability of the its child labor based sanction.¹¹⁰

C. WTO Law and U.S. Section 307

Since international organizations tend generally to lack human rights enforcement mechanisms beyond the “mobilization of shame,” the WTO stands out as an attractive if not the ideal arena in which to confront fundamental violations of internationally recognized labor rights, including the rights of working children. It is unlikely that a targeted WTO member country would protest a sanction issue in a WTO dispute settlement proceeding lest it publicize its child labor practices. Nevertheless, since legality is central to international legitimacy independently of whether or not the measure ever will be litigated, it is important to consider the trade law issues discussed above when designing and implementing a child labor trade sanction.

Taking Section 307 of the U.S. Tariff Act of 1930 as our model, we have analyzed the key features of a trade sanction which raise issues under WTO standards. Based on this analysis, we conclude that Section 307 is capable of surviving a WTO challenge. The fact that trade sanctions such as Section 307 are targeted at a production process and not at a product per se raises important interpretive issues, but we conclude that such sanctions are not or should not be a problem under current WTO law. The more difficult question is whether child labor sanctions can be excused under the existing public morals or human life and health exceptions of the

108 See Cleveland, “Norm Internationalization and U.S. Economic Sanctions,” pp. 69-73 (analyzing the criticisms of U.S. unilateralism).

109 Ibid., p. 74

110 Ibid., p. 85.

GATT. As argued above, it is reasonable and appropriate to conclude that they do come within the scope of the exceptions.

The most serious issue is unilateralism. Section 307 is unilateral in nature since it allows the U.S. to act essentially on its own determination.¹¹¹ While a unilateral sanction is inherently controversial, such sanctions can prove to be multilateral *de facto*¹¹² when there is a multilateral legal or moral consensus underlying a *de jure* unilateral ban. This is to the good given that, as discussed above, a multilateral approach to trade sanctions is to be preferred over a unilateral one. The most troubling scenario, implying that there exists no international consensus whatsoever, would be a sanction that is unilateral in both law and fact. #This issue presents the greatest risk to Section 307 and similar trade sanctions. In interpreting the Article XX chapeau, the WTO Appellate Body has indicated that it expects sanctioning countries to engage in bona fide multilateral negotiations before resorting to unilateral action. Section 307 is not a response by the U.S. to failed multilateral negotiations, but international standards prohibiting forced or indentured child labor do confer a *de facto* multilateralism on Section 307.

Given the spotty U.S. record relative to multilateral human rights instruments, it remains to be seen if this conferral would be enough under WTO law. A fully multilateral trade sanctions regime would be subject to less opposition and create less criticism on “culture specificity” and “power asymmetry” grounds, but *de facto* multilateralism at least is preferable to pure unilateralism.

IV. Conclusion

Trade sanctions that take aim at child labor practices to enhance the human rights of working children, such as Section 307 of the U.S. Tariff Act of 1930, have a role to play in the

111 See *ibid.*, pp. 23-24 (explaining that countries without a formal measure could provide *de facto* “low profile support” for a *de jure* U.S. sanction or threat, as imposed on Iraq after the Gulf War, for example).

112 *Ibid.*, pp. 24-25.

internationalization of fundamental values. Sanctions can influence producers in particular child labor sectors, they can attract foreign attention to the importance of protecting exploited children in various parts of the world, and they can increase multilateral pressure on the target country. In sum, they can move states and private actors “from one-time grudging compliance to habitual internalized obedience.”¹¹³

Since a trade-based strategy must work within the rules of the GATT, the means employed to address child labor through trade sanctions must be designed carefully. We have argued that, if correctly legislated and enforced, the use of unilateral child labor sanctions such as Section 307 can be justified under the GATT. Since 1995, WTO case law addressing Article XX has evinced progressive development in its interpretation of specific exceptions, the necessity test, and in the utilization of the chapeau, shedding light on how to reconcile human rights values and trade values that may at the outset appear in conflict.

Given the fact that child labor enforcement efforts under Section 307 have so far been fruitless, it is disappointing that the WTO as currently constituted has no active role to play in compelling any state to enforce international child labor standards. However, by ruling positively on any unilateral child labor sanction statute that comes before them, future WTO panels can play an important continuing role in shaping the interpretation of GATT provisions to promote fundamental human rights, in particular the human rights of working children.

One conclusion that emerges forcefully from this volume is that child labor is a complex social phenomenon with many causes. Many of the social factors contributing to child labor, including ignorance, avarice, and prejudice, may be addressed effectively through trade sanctions, supplemented by consciousness-raising strategies. However, the efforts of reform-minded states must not end with the imposition of trade sanctions. Child labor sanctions alone

113 Koh, “Why Do Nations Obey International Law?,” p. 2646, 2655.

are inadequate to address the root causes and extent of child labor because there always is the risk that children who lose employment in a targeted sector will move to another area, perhaps into the informal and potentially even more dangerous economy. Sanctioning states must look beyond trade measures to find all variety of effective market-oriented strategies that can persuade producers, consumers, and investors to pursue policies protecting children. If possible, such measures should be pursued prior to, and in tandem with, the imposition of any trade sanction. Skillfully designed trade sanctions; consumer education and boycotts involving child labor products; social labeling; consumer boycotts, socially responsible investing; corporate self-discipline; and union consolidation around the rights of working children—all and more are needed to ensure the successful furthering of children’s rights.¹¹⁴

One cautionary note: the fact that poverty is a leading cause of child labor should lead to caution in designing regulatory responses that do not contain a poverty-reduction component. It does little to advance the protection of children’s rights if sanctions and other market-oriented strategies lead to the elimination of legitimate, albeit marginal, industries employing children who then are forced by poverty into the even riskier informal economy. This does not mean that sanctions have no place; they are a necessary tool for realigning both producer and consumer interests toward the pursuit of more difficult, but ultimately necessary, societal reforms. Trade sanctions by themselves, and indeed market-oriented strategies as a whole, are nevertheless unlikely to constitute an adequate response unless coupled with broader measures aimed at alleviating poverty. This multifaceted approach is essential for protecting the rights of working children and for resolving social and economic problems that compelled the children to enter the workplace in the first place.

114 For convenient discussion of these “extra legal” initiatives, see in this volume Weston and Teerink, ch. 10, “Abolishing Child Labor . . .”; Cullen, ch. 4, “From Treaties to Labels . . .”; and Wiseberg, ch. 14, “NGOs in the Struggle . . .” In addition, see, e.g., Macklem, “Labor Law Beyond Borders”; Schrage, Promoting International Worker Rights Through Private Voluntary Initiatives . . .; U.S. Department of Labor, *By The Sweat & Toil of Children* . . ., vols. 3 (1996) and 4 (1997).

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