

The Labor Link: Applying the International Trading System To Enforce Violations of Forced and Child Labor

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I. INTRODUCTION

On May 23, 1993, when President Clinton signed Presidential Executive Order No. 12850, he renewed China's most favored nation¹ ("MFN") trade

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1. Most favored nation status is "an obligation to treat activities of a particular foreign country or its citizens at least as favorably as it treats the activities of any other country." JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 136 (1989). The U.S. Trade Act of 1974, Pub. L. No. 93-618, § 402, 88 Stat. 2056 (codified at 19 U.S.C. § 2432 (1988)), authorizes the President to extend MFN status to those nonmarket

status with the United States for an additional year. The Order placed mandatory conditions on the further renewal of MFN status by requiring China to end prison-labor exports to the United States and to make "overall, significant progress" in the area of human rights by June 1994.² Twelve months later, however, President Clinton renewed China's MFN status with virtually no conditions even though he acknowledged that China had failed to meet the requirements embodied in the 1993 Order. More significantly, the President stated that he was abandoning efforts to link China's MFN status to improvements in its human rights performance,³ a policy stance that had precipitated annual battles between Congress and the President since the Tiananmen Square Massacre in 1989.⁴

Certain members of Congress, mostly from President Clinton's own political party, reacted angrily to the announcement and proposed a bill to reinstitute the trade-human rights linkage by imposing new trade sanctions on

economy countries that allow their citizens the right or opportunity to emigrate. China can only receive MFN status if the President certifies China's emigration policy and Congress does not vote to deny China this status.

MFN is one of the fundamental principles underlying the General Agreement on Tariffs and Trade ("GATT"). It is also one of the fundamental principles underlying the World Trade Organization ("WTO"), as the WTO agreement incorporates all prior GATT agreements. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Agreement Establishing the Multilateral [World] Trade Organization, GATT Doc. MTN/FA (Dec. 15, 1993), *reprinted in* 33 I.L.M. 13 [hereinafter WTO Agreement].

On April 15, 1994, after over seven years of negotiations, leaders from more than 117 countries signed the Final Act of the Uruguay Round Negotiations of GATT at Marrakesh, Morocco. U.S. GENERAL ACCOUNTING OFFICE, GAO/GGD-94-83b, THE GENERAL AGREEMENT ON TARIFFS AND TRADE URUGUAY ROUND FINAL ACT SHOULD PRODUCE OVERALL U.S. ECONOMIC GAINS 6 (1994) [hereinafter URUGUAY ROUND SHOULD PRODUCE U.S. GAINS]. This historic agreement not only established the WTO, the successor to GATT, but also achieved numerous other trade agreements on goods, services, intellectual property rights, trade-related investments, and dispute settlement practices. *Id.*

The WTO "provide[s] the common institutional framework for the conduct of trade relations among its Members in matters related to the [Final Act] agreements and associated legal instruments included in the Annexes to this Agreement." WTO Agreement, *supra*, art. 2, ¶ 1. It creates a single institutional framework to implement and operate all trade agreements associated with GATT and the Uruguay Round. GATT FOCUS (Info. and Media Rel. Division of the GATT, Geneva, Switz.), May 1994, at 11; Amelia Porges, *Introductory Note to General Agreement on Tariffs and Trade — Multilateral Trade Negotiations (The Uruguay Round): Final Act Embodying the Results of the Uruguay Round of Trade Negotiations*, Dec. 15, 1993, 33 I.L.M. 1, 2.

The WTO iterates the same objectives as GATT. 107 GATT FOCUS, *supra*, at 11. It also incorporates many of the same definitions and concepts that GATT developed. This Article will therefore consider the WTO to be indistinct from GATT and will use the term "GATT/WTO." For an overview of the WTO and the Final Act, see generally *The Final Act of the Uruguay Round*, NEWS OF THE URUGUAY ROUND (Info. and Media Rel. Division of the GATT, Geneva, Switz.), Apr. 5, 1994; Porges, *supra*; Richard H. Steinberg, *The Uruguay Round: A Legal Analysis of the Final Act*, INT'L Q., Apr. 1994, at 1; URUGUAY ROUND SHOULD PRODUCE U.S. GAINS, *supra*.

2. Elaine Sciolino, *Clinton and China: How Promise Self-Destructed*, N.Y. TIMES, May 29, 1994, at A1, A8.

3. *Clinton's Call: Avoid Isolating China*, N.Y. TIMES, May 27, 1994, at A8.

4. Thomas L. Friedman, *U.S. Is To Maintain Trade Privileges for China's Goods: Clinton Votes for Business*, N.Y. TIMES, May 27, 1994, at A1, A8. On May 2, 1992, President Bush vetoed legislation that would have conditioned the renewal of China's MFN status on improvement of its human rights practices. He argued that attaching such conditions would retard the progress of U.S.-China relations. *Bush Vetoes Bill to Link Trade with China on Its Rights Record*, CHI. TRIB., Mar. 3, 1992, at 5. On March 18, 1992, the U.S. Senate failed to override President Bush's veto. *China/MFN: Senate Sustains President's Veto of Bill Conditioning MFN Status for China*, BNA INT'L TRADE DAILY, Mar. 20, 1992, available in LEXIS, News Library.

China.⁵ The U.S. House of Representatives, however, overwhelmingly defeated the bill and later endorsed the President's decision to abandon the trade linkage.⁶ This controversy⁷ represents but one battle in a larger debate about the propriety of nations imposing economic sanctions to enforce human rights.

While the international community has promulgated many laws and conventions since World War II regarding international human rights, the implementation of human rights norms has remained a major problem.⁸ Sadly, international human rights scholars have paid little attention to this problem; most concern themselves with the rules while ignoring the processes under which human rights rules operate.⁹

Much of international human rights enforcement depends on the use of monitoring, reporting, publicity, and moral persuasion.¹⁰ Yet such devices have proven inadequate for effective enforcement. Human rights violations are seen primarily as a domestic concern. Because governments usually violate their own citizens' rights and thus do not directly harm other states, foreign nations have weak incentives to retaliate against a state that has abrogated its human rights commitments. In contrast, materially interdependent states have stronger incentives to ensure compliance with international norms.¹¹ This point explains why states, while reluctant to criticize each other in human rights matters, scrupulously police each other in trade matters.

A number of human rights standards are also viewed as international labor standards. These include freedom of association, the right to organize and bargain collectively, the abolition of forced labor, and establishment of a minimum age for child labor.¹² Scholars¹³, unions,¹⁴ and countries¹⁵ have

5. David R. Sands, *Top Democrats Challenge Clinton on China Trade*, WASH. TIMES, June 17, 1994, at A1.

6. Keith Bradsher, *Bill to Restrict China's Imports Loses in House*, N.Y. TIMES, Aug. 10, 1994, at A7; Sue Kendall, *House Strongly Supports Clinton on China's MFN*, AGENCE FRANCE PRESSE, Aug. 10, 1994, available in LEXIS, News Library.

7. For recent articles concerning the various positions in this debate, see, Bill Bradley, *Trade, the Real Engine of Democracy*, N.Y. TIMES, May 25, 1994, at A21; Holly Burkhalter, *The Unmaking of a Human Rights Policy*, AM. LAW., June 13, 1994, at 6, available in LEXIS, News Library; Hobart Rowen, *Too Cozy with China's Despots*, WASH. POST, Aug. 11, 1994, at A31; David C. Unger, *Editorial Notebook: Human Rights Diplomacy, R.I.P.*, N.Y. TIMES, June 13, 1994, at A14.

8. W. Michael Reisman, *Through or Despite Governments: Differentiated Responsibilities in Human Rights Programs*, 72 IOWA L. REV. 391, 394 (1987).

9. Mark W. Janis, *Foreword: International Courts and the Efficacy of International Law*, 2 CONN. J. INT'L L. 261, 263-65 (1987).

10. See Jack Donnelly, *International Human Rights: A Regime Analysis*, 40 INT'L ORG. 600, 619 (1986); Dinah Shelton, *International Enforcement of Human Rights: Effectiveness and Alternatives*, 74 AM. SOC'Y INT'L L. PROC. 6, 7-8 (1980).

11. Donnelly, *supra* note 10, at 616-19.

12. See Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2411(d)(3)(B)(iii) (1988); Trade and Tariff (General System of Preferences Renewal) Act of 1984, 19 U.S.C. § 2462(a)(4) (1988); see also Ray Marshall, *Trade-Linked Labor Standards*, in INTERNATIONAL TRADE: THE CHANGING ROLE OF THE UNITED STATES 67, 71 (Frank J. Macchiarola ed. 1990) (Proceedings of The Academy of Political Science); Gijsbert van Liemt, *Minimum Labour Standards and International Trade: Would a Social Clause Work?*, 128 INT'L LAB. REV. 433, 436-38 (1989).

13. See, e.g., GOTE HANSSON, SOCIAL CLAUSES AND INTERNATIONAL TRADE 11-42 (1983); INTERNATIONAL LABOR RIGHTS AND EDUCATION RESEARCH FUND, TRADE'S HIDDEN COSTS: WORKER RIGHTS IN A CHANGING WORLD ECONOMY x-xiv (1988) [hereinafter TRADE'S HIDDEN COSTS]; Philip Alston, *International Trade as an Instrument of Positive Human Rights Policy*, 4 HUM. RTS. Q. 155-56

argued that because labor is an input in the production of goods that enter the international trading system, violations of international labor standards should be enforced through trade sanctions. Unfortunately, most proposals for enforcing labor standards through trade law lack the details necessary for implementation.

This Article examines two international labor standards: prohibition of forced labor and a minimum age for child employment.¹⁶ It assumes that both of these standards are customary international law norms.¹⁷ This Article argues that violations of these standards by a state, either directly or by its failure to adequately police violations, constitute a state subsidy to the producers of those goods and thereby give the violating state an unfair competitive advantage in its trading relations with other countries. Therefore, states exploiting this unfair competitive advantage should be sanctioned in their

(1982); Gus Edgren, *Fair Labour Standards and Trade Liberalization*, 118 INT'L LAB. REV. 523 (1979).

14. See, e.g., INTERNATIONAL CONFEDERATION OF FREE TRADE UNIONS, FREE TRADE UNIONS FOR A DEMOCRATIC WORLD ORDER: THE ROLE OF THE ICFTU 7-23 (1992) [hereinafter *ROLE OF ICFTU*]; INTERNATIONAL METALWORKERS' FEDERATION, TRADE AND WORKERS' RIGHTS — TIME FOR A LINK 3-8 (1988) [hereinafter *TIME FOR A LINK*].

15. Since 1979, the United States has submitted proposals for international labor standards to GATT. Canada also supported the concept of developing a fair international labor standards system in 1979. HANSSON, *supra* note 13, at 27-28. During the Lome II negotiations in 1978, the European Economic Community ("EEC") proposed and later withdrew a provision that would have linked trade relations to international labor standards. Philip Alston, *Linking Trade and Human Rights*, 23 GERMAN Y.B. INT'L L. 126, 137-38 (1980).

16. The scope of this Article is limited to these two international labor and human rights norms because they are the most easily defined of this group of standards. However, the discussion of international enforcement mechanisms and regimes may help illuminate solutions concerning other human rights.

17. This assumption is extremely credible given the widespread acceptance of the principles. With regard to forced labor, a number of international and regional agreements, conventions, and treaties have been promulgated that deal with the abolition of practices such as forced labor and debt bondage. See, e.g., Convention Concerning Forced or Compulsory Labor (No. 29), June 28, 1930, reprinted in 1 INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS 155 (1982) (most widely ratified of all ILO conventions, with 129 country ratifications as of 1992); Convention Concerning the Abolition of Forced Labour (No. 105), June 25, 1957, reprinted in 1 INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS 618 (ratified by 110 countries as of 1991); International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter *Economic, Social and Cultural Rights Covenant*]; International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). Virtually all states have constitutionally or statutorily outlawed slavery. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. e, reporter's note 4 (1987) [hereinafter *RESTATEMENT OF FOREIGN RELATIONS*].

Significant international action has taken place during this century to protect the rights of children and to regulate their employment. This action is reflected in the adoption of many international and regional agreements and treaties. See, e.g., Convention Concerning Minimum Age for Admission to Employment, No. 138, June 26, 1973, 1015 U.N.T.S. 297 (1976) [hereinafter *ILO Minimum Age Convention*, No. 138]; Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 (1948); Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), U.N. GAOR, 14th Sess., Supp. No. 19, at 16, U.N. Doc. A/4354 (1959); Economic, Social and Cultural Rights Covenant, *supra*; Convention on the Rights of the Child, Nov. 20, 1989, U.N. Doc. A/RES/44/25, reprinted in 28 I.L.M. 1448 (entered into force Sept. 2, 1990).

Almost all states have adopted legislation establishing a minimum age for employment, and the principle is widely accepted. International Labour Office, *The Emerging Response to Child Labour*, 7 CONDITIONS OF WORK DIG. 1, 7-12 (1988) [hereinafter *Emerging Response to Child Labour*]. One hundred and fifteen countries have enacted national legislation establishing the basic minimum age for employment at either 14 years of age or older. *Id.* at 10 (Table 2). Only one nation, the United Republic of Tanzania, has a minimum age for employment in light work under 12 years, and only 13 nations have determined that the minimum age for employment for hazardous work is under 16 years. *Id.* at 11-12.

trading relations. Specifically, this Article proposes that the dispute resolution mechanisms of the International Labor Organization ("ILO") and the General Agreement on Tariffs and Trade/World Trade Organization ("GATT/WTO") be linked explicitly to enforce international labor standards through trade sanctions. Once international human rights violations are acknowledged as producing unfair competitive advantages, states will realize that they have an incentive to protect their own material interests by sanctioning the violator. In effect, the self-interests of each state can be used to promote and enforce adherence to human rights standards.

Part II of this Article demonstrates how lax enforcement of these international labor standards leads to persistent and gross human rights violations with transnational economic consequences. This Part also argues that current international and regional human rights enforcement regimes are inadequate. Part III introduces the concept of viewing violations of these two international labor standards as state subsidies or "social dumping,"¹⁸ by which a state gains an unfair competitive advantage within the international trading system. Part IV examines the structure, enforcement provisions, and dispute settlement procedures of the ILO and GATT/WTO, the two institutions that would operate within an international enforcement regime to prevent labor abuses. Finally, Part V demonstrates how combining ILO and GATT/WTO enforcement and dispute procedures could better deter and sanction violations of forced and child labor.

II. VIOLATIONS OF INTERNATIONAL CUSTOMARY LAW AND LABOR STANDARDS AND THE IMPOTENCE OF CURRENT INTERNATIONAL HUMAN RIGHTS ENFORCEMENT REGIMES

A. *State Nonconformity to Norms Against Forced and Child Labor*

Although slavery, forced or compulsory labor,¹⁹ and the employment of underage children²⁰ are transgressions of customary international law, gross

18. The term "social dumping" means the "export of products that owe their competitiveness to low labour standards." Steve Charnovitz, *The Influence of International Labour Standards on the World Trading Regime*, 126 INT'L LAB. REV. 565, 566 (1987) [hereinafter Charnovitz, *Influence of Labour Standards*]. The problem was considered as early as 1927 during the World Economic Conference convened by the League of Nations. *Id.*; Steve Charnovitz, *International Trade and Worker Rights*, 7 SAIS REV. 185, 185 (1987) [hereinafter Charnovitz, *International Trade*].

19. Slavery has been defined as the "status or condition of a person over whom any or all of the powers attaching to the rights of ownership are exercised." Slavery Convention, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 251, art. 1. Forced labor has been described as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily." Convention Concerning Forced or Compulsory Labour (No. 29), *supra* note 17, art. 2, ¶ 1. Debt bondage has been defined as "the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined." Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, art. 1(a), 266 U.N.T.S. 3, 41. This Article will consider these and similar practices equivalent and will refer to them as "forced labor."

20. This paper treats the ILO Minimum Age Convention, No. 138, as the modern international labor standard for determining the minimum age required for employment. This choice is appropriate for three

violations persist in a number of countries.²¹ Examples of three states that are gross and persistent violators of the standards prohibiting forced and child labor are China, the Dominican Republic, and India.²² These examples demonstrate the ineffectiveness of current international human rights enforcement regimes in addressing states' nonconformity to international labor standards.

1. *China: Prison Labor in the Production of Exports*

A vast forced labor system in China, called *laogai*, uses prisoners to produce goods that are then exported to other countries.²³ Estimates of China's prison population range from two million to more than ten million in at least 3,000 prisons; labor reform and reeducation facilities, and detention centers.²⁴ Of that population, between one hundred thousand and one million Chinese, many charged with "subversive" political and religious beliefs and actions, are being held illegally under administrative detention without having been accorded the benefits of normal judicial processes.²⁵ As the General Accounting Office reported, "[f]orced labor is an integral part of the political, judicial, penal, and economic systems in [China] and is practiced throughout the country."²⁶

Forced labor in China falls into three categories of detention. First is the "reform through labor" category, consisting of prisoners convicted by courts

reasons. First, most countries have already achieved this standard. *See supra* note 17. Second, it uses a two-tiered system in establishing the minimum age based on whether a country is developed or developing. Third, it classifies employment into three types — light work, hazardous work, and work subject to the basic minimum age — and develops a different standard for each type of occupation. The drawbacks to using this standard are that it allows countries to exempt a limited scope of employment activities from application of the convention, to define themselves as developed or developing, and to define work as light or hazardous. These flaws can be remedied by revising the current standard to disallow any exemptions for employment activities that produce goods to enter the international trading system. This Article treats as impermissible child labor practices that violate this revised standard.

21. These violations are primarily documented by nongovernmental human rights organizations, reported to various international organizations (i.e., ILO and the Working Group on Contemporary Forms of Slavery of the United Nations Human Rights Commission), and publicized by the news media. Such reporting and documentation rely upon moral persuasion and public outrage to force governments and international organizations to take action against transgressors. Yet many times no action is taken.

22. These states are only illustrative, not exhaustive, of violators of forced and child labor standards.

23. Jeff Greenwald & Kathi Kennedy, *A Chinese Label on Your Shoes, Wine or Socks May Mean 'Made in Prison'—and That's a Violation of U.S. Law*, L.A. TIMES, June 19, 1991, (Magazine), at 10.

24. U.S. GEN. ACCOUNTING OFFICE, NAT'L SEC. & INT'L AFFAIRS DIV., GAO/NSIAD-90-244BR, GAO RESULTS IN BRIEF 1 (1990) [hereinafter GAO RESULTS IN BRIEF] (citing State Department estimates); *China's Ugly Export Secret: Prison Labor*, BUS. WK., Apr. 22, 1991, at 42 [hereinafter *China's Ugly Export Secret*]; Charles Lane et al., *The Last Gulag*, NEWSWEEK, Sept. 23, 1991, at 26. All estimates are crude because Chinese authorities forbid routine visits to their prisons and allow foreign groups only occasional visits to designated "model prisons." *Prison Labor In China*, NEWS FROM ASIA WATCH, Apr. 19, 1991, at 4 [hereinafter NEWS FROM ASIA WATCH: PRISON LABOR]; *see also* ASIA WATCH, DETAINED IN CHINA AND TIBET xxi-xxiii (1994) (describing difficulties in obtaining accurate count of number of Chinese prisoners and detainees).

25. Jennifer Brooks, *Amnesty International Says China Detaining Millions Without Trial*, UPI, Sept. 25, 1991, available in LEXIS, News Library, UPI file; Lane et al., *supra* note 24, at 26.

26. GAO RESULTS IN BRIEF, *supra* note 24, at 1; *see also* Richard Boucher, State Department Briefing, Federal News Service, Sept. 16, 1991, available in LEXIS, News Library ("We've been aware of the existence of prison factories and agricultural farms in China which employ convict labor. Imprisonment in China, except for detention camps, generally entails compulsory labor."):

of criminal acts and sentenced to reform by labor. Second is "reeducation through labor," in which individuals are held in administrative detention and extrajudicially sentenced to punishment by labor without judicial review. Third is the "forcible retention" or "forced job placement" category, consisting of those who, having served out their sentences, are required to remain and work in forced labor camps for extremely low wages.²⁷

Documents by Chinese prison authorities prove that official Chinese policy has been to use prison labor to manufacture goods for foreign export.²⁸ Recent articles in the Chinese prison labor journal *Theoretical Studies in Labor Reform and Labor Reeducation* depict and extol the virtues of such practices and give advice on management techniques to increase the use of forced labor for manufacturing.²⁹

China has been using forced labor to produce export goods since at least 1979³⁰ and evidence shows that a wide range of its export products have been made with prison labor.³¹ Harry Wu, a scholar at Stanford University's Hoover Institute, visited China in June and July of 1991, posing as a Chinese-American businessman interested in exporting products to the United States. He found that steel pipe, hand tools, and animal hides were among the prison labor products being exported from China.³² Similarly, a representative of

27. NEWS FROM ASIA WATCH: PRISON LABOR, *supra* note 24, at 3-4 (describing three categories of detention); see also Greenwald & Kennedy, *supra* note 23 (same); *Hearing on ILO Convention (No. 105) Concerning the Abolition of Forced Labor, Ex. K, 88-1 Before the Senate Comm. on For. Rel.*, 102d Cong., 1st Sess. 46 (1991) (prepared statement of Chris Smith, U.S. Representative from New Jersey) (same).

28. NEWS FROM ASIA WATCH: PRISON LABOR, *supra* note 24, at 8-24 (containing translated articles from *Theoretical Studies in Labor Reform and Labor Reeducation*, restricted circulation, bi-monthly journal for Chinese prison and labor camp officials); *Forced Labor Exports from China: Update No. 1*, NEWS FROM ASIA WATCH, Sept. 19, 1991, at 7-8 [hereinafter NEWS FROM ASIA WATCH: FORCED LABOR].

29. See NEWS FROM ASIA WATCH: PRISON LABOR, *supra* note 24, at 8-24.

30. China's policy of exporting forced labor goods is an outgrowth of Chinese Leader Deng Xiaoping's policy to liberalize the Chinese economy. That policy included making prisons responsible for their own financial survival, which led to the use of forced labor to produce export goods. *China's Ugly Export Secret*, *supra* note 24, at 43 (attributing prison trade to Deng's liberalization efforts); Lane et al., *supra* note 24, at 27 (same).

31. Remy et Associates, the French liquor distributor, admitted that from 1982 to 1985 it used grapes cultivated from a Chinese prison labor camp to produce Dynasty Dry Rose, a wine widely marketed in the West. *China's Ugly Export Secret*, *supra* note 24, at 43; see also Greenwald & Kennedy, *supra* note 23; NEWS FROM ASIA WATCH: PRISON LABOR, *supra* note 24, at 6. Others claim that certain brands of tea are made on Chinese labor farms. Harry Wu avers that Golden Sail tea, produced by the Yingde Tea Company, is a product of the Yingde Laogai Camp. Greenwald & Kennedy, *supra* note 23, at 10. Steven Mosher, Claremont Institute's Asian Studies Center Director, stated in a 1990 study that Yingdeh Black Tea is a prison product being currently imported into the United States. *US Scholar Reveals Labor Reform Camp System on M'land*, Central News Agency, Oct. 23, 1990, available in LEXIS, News Library.

In May 1994, Human Rights Watch/Asia revealed evidence that an Illinois-based company had recently imported latex medical examination gloves from a Chinese company that had used dozens of political prisoners in its quality control operations. *New Evidence of Chinese Forced-Labor Imports to the U.S.*, HUMAN RIGHTS WATCH/ASIA NEWSLETTER, May 24, 1994, at 1, 1-8 (on file with author). These imports directly contravened a 1992 Memorandum of Understanding signed by the U.S. and Chinese governments in which China agreed to stop the export of prison or forced-labor goods to the United States. *Id.* at 1.

32. Harry Wu, *A Prisoner's Journey*, NEWSWEEK, Sept. 23, 1991, at 32; Daniel Southerland, *The Witness Against China*, WASH. POST, Sept. 29, 1991, at H5 (noting import ban proposed on hand tools). Recently, the U.S. Customs Service banned the import of wrenches and steel pipes made by four Chinese companies because of evidence that those products were made with prison labor. John Burgess, *U.S. Blocks Exports by 4 Chinese Firms; Companies Alleged to Use Prison Laborers*, WASH. POST, Oct. 5, 1991, at B1.

Adidas South Korea visited a prison shoe production facility in China in 1990 and found thousands of shoes targeted for export to the United States.³³

Import-export companies are often unaware that the products they trade are made with prison labor. Each prison enterprise has two identities — one as a production unit and the other as a reform-through-labor detachment — to disguise the fact that the products are from labor reform camps.³⁴ By using prison labor, the government reduces labor costs by ten to twenty percent compared to those in factories using free labor.³⁵ In this way, the Chinese retain a competitive advantage that allows them to obtain much-needed foreign currency.³⁶

Prisoners are forced to labor under extremely harsh conditions. Harry Wu, while visiting the Qinghai Hide and Garment Factory (also known as Qinghai Number Five Labor Reform Detachment), witnessed naked prisoners processing sheepskin hides while standing chest-deep in vats of toxic chemicals.³⁷ Prisoners work up to 15 hours a day and receive little or no wages.³⁸ Medical services, when provided at all, are seriously deficient.³⁹ Moreover, prison officials often cut food rations for disciplinary problems or for failure to meet production quotas.⁴⁰ Prisoners are also beaten if they do not meet their quotas.⁴¹

The most appalling aspect of China's forced labor system is that detainees who have already served their sentences are commonly held for indefinite periods and are forced to work.⁴² Although they live outside the prison, such persons must continue to work in the prison production units, sometimes for the remainder of their lives.⁴³ This tactic is most often used to remove "unrepentant" detainees, such as political prisoners, from society.⁴⁴ According to one estimate, hundreds of thousands of former prisoners work under such conditions and receive only 60% of a normal salary.⁴⁵

In sum, China uses a vast forced labor system within its prisons to produce a variety of export goods. This system is important to China in that the labor camps contribute substantial economic benefits and much needed foreign exchange to the nation's economy.

33. *China's Ugly Export Secret*, *supra* note 24, at 43.

34. Wu, *supra* note 32, at 32.

35. NEWS FROM ASIA WATCH: PRISON LABOR, *supra* note 24, at 2.

36. The 1989 *Law Year Book of China*, a Chinese government publication, stated that in 1988, forced labor product exports increased by 21% and reached \$800 million. Greenwald & Kennedy, *supra* note 23, at 10. Other estimates put the figure at \$100 million each year. *China's Ugly Export Secret*, *supra* note 24, at 42.

37. Wu, *supra* note 32, at 32.

38. *China's Ugly Export Secret*, *supra* note 24, at 43.

39. NEWS FROM ASIA WATCH: PRISON LABOR, *supra* note 24, at 5.

40. *Id.*

41. Lane et al., *supra* note 24, at 26.

42. See *supra* text accompanying note 27.

43. *China's Ugly Export Secret*, *supra* note 24, at 43.

44. NEWS FROM ASIA WATCH: PRISON LABOR, *supra* note 24, at 2.

45. Lane et al., *supra* note 24 (estimate of Harry Wu).

2. Dominican Republic: Forced and Child Labor in State-Run Sugarcane Plantations

The Dominican Republic is the second largest sugar producer in the Caribbean and depends heavily on sugar for export earnings.⁴⁶ The Dominican government's *Consejo Estatal de Azúcar* (State Sugar Council or "CEA") owns and operates many of the country's sugar plantations.⁴⁷ The working and living conditions of sugarcane cutters are so harsh⁴⁸ that native Dominicans refuse to work on the plantations.⁴⁹ As a result, severe labor shortages on CEA plantations⁵⁰ lead the Dominican government to deceitfully recruit Haitians, including children, and force them to work as cane cutters.⁵¹

Recruiters working for the CEA use false promises about jobs, wages, and living conditions to entice Haitians into coming with them to the Dominican Republic.⁵² These recruiters, called *buscones*, are paid for each recruit they deliver to the border.⁵³ Once at the border, Dominican soldiers or CEA

46. For 1990-91, the Dominican Republic expected to produce 622,965 metric tons of sugar. It exported 460,997 metric tons of sugar cane to the United States in fiscal year 1990 and earned \$178 million. The Dominican Republic has the largest U.S. sugar quota and accounts for 10% of U.S. sugar imports. LAWYERS COMMITTEE FOR HUMAN RIGHTS, *CHILDHOOD ABDUCTED: CHILDREN CUTTING SUGAR CANE IN THE DOMINICAN REPUBLIC* 76 (1991) [hereinafter *CHILDHOOD ABDUCTED*] (quoting various sources such as U.S. Department of Agriculture, Dominican Sugar Institute, and various newspapers for figures).

47. *Id.* at iii; *Forced Labor and ILO Convention 105: Testimony of Holly Burkhalter, Human Rights Watch, Before the Senate For. Rel. Comm.* 12, Apr. 22, 1991 [hereinafter *Forced Labor Testimony*] (on file with author).

48. Cane cutters work for 12 to 13 hours without a break. Some work without gloves, shoes, hats, or protective gear. They are not provided sanitation facilities during the day, and medical care is not provided. Those who cut themselves while working with the machete used to cut cane must care for themselves. *Forced Labor Testimony, supra* note 47, at 13; *see also* *CHILDHOOD ABDUCTED, supra* note 46, at iii, 74-75, 84 (noting unsafe and inhumane labor conditions).

49. *CHILDHOOD ABDUCTED, supra* note 46, at 30-31; *Forced Labor Testimony, supra* note 47, at 12.

50. *CHILDHOOD ABDUCTED, supra* note 46, at 43-44. From 1952 until 1966, Haiti had contracted with the Dominican Republic to annually deliver a regular supply of between 15,000 and 18,000 Haitian cane cutters. Since the fall of the Duvalier regime in Haiti in 1986, no contract has existed between the two nations. As a result, the Dominican government has had to use other invidious methods of recruitment, "including force, abduction, deceit, and national roundups of dark-skinned 'Haitian-looking' people." *Id.* at 3 (citation omitted).

51. *CHILDHOOD ABDUCTED, supra* note 46, at 83; *Forced Labor Testimony, supra* note 47, at 12-16. Anti-Slavery International for the Protection of Human Rights ("ASI") first submitted reports of forced labor on the Dominican Republic sugarcane plantations to the United Nations Working Group on Contemporary Forms of Slavery in 1979. ROGER SAWYER, *SLAVERY IN THE TWENTIETH CENTURY 170-71* (1986). ASI has continued to submit reports to the Working Group over the past decade. In a 1990 report, ASI stated that forced labor of Haitian cane cutters and child labor on sugarcane plantations in the Dominican Republic continues. ANTI-SLAVERY SOCIETY, *REPORT TO THE WORKING GROUP ON CONTEMPORARY FORMS OF SLAVERY* (1990). Since 1983, the ILO has investigated and commented on forced and child labor on Dominican sugarcane plantations. In comments made after 1991, ILO reported that substantial forced labor violations still exist. INTERNATIONAL LABOUR OFFICE, *REPORT OF THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS, 78TH SESS. 312-21* (1991) [hereinafter *ILO COMM. OF EXPERTS: 78TH SESS.*]; *see also* *Prevention of Traffic in Persons and the Exploitation of Prostitution of Others: Review of Developments in Other Fields of Contemporary Forms of Slavery*, U.N. Working Group on Contemporary Forms of Slavery, 16th Sess., Provisional Agenda Items 4 and 5, at 5-6, U.N. Doc. E/CN.4/Sub.2/AC.2/1991/5/Add.2 (1991) [hereinafter *Prevention of Traffic in Persons*] (citing report by ILO of urgent need to end abuses committed against Haitian workers on sugarcane plantations in Dominican Republic).

52. *CHILDHOOD ABDUCTED, supra* note 46, at 44.

53. *Id.* at 44.

employees guard the Haitians until they are transported to the sugarcane plantations.⁵⁴ Some of the cane cutter recruits are less than fourteen years old.⁵⁵

Haitians already within the Dominican Republic are captured by Dominican soldiers and CEA field guards who bring them to plantations and force them to harvest sugarcane. Dominican authorities set up roadblocks on country roads and stop buses to look for Haitians. They then bring Haitians and Haitian-looking people who do not have proper documentation to the plantations.⁵⁶

Once brought to the plantations, Haitian workers cannot leave. Dominican soldiers and CEA armed guards patrol the plantations and surrounding communities to prevent the workers from escaping.⁵⁷ To further thwart escape, authorities sometimes confiscate all of the workers' clothes except those they are wearing, take away their clothes each night and return them the next day, or lock up the workers at night.⁵⁸ Military patrols also help prevent the workers from leaving the sugarcane fields and force the Haitians to cut the sugarcane.⁵⁹

The cane cutters are not paid in wages, but in vouchers that cannot be exchanged for cash for as long as two weeks. Workers, having no other source of food, use their vouchers at the *bodega popular*, a kind of company store, where the vouchers are discounted by fifteen to twenty percent. Only the *bodega popular* will accept these vouchers; the workers are therefore forced to remain on the plantations if they want to subsist.⁶⁰ Some workers become indebted from purchasing their food and lodging at these company stores.⁶¹

Children are part of this forced labor system too.⁶² Strong evidence suggests that children fourteen years old and under are employed as cane harvesters,⁶³ and that many begin work in the cane fields before they reach the age of ten.⁶⁴ The Dominican government essentially admitted that it employs young children on the CEA sugarcane plantations by announcing a 1991 program to repatriate plantation-working children fourteen years old and under.⁶⁵

54. *Id.* at 49-50. The Dominican military aids the *buscones* in other aspects of the recruitment process. See *Forced Labor Testimony*, *supra* note 47, at 13 (describing role Dominican soldiers play in capturing Haitians and delivering them to CEA plantations).

55. For examples of Haitian children 14 years old and under who were recruited to work in the Dominican Republic sugarcane fields, see interviews by the Lawyers Committee for Human Rights in CHILDHOOD ABDUCTED, *supra* note 46, at 4-9, 20.

56. *Id.* at 54-58.

57. *Id.* at 8, 16, 17, 55-61; *Forced Labor Testimony*, *supra* note 47, at 13, 16 n.10.

58. CHILDHOOD ABDUCTED, *supra* note 46, at 60; ILO COMM. OF EXPERTS: 78TH SESS., *supra* note 51, at 316, 318.

59. CHILDHOOD ABDUCTED, *supra* note 46, at 55.

60. *Id.* at 62-63.

61. *Forced Labor Testimony*, *supra* note 47, at 13.

62. *Id.* at 14.

63. *Id.* (stating that they have observed and interviewed "scores of young children working in the fields").

64. CHILDHOOD ABDUCTED, *supra* note 46, at 12.

65. *Id.* at 21.

3. *India: Forced and Child Labor in the Carpetmaking and Glass Industries*

Slavery, forced labor, bonded labor, and child labor have existed in India for centuries.⁶⁶ These practices are an outgrowth of India's stratified society, as embodied in the caste system.⁶⁷ Economic modernization and the need for export earnings have increased such practices.⁶⁸ Forced and child labor are persistently used to produce goods, such as carpets and glass, for export.⁶⁹ Despite laws⁷⁰ and judicial pronouncements,⁷¹ these practices continue unabated.⁷² Many experts blame the continuance of these practices on government complicity and inadequate enforcement.⁷³

Demand for Indian carpets increased markedly in the early 1970s when Iran officially and effectively banned child labor.⁷⁴ Heightened demand also brought about an increase in the use of child labor in India, especially bonded child labor. Between 100,000 and 150,000 children in the province of Uttar

66. ANTI-SLAVERY INTERNATIONAL, CHILDREN IN BONDAGE — SLAVES OF THE SUBCONTINENT 24-28 (1991) [hereinafter CHILDREN IN BONDAGE].

67. *Id.* at 22-24; PHARIS J. HARVEY & LAUREN RIGGIN, TRADING AWAY THE FUTURE: CHILD LABOR IN INDIA'S EXPORT INDUSTRIES 2, 12-15 (1994).

68. *See, e.g.*, CHILDREN IN BONDAGE, *supra* note 66, at 24, 61; HARVEY & RIGGIN, *supra* note 67, at ii, 20-21.

69. Other export industries where forced and child labor are allegedly used include lockmaking, diamond mining, toymaking, hand loom weaving, and brassworking. *See Prevention of Traffic in Persons, supra* note 51, at 3; *see also* PETER LEE-WRIGHT, CHILD SLAVES 30-60 (1990).

70. Article 24 of the Indian Constitution states, "No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment." INDIA CONST. art. 24. In 1976, the Indian Parliament officially abolished bonded labour. The Bonded Labour System (Abolition) Act, No. 19 (1976) (India). The purpose of the act is to prevent the economic and physical exploitation of weaker sections of the Indian people. It specifically frees every bonded laborer and makes it a criminal offense to compel another to render any bonded labor. *Id.* ch. 2, § 4 & ch. 6, § 16. The Indian Parliament also enacted a statute which "prohibit[s] the engagement of children in certain employments and . . . regulate[s] the conditions of work of children in certain other employments." The Child Labour (Prohibition and Regulation) Act, No. 61 (1986) (India). Specifically, the statute prohibits children under 14 years of age from working in a number of occupations, including carpet-weaving, but excludes work with the aid of the child's family. *Id.* ch. 2, § 3. It also regulates the employment of children under the age of 14 with respect to hours and working conditions. *Id.*

71. The Supreme Court of India has ruled on more than one occasion that a system of bonded labor is a violation of fundamental constitutional rights and an affront to human dignity and has ordered the State Governments to immediately implement the provisions of The Bonded Labour System (Abolition) Act of 1976. *Bandhua Mukti Morcha v. Union of India & Others*, [1984] 2 S.C.R. 67 (decided on Dec. 16, 1983); *People's Union for Democratic Rights v. Union of India & Others*, [1983] 1 S.C.R. 456 (decided on Sept. 18, 1982).

72. CHILDREN IN BONDAGE, *supra* note 66, at 3 (estimating that 15 million children work as bonded laborers in India).

73. *See id.* at 40; *Report by the Bonded Labour Liberation Front of India*, Working Group on Contemporary Forms of Slavery, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Commission on Human Rights, U.N. ESCOR, 16th Sess. (1991) (on file with author) [hereinafter *Report by Bonded Liberation Front*]; ILO COMM. OF EXPERTS: 78TH SESS., *supra* note 51, at 84-92; ANTI-SLAVERY INTERNATIONAL, A PATTERN OF SLAVERY — INDIA'S CARPET BOYS 23-25, 40-43 (1988) [hereinafter INDIA'S CARPET BOYS]; SAWYER, *supra* note 51, at 124-35; Bertrand Marotte et al., *Stores Don't Check Whether Child Slaves Make Rugs*, MONTREAL GAZETTE, Sept. 29, 1991, at A4.

74. As a result of Iran's ban of child labor, the price of Persian carpets rose and Western buyers sought other sources. They turned to India, where carpetmaking is an established art, and revived the industry to meet the growing demands of Western markets. CHILDREN IN BONDAGE, *supra* note 66, at 10.

Pradesh and another 80,000 in Kashmir currently labor in the carpet industry.⁷⁵ An estimated fifteen to ninety percent of these children are bonded laborers.⁷⁶ According to Indian investigators, the use of bonded child labor is so prevalent that it is impossible to verify that a carpet has not been made with such labor.⁷⁷ In 1990, India earned between \$265 and \$275 million from carpet exports, making that industry a significant source of foreign exchange.⁷⁸ Ninety percent of the carpets produced in India are exported to Europe and the United States.⁷⁹

Two main types of bonded labor exist in India: inherited or intergenerational bondage and bondage by debt. In both types, the accumulation of debt begins the cycle of bondage. Under inherited bondage, children must work off debts incurred by preceding generations, often by replacing family members who are too old to continue working.⁸⁰ Under bondage by debt, family members either become bonded laborers to pay off debts which they have incurred and/or they sell their children into bondage in exchange for small loans.⁸¹

Typically, parents sell their children into bondage. They accept cash from loom owners or agents who travel to India's poorest areas, such as Bihar or Uttar Pradesh, searching for cheap, exploitable labor. The owners or agents pay parents cash in exchange for the authority to bring their children to the carpet-weaving belt of Mirzapur or the Vale of Kashmir.⁸² Some children are kidnapped and sold into bondage by traffickers. Others are allegedly adopted and placed into homes where they are used as cheap laborers.⁸³ Agents trick many children by promising to take them to see a movie and, instead, taking them to carpet-weaving work sites. At these work sites, children are promised

75. *Id.* at 9-10; Joseph Albright & Marcia Kunstel, *Stolen Childhood*, CHI. TRIB., Oct. 5, 1987, at C1; Anne Crawford, *Traditional Industry Exploits Children*, CALGARY HERALD, Oct. 20, 1991, at A7; Bill Tarrant, *Indian Anti-Slavery Group Urges Boycott on Child-Made Carpets*, The Reuter Library Report, Feb. 15, 1991, available in LEXIS, News Library.

A more recent estimate puts the number of children working in India's carpetmaking industry between 300,000 and 500,000. HARVEY & RIGGIN, *supra* note 67, at 72. Accurate estimates of the number of child laborers in India are difficult to obtain; the Indian government has never conducted a comprehensive survey of child labor due to the controversial nature of the practice and differing definitions of child labor. *Id.* at 3-4.

76. *Statement by Kailash Satyarthi, Bonded Liberation Front of India*, Working Group on Contemporary Forms of Slavery, Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. ECOSOC, 15th Sess. (1990) [hereinafter *Bonded Liberation Front of India*] (on file with author); INDIA'S CARPET BOYS, *supra* note 73, at 3; Tarrant, *supra* note 75.

77. Bertrand Marotte & Dave Todd, *Retailers Hit With Mounting Criticism*, CALGARY HERALD, Oct. 13, 1991, at F2.

78. Tarrant, *supra* note 75; Ben Tierney, *Carpet Boys Live a Life of Squalid Slavery*, VANCOUVER SUN, Sept. 30, 1991, at A1.

79. *Bonded Liberation Front of India*, *supra* note 76.

80. CHILDREN IN BONDAGE, *supra* note 66, at 24; SAWYER, *supra* note 51, at 128.

81. CHILDREN IN BONDAGE, *supra* note 66, at 25.

82. *Id.* at 9-10, 25-26; LEE-WRIGHT, *supra* note 69, at 52; Ben Tierney & Dave Todd, *Swept Under the Carpet; About 10 Million Children in India Work in Slavery — Many of Them as Carpet Boys in the Rug Trade*, MONTREAL GAZETTE, Sept. 29, 1991, at A4. The agents may promise a better life for the children, give the parents a false name and address, and transport the children to the carpet-weaving place of employment far removed from the village from which they came. CHILDREN IN BONDAGE, *supra* note 66, at 27-28.

83. *Id.* at 25.

good wages and decent food, but these promises are empty.⁸⁴ Some children tricked in this way are less than ten years of age.⁸⁵

Carpet-weavers work under adverse conditions. Most of the looms are installed in small mud huts that are seldom larger than twelve feet by nine feet and have very poor lighting. Trenches are dug into the dirt floor in order to accommodate the looms, which are taller than the huts, and to catch pieces of wool. Three to six workers sit next to each other in these close quarters and work one strip of carpet.⁸⁶ They work at least twelve hours every day, during the heat of summer as well as cold of winter, and receive only one break for their midday meal.⁸⁷ The bonded laborers usually subsist on an inadequate diet of rice and lentils.⁸⁸ Many of the children are beaten, tortured, and sexually abused. When ill or injured, they receive no medical attention.⁸⁹ Because most of the children are brought from far away to work the looms, they sleep between the looms on the dirt floor of the huts in which they labor.⁹⁰

Bonded and child labor abuses in India are not limited to the carpet industry. For instance, the glass industry, centered in the city of Firozabad in the state of Uttar Pradesh, employs between 150,000 and 200,000 workers, and studies estimate that 8,000 to 50,000 of the workers are children below the age of fourteen.⁹¹ Of those children, seventy to eighty percent are bonded laborers.⁹²

Although India produces glass products primarily for internal consumption, a significant number are exported to third world countries in Africa and Asia.⁹³ Egypt and Kenya, for example, purchase much of the cheap pyrex laboratory glassware manufactured in Firozabad factories employing children.⁹⁴ India's glass exports in the 1982-83 fiscal year totaled nearly twelve million pounds sterling.⁹⁵ Western nations also import these glass products. Nestle's, a Swiss multinational corporation, is a large-volume customer of two major Firozabad glass factories.⁹⁶ Borosil, an Indian subsidiary of the U.S. company Corning Glass, buys some of its cheaper laboratory glassware from West Glass, a Firozabad factory that employs children.⁹⁷

84. INDIA'S CARPET BOYS, *supra* note 73, at 5.

85. Tierney & Todd, *supra* note 82, at A4.

86. INDIA'S CARPET BOYS, *supra* note 73, at 20.

87. *Id.* at 22; Tierney & Todd, *supra* note 82, at A4.

88. LEE-WRIGHT, *supra* note 69, at 52.

89. CHILDREN IN BONDAGE, *supra* note 66, at 40, 60; INDIA'S CARPET BOYS, *supra* note 73, at 5, 14, 19, 26, 29-30; Christopher Thomas, *Singh Links Drive to Assist Lowly Castes with Plight of Child Slaves*, THE TIMES (London), Sept. 20, 1990, available in LEXIS, News Library; Tierney & Todd, *supra* note 82, at A4.

90. INDIA'S CARPET BOYS, *supra* note 73, at 22; Tierney & Todd, *supra* note 82, at A4.

91. HARVEY & RIGGIN, *supra* note 67, at 84 & n.70.

92. CHILDREN IN BONDAGE, *supra* note 66, at 12. One report stated that visits to all five of Firozabad's largest glass factories revealed that boys under the age of 14 worked there. Albright & Kunstel, *supra* note 75, at C1.

93. LEE-WRIGHT, *supra* note 69, at 46.

94. *Id.* at 47.

95. *Id.* at 46.

96. Albright & Kunstel, *supra* note 75, at C1.

97. LEE-WRIGHT, *supra* note 69, at 47.

Glasswork is particularly hazardous. The children work with or near fiery molten glass and crude open furnaces whose temperatures range from 700 to 1,800 degrees centigrade. The boys must carry four-foot long metal poles dipped into the furnaces, with attached loams of molten glass, to older glassblowers who shape the glass products. After blowing the object, the glassblower throws the pole to a child below him. The boy must catch the pole, spin it, and drizzle it with water to tame its heat. He then must zigzag quickly through the factory over to a conveyor belt, crossing a floor littered with broken glass while dodging molten glass drippings. The air in the factory is polluted with chemicals, soot, and coal dust,⁹⁸ which make the workers susceptible to asthma, bronchitis, eye problems, burns and chronic anemia.⁹⁹ Seventy-six percent of these children have tuberculosis.¹⁰⁰

Forced and child labor is ubiquitous to the Indian economy. Modernization and the need for foreign exchange earnings have created incentives for the Indian government to turn a blind eye to the plight of bonded and child laborers. In order to remain competitive, India has allowed these practices to continue and to be adapted to the needs of a modern export economy.¹⁰¹

B. *Failure to Prevent Violations of Forced and Child Labor*

A multilateral agreement in international law creates legally binding rights and obligations between the parties.¹⁰² Some international agreements create obligations that are *erga omnes* (for all states) and thus give all parties a legal interest in ensuring that each party abides by the terms of the agreement.¹⁰³ Unless specifically stated otherwise, any party to an *erga omnes* agreement can enforce the agreement's rights and obligations against another party that breaches the terms of the agreement.¹⁰⁴ The right to enforce holds even if the breach does not actually harm the enforcing party.

Because this proposition applies to human rights agreements, any state party to such an agreement can remedy a violation by another state party.¹⁰⁵

98. *Id.* at 44-45; Albright & Kunstel, *supra* note 75, at C1.

99. LEE-WRIGHT, *supra* note 69, at 44-45.

100. CHILDREN IN BONDAGE, *supra* note 66, at 12.

101. India is not the only nation on the Indian subcontinent where forced and child labor persist. Child labor practices in Nepal and Pakistan are very similar to those in India. *See, e.g., id.* at 16-17 (describing practices in Nepal), 18-20 (describing practices in Pakistan); Tim Kelsey, *Fight to Rescue Pakistani Child Slaves*, THE INDEPENDENT, Aug. 14, 1991, at 10. The reason these abuses persist in these countries is neither geographic nor cultural; it is economic. These nations compete for export earnings from the same products. Importers from developed nations play them off against one another to obtain the lowest price for the goods. So long as one of these countries employs forced and child labor in its export economy, other nations must follow to remain competitive.

For examples of the use of child labor in Europe, see LEE-WRIGHT, *supra* note 69, at 160-75 (describing child labor practices in Portugal); MARINA VALCARENGHI, CHILD LABOUR IN ITALY (1981); SUZANNE WILLIAMS, CHILD WORKERS IN PORTUGAL (1992) (published by Anti-Slavery International).

102. RESTATEMENT OF FOREIGN RELATIONS, *supra* note 17, §§ 301, 312, 321 (1990).

103. *E.g., id.*, § 902 & cmts. a, i, introductory note to pt. IX.

104. *See id.* §§ 335, 901 & reporter's note 1, 902 & cmts. a, i.

105. LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 1016-17 (2d ed. 1987) (stating that human rights agreements clearly give every party to agreement legal interest to ensure that agreement is being followed and right to invoke legal remedies if agreement is being violated); *see also* RESTATEMENT OF FOREIGN RELATIONS, *supra* note 17, § 701 reporter's note 3 & introductory note to pt. VII.

"The international human rights movement is based on the concept that every nation has an obligation to respect the human rights of its citizens, and that other nations and the international community have a right, and responsibility, to protest if this obligation is not lived up to."¹⁰⁶ States can enforce human rights even in the absence of a written agreement because customary international human rights obligations are binding among all states (*erga omnes*).¹⁰⁷ Violation of an international customary human rights norm is an offense against the international community for which any state may seek redress.¹⁰⁸

Compared to the pre-World War II era, the protection of human rights has progressed dramatically. Human rights standards and treaties, at both the international and regional levels, have proliferated at a remarkable rate.¹⁰⁹ Although the overwhelming majority of states have adopted these treaties and agreements,¹¹⁰ the application of human rights standards nevertheless remains a major problem.¹¹¹

For a variety of reasons, states are generally hesitant to press human rights claims against other states.¹¹² To begin with, most human rights violations concern a government's treatment of its own people. Because other states are not materially harmed or directly affected by the human rights violations, they generally do not make claims against the violating state.¹¹³ In order to justify this inaction, states rationalize that human rights are a national, not an international, concern.

Second, states are reluctant to criticize each other on human rights issues because they do not want to jeopardize their relations with the violator, and because they have other interests that they view as more important than human

106. Richard B. Bilder, *An Overview of International Human Rights Law*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 3, 3 (Hurst Hannum ed., 1984); see also B.G. Ramcharan, *Strategies for the International Protection of Human Rights in the 1990s*, 13 HUM. RTS. Q. 155, 162 (1991).

107. RESTATEMENT OF FOREIGN RELATIONS, *supra* note 17, § 701 reporter's note 3.

108. *Id.* § 701 reporter's note 3, § 703 cmt. b, § 703 reporter's notes 3, 4. The International Court of Justice in the *Barcelona Traction* case said:

In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-a-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

Case Concerning the *Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain)* 1970 I.C.J. 3, 32. Therefore, the "basic rights of the human person," which would include customary international human rights norms, are obligations towards the "international community as a whole" so that all states have a legal interest in their protection and, therefore, a right to redress violations.

109. Donnelly, *supra* note 10, at 633; Reisman, *supra* note 8, at 393.

110. LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW 204-23 (1989); HENKIN ET AL., *supra* note 105, at 980-1039; Burns H. Weston, *Human Rights*, in HUMAN RIGHTS IN THE WORLD COMMUNITY 12 (Richard P. Claude & Burns H. Weston eds., 1989).

111. Bilder, *supra* note 106, at 13; Reisman, *supra* note 8, at 393-94. For a more general statement on the problem of making international law effective, see Janis, *supra* note 9, at 261.

112. RESTATEMENT OF FOREIGN RELATIONS, *supra* note 17, introduction to pt. VII; Bilder, *supra* note 106, at 14.

113. RESTATEMENT OF FOREIGN RELATIONS, *supra* note 17, introduction to pt. VII; Donnelly, *supra* note 10, at 616-17.

rights. Furthermore, states are extremely sensitive about their own human rights practices and thus feel intensely threatened by the subject.¹¹⁴ Many states fear that criticism of another's human rights practices will be viewed as a hostile act, initiated for purely political reasons, and will thus subject them to retaliation.¹¹⁵ Finally, states do not want unnecessarily to sully their political and economic relationships with each other.

The ability to compel states to abide by their human rights obligations differs dramatically depending on the human rights standard, the nation, and the regime. The prevention of violations of even the least controversial human rights standards (i.e., forced and child labor) are problematic, permitting persistent and gross violations to continue unabated throughout the world.¹¹⁶

The current human rights regimes are based on a perception of moral, rather than material, interdependence.¹¹⁷ States understand that the only sanctions they might suffer for violating their human rights commitments are moral. Thus, the incentives for states to conform their own human rights practices with international standards are weak. The current human rights regimes are incapable of preventing persistent and massive violations of international human rights norms, including those norms forbidding forced or child labor.

Existing human rights regimes¹¹⁸ employ a variety of techniques to obtain consistent state compliance with human rights responsibilities, but none uses a strong sanctioning mechanism to punish persistent violators of international human rights norms. Instead, these regimes rely mainly on nonpunitive methods such as reporting and monitoring, complaint procedures, ad hoc investigations, confidential and diplomatic dialogues, on-site visits, publicity, moral persuasion, and public censure to obtain compliance.¹¹⁹ Some regimes even rely upon the threat of suspension or expulsion to procure

114. Donnelly, *supra* note 10, at 616.

115. Scott Leckie, *The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking*, 10 HUM. RTS. Q. 249, 254 (1988).

116. See *supra* part II.A.

117. Donnelly, *supra* note 10, at 618.

118. The major international human rights enforcement regimes include international covenants, such as the Universal Declaration of Human Rights, *supra* note 17, the International Covenant on Civil and Political Rights, *supra* note 17, the International Covenant on Economic and Social Rights, *supra* note 17, and the Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter *Optional Protocol*]. They also include: the United Nations system, see Louis B. Sohn, *Human Rights: Their Implementation and Supervision by the United Nations*, in 2 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 369 (Theodor Meron ed., 1984); the European system, European Convention of the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1953, 213 U.N.T.S. 221, Europ. T.S. No. 5 (entered into force Sept. 3, 1953); the Inter-American system, Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3; the American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36 (entered into force July 18, 1978), art. 6 [hereinafter *American Convention*]; and the International Labor Organization, see, e.g., ANTONY ALCOCK, *HISTORY OF THE INTERNATIONAL LABOUR ORGANISATION* (1971).

For overviews and critiques of the various international and regional human rights systems, see Kathy Zoglin, *United Nations Action Against Slavery: A Critical Evaluation*, 8 HUM. RTS. Q. 306 (1986) (discussing United Nations); P. VAN DIJK & G.J.H. VAN HOOFF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2d. ed. 1990) (discussing European human rights system); THOMAS BUERGENTHAL ET AL., *PROTECTING HUMAN RIGHTS IN THE AMERICAS* (3d ed. 1990) (critiquing Inter-American system).

119. Shelton, *supra* note 10, at 7.

compliance although they have never actually carried out these threats.¹²⁰ None of the international or regional human rights enforcement regimes have employed, or appear willing to employ, any material sanctions against a state that persistently violates human rights norms. Because the threats of sanctions are not employed, states are not effectively deterred.

III. TOWARD AN EFFECTIVE REGIME TO PREVENT VIOLATIONS OF FORCED AND CHILD LABOR

Because the nonpunitive measures used by the current human rights enforcement regimes to prevent gross and persistent human rights violations are inadequate, a new economically based system to achieve effective enforcement is needed. States are much more apt to take punitive actions against each other, beyond verbal condemnation, where their material interests are affected.¹²¹ Each state calculates its long-term material interests and then chooses to follow a model of cooperation or defection. When states are materially interdependent, they only benefit to the extent that other states cooperate because each state has the unilateral power to prevent the others from enjoying those benefits.¹²² Once states are required to interact with each other over infinite iterations in order to gain material benefits, they have strong incentives to cooperate and to punish the other side for any breach of the mutually agreed upon rules in order to prevent future defections.¹²³

International trade is one area where states are materially interdependent and thus scrupulous about policing each other's behavior.¹²⁴ No state can thrive and improve its people's standard of living without involving itself in world trade. Hence, no state can afford to opt out of the rules and standards of the world trading system embodied in the GATT/WTO, the principal international institution regulating world trade.¹²⁵

The abolition of forced and child labor is both a human rights standard and an international labor standard. As labor is a major input in the production of goods that enter the international trading system, violations of international labor standards should be enforced through the international trading system. This mode of enforcement would more effectively compel states to adhere to labor standards because of the greater incentives resulting from states' material

120. With regard to the European human rights regime, see Kevin Boyle, *Practice and Procedure on Individual Applications Under the European Convention on Human Rights*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 133, 136 (Hurst Hannum ed., 1984) (describing ultimate sanction of Committee of Ministers as suspension or expulsion of state from Council of Europe). With regard to the ILO, see INT'L METALWORKERS FEDERATION, MALAYSIA AND THE ILO: TWO DECADES OF VIOLATING ILO CONVENTIONS (1992) (describing attempt to suspend Malaysia from ILO for repeated violations of freedom of association with regards to union organizing) (on file with author).

121. Donnelly, *supra* note 10, at 618-19.

122. *Id.* at 618.

123. See, e.g., ROBERT AXELROD, THE EVOLUTION OF COOPERATION 188 (1984).

124. See, e.g., ECONOMIC POLICY COUNCIL OF THE UNITED NATIONS ASSOCIATION OF THE USA, THE INTERNATIONAL LABOR ORGANIZATION AND THE GLOBAL ECONOMY: NEW OPPORTUNITIES FOR THE UNITED STATES IN THE 1990s 1-3, 5 (1991) [hereinafter ECONOMIC POLICY COUNCIL]; JACKSON, *supra* note 1, at 3; Robert B. Reich, *Who is Us?*, 68 HARV. BUS. REV. 53, 53 (1990) (arguing that globalization of economy has transformed corporations from national to multinational entities).

125. JACKSON, *supra* note 1, at 27-39, 299-302. GATT is currently being phased out and replaced by the WTO. For a description of the WTO, see *supra* note 1.

interdependence in trade matters.

States within the international trading system are required to follow certain rules and practices that define permissible behavior with respect to their trading relationships. The rationale behind this system is that free trade is superior to the alternative of erecting trade barriers.¹²⁶ The benefits from free trade include increased world economic growth and welfare.¹²⁷ As one prominent economist has noted, "[f]ree trade promotes a mutually profitable regional division of labor, greatly enhances the *potential* real national product of all nations, and makes possible higher standards of living all over the globe."¹²⁸ States have strong, vested interests in ensuring that all other states obey the rules and practices of the international trading system and, consequently, will enforce those rules by sanctioning violators.¹²⁹

While the rules and practices of the international trade system are multifarious and subject to many exceptions, states regularly follow the most important conventions. International trade rules and practices generally prohibit the use of quantitative restrictions or quotas,¹³⁰ allow negotiations to determine binding tariff levels,¹³¹ and require states to adhere to the obligations of most favored nation status and national treatment.¹³²

Dumping and subsidies are two particular trade behaviors normally considered to constitute "unfair trading practices," and hence subject the violating state to punitive measures taken by the affected state parties.¹³³ In other words, the rules of the international trading system regard these practices as methods of unfair competition.¹³⁴ Dumping, the practice of selling products for export at less than their domestic price, is generally condemned,

126. See GARY C. HUFBAUER & JOANNA S. ERB, *SUBSIDIES IN INTERNATIONAL TRADE* 8 (1984); JACKSON, *supra* note 1, at 8-10; PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 660-71, 677-90 (14th ed. 1992) (describing benefits of and theory behind free trade); Cletus C. Coughlin et al., *Protectionist Trade Policies: A Survey of Theory, Evidence and Rationale*, FEDERAL RESERVE BANK OF ST. LOUIS REVIEW, Jan.-Feb. 1988, at 12. The theoretical basis supporting the superiority of the free trade system is David Ricardo's famous theory of comparative advantage. See generally David Ricardo, *On the Principles of Political Economy and Taxation*, reprinted in *THE WORKS AND CORRESPONDENCE OF DAVID RICARDO* 1 (Piero Sraffa ed., 1951). For a modern description of the theory of comparative advantage and its relevance to international trade, see, e.g., JACKSON, *supra* note 1, at 10-17; SAMUELSON & NORDHAUS, *supra*, at 663-71; Coughlin et al., *supra*, at 12-13.

127. JACKSON, *supra* note 1, at 13 & nn.24-26, 15 n.34 (citing studies confirming benefits from free trade); SAMUELSON & NORDHAUS, *supra* note 126, at 660-71, 677-90; Coughlin et al., *supra* note 126, at 12-20 (surveying studies which support gains from free trade and costs of protectionism).

128. PAUL A. SAMUELSON, *ECONOMICS* 651 (11th ed. 1980).

129. At least one economist and former U.S. Secretary of Labor has argued that trade benefitting ordinary people requires rules be "transparent, fair and enforceable." Marshall, *supra* note 12, at 67.

130. JACKSON, *supra* note 1, at 115-16, 129-30.

131. *Id.* at 115-23.

132. For a discussion of MFN, see *id.* at 134-48. For a discussion of national treatment obligations and nontariff barriers, see *id.* at 190-202.

133. *Id.* at 217. "Unfair" trade, as opposed to "fair" trade, is "normally deemed to include trade which has been influenced or promoted by such activity as 'dumping,' or government subsidies, or attempts by foreign sellers to evade legitimate regulations regarding the environment, fair competition, intellectual property protection, etc. To counter these activities, it is often said that an importing nation is justified in taking importing-restraining actions of various types." *Id.* at 151.

134. Edgren, *supra* note 13, at 526; see also JACKSON, *supra* note 1, at 217-21 (stating that, while international trading system polices fair competition, its determination is extremely difficult given myriad of societies and economic systems); TIME FOR A LINK, *supra* note 14, at 7 (arguing that GATT can intervene if governments unfairly distort trade through subsidies, unfair tariffs, and dumping).

especially where the dumped goods harm competing industries in the importing nation.¹³⁵ Subsidies, although subject to varying definitions, occur when a government either makes a payment, remits charges, or supplies commodities or services at less than cost or market price in order to supply to a general market a product or service that could only be supplied, in the absence of the payment or remission, in the same quantity at a higher price.¹³⁶ Export subsidies, those granted to products only when exported, are especially disfavored and are usually considered to 'be *per se* violations of the international trading system. Domestic or production subsidies, those granted to products whether or not they are exported, are frowned upon yet permitted as exercises of sovereign authority within a country.¹³⁷ In either case, a country whose competing industries are materially injured as a result of competition from an exporting nation's subsidized products can retaliate by imposing countervailing duties against those products.¹³⁸

Given that the international trading system adheres to a set of rules and practices that prohibit unfair trading practices, such as dumping and subsidies, and given that labor is a major factor in the production of goods that enter the international trading system, the use of forced and child labor should be forbidden. Violations of these two international labor standards should be viewed as a state subsidy or "social dumping" that give states an unfair competitive advantage.¹³⁹ These practices constitute "social dumping" in that the state has allowed products to be exported and sold at less than their normal value because the cost of labor inputs has been artificially depressed by the exploitation of forced or child labor.¹⁴⁰ These practices constitute a state subsidy in that the state, either directly or by failing to police violations of these standards, has helped producers of exported goods obtain an unfair competitive advantage.¹⁴¹

135. JACKSON, *supra* note 1, at 221. The normal value usually means "the price for which those same products would be sold on the 'home' or exporting market." *Id.* For a discussion of dumping, see *id.* at 217-47.

136. HUFBAUER & ERB, *supra* note 126, at 9 n.5 (quoting 1965 definition from U.S. Joint Economic Committee).

137. JACKSON, *supra* note 1, at 249-50.

138. *Id.* at 249. For a discussion of the subsidy issue, see, e.g., *id.* at 249-73; HUFBAUER & ERB, *supra* note 126.

139. The introduction of rules within the international trading system that set minimum international standards of labor conduct has been referred to by many commentators as introducing a "social clause" into international trade. HANSSON, *supra* note 13, at 11; ROLE OF ICFTU, *supra* note 14, at 21-22; J.M. Servais, *The Social Clause in Trade Agreements: Wishful Thinking or an Instrument of Social Progress?*, 128 INT'L LAB. REV. 423 (1989). A social clause "would make it possible to restrict imports of commodities that have been produced by means of working conditions that are inferior to the minimum requirements stated in the incorporated standards or social clauses. Countries that do not comply with the minimum requirements must choose between a change in working conditions or run the risk of being confronted with increased trade barriers in their export markets." HANSSON, *supra* note 13, at 11; see also ECONOMIC POLICY COUNCIL, *supra* note 124, at 29 (arguing that enforcement of minimum international labor standards will ensure equity, efficiency, and balanced economic growth and prohibit use of unfair competitive advantage); Marshall, *supra* note 12, at 67-73 (same).

140. For a definition of the phrase "social dumping," see *supra* note 18.

141. "[T]he failure to respect international norms with regards to [labor standards] . . . constitutes a means of subsidization of exports equivalent to a direct financial subsidy, but with the difference that it is derived from the exploitation of workers." International Confederation of Free Trade Unions, Statement to the Ministerial Meeting on the Uruguay Round of Multilateral Trade Negotiations, ¶ 4 (Dec. 3-7, 1990) (on file with author) [hereinafter ICFTU Statement].

This type of unfair competitive advantage is economically inefficient. Classical economic theory grounds free trade in the concept of liberalism.¹⁴² Individual economic agents, including producers, workers, and consumers, maximize their utility by acting in their own self-interest.¹⁴³ This freedom to act in one's self-interest must be guaranteed in order to realize free trade's benefits. Consequently, situations in which workers are not able to make economic choices must be forbidden.¹⁴⁴ Children, who are unable to make real choices because they lack the maturity, and persons subjected to forced labor, do not have freedom of choice. Because they are coerced into certain economic situations, they are not free to maximize their self-interests and thus are stripped of the benefits of this economic system. The international trading system needs to create and enforce minimum workplace standards that prohibit forced and child labor, as these practices are inimical to a system based on freedom of economic choice and maximization of individual self-interest.

The prohibitions on forced and child labor are international norms that all states accept as binding. Enforcement of these international labor standards in a fair, nondiscriminatory, and multilateral manner would thus merely require states to honor their current commitments to fair competition and trade. Furthermore, conscientious enforcement of these standards would strengthen the international trading system in several ways.

First, the system would assert its sincere and impartial desire to enforce rules that promote fair competition and trade and would demonstrate its belief that an open trading system is beneficial to the global economy. The system currently enforces rules of fair competition by restricting capital subsidies and dumping without addressing labor abuses. The "established rules governing international trade allow competition at any cost to the workers, no matter how inhumane the methods. The inclusion of labour safeguards in this set of rules would be a way of indicating that trade is not an end in itself, that its function is to improve the living standards of workers as well as consumers."¹⁴⁵

Second, enforcement of labor standards would make the international trading system more efficient and stimulate growth in the world economy. Exploited workers would not be forced to subsidize inefficient companies. Consequently, labor resources would shift to more productive uses and market distortions would decrease.¹⁴⁶ Adult workers could better support their families and increase their purchasing power, leading to greater global demand. In addition, children kept out of the workforce would be more likely to

142. HANSSON, *supra* note 13, at 177-78.

143. *Id.*; see generally ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Edwin Cannan ed., 1937) (1776).

144. Steve Charnovitz, *Fair Labor Standards and International Trade*, 20 J. WORLD TRADE L. 61, 69 (1986) (arguing for proscription against situations in which workers cannot make labor market choices freely, such as cases of forced labor).

145. Edgren, *supra* note 13, at 526; see also TIME FOR A LINK, *supra* note 14, at 7 (arguing that social clause on workers' rights would enhance world welfare); van Liemt, *supra* note 12, at 435 (noting that social clause proponents believe it enables workers to benefit from increased trade).

146. Companies that rely on forced and child labor are inefficient because they could not compete against more efficient companies if forced to use voluntary, adult labor. A company's survival based on forced and child labor means that economic resources, including human resources, cannot be shifted from inefficient to more efficient uses. Marshall, *supra* note 12, at 67-68, 72; see also Edgren, *supra* note 13, at 524 (observing that market distortions are caused by use of "sweated labour").

become educated and develop their human resources potential, resulting in a more highly educated and advanced workforce.¹⁴⁷

Third, individual states would be less likely to enact protectionist measures in an economy where multilateral institutions effectively regulate trade and enforce fair labor standards. Although seen by many lesser developed countries as a disguised form of protectionism, multilateral enforcement of these standards would have the opposite effect. The removal of unfair labor practices would ameliorate protectionist sentiments in developed states.¹⁴⁸ Because lesser developed countries would participate in the formulation and implementation of objective multilateral labor standards, they would not have to fear the application of sanctions for unilateral, protectionist aims.¹⁴⁹

As long as some countries allow forced and child labor to occur, other countries are at a competitive disadvantage and thus are penalized for respecting international labor standards. Enforcement of customary international labor standards would therefore enable lesser developed countries to promote social development within their countries. Absent such enforcement, the least developed countries attempt to decrease their production costs and gain a trade advantage by exploiting unfair labor practices, thereby creating a downward spiral,¹⁵⁰ in which countries with the worst labor practices impose their standards on competitors.¹⁵¹

Because forced and child labor provide unfair competitive advantages, states have a strong incentive to protect their own material interests by sanctioning the violator. In effect, the self-interest of each state can stimulate the promotion and enforcement of human rights standards.

IV. THE INSTITUTIONAL PLAYERS IN THE INTERNATIONAL ENFORCEMENT REGIME: THE ILO AND GATT/WTO

A. *The International Labor Organization*

The ILO is considered the premier international organization dealing with worker rights and related human rights issues.¹⁵² Its activities include setting

147. See HANSSON, *supra* note 13, at 169 (mentioning possible gains to child welfare).

148. *Id.* at 173-74; TIME FOR A LINK, *supra* note 14, at 44; Charnovitz, *Influence of Labour Standards*, *supra* note 18, at 581; van Liemt, *supra* note 12, at 435.

149. TIME FOR A LINK, *supra* note 14, at 44; Harlan Mandel, *In Pursuit of the Missing Link: International Worker Rights and International Trade?*, 27 COLUM. J. TRANSNAT'L L. 442, 448 (1989).

150. TIME FOR A LINK, *supra* note 14, at 15; ICFTU Statement, *supra* note 141, at ¶ 4.

151. Marshall, *supra* note 12, at 73.

152. See generally INTERNATIONAL LABOUR OFFICE, INTERNATIONAL LABOUR STANDARDS: A WORKER'S EDUCATION MANUAL (3d ed. 1990) [hereinafter INT'L LABOUR STANDARDS]; E. OSIEKE, CONSTITUTIONAL LAW AND PRACTICE IN THE INTERNATIONAL LABOUR ORGANISATION (1985); ABDUL-KARIM TIKRITI, TRIPARTISM AND THE INTERNATIONAL LABOUR ORGANISATION (1982); NICOLAS VALTICOS,

international labor standards through the passage of Conventions and Recommendations; supervising the implementation of those standards; and providing technical assistance, information, and aid through its permanent secretariat, the International Labor Office.¹⁵³ The ILO, through its standard-setting activities, has created a comprehensive international labor code, an unprecedented achievement for an international organization.¹⁵⁴ The ILO's major drawback is its exclusive reliance on moral persuasion and similar nonpunitive techniques to obtain compliance with the standards it promulgates. Thus, the ILO achieves only limited success, especially with recalcitrant states.

The ILO's effectiveness is due primarily to its unique tripartite structure. In all of the ILO's activities, the most representative employers' organization, the most representative workers' organization, and the government of each state participate equally.¹⁵⁵ Worker and employer involvement provide alternative sources of information to government statistics, force governments to be honest in the information they do provide, make the ILO more accountable, and counterbalance the political motives that governments bring to any international body.

The ILO enforcement system is sophisticated and multi-faceted. It includes two noncontentious reporting procedures: the normal reporting system on ILO Conventions and Recommendations, which involves the submission and examination of annual reports, and the "direct contacts" procedure, which deals with member states that persistently fail to comply with their organizational obligations. The enforcement system also includes two contentious procedures involving representations and complaints, and technical cooperation programs to help member states comply with their ILO obligations. Largely as a result of this intricate supervisory system, the ILO has been successful in ensuring member states' adherence to formal obligations.¹⁵⁶

The ILO is structured around three principal bodies: the International Labor Conference ("ILC"), the Governing Body ("GB"), and the International

INTERNATIONAL LABOR LAW (1979); Virginia A. Leary, *Lessons from the Experience of the International Labour Organisation*, in *THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL* 580 (Phillip Alston ed., 1992).

153. See generally OSIEKE, *supra* note 152; TIKRITI, *supra* note 152.

154. See INTERNATIONAL LABOUR OFFICE, *INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS, 1919-1991* (1992).

155. INT'L LABOUR STANDARDS, *supra* note 152, at 13; Donnelly, *supra* note 10, at 629; Leary, *supra* note 152, at 584; Lee Swepston, *Human Rights Complaint Procedures of the International Labor Organization*, in *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* 74, 75 (Hurst Hannum ed., 1984).

156. See Leary, *supra* note 152, at 580; see also A.H. ROBERTSON & J.G. MERRILLS, *HUMAN RIGHTS IN THE WORLD* 236-37 (3d ed. 1989); Swepston, *supra* note 155, at 74 (describing ILO's enforcement mechanisms for human rights as highly effective); Diana Vincent-Daviss, *Human Rights Law: A Research Guide to the Literature — Part III: The International Labor Organization and Human Rights*, 15 N.Y.U. J. INT'L L. & POL. 211, 248 (1982) (arguing that ILO has been most successful at implementing its human rights instruments).

A major reason for the success of the two-tiered normal reporting system is the use of independent experts in a depoliticized, objective, private proceeding, followed by public sessions where nongovernmental representatives actively participate. The Conference Committee and plenary session of the conference provide the only opportunities for delegates to assess the application of international labor standards. OSIEKE, *supra* note 152, at 177. Active participation by representatives of employers' and workers' organizations holds governments accountable for their actions and helps keep government reports honest. The public sessions also furnish an occasion for these groups to publicize and shame a government for its failure to abide by its commitments. Leary, *supra* note 152, at 599-601.

Labor Office ("Office"). The ILC is the ILO's "supreme policy-making and legislative organ"¹⁵⁷ and usually meets once a year.¹⁵⁸ The GB, which serves as the executive council of the ILO,¹⁵⁹ usually meets three times per year. Its responsibilities include setting the agenda for the conference and other ILO meetings, appointing the Director-General of the ILO, overseeing the activities of the Office, taking note of decisions resulting from the contentious procedures, and following up on actions to be taken as a result of those decisions.¹⁶⁰ The Office is the ILO's permanent secretariat and is headed by the Director-General. It manages the organization's day-to-day activities.¹⁶¹

The ILO sets and enforces international labor standards. It sets standards through the ILC, the sole ILO body with the authority to adopt standards. The ILC adopts either Conventions (legally binding formal obligations) or Recommendations (less formal, nonbinding obligations that either supplement Conventions or deal with subjects that do not lend themselves to precise, universal obligations).¹⁶² The standards resulting from this process address economic and social rights in a "precise and concrete" fashion.¹⁶³

Once the ILC adopts the Convention, each member state is required to submit it to a competent national authority within twelve to eighteen months in order to make the Convention legally binding.¹⁶⁴ Member states that oppose ratification are not relieved of this obligation.¹⁶⁵ States are not permitted to ratify a Convention with reservations but must either accept or reject it as written.¹⁶⁶

The regular ILO system of supervision requires each member state to submit and examine annual reports.¹⁶⁷ Under the ILO Constitution, each member state must also send copies of its report to employers' and workers' organizations in its country.¹⁶⁸ These organizations are then able to make

157. TIKRITI, *supra* note 152, at 154.

158. INTERNATIONAL LABOUR OFFICE, CONSTITUTION OF THE INTERNATIONAL LABOUR ORGANISATION AND STANDING ORDERS OF THE INTERNATIONAL LABOUR CONFERENCE, art. 3, ¶ 1 (1989) [hereinafter ILO CONST.]; INT'L LABOUR STANDARDS, *supra* note 152, at 10; TIKRITI, *supra* note 152, at 154.

159. INT'L LABOUR STANDARDS, *supra* note 152, at 11.

160. *Id.*

161. *Id.*

162. Francis Wolf, *Human Rights and the International Labour Organisation*, in 2 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 273, 273-74 (Theodor Meron ed., 1984). A Convention is promulgated only if two thirds of the delegates present at the ILC vote in favor of the proposed text. ILO CONST., *supra* note 158, art. 19, ¶ 2. This two thirds voting deviates from the usual practice of most international organizations, which require unanimity to make an obligation legally binding. See J.F. McMahon, *The Legislative Techniques of the International Labour Organisation*, 1965-66 BRIT. Y.B. INT'L L. 1, 11 (1968). The voting system is also unique because half of the delegates voting on standards at the ILC are representatives of employers and workers rather than states. *Id.* at 11.

163. Leary, *supra* note 152, at 587.

164. ILO CONST., *supra* note 158, art. 19, ¶ 5(b).

165. Wolf, *supra* note 162, at 276-77.

166. INT'L LABOUR STANDARDS, *supra* note 152, at 75; see TIKRITI, *supra* note 152, at 264. Instead of allowing reservations, the ILO employs a number of flexibility clauses in its drafting of Conventions that allow member states to accept differing levels and manner of obligations. For a discussion of these flexibility clauses, see McMahon, *supra* note 162, at 31-68; J.M. Servais, *Flexibility and Rigidity in International Labour Standards*, 125 INT'L LAB. REV. 193 (1986); Nicolas Valticos, *The Future Prospects for International Labour Standards*, 118 INT'L LAB. REV. 679, 689-90 (1979).

167. See ILO CONST., *supra* note 158, art. 22.

168. *Id.* art. 23, para. 2.

observations and comment on the government report's veracity.¹⁶⁹

Once the reports are submitted, the Committee of Experts ("COE") scrutinizes them. This committee consists of a geographically balanced group of twenty prominent legal experts who serve in their personal capacities rather than as government representatives. They are appointed for three-year renewable terms by the GB on the recommendation of the ILO Director-General.¹⁷⁰ Under the terms of the ILO Constitution, appointments are based solely on technical competence so as to insulate the process from government pressure.¹⁷¹

The COE supervises the legal application of Conventions and Recommendations. Its purposes are 1) to examine the annual reports under article 22 of the ILO Constitution on the application of ratified Conventions, 2) to examine the government reports that detail their law and practice with regards to selected unratified Conventions, and 3) to examine information supplied by governments on newly adopted Conventions.¹⁷²

The COE described the manner in which it performs its duties as follows:

The Committee's fundamental principles, as voiced on a number of occasions, call for impartiality and objectivity in pointing out the extent to which it appears that the position in each State is in conformity with the terms of the Conventions and the obligations which that State has undertaken by virtue of the Constitution of the ILO. The members of the Committee must accomplish their task in complete independence as regards all member states.¹⁷³

COE members execute their responsibilities in a thorough, independent, impartial, and objective fashion.¹⁷⁴ The committee does not restrict itself to information provided by governments. It examines a wide range of material from many sources, including information on legislation and regulations provided in official government publications, court decisions, texts of collective agreements, conclusions and findings of other deliberative bodies (i.e. the GB, Commission of Inquiry, U.N. Commission on Human Rights, Working Group on Slavery),¹⁷⁵ and comments from employers' and workers' organizations.¹⁷⁶

The COE meets in closed sessions and its deliberations are private.¹⁷⁷ After these deliberations, the COE makes specific findings regarding member-state compliance with Conventions. The findings take the form of either observations or direct requests. Observations, published in a lengthy annual

169. See Wolf, *supra* note 162, at 279-80.

170. INT'L LABOUR STANDARDS, *supra* note 152, at 84-85.

171. See ALFRED G. MOWER, JR., INTERNATIONAL COOPERATION FOR SOCIAL JUSTICE: GLOBAL AND REGIONAL PROTECTION OF ECONOMIC/SOCIAL RIGHTS 70 (1985); TIKRITI, *supra* note 152, at 287; Leary, *supra* note 152, at 596-97.

172. INT'L LABOUR STANDARDS, *supra* note 152, at 85.

173. *Id.* (quoting from 1977 statement by COE).

174. OSIEKE, *supra* note 152, at 174.

175. INT'L LABOUR STANDARDS, *supra* note 152, at 85-86.

176. MOWER, *supra* note 171, at 88.

177. TIKRITI, *supra* note 152, at 289; Leary, *supra* note 152, at 597. One commentator has stated that closed sessions without government representatives allow the COE to engage in a technical, depoliticized examination of reports that enhances the committee's reputation. Yet this advantage has come at the expense of drawing little publicity or media attention to the committee's work. Leary, *supra* note 152, at 597.

COE report, are used to draw attention to cases involving more serious or long-standing failures to comply with Convention obligations.¹⁷⁸ Direct requests are not published but are sent directly to the member state concerned and to employers' and workers' organizations in that state.¹⁷⁹

The COE submits its report to the ILC, which uses it as the basis for the conference's discussions concerning compliance by member states. An appointed tripartite Conference Committee on the Application of Conventions and Recommendations,¹⁸⁰ which holds all of its sessions in public,¹⁸¹ first examines and discusses the report. The Conference Committee focuses on member states encountering the greatest difficulties in meeting their ILO obligations and normally invites them to make a statement and answer questions from the committee concerning the report.¹⁸² Although representatives of these member states are not required to appear or make a statement, most submit written statements, and many appear in person before the committee.¹⁸³

The Conference Committee then summarizes its discussions and conclusions in a report submitted for adoption at one of the plenary sessions of the conference. This report provides another opportunity for open discussion among the delegates regarding a member state's failure to abide by its obligations. If adopted, the report is transmitted to member states with instructions to address certain points in their next report to the ILO.¹⁸⁴

Another supervisory method instituted to supplement the regular reporting system is the "direct contacts" procedure.¹⁸⁵ This procedure is used when a state has persistently failed to comply with the COE's or the ILO Commission of Inquiry's findings, or when the government concerned has repeatedly questioned the COE's assessment of the situation prevailing in the country.¹⁸⁶ A "direct contact" involves ILO officials visiting the country in question to assess the situation more thoroughly, to promote a more intimate, informal dialogue with the government, and to aid in the provision of technical assistance.¹⁸⁷

In addition to this regular supervisory system, two contentious procedures also exist: representations and complaints. The representation procedure, found in articles 24 and 25 of the ILO Constitution, allows any employers' or workers' organization to make a "representation" that a member state has

178. INT'L LABOUR STANDARDS, *supra* note 152, at 86.

179. *Id.* The COE is extremely polite in its comments and has developed a highly stylized and understated, diplomatic language to couch its remarks. For example, phrases such as "with concern" or "with regret" are understood to denote harsh criticism and signify that the government's failure to adhere to its Convention obligations are serious. Leary, *supra* note 152, at 598.

180. INT'L LABOUR STANDARDS, *supra* note 152, at 88; TIKRITI, *supra* note 152, at 291; Leary, *supra* note 126, at 598-99.

181. TIKRITI, *supra* note 152, at 291.

182. INT'L LABOUR STANDARDS, *supra* note 152, at 88; TIKRITI, *supra* note 152, at 293-94; Wolf, *supra* note 162, at 284.

183. INT'L LABOUR STANDARDS, *supra* note 152, at 88-89.

184. *Id.* at 89; OSIEKE, *supra* note 152, at 175; *see also* TIKRITI, *supra* note 152, at 294.

185. The COE suggested the "direct contacts" procedure in 1968, and it has been in operation since 1969. INT'L LABOUR STANDARDS, *supra* note 152, at 90-91.

186. *Id.* at 90.

187. *Id.* at 90-91; MOWER, *supra* note 171, at 92-93; Leary, *supra* note 152, at 611-12.

"failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party."¹⁸⁸ An employers' or workers' organization can submit a representation regardless of its national affiliation or relationship to the member state in question.¹⁸⁹

The organization submits the representation to the ILO Director-General, who immediately brings it to the attention of the GB and notifies the member state concerned.¹⁹⁰ If the representation is receivable,¹⁹¹ the GB appoints a tripartite committee composed of one government, one employer, and one worker representative from its members.¹⁹² Their task is to evaluate the substance of the representation, decide upon conclusions and recommendations, and report their determinations to the GB.¹⁹³

All committee sessions are private and confidential.¹⁹⁴ During the examination, the committee may request further information from the organization filing the representation and/or from the government concerned, and it may also invite a representative from either party to appear before the committee. Alternatively, a request may be made by the government that a representative of the Director-General visit the country and initiate the "direct contacts" procedure.¹⁹⁵

After receiving the committee's report, the GB undertakes private and confidential deliberations on the representation. The government concerned is invited to participate in these proceedings but may not vote on the matter.¹⁹⁶ The GB can accept the government's explanation and terminate the procedure, or it may table the matter and seek additional information.¹⁹⁷ Alternatively, under article 25, "[i]f no statement is received within a reasonable time from the government in question, or if the statement when received is not deemed to be satisfactory by the Governing Body, the latter shall have the right to publish the representation and the statement, if any, made in reply to it."¹⁹⁸ Finally, the GB may decide to convert the representation into a complaint against the member state.¹⁹⁹ No matter what the decision, the organization that filed the complaint is kept abreast of all actions taken.²⁰⁰ If the GB

188. ILO CONST., *supra* note 158, art. 24.

189. INT'L LABOUR STANDARDS, *supra* note 152, at 97; OSIEKE, *supra* note 152, at 219-20; Swepston, *supra* note 155, at 80.

190. OSIEKE, *supra* note 152, at 212.

191. The GB first evaluates the receivability of a representation. To be receivable, a representation must meet the following six conditions: it must 1) be communicated to the Office in writing, 2) come from an industrial association of workers or employers, 3) specifically refer to article 24 of the ILO Constitution, 4) concern a member state of the ILO, 5) refer to an ILO Convention of which the member state is a party, and 6) specify the manner in which the member state has failed to secure effective observance within its jurisdiction of the Convention. *Id.* (citing article 2(2) of Standing Orders contained in ILO, *Official Bulletin*, Vol. 64 (1981), Series A, No. 1).

192. OSIEKE, *supra* note 152, at 212; TIKRITI, *supra* note 152, at 297-98; Leary, *supra* note 152, at 610.

193. OSIEKE, *supra* note 152, at 212.

194. *Id.* at 212-13.

195. *Id.* at 213; TIKRITI, *supra* note 152, at 298.

196. OSIEKE, *supra* note 152, at 213.

197. TIKRITI, *supra* note 152, at 298.

198. ILO CONST., *supra* note 158, art. 25.

199. *Id.* art. 26, ¶ 4. For a discussion of the complaint procedure, see text accompanying *infra* notes 203-224.

200. TIKRITI, *supra* note 152, at 299.

decides that publication is required, it chooses the form and the date of publication.²⁰¹ Publication completes the representation portion of the procedure. However, the case continues to be monitored through regular ILO supervisory procedures.²⁰²

The complaint procedure, a more elaborate contentious proceeding, is governed by articles 26 to 29 and 31 to 34 of the ILO Constitution. Any member state that has ratified a particular Convention may file a complaint against another member state bound by the same Convention whenever "it is not satisfied that [the] other Member is securing the effective observance of [that] Convention."²⁰³ The GB may also initiate this procedure, either *sua sponte* or upon receiving a complaint from a Conference delegate.²⁰⁴

Once the complaint is initiated, the GB may communicate it to the member state concerned to give the government an opportunity to reply.²⁰⁵ If the reply received is not deemed satisfactory by the GB or if no reply is received within a designated time period, the GB may appoint a Commission of Inquiry ("COI").²⁰⁶ Alternatively, the GB may decide that it is not necessary to communicate the complaint to the implicated member state before appointing the COI.²⁰⁷ If the GB appoints a COI, the merits of the complaint cannot be discussed until the COI has completed its investigation and filed its report.²⁰⁸

A COI is a quasi-judicial body composed of three prominent persons who serve in their personal capacities²⁰⁹ and who are appointed by the GB on the nomination of the ILO Director-General.²¹⁰ The duties of the COI are to

fully consider[] the complaint . . . and prepare a report embodying its findings on all questions of fact relevant to determining the issue between the parties and containing such recommendations as it may think proper as to the steps which should be taken to meet the complaint and the time within which they should be taken.²¹¹

Although the ILO Constitution prescribes no procedure to fulfill these duties, the Commission's practice is to function in much the same manner as a judicial body.²¹² Its activities usually involve taking statements and documentary evidence from the parties, examining witnesses, and conducting

201. *Id.* at 298.

202. Swepston, *supra* note 155, at 82.

203. ILO CONST., *supra* note 158, art. 26, ¶ 1.

204. *Id.* art. 26, ¶ 4.

205. *Id.* art. 26, ¶ 2.

206. *Id.* art. 26, ¶ 3.

207. *Id.*

208. OSIEKE, *supra* note 152, at 226.

209. INT'L LABOUR STANDARDS, *supra* note 152, at 98; OSIEKE, *supra* note 152, at 227; Wolf, *supra* note 162, at 288.

210. OSIEKE, *supra* note 152, at 227; Wolf, *supra* note 162, at 288. This method of appointment is used to ensure complete impartiality, independence, and objectivity. *Id.* The serious nature of the role of the COI is indicated by the fact that the members must "make a declaration that they will perform their duties and exercise their powers 'honourably, faithfully, impartially, and conscientiously.'" OSIEKE, *supra* note 152, at 227. The declaration made by the members of the COI is similar to that made by the judges of the International Court of Justice. OSIEKE, *supra* note 152, at 227-28.

211. ILO CONST., *supra* note 158, art. 28.

212. OSIEKE, *supra* note 152, at 228-29.

on-the-spot investigations.²¹³ Member states not directly involved in the complaint are also required to present to the COI any information they have concerning the complaint.²¹⁴ Those member states bordering on or having significant trade relations with the countries involved in the complaint are usually called upon to furnish any relevant information.²¹⁵

On completion of its investigation, the COI presents its report to the GB and to the parties implicated in the complaint. The report is also published in the ILO's *Official Bulletin*.²¹⁶ Although the COI is only required to make findings of fact, distinguishing factual from legal issues in these cases is difficult. In order to determine whether a party has violated the Convention, the Commission must examine a party's obligations under the relevant Convention. Thus, it must conduct an inquiry into both fact and law.²¹⁷

Once the report is received, an implicated government has up to three months to notify the ILO Director-General that "it accepts the recommendations contained in the report of the Commission; and if not, whether it proposes to refer the complaint to the International Court of Justice" ("ICJ").²¹⁸ The decision of the ICJ on the matter is final.²¹⁹ Without a request for an ICJ determination, the presumption is that the COI's recommendations are accepted and therefore the implicated member state is bound to implement them within the specified time period. This presumption occurs even if the state fails to declare its intentions concerning the COI's report within the three-month period.²²⁰

If a member state fails to carry out the COI's recommendations or ICJ's decision within the stipulated time period, the GB has broad discretion in its recommendations to the Conference for securing compliance.²²¹ In addition, a member state that was found in a previous complaint procedure to have breached its obligations can request that a COI be constituted to verify that it has attained compliance.²²² If verified, the GB will discontinue any additional compliance measures that it might have instituted.²²³ Finally, the COI usually includes in its recommendations a request that the member state concerned indicate in its annual reports to the ILO the steps that it has taken to give effect to the recommendations. The complaint procedure is thus linked to the regular ILO supervisory mechanisms so the ILO can monitor a member state's progress in the matter.²²⁴

The ILO relies on moral persuasion, publicity, shame, diplomacy, and

213. INT'L LABOUR STANDARDS, *supra* note 152, at 99; OSIEKE, *supra* note 152, at 228; Swepston, *supra* note 155, at 83-84; Wolf, *supra* note 162, at 288.

214. ILO CONST., *supra* note 158, art. 27.

215. INT'L LABOUR STANDARDS, *supra* note 152, at 99.

216. See ILO CONST., *supra* note 158, art. 29, ¶ 1; Swepston, *supra* note 155, at 84.

217. OSIEKE, *supra* note 152, at 231.

218. ILO CONST., *supra* note 158, art. 29, ¶ 2.

219. *Id.* art. 31.

220. OSIEKE, *supra* note 152, at 233. Although six complaint proceedings have resulted in a COI report, no government has chosen to appeal the commission's findings or recommendations to the ICJ. INT'L LABOUR STANDARDS, *supra* note 152, at 99.

221. ILO CONST., *supra* note 158, art. 33.

222. *Id.* art. 34.

223. *Id.* This procedure has never been used. Swepston, *supra* note 155, at 85.

224. INT'L LABOUR STANDARDS, *supra* note 152, at 99.

dialogue to ensure compliance by member states.²²⁵ No material form of sanctions has ever been utilized.²²⁶ As a matter of fact, “[n]one of the ILO’s supervisory procedures include sanctions against a country found in violation of an ILO standard.”²²⁷ While these enforcement mechanisms are adequate to deal with some situations, the annual reports of the COE are filled with comments concerning persistent violators of various Conventions, including those dealing with forced and child labor.²²⁸ The lack of sanctions is a major weakness in the ILO’s procedures because it allows persistent violations to continue.

Moreover, the ILO rarely utilizes its contentious proceedings.²²⁹ While some have argued that this disuse is due to the effectiveness of regular supervisory procedures,²³⁰ a more likely explanation is the reluctance of states to criticize each other for human rights violations. Because nations often view complaints as hostile acts, they fear retaliation. Hence, overuse of contentious proceedings may create distrust among member states and threaten the entire ILO system.²³¹

Besides the supervisory systems, the ILO provides member states with technical assistance in achieving greater compliance with the ILO’s objectives and principles.²³² The technical cooperation programs are designed to help developing countries overcome difficulties that prevent them from implementing ratified Conventions²³³ and create more hospitable conditions to further Convention ratification and application.²³⁴

225. Servais, *supra* note 166, at 202-03; *see also* Lynn Martin, U.S. Secretary of Labor, Statement before Foreign Relations Comm. of U.S. Senate, app. (Apr. 22, 1991) (“ILO functions strictly on the basis of moral persuasion”) (on file with author) [hereinafter Martin Statement]; TIKRITI, *supra* note 152, at 291 (“it must be remembered that no sanctions can be imposed upon member states, except the moral sanction of public discussion about their performance”).

226. OSIEKE, *supra* note 152, at 235.

227. Martin Statement, *supra* note 225, at app.; *see also* TIKRITI, *supra* note 152, at 291 (discussing how ILO’s supervisory procedures operate as moral sanction).

228. *See generally* INTERNATIONAL LABOUR OFFICE, REPORT OF THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS, 75TH-79TH SESS. (1988-1992) (identifying and discussing specific nation-state violators).

229. INT’L LABOUR STANDARDS, *supra* note 152, at 100; Swepston, *supra* note 155, at 92; *see also* Leary, *supra* note 152, at 609-10 (stating that complaint and representation procedures have been rarely used until recently). Between 1924 and 1970, only eight representations were made; in 1991, five representations were being considered. *Id.* at 610. By 1984, only 14 complaints had been received. Wolf, *supra* note 162, at 289.

230. INT’L LABOUR STANDARDS, *supra* note 152, at 100; Swepston, *supra* note 155, at 92.

231. *Cf.* Leary, *supra* note 152, at 601 (“The ILO experience establishes that criticisms of States, however diplomatically couched, elicit strong opposition from the criticized State and its allies and may in the end threaten the very existence of a reporting system.”).

232. *See generally* *International Labour Standards and Technical Cooperation*, ILO Governing Body, 252d Sess., ILO Doc. GB.252/15/1 (Mar. 2-6, 1992) [hereinafter *Technical Cooperation*] (photocopy on file with author) (clarifying links between international standards and ILO’s technical cooperation programs).

233. *Id.* at 10; Leary, *supra* note 152, at 589.

234. *Technical Cooperation*, *supra* note 232, at 6, 12. The ILO attempts to ensure that linkages between international labor standards and technical cooperation are complimentary. All technical cooperation programs must thus meet certain conditions. First, the projects must fall within the ILO mandate, and the Office must be competent to implement them properly. Second, the projects must reflect the principle of tripartism and contribute to the member state’s economic development in congruence with the organization’s ideals of social justice and respect for human beings. Third, the programs must be integrated into and appropriate for the policies of the member state, take into account all ILO constituent

The ILO does not condition technical cooperation on a member state's compliance with its obligations under the various international labor standards.²³⁵ The withdrawal of technical cooperation programs has never been used to punish states that refuse to implement human rights or labor standards.²³⁶ Instead, the programs are viewed as a "carrot" that encourages states to follow ILO standards.²³⁷

A technical cooperation program begins after the ILO and the member state enter into a partnership in which each party shares a commitment and responsibility to satisfy the organization's and program's objectives.²³⁸ If the ILO observes serious violations of its human rights standards in a country in which a technical cooperation program is being implemented, it initiates a thorough review of the program. After review, the ILO may revise the program to be more compatible with the country's needs and conditions, or it may terminate the program until conditions in the country become more suited to the reciprocal obligations needed to make a technical cooperation program successful. In states where serious human rights violations have occurred, the GB closely monitors the situation.²³⁹

B. *The General Agreement on Tariffs and Trade/World Trade Organization*

The General Agreement on Tariffs and Trade ("GATT"),²⁴⁰ became effective on January 1, 1948. On January 1, 1995, it was succeeded by the World Trade Organization ("WTO").²⁴¹ GATT/WTO has evolved into the

viewpoints, and result in a true partnership. *Id.* at 9.

235. *Id.* at 4-5, 7-8, 15.

236. Leary, *supra* note 152, at 589.

237. *Id.*

238. Each specific program must be designed and implemented in a cooperative fashion taking into account local conditions, priorities, and the economic environment. *Technical Cooperation*, *supra* note 232, at 12, 14.

239. *Id.* at 14. The technical cooperation programs cover the following areas: employment and development, training, sectoral activities, the working environment, industrial relations, social security, workers' education, and assistance to employers' organizations. ILO BUREAU OF PUBLIC INFORMATION, INTERNATIONAL LABOUR ORGANISATION BACKGROUNDER 6 (1991). The specific activities may include providing technical assistance in drafting legislation and regulations, organizing regional seminars on standards, assisting in the development of small-scale industries and cooperatives, and providing technical and vocational education. *Id.* For a description of a worldwide technical cooperation program, see INTERNATIONAL LABOUR OFFICE, WORKING CONDITIONS AND ENVIRONMENT DEPARTMENT, INTERDEPARTMENTAL PROJECT ON THE ELIMINATION OF CHILD LABOUR (1992).

240. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. pt. 5, at A3, 55 U.N.T.S. 194 (entered into force Jan. 1, 1948) [hereinafter GATT]. References to GATT will include the original document, annex 1, and all subsequent amendments. They can be found in GATT, THE TEXT OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE (1986), published by the GATT Secretariat in Geneva, Switzerland. References to the codes, framework agreements, and decisions of the Contracting Parties emerging from the multilateral trade negotiations of the Tokyo Round held between 1973 and 1979 will be cited to GATT, THE TEXTS OF THE TOKYO ROUND AGREEMENTS (1986) [hereinafter TOKYO ROUND], published by the GATT Secretariat.

For a history of the events leading up to and the negotiations surrounding the GATT, see generally KENNETH DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION (1970); WILLIAM DIEBOLD, THE END OF THE ITO (1952); RICHARD N. GARDNER, STERLING-DOLLAR DIPLOMACY (1969); ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY 1-61 (2d. ed. 1989); JACKSON, *supra* note 1, at 30-39; CLAIR WILCOX, A CHARTER FOR WORLD TRADE (1949).

241. WTO Agreement, *supra* note 1.

principal international organization for the regulation of international trade.²⁴² It covers almost every aspect of world trade in goods and is the primary international forum for negotiating and settling disputes on trade matters.²⁴³ The primary objective of GATT/WTO is to "liberalize international trade and place it on a secure basis, thereby contributing to the economic growth, development and welfare of the world's people."²⁴⁴ As of July of 1992, 104 governments were members of GATT and an additional 30 nations had applied for admission.²⁴⁵ These members account for nearly 90 percent of world trade.²⁴⁶ Members are obliged to negotiate the reduction of tariffs, eliminate nontariff barriers, and refrain from discriminatory treatment.²⁴⁷

GATT members are referred to as contracting parties and collective action of those parties is designated by the term CONTRACTING PARTIES ("CPs").²⁴⁸ The CPs, which constitute the principal body of GATT, oversee operations and have broad authority.²⁴⁹ Each contracting party receives one vote, and most decisions are made by a majority.²⁵⁰ In practice, however, the CPs act almost exclusively by consensus in all business matters.²⁵¹ The CPs meet once a

242. GATT, GATT ACTIVITIES 1991, at 1 (1992); HENKIN ET AL., *supra* note 105, at 1165; JACKSON, *supra* note 1, at 27; William J. Davey, *The WTO/GATT World Trading System: An Overview*, in HANDBOOK OF GATT DISPUTE SETTLEMENT 7 (Pierre Pescatore et al. eds., 1988).

243. Davey, *supra* note 242, at 7-8.

244. GATT ACTIVITIES 1991, *supra* note 242, at 1; WTO Agreement, *supra* note 1, pmb1; *see also* William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 51, 53 (1987) ("basic goal of GATT is to promote free international trade by establishing rules that limit national impediments to trade").

245. GATT ACTIVITIES 1991, *supra* note 242, at 1, 151-52. Under the newly created WTO, 76 states are currently members, and an additional 16 states are close to joining. David Rohde, *From Bananas to Buttons, New Trade Rules Kick In*, CHRISTIAN SCI. MONITOR, Feb. 15, 1995, at 1.

246. GATT ACTIVITIES 1991, *supra* note 242, at 1.

247. *Id.* at 40-41; Davey, *supra* note 242, at 17. The obligation of nondiscriminatory treatment is embodied in articles I and III of GATT. Article I expresses the MFN principle. GATT, *supra* note 240, art. I. It normally requires that all activities and products of a foreign country are treated as favorably as those from other foreign countries. JACKSON, *supra* note 1, at 133-48. Article III pertains to national treatment and requires contracting parties to "treat foreign goods equally to domestic goods, once the foreign goods have cleared customs and become part of the internal commerce." JACKSON, *supra* note 1, at 133; *see* GATT, *supra* note 240, art. III. For a discussion of the national treatment obligation, *see* JACKSON, *supra* note 1, at 189-202. Many of the remaining articles of the GATT can be regarded as a "code of conduct" that regulates government behavior in international trade. JACKSON, *supra* note 1, at 40. These provisions include freedom of transit, GATT, *supra* note 240, art. V, valuation of goods for customs purposes, *id.* art. VII, procedures of customs administration, *id.* arts. VIII & X, marks of origin, *id.* art. IX, state trading enterprises, *id.* art. XVII, subsidies, *id.* art. XVI, and antidumping and countervailing duties, *id.* art. VI.

248. The term "contracting party" designates a member of GATT. The term "CONTRACTING PARTIES" is used when the members of GATT act jointly. JACKSON, *supra* note 1, at 48. Under the WTO, each country will be designated as a member. Representatives of all the members of the WTO will meet at a Ministerial Conference held at least once every two years. WTO Agreement, *supra* note 1, art. IV, ¶ 1.

249. JACKSON, *supra* note 1, at 48. Under article XXV, "Representatives of the contracting parties shall meet from time to time for the purpose of giving effect to those provisions of th[e] Agreement which involve joint action and, generally, with a view to facilitating the operation and furthering the objectives of th[e] Agreement." GATT, *supra* note 240, art. XXV, ¶ 1. A Ministerial Conference carries out the functions of the WTO. WTO Agreement, *supra* note 1, art. IV, ¶ 1. In the interim, a General Council composed of representatives of all WTO members will carry out the implementation and operations of the WTO and will meet as appropriate. *Id.* art. IV, ¶ 2.

250. GATT, *supra* note 249, art. XXV, ¶¶ 2, 4.

251. JACKSON, *supra* note 1, at 48-50; Davey, *supra* note 242, at 11. "The WTO shall continue the practice of decision-making by consensus followed under GATT . . ." WTO Agreement, *supra* note 1, art. IX, ¶ 1. Only when a decision cannot be arrived at by consensus will matters be decided by voting. Each WTO member will receive one vote. On matters of Multilateral Trade Agreement interpretation, a three-fourths majority of the members is required to adopt an interpretation. A decision to waive an

year and delegate the rest of GATT's business to other organs.²⁵²

The GATT Council ("Council"), established in 1960, exercises all of the powers of the CPs, except the power to grant waivers under article XXV, paragraph 5.²⁵³ It considers issues that arise between sessions of the CPs; supervises committees, working parties, and other subsidiary bodies of the CPs, providing guidance as necessary; and examines and makes recommendations on the reports of such bodies. In addition, the Council prepares for sessions of the CPs, handles "such other matters with which the [CPs] may deal at their sessions," and exercises additional duties that the CPs may delegate to the Council.²⁵⁴ The Council directs GATT's operations and meets on a monthly basis.²⁵⁵

In addition to the Council, a Director General, head of the GATT/WTO Secretariat, handles the day-to-day operations of GATT/WTO and oversees the work of a professional staff.²⁵⁶ Various committees and working parties deal with other specific aspects of the GATT/WTO system.

1. *Unfair Trade Practices under GATT/WTO*

The two major unfair trade practices regulated by GATT/WTO are dumping and subsidies. If dumping by an exporting state "causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry,"²⁵⁷ the importing country can apply antidumping duties "not greater in amount than the margin of dumping in respect of such product" in order to offset or prevent the dumping.²⁵⁸ The GATT provisions on dumping provide a framework for the promulgation of antidumping laws and investigation of trade practices.²⁵⁹

obligation imposed on a member must be made by a three-fourths majority. *Id.* art. IX. Procedural amendments to the WTO or other Multilateral Trade Agreements require a two-thirds majority while substantive amendments require a three-fourths majority. The members decide whether a proposed amendment is substantive or procedural. *Id.* art. X.

252. JACKSON, *supra* note 1, at 48; Davey, *supra* note 242, at 11-12. Representatives of all the members of the WTO will meet at a Ministerial Conference held at least once every two years. WTO Agreement, *supra* note 1, art. IV, ¶ 1.

253. GATT, Basic Instruments and Selected Documents ("BISD") 9S/7, 8-9 (1961) (decision of 4 June 1960 establishing council of representatives). The Council is open to any contracting party willing to serve and accept the responsibilities of membership. *Id.* at 8.

254. *Id.*

255. JACKSON, *supra* note 1, at 48; Davey, *supra* note 242, at 12. Under the WTO, the General Council is delegated all of the functions of the Ministerial Conference and oversees the operation of the WTO and the Multilateral Trade Agreements. WTO Agreement, *supra* note 1, art. IV, ¶ 2. The General Council will also convene as the Dispute Settlement Body as appropriate and discharge its obligations under the Dispute Settlement Understanding. *Id.* art. IV, ¶ 3.

256. Davey, *supra* note 242, at 14-15. The Secretariat produces international trade studies and provides support services for GATT's activities. The Secretariat's role has traditionally been passive, tending towards facilitating negotiations and servicing members' needs. *Id.*

257. GATT, *supra* note 245, art. VI, ¶ 1.

258. *Id.* art. VI, ¶ 2.

259. See Davey, *supra* note 242, at 53-56. Antidumping infractions reach GATT only when one contracting party challenges the laws or investigations of another contracting party as being contrary to the provisions found in GATT or the 1979 Tokyo Round Antidumping Code. See JACKSON, *supra* note 1, at 94-100; TOKYO ROUND, *supra* note 240, at 127-45; GATT, ANALYTICAL INDEX ARTICLE VI-1 TO VI-28 (5th ed. 1989) (analyzing article VI as per various agreements, CPs' interpretations and decisions, and dispute proceedings). The Tokyo Round Antidumping Code is officially entitled "Agreement on

This framework has proved influential in shaping individual country law and practice.²⁶⁰

Subsidies are regulated under GATT through articles VI and XVI²⁶¹ and the 1979 Tokyo Round Subsidies Code ("Subsidies Code").²⁶² The subject is controversial, and uncertainty abounds concerning the definition of, theory behind, and proper response to a subsidy.²⁶³ Thus, GATT has been ambiguous and imprecise in its attempts to regulate subsidies.

The WTO, in contrast, has defined subsidies and provided more precise criteria for their regulation. The Final Act of the Uruguay Round defines a subsidy as government or public financial contributions provided directly or indirectly to benefit a specific firm or industry.²⁶⁴ Subsidies are usually classified as either export subsidies or domestic/production subsidies.²⁶⁵ In order to be actionable under the WTO, a subsidy must be "specific," meaning that the government grants the subsidy, either in law or fact, to a firm, industry, or group of firms or industries.²⁶⁶

The WTO has divided subsidies into three categories and regulates each type differently. The first category is prohibited subsidies, which basically include export subsidies and subsidies that are contingent upon the use of domestic goods over imported goods. Prohibited subsidies must be abated and are subject to countervailing duties.²⁶⁷ The second category is actionable subsidies and primarily includes domestic subsidies that produce adverse trade effects. A domestic subsidy is actionable when it causes injury to the domestic industry of another member state, nullifies or impairs benefits accruing to another member state under the WTO, or causes "serious prejudice" to the

Implementation of Article VI of the General Agreement on Tariffs and Trade."

260. See, e.g., JACKSON, *supra* note 1, at 228-44 (detailing U.S. law and practice).

261. GATT, *supra* note 240, arts. VI & XVI.

262. Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, TOKYO ROUND, *supra* note 240, at 51-80.

263. Neither GATT nor the 1979 Tokyo Round Subsidies Code defines the term subsidy. A number of commentators have stated that the issue of subsidies is controversial, perplexing, and not capable of uniform definition or theory. See, e.g., HUFBAUER & ERB, *supra* note 126, at 9-13 (giving examples of different definitions of term); JACKSON, *supra* note 1, at 261-69; Davey, *supra* note 244, at 59-60. A variety of theories either support the idea that all or some subsidies are harmful and should be countervailed, or claim that subsidies are beneficial and should not invoke any response. See, e.g., HUFBAUER & ERB, *supra* note 126, at 19-21; JACKSON, *supra* note 1, at 251-54; Davey, *supra* note 242, at 59; Warren F. Schwartz & Eugene W. Harper, Jr., *The Regulation of Subsidies Affecting International Trade*, 70 MICH. L. REV. 831, 839-51 (1972). Unfortunately, determining the overall impact of a subsidy on an economy is extremely difficult and imprecise.

This Article will not be able to resolve the issues surrounding subsidies but suggests that the current understanding of harmful or "actionable" subsidies should be expanded to include gross and persistent violations of the prohibition against forced or child labor.

264. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex 1A: Agreement on Subsidies and Countervailing Measures, *opened for signature* April 15, 1994 art. 1.1(a)(1) [hereinafter Subsidies Agreement].

265. HUFBAUER & ERB, *supra* note 126, at 12-13, 45; JACKSON, *supra* note 1, at 249-50. Although easy in theory, classifying a subsidy may be difficult. For example, although a government gives a subsidy to all industries that manufacture a particular product regardless of where the product is sold and may regard that subsidy as a production subsidy, if the product is chiefly exported, it may be better classified as an export subsidy. Classification is important because it leads to different levels of scrutiny and consequences.

266. Subsidies Agreement, *supra* note 264, arts. 1.2, 2.

267. *Id.* art. 3.

trade interests of another member state.²⁶⁸ The third category, nonactionable subsidies, is not limited to a specific firm or industry. These subsidies include government research and development assistance, aid to disadvantaged regions, and assistance to ensure compliance with environmental requirements.²⁶⁹

Countervailing duties may only be imposed against prohibited and actionable subsidies, and only if the subsidy causes or threatens to cause "material injury."²⁷⁰ A countervailing duty is a "special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production or export of any merchandise."²⁷¹ These duties may only be levied in an amount that is less than or equal to the amount of the subsidy.²⁷²

Subsidies may be actionable even when they do not violate GATT/WTO. In some cases, the introduction or alteration of a subsidy will nullify or impair a mutually agreed-upon tariff or other reciprocal GATT/WTO benefit.²⁷³ Even if the introduction or alteration of the subsidy does not amount to a GATT violation,²⁷⁴ it is actionable so long as the subsequent action nullified or impaired a benefit that was reasonably expected by the other party.²⁷⁵ Once nullification or impairment is found to have occurred, the subsidizing government must desist or face possible retaliation, including the withdrawal of a tariff concession, the imposition of a quota, or the suspension of trading privileges.²⁷⁶

Besides giving CPs the authority to respond to unfair trading practices, GATT also permits CPs to adopt and enforce measures "necessary to protect public morals" or "relating to products of prison labour."²⁷⁷ This "general exceptions" article cannot be invoked in an arbitrary or unjustifiably discriminatory manner or used as a disguised restriction on international trade.²⁷⁸ Although some commentators have asserted that GATT dispute settlement panels strictly enforce the general exception provisions of article XX,²⁷⁹ the phrases dealing with protecting public morals or relating to

268. *Id.* art. 5. Article 6 defines "serious prejudice." *Id.* art. 6.

269. *Id.* art. 8.

270. GATT, *supra* note 240, art. VI. While the term "material injury" is never defined, GATT's Subsidies Code does list a number of factors to be used to measure the extent of the injury. These criteria include declines in output, market-share, sales, profits, etc. TOKYO ROUND, *supra* note 240, at 61 (referring to Subsidies Code, art. 6, ¶ 3).

271. GATT, *supra* note 240, art. VI, ¶ 3.

272. *Id.* The WTO Subsidies Agreement is similar to GATT with regard to the definition of "material injury" and the imposition of countervailing duties. See Subsidies Agreement, *supra* note 264, arts. 10-23.

273. GATT, *supra* note 240, art. XXIII; Subsidies Agreement, *supra* note 264, art. 5(b).

274. GATT, *supra* note 240, art. XXIII, ¶ 1.

275. HUFBAUER & ERB, *supra* note 126, at 33.

276. GATT, *supra* note 240, art. XXIII, ¶ 2; see also HUFBAUER & ERB, *supra* note 126, at 33 (summarizing nullification and impairment theory and practice). For further discussion of nullification and impairment, see *infra* notes 288-291 and accompanying text.

277. GATT, *supra* note 240, art. XX, ¶¶ (a), (e).

278. Jan Klabbbers, *Jurisprudence in International Trade Law: Article XX of GATT*, 26 J. WORLD TRADE 63, 88 (1992).

279. Davey, *supra* note 242, at 63 (describing strict enforcement of article XX conditions by GATT panels); Klabbbers, *supra* note 278, at 88-89 (arguing article XX calls for restrictive interpretation because it is exception to basic GATT obligations).

products of prison labor have never been interpreted.²⁸⁰ Hence, if international standards preventing such practices exist, then legislation regulating or prohibiting the importation of goods made under those production processes would be consistent with GATT.²⁸¹

2. GATT/WTO Dispute Settlement Procedures²⁸²

Promoting free international trade demands the efficient resolution of disputes within GATT/WTO through the application of mutually formulated rules.²⁸³ GATT has been relatively successful at resolving trade disputes²⁸⁴ and is the most widely used international dispute resolution mechanism.²⁸⁵ Despite a substantial increase in the number of GATT disputes over the last decade, the integrity of the international trading system remains intact.²⁸⁶ Articles XXII and XXIII of GATT detail the basis for the dispute settlement

280. See GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 518-49 (6th ed. 1994). *But see id.* at 525-26 (discussing 1991 unadopted panel report on GATT dispute entitled "United States — Restrictions on Imports of Tuna," concerning U.S. prohibition of imports of certain yellowfin tuna products from Mexico pursuant to Marine Mammal Protection Act in which dispute panel rejected U.S. contention that ban was consistent with GATT article XX(b), necessary to protect human, animal, or plant life or health).

281. Cf. Kenneth S. Komoroski, *Failure of Governments to Regulate Industry: A Subsidy under the GATT?*, 10 Hous. J. INT'L L. 189 (1988) (arguing that government's failure to take action with regard to international legal standard amounts to countervailable subsidy in case of industrial environmental controls).

282. A new dispute settlement mechanism incorporated into the Final Act of the Uruguay Round creates an integrated dispute settlement procedure within the WTO to encompass all multilateral trade agreements and follows a more legalistic approach than that used previously in GATT. GATT FOCUS, *supra* note 1, at 12; Palitha T.B. Kohona, *Dispute Resolution under the World Trade Organization—An Overview*, 28 J. WORLD TRADE 23, 24 (1994). This procedure will be administered by the Dispute Settlement Body ("DSB"), which will act for the General Council. The DSB will be composed of all WTO members who choose to become members of the DSB, and all DSB decisions will be made by consensus. GAO ON URUGUAY ROUND, *supra* note 1, at 32-34; GATT FOCUS, *supra* note 1, at 12; Miquel Montaña I Mora, *A GATT with Teeth: Law Wins over Politics in the Resolution of International Trade Disputes*, 31 COLUM. J. TRANS. L. 103, 142-43 (1993).

The WTO dispute settlement procedures adhere to the same principles for dispute resolution applied under Articles XXII and XXIII of the GATT. General Agreement on Tariffs and Trade - Multilateral Trade Negotiations (The Uruguay Round): Understanding on Rules and Procedures Governing the Settlement of Disputes, GATT Doc. MTN/FA II-A2 (Dec. 15, 1993), *reprinted in* 33 I.L.M. 112 [hereinafter WTO Understanding]. They build upon the enforcement procedures that the GATT originally established, as supplemented by the 1979 Tokyo Round Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, GATT Doc. No. L/4907, TOKYO ROUND, *supra* note 240, at 200 (adopted on Nov. 28, 1979) [hereinafter Tokyo Understanding], and the 1989 Improvements, Improvements to the GATT Dispute Settlement Rules and Procedures, Apr. 12, 1989, GATT Doc. No. L/6489, BISD 36S/61.

For purposes of this Section, the principles of articles XXII and XXIII of GATT will be delineated as the substantive basis for initiating dispute settlement proceedings while the newer dispute settlement procedures of the post-Uruguay Round WTO Understanding will be described as the procedures to be followed once a dispute settlement proceeding is initiated.

283. JACKSON, *supra* note 1, at 87-88; Judith H. Bello & Alan F. Holmer, *U.S. Trade Law and Policy Series No. 16: Settling Disputes in the GATT: The Past, Present and Future*, 24 INT'L LAW. 519, 519 (1990).

284. Davey, *supra* note 244, at 53.

285. Gary N. Horlick, *The US-Canada FTA and GATT Disputes Settlement Procedures: The Litigant's View*, 26 J. WORLD TRADE 5, 5 (1992); Ernst-Ulrich Petersmann, *Settlement of International and National Trade Disputes Through the GATT: The Case of Anti-Dumping Law*, in ADJUDICATION OF INTERNATIONAL TRADE DISPUTES IN INTERNATIONAL AND NATIONAL ECONOMIC LAW 77, 88 (Günther Jaenicke & Ernst Ulrich-Petersmann eds., 1992).

286. Davey, *supra* note 244, at 78-83; *see also* Bello & Holmer, *supra* note 283, at 525 (stating that "recent GATT panel activity has increased dramatically").

proceedings. The Understanding on Rules and Procedures Governing the Settlement of Disputes, incorporated as part of the Final Act of the Uruguay Round, improves upon these GATT procedures by delineating stricter timetables and more formal, legalistic dispute settlement procedures.²⁸⁷

Rather than simply determining whether an action is a transgression, GATT considers whether an action involves either the "nullification or impairment" of "benefits accruing . . . under this agreement" or, less frequently, an impediment to the "attainment of any objective of the Agreement."²⁸⁸ The concept behind "nullification or impairment," the phrase most often used to invoke GATT/WTO dispute settlement procedures, is that mutually agreed-upon tariff bindings or other reciprocal GATT benefits should not be frustrated or impeded by subsequent measures taken by a contracting party.²⁸⁹ The meaning of this phrase, however, is vague and ambiguous.²⁹⁰ The similarly imprecise phrase, "benefits accruing . . . under this Agreement," is usually understood to mean the benefits that accrue to a contracting party from GATT/WTO compliance, including the reduction or elimination of artificial trade barriers.²⁹¹ Thus, under GATT/WTO's system, the critical concern is not only with violations per se, but with the impact of a contracting party's actions on the benefits another contracting party is supposed to receive under GATT/WTO's aegis.

Although formally adhering to the same three standards for initiating disputes as the GATT,²⁹² the WTO Agreement modified the manner in which different complaints are handled.²⁹³ "Violation complaints" are treated under the WTO much as they were under GATT. These complaints are levied when "the failure of another contracting party to carry out its obligations under th[e] Agreement" causes a nullification or impairment of benefits or the impediment of GATT/WTO objectives.²⁹⁴ Actionable violations of GATT/WTO carry a presumption of prima facie nullification or impairment and usually result in direct infringement of benefits.²⁹⁵ Hence, no statistical evidence of trade damage is required with violation complaints because the breach involves a

287. Some of these improvements include more detailed dispute procedures, a modification of the consensus rule so that only consensus of the DSB can end the process, an appellate procedure, and greater emphasis on using panel members who are well-qualified in international trade law. Kohona, *supra* note 282, at 24; Montaña I Mora, *supra* note 282, at 142-46.

288. GATT, *supra* note 240, art. XXIII, ¶ 1.

289. HUFBAUER & ERB, *supra* note 126, at 33.

290. JACKSON, *supra* note 1, at 94-95; John H. Jackson, *Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT*, 13 J. WORLD TRADE L. 1, 6-7 (1979) [hereinafter Jackson, *Governmental Disputes*].

291. Robert E. Hudec, *Regulation of Domestic Subsidies Under the MTN Subsidies Code*, in INTERFACE THREE: LEGAL TREATMENT OF DOMESTIC SUBSIDIES 1, 2-3 (Don Wallace, Jr. et al. eds., 1984).

292. Under GATT, complaints are characterized as 1) violation complaints, 2) nonviolation complaints, or 3) situation complaints. GATT, *supra* note 240, art. XXIII, ¶ 1.

293. WTO Understanding, *supra* note 282, arts. 3, 26.

294. GATT, *supra* note 240, art. XXIII, ¶ 1(a).

295. JACKSON, *supra* note 1, at 94-95; Jackson, *Governmental Disputes*, *supra* note 290, at 6; Pierre Pescatore, *Drafting and Analyzing Decisions on Dispute Settlement*, in HANDBOOK OF GATT DISPUTE SETTLEMENT 3, 4 (Pierre Pescatore et al. eds., 1991); Petersmann, *supra* note 285, at 86 n.4, 87. Under the WTO dispute settlement system, "an infringement of the obligations assumed under a covered agreement . . . is considered *prima facie* to constitute a case of nullification or impairment." WTO Understanding, *supra* note 282, art. 3, ¶ 8.

deviation from the conditions of competitive benefits protected by GATT/WTO rules.²⁹⁶

The term "nonviolation complaints" describes cases in which a contracting party believes that benefits or objectives are being nullified, impaired, or impeded because of a measure enacted and/or applied by a contracting party, even if that action does not directly conflict with the provisions of the Agreement.²⁹⁷ In such cases, the aggrieved party must prove through detailed evidence, including statistical evidence of trade damage, that a nullification or impairment occurred.²⁹⁸ To prevail in nonviolation complaints, the contracting party bringing the case must show that the "action of the [other contracting party] which resulted in upsetting the competitive relationship between [the implicated products and/or parties] could not *reasonably have been anticipated* by the [moving party], taking into consideration all pertinent circumstances and the provisions of the General Agreement."²⁹⁹ This "reasonable expectations" standard appears to be a contract- or reliance-type principle.³⁰⁰

Nonviolation complaints require that equitable and *ex aequo et bono* considerations enter into resolution of the dispute.³⁰¹ If the measure concerned is not found to be a violation, the accused member state is under no obligation to withdraw the measure. The parties concerned are nevertheless encouraged to arrive at "a mutually satisfactory adjustment."³⁰² Compensation may be used as such a mutually satisfactory alternative to settle the dispute.³⁰³

296. Petersmann, *supra* note 285, at 86 n.4.

297. GATT, *supra* note 240, art. XXIII, ¶ 1(b).

298. Petersmann, *supra* note 285, at 86.

299. *The Australian Subsidy on Ammonium Sulphate*, GATT Doc. CP. 4/39 (Apr. 3, 1950) (report from Australian and Chilean delegations) (emphasis added). At least one commentator has called this case the *Marbury v. Madison* of GATT. JACKSON, *supra* note 1, at 338 n.50. For a discussion of the case and its implications, see HUDEC, *supra* note 240, at 159-67.

300. See JACKSON, *supra* note 1, at 95. The principle in contract law is known as promissory estoppel,

which arises when there is a promise which promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of promisee, and such does induce such action or forbearance, and such promise is binding if injustice can be avoided only by enforcement of promise.

BLACK'S LAW DICTIONARY 1214 (6th ed. 1990).

The CPs recognized the legitimacy of reasonable expectations in 1955 when they determined that a contracting party which has negotiated a concession under Article II may be assumed, for the purpose of Article XXIII, to have a reasonable expectation, failing evidence to the contrary, that the value of the concession will not be nullified or impaired by the contracting party which granted the concession by the subsequent introduction or increase of a domestic subsidy

Other Barriers to Trade, GATT Doc. L/334 (Mar. 3, 1955 report from Working Party). In making that decision, the CPs also implicitly recognized the elements required in a nonviolation complaint. This standard has been applied consistently in subsequent cases. See *EEC Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, GATT Doc. No. L/6627 (Jan. 25, 1990 report of the panel); *Treatment by Germany of Imports of Sardines*, GATT Doc. G/26 (Oct. 31, 1952 report from Norwegian and West German delegations); *The Australian Subsidy on Ammonium Sulphate*, GATT Doc. CP. 4/39 (Apr. 3, 1950).

301. Jackson, *Governmental Disputes*, *supra* note 290, at 7; Petersmann, *supra* note 285, at 86 n.4. Nonviolation complaints involve a balancing of benefits or concessions. Davey, *supra* note 244, at 56-57; Hudec, *supra* note 291, at 3.

302. WTO Understanding, *supra* note 282, art. 26, ¶ 1(b).

303. *Id.* art. 26, ¶ 1(d).

The third standard is a catch-all called "situation complaints."³⁰⁴ Specifically, it pertains to cases in which a "contracting party . . . consider[s] that any benefit accruing to it . . . is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of . . . the existence of any other situation."³⁰⁵ No GATT practice or decided cases have dealt with a dispute brought solely under this standard,³⁰⁶ and its meaning is therefore unclear.³⁰⁷

The goal of the WTO dispute settlement system is to achieve satisfactory settlements of disputes, with a preference for mutually agreed solutions.³⁰⁸ If no such solution can be found, then the primary objective of the dispute settlement procedure is to obtain a withdrawal of measures that conflict with the provisions of the covered agreements. Compensation may be used if even this solution is not possible. As a last resort, the complaining member may suspend concessions or similar obligations to the other Member concerned.³⁰⁹

The first stage of WTO dispute settlement usually involves consultations although unlike the GATT, WTO does not mandate this procedure.³¹⁰ Each party is required to "accord sympathetic consideration" to requests by other members for consultation whenever a measure taken within the territory of the complaining member affects the operation of any covered agreement.³¹¹ If a party fails to respond to a request for consultation within ten days and the members do not begin consultations within thirty days after receipt of the request, the complaining member can call for the establishment of a panel.³¹² If consultations do not result in a satisfactory solution within sixty days, or if the parties agree before that date that consultations will not solve the dispute, the complaining member can, again, request the establishment of a panel.³¹³

The request must be in writing, contain a brief summary of the factual and legal basis of the complaint, and state whether consultations were held.³¹⁴ Once requested, a panel must be established no later than the next Dispute Settlement Body ("DSB") meeting, unless the DSB decides by consensus not to establish a panel.³¹⁵ The panel is empowered to examine the facts of the dispute in light of the particular trade agreement to which the members are parties. Based on this inquiry, the panel makes its findings, on which the DSB will then rely in making recommendations or rulings.³¹⁶

304. Petersmann, *supra* note 285, at 86.

305. GATT, *supra* note 240, art. XXIII, ¶ 1(c).

306. Eric Canal-Forgues & Rudolf Ostrihansky, *New Developments in the GATT Dispute Settlement Procedures*, 24 J. WORLD TRADE 67, 68 (1990); Pescatore, *supra* note 295, at 5.

307. Canal-Forgues & Ostrihansky, *supra* note 306, at 68-69.

308. WTO Understanding, *supra* note 282, art. 3, ¶¶ 4, 6.

309. *Id.* art. 3, ¶ 7.

310. Canal-Forgues & Ostrihansky, *supra* note 306, at 68; Kohona, *supra* note 282, at 35; Rosine Plank, *An Unofficial Description of How a GATT Panel Works and Does Not*, J. INT'L ARB., Dec. 1987, at 53, 54, 60.

311. WTO Understanding, *supra* note 282, art. 4, ¶ 2.

312. *Id.* art. 3, ¶ 3.

313. *Id.* art. 3, ¶ 7.

314. *Id.* art. 6, ¶ 2.

315. *Id.* art. 6, ¶ 1. Unlike GATT, the WTO recognizes the right of a complaining member to have a panel established to resolve its dispute. Kohona, *supra* note 282, at 35-36; Montañà I Mora, *supra* note 282, at 147.

316. WTO Understanding, *supra* note 282, art. 7, ¶ 1.

The panel may be composed of either three or five members.³¹⁷ If the disputants cannot agree on the panelists within twenty days, either party can ask the GATT Director-General to appoint the remaining panel members within ten days.³¹⁸ The Director-General selects these panelists after consulting with the chairs of the DSB and of the relevant Council or Committee.³¹⁹

Panels are drawn from a list maintained by the Secretariat³²⁰ of:

well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.³²¹

In addition to consultations, four other voluntary procedures — good offices, conciliation, mediation, and arbitration — are available.³²² The first three may begin and end at any time during the dispute settlement proceedings and may continue alongside the formal proceedings.³²³ Resort to arbitration is subject to mutual agreement.³²⁴ As with consultations, parties not satisfied with these other less contentious procedures can request that a panel be established to resolve the dispute.³²⁵

The WTO protects the interests of third parties by allowing their limited participation in all such dispute proceedings.³²⁶ Specifically, the DSB and the members of the WTO receive notice of any consultations, requests for dispute procedures, or bilateral solutions.³²⁷ If a contracting third party has a “substantial interest”³²⁸ in a matter before a panel, it has a right to be heard

317. The default procedure is a three-member panel; parties may agree to a five-member tribunal. *Id.* art. 8, ¶ 5. The Secretariat proposes nominations for the panel to the disputants, who should only oppose the nominations for compelling reasons. *Id.* art. 5, ¶ 6.

318. *Id.* art. 8, ¶ 7.

319. *Id.* For a description of the panelist selection process under GATT, see Plank, *supra* note 310, at 65-72. If a number of contracting parties each requests the establishment of a panel relating to the same matter, the requests are consolidated before a single panel. In developing the consolidated panel, the rights of each of the individual contracting parties must be protected in a fashion equivalent to what each would have received in separate panels. If a consolidated panel is not possible, the panelists on each panel should, if possible, be the same persons, and the timetables should be harmonized. WTO Understanding, *supra* note 282, art. 9.

320. *Id.* art. 8, ¶ 4. A roster of qualified panelists was created in 1984 and has been extended and expanded since that time. Canal-Forgues & Ostrihansky, *supra* note 306, at 74.

321. WTO Understanding, *supra* note 282, art. 8, ¶ 1.

322. *Id.* arts. 5, 25. A panelist cannot be from the same country as that of a party to the dispute unless all parties to the dispute agree to such participation. *Id.* art. 8, ¶ 3.

323. *Id.* art. 5.

324. *Id.* art. 25. For a discussion of arbitration under GATT, see Canal-Forgues & Ostrihansky, *supra* note 306, at 80-81.

325. WTO Understanding, *supra* note 282, art. 6.

326. *Id.* art. 10; *see also* Canal-Forgues & Ostrihansky, *supra* note 306, at 76 (describing similar protections for third parties under GATT).

327. GATT FOCUS, *supra* note 1, at 12-14.

328. WTO Understanding, *supra* note 282, art. 10, ¶ 2. The term “substantial interest” has been interpreted to mean “any interest perceived as substantial by the Party concerned.” Canal-Forgues & Ostrihansky, *supra* note 306, at 77.

by the panel³²⁹ even if one of the original disputants protests.³³⁰

The panel discharges its responsibility under the dispute settlement proceedings by allowing sufficient flexibility in its procedures for each of the disputants and other interested parties to prepare their submissions and by balancing that interest against the need to resolve the matter in an expeditious manner.³³¹ Within one week of its establishment, the panel consults with the parties and fixes a timetable.³³² Each disputant normally offers written submissions to the panel, with the complainant offering its submission first unless the panel decides to entertain simultaneous submissions.³³³ The panel then holds oral hearings during which each disputant presents its arguments and answers questions. After this first round of written submissions and oral arguments, a second round of written submissions and hearings takes place that allows for a more focused and adversarial discussion of the arguments initially presented.³³⁴ During this investigatory phase, the panel can seek information and technical advice from any individual or body, including outside experts.³³⁵ All proceedings, including the informal panel deliberations,³³⁶ are held in private and are strictly confidential.³³⁷

These proceedings culminate in a report to the DSB.³³⁸ That includes the panel's findings of fact, the applicability of relevant provisions, and the basic rationale behind any findings and recommendations.³³⁹ These reports are analogous to appellate court opinions of law³⁴⁰ and generally resolve the major issues raised by the parties.³⁴¹ If the panel finds "nullification or impairment," it usually recommends that the offending practice be discontinued³⁴² or, if discontinuation is not immediately possible, that the injured party be compensated. The panel recommends authorizing retaliation by the injured party only as a last resort.³⁴³ The entire time frame for investigation and completion of the final report should normally not exceed six months and should never take longer than nine months.³⁴⁴

The panel reports are circulated to the members and, after a minimum of twenty days, considered for adoption. If a member objects to a panel report, it must give written reasons and circulate its objections at least ten days prior

329. WTO Understanding, *supra* note 282, art. 10, ¶ 2.

330. Canal-Forgues & Ostrihansky, *supra* note 306, at 76.

331. WTO Understanding, *supra* note 282, art. 12.

332. *Id.* art. 12, ¶ 3.

333. *Id.* art. 12, ¶ 6.

334. *Id.* app. 3 (detailing working procedures of panel); Pescatore, *supra* note 295, at 13.

335. WTO Understanding, *supra* note 282, art. 13 & app. 4; Petersmann, *supra* note 285, at 91.

336. WTO Understanding, *supra* note 282, art. 14.

337. Pescatore, *supra* note 295, at 13; Petersmann, *supra* note 285, at 91.

338. Before the final panel report is circulated to the Members of the DSB, it goes through an interim review stage in which the party disputants are given an opportunity to receive, review, and comment upon an interim draft panel report. *Id.* art. 15.

339. *Id.* art. 12, ¶ 7.

340. See Pescatore, *supra* note 295, at 14. The reports may include majority and dissenting opinions. One major difference between these reports and judicial opinions, however, is that the opinions are anonymous. Petersmann, *supra* note 285, at 91.

341. Petersmann, *supra* note 285, at 91.

342. Davey, *supra* note 242, at 74.

343. *Id.*

344. WTO Understanding, *supra* note 282, art. 12, ¶¶ 8-9.

to the DSB meeting at which the panel report will be considered. At this meeting, all members, including the party disputants, can participate in the deliberations concerning the report's acceptance. The DSB usually adopts the panel report within sixty days after it is circulated. The DSB may, however, decide by consensus not to adopt the report. Alternatively, the DSB may delay consideration of the report if one of the party disputants notifies the DSB of its decision to appeal. In this case, the DSB will wait to receive the Appellate Body's report before considering the dispute.³⁴⁵

A party disputant has the right to appeal a panel decision to an Appellate Body.³⁴⁶ The DSB establishes an Appellate Body composed of seven persons, three of whom serve on any one case. Persons appointed to the Appellate Body serve four-year terms and may be reappointed once.³⁴⁷ These members are "persons of recognized authority, with demonstrated expertise in law, international trade, and the subject matter of the covered agreements generally"³⁴⁸ and may not be affiliated with any government. The Appellate Body's membership must also be broadly representative of the WTO.³⁴⁹

Appeals are limited to legal issues covered in the panel report and the panel's interpretations of that law.³⁵⁰ The Appellate Body generally has sixty, and never more than ninety, days to "uphold, modify or reverse the legal findings and conclusions of the panel."³⁵¹ Once completed, the Appellate Body report is automatically adopted by the DSB and unconditionally accepted by the party disputants unless the DSB decides by consensus not to adopt it within thirty days following its circulation to the members.³⁵² Therefore, the entire dispute settlement process should generally not exceed nine months when there is no appeal of the panel report, and twelve months when an appeal is sought.³⁵³

If the panel or Appellate Body concludes that a measure is inconsistent with an existing obligation under a covered agreement, it recommends that the member concerned bring its measure into conformity with its obligation under the relevant agreement and may suggest ways to implement its recommendations.³⁵⁴ A member is expected to comply immediately with the recommendations of the DSB unless such compliance is impracticable. Otherwise, the state is given "a reasonable period of time" to comply.³⁵⁵

345. *Id.* art. 16.

346. *Id.* art. 17. Only parties to the dispute can appeal a panel report, but third parties can participate in the appeal by making written submissions and appearing before the Appellate Body. *Id.* art. 17, ¶ 4.

347. *Id.* art. 17, ¶¶ 1-2.

348. *Id.* art. 17, ¶ 3.

349. *Id.*

350. *Id.* art. 17, ¶ 6.

351. *Id.* art. 17, ¶¶ 5, 13. Its proceedings and deliberations are confidential. *Id.* art. 17, ¶ 10.

352. *Id.* art. 17, ¶ 14.

353. *Id.* art. 20.

354. *Id.* art. 19, ¶ 1.

355. *Id.* art. 21, ¶ 3. The reasonable period of time is either a) a period of time proposed by the Member concerned and approved by the DSB at a meeting held within thirty days from adoption of the panel or Appellate Body report; b) if that fails, a period of time mutually agreed upon by the parties within forty-five days after the recommendations and rulings are adopted; or c) if no agreement is reached, a period of time determined through binding arbitration within ninety days after the recommendations and rulings are adopted. *Id.* In any event, the reasonable period of time will generally not exceed fifteen months. *Id.* If a party needs clarification or if the parties disagree about the extent of the actions required

The DSB monitors compliance with the recommendations or rulings.³⁵⁶ Any party can raise the issue of implementation at any DSB meeting after a report is adopted,³⁵⁷ and the DSB will automatically consider the issue after six months. The issue remains on the DSB's agenda until it is resolved to the DSB's satisfaction.³⁵⁸

An aggrieved member can obtain compensation and suspension of concessions if the offending member does not implement the recommendations and rulings within a reasonable period of time.³⁵⁹ The offending member must, if requested, enter into negotiations towards mutually acceptable compensation with any party invoking the dispute settlement procedures. If no agreement is reached within twenty days after the reasonable period of time for implementation expires, the party that invoked the dispute settlement process can request authorization from the DSB to suspend concessions or other obligations owed to the offending member under the covered agreements.³⁶⁰ The degree of retaliation must be equivalent to the level of nullification or impairment.³⁶¹

The DSB has thirty days to either grant authorization for retaliation or decide by consensus to reject the request. If the offending member objects to the level of suspension proposed or claims that the principles and procedures for retaliation are not being followed, it can refer the matter to arbitration.³⁶² The arbitrator's inquiry is then limited to whether the level of suspension is appropriate and the principles and procedures for retaliation are being followed; the nature of the concessions or other obligations to be suspended fall outside the scope of arbitral review. The arbitrator's decision is final and will be applied unless the DSB rejects the request for retaliation by consensus.³⁶³

Retaliatory measures are temporary and are terminated once the inconsistent measure is rescinded or the member has implemented the recommendations or rulings. The DSB monitors implementation until the member complies, solves problems regarding the nullification or impairment of benefits, or reaches a mutually satisfactory solution with the aggrieved state(s).³⁶⁴ Although the threat of retaliation is available under GATT, few

to comply with the recommendations and rulings, the original panel will clarify the matter within ninety days. *Id.* art. 21, ¶ 5.

356. *Id.* art. 21, ¶ 6.

357. *Id.*

358. *Id.* For a discussion of surveillance of implementation of recommendations and rulings by the GATT Council, see Canal-Forgues & Ostrihansky, *supra* note 306, at 78-80.

359. WTO Understanding, *supra* note 282, art. 22.

360. *Id.* art. 22, ¶ 2. The principles and procedures to be followed for retaliation are as follows: a) suspension of concessions or other obligations should be in the same sector as that in which the violation occurred; b) if that is not practical, then retaliation can occur in other sectors of the same covered agreement; and c) if such retaliation is ineffective, and the circumstances are serious enough, the suspension of concessions or other obligations can occur under another covered agreement. *Id.* art. 22, ¶ 3.

361. *Id.* art. 22, ¶ 4.

362. The arbitrator is usually a member of the original panel, if possible, or else an arbitrator appointed by the Director-General, and the arbitration must be completed within sixty days after the reasonable period of time has expired. *Id.* art. 22, ¶ 6.

363. *Id.* art. 22, ¶ 7.

364. *Id.* art. 22, ¶ 8.

states have used it.³⁶⁵ Even so, the level of compliance with GATT dispute decisions has been generally high.³⁶⁶

V. MELDING OF ILO AND GATT PROCEDURES TO ENFORCE PROHIBITIONS OF FORCED AND CHILD LABOR

GATT/WTO provisions on unfair trading practices can be interpreted to prohibit the use of forced and child labor. Forced and child labor are forms of "social dumping" — the production and sale of goods for less than their full value. These practices artificially reduce labor costs and are thus the economic equivalent of a state subsidy to producers of those goods. State failure to adequately police violations of labor standards also gives the state and its producers an unfair competitive advantage in trading relations with other countries. Because these practices are recognized as violations of international law, their use in the production of goods that enter the international trading system either violates GATT/WTO obligations, or nullifies or impairs any trade benefits accruing to a member under GATT/WTO.

Moreover, under the general exceptions provisions of GATT, an importing country can reject products of prison labor and can adopt measures necessary to protect public morals. Although never interpreted as authority to safeguard morality in the exporting country, this general exception could be interpreted as protecting all human beings from practices such as forced or child labor.³⁶⁷

Yet the idea of enforcing labor standards through the GATT has always been rejected.³⁶⁸ Members have repeatedly refused to establish even a working party to consider the issue.³⁶⁹ Less developed countries in particular have adamantly opposed linking trade with the enforcement of labor standards.³⁷⁰ They argue that any such linkage is disguised protectionism, an attempt to undermine their competitive advantage.³⁷¹ A number of members also claim that it is the province of the ILO alone to establish and enforce

365. Robert E. Hudec, *The Judicialization of GATT Dispute Settlement*, Remarks at Conference entitled *Due Process and Transparency in Trade: International Rules and Domestic Procedures* 12 (May 3, 1990) (sponsored by Centre for Trade Policy and Law and The Faculty of Law of the University of Ottawa) (transcript available in GATT Library file, Geneva). One commentator argues that the mere threat of retaliatory action is highly efficacious in obtaining compliance from a recalcitrant contracting party. Pescatore, *supra* note 295, at 7.

366. Hudec, *supra* note 365, at 15.

367. See HANSSON, *supra* note 13, at 175-76.

368. Meetings on Workers' Rights and Trade, Geneva, 4-5 Sept. 1990, Int'l Confederation of Free Trade Unions Internal Doc. No. 98EB/12(a) — ESC 2 — Annex I ¶¶ 2-3 (Dec. 3, 1990) [hereinafter ICFTU Memo] (on file with author); Charnovitz, *Influence of Labour Standards*, *supra* note 18, at 565, 574-75; Charnovitz, *International Trade*, *supra* note 18, at 197; Mandel, *supra* note 149, at 449 n.31; *Worker Rights and International Trade*, 81 AM. SOC'Y INT'L L. PROC. 59, 61, 64-65 (1987) [hereinafter *Worker Rights Proceedings*] (remarks of Jorge F. Perez-Lopez).

369. ICFTU Memo, *supra* note 368, ¶¶ 2-3; Int'l Confederation of Free Trade Unions, Submission to the Negotiators Preparing the Final Agreement of the Uruguay Round of GATT Multilateral Trade Negotiations 4-5 (undated) (received from ICFTU in 1993) (on file with author).

370. ICFTU Memo, *supra* note 14, ¶¶ 8, 10; Mandel, *supra* note 149, at 449 n.31 (giving India, Brazil, Mexico, Chile, Nicaragua, Malaysia, and the Philippines as examples).

371. ICFTU Memo, *supra* note 14, ¶ 10.

labor standards.³⁷² In turn, whenever the ILO has considered linking labor standards with trade, it has rejected the idea as beyond the ILO's expertise and mandate.³⁷³ Neither GATT/WTO nor ILO has expertise in both international labor and trade.³⁷⁴ If one organization attempted to regulate conduct in both areas, it would encroach upon the other's area of expertise.

Consequently, only a multilateral enforcement regime can prevent forced and child labor. A multilateral enforcement regime would address the protectionist argument because its standards and operational procedures would be determined through the participation of all nations rather than imposed unilaterally.³⁷⁵ If all nations participated in the establishment of minimal standards and enforcement procedures, no single nation would obtain an unfair competitive trade advantage from labor abuses. Thus, one of the principal reasons for protectionism would disappear.³⁷⁶ The standards should be clear, precise, and verifiable, and the regime would have to implement those standards in an equitable, objective, and effective manner.³⁷⁷ To be effective, these enforcement procedures would need to be well-known and allow complaints to be initiated by a number of parties, not just states.³⁷⁸ Finally, this enforcement regime must fit into the current system of international trade regulation while drawing upon the expertise of the ILO.

As a rule, "[s]upervision of compliance should be entrusted to those organizations with the greatest technical competence in the field."³⁷⁹ Because the ILO is the most competent international organization in the field of international labor and GATT/WTO in international trade, combining these two organizations would create the most effective enforcement regime for ensuring

372. *Id.* ¶¶ 8, 11; ECONOMIC POLICY COUNCIL, *supra* note 124, at 31.

373. ICFTU Memo, *supra* note 368, ¶ 11; Int'l Labour Conference, Provisional Record of Conference: 1988 (from files of Lee Sweptson of ILO, Geneva) (notes on file with author); Int'l Labour Office, Report of Discussion of Informal Working Group on Minimum International Labour Standards held on 8 November, 1990 (from files of Lee Sweptson of ILO, Geneva) (notes on file with author). *See generally* Alston, *supra* note 13, at 175-81 (summarizing proposals considered by ILO).

374. *See, e.g.*, ICFTU Memo, *supra* note 14, ¶ 11 ("Some officials [from various GATT trade delegation members] stated that GATT was not the correct forum for discussion of workers' rights, when one already exists in the ILO. . . . The ICFTU pointed out that the same argument has equally been used at the ILO to block discussions, since the ILO has no competence as regards trade."); Marshall, *supra* note 12, at 73 ("The GATT . . . has never had much interest in, or expertise on, labor matters.").

375. The United States has enacted four statutes that unilaterally link access to the U.S. market with adherence to certain labor standards: (1) the Omnibus Trade and Competitiveness Act; Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (codified at 19 U.S.C. 2411 (1988)); (2) the General System of Preferences Renewal Act of 1984; Trade and Tariff Act of 1984 § 501, Pub. L. No. 98-573, 98 Stat. 2948, 3018 (codified at 19 U.S.C. §§ 2461-2465 (1988)); (3) the Caribbean Basin Initiative; Interest and Dividend Tax Compliance Act of 1983, Pub. L. No. 98-67, 97 Stat. 369 (codified at 19 U.S.C. §§ 2701-2706 (1988)); and (4) the Overseas Private Investment Corporation Act; Overseas Private Investment Corporation Act of 1985 § 5, Pub. L. No. 99-204, 99 Stat. 1669, 1670 (codified in scattered sections of 22 U.S.C. and 31 U.S.C. (1988)). For a brief description of these acts, see, e.g., Theresa A. Amato, Note, *Labor Rights Conditionality: United States Trade Legislation and the International Trade Order*, 65 N.Y.U. L. REV. 79, 96-104 (1990); Mandel, *supra* note 149, at 444-47, 466-77. Amato argues that unilateral action by the United States is a violation of GATT's principle of multilateralism. Amato, *supra*, at 105-08, 125. Mandel, in contrast, justifies the utilization of a unilateral approach. Mandel, *supra* note 149, at 444-47, 466-77.

376. Charnovitz, *Influence of Labour Standards*, *supra* note 18, at 581.

377. Charnovitz, *supra* note 144, at 75-76; Marshall, *supra* note 12, at 70, 76.

378. Marshall, *supra* note 12, at 76.

379. THEODOR MERON, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS 214 (1986).

adherence to international human rights and labor standards.³⁸⁰ This synergistic linkage, relying on each international organization's substantive and procedural strengths and expertise, could effectuate international human rights and labor rights policies and be used as a model to demonstrate cooperation among multilateral organizations to optimize world public order.

A. Joint ILO-GATT/WTO Enforcement Regime: Preliminary Remarks

Creating one enforcement mechanism through a synergistic combination of ILO and GATT/WTO expertise would provide the most effective means of preventing violations of forced and child labor in the production of goods that enter the international trading system. The ILO would bring to this enforcement mechanism over seventy years of experience, through its reporting and contentious supervisory procedures, in determining compliance with basic international labor standards.³⁸¹ Moreover, it has an established technical cooperation component to complement its supervisory activities.

GATT/WTO possesses expertise in determining the existence and extent of unfair trade practices and in supervising the elimination of those practices through the use of economic penalties.³⁸² It also boasts a widely used and relatively successful dispute resolution mechanism.³⁸³ GATT/WTO would, therefore, bring its expertise on trade practices and its well-developed dispute settlement system and enforcement procedures to the joint enforcement system.³⁸⁴

Furthermore, this joint ILO-GATT/WTO enforcement regime would build upon the current procedures employed by each international organization, providing more effective enforcement than does either organization individually. For example, this regime would be able to use the expertise of the ILO's Committee of Experts and technical cooperation programs, as well as GATT/WTO's panel procedure and experience in assessing and supervising penalties. Melding familiar bodies and procedures from the ILO and GATT/WTO, rather than creating a new enforcement regime, would also make enforcement more palatable to member states.

A discussion of how this combined enforcement regime would actually

380. A number of commentators have suggested the idea of an ILO-GATT/WTO linkage to prevent violations of international labor standards by using the international trading system. See, e.g., ECONOMIC POLICY COUNCIL, *supra* note 124, at 36-37; HANSSON, *supra* note 13, at 181-82; TIME FOR A LINK, *supra* note 14, at 46-47; Charnovitz, *Influence of Labour Standards*, *supra* note 18, at 580-81; Int'l Confederation of Free Trade Unions, The Social Clause: A Technical Note from the ICFTU Secretariat on Its Rationale and on Its Operating Mechanisms 2-4 (undated) [hereinafter ICFTU Technical Note] (received from ICFTU in 1993) (on file with author); Mandel, *supra* note 149, at 448; Marshall, *supra* note 12, at 67, 73, 76-77.

381. See ICFTU Technical Note, *supra* note 380, at 3; Charnovitz, *supra* note 144, at 76-77; see also ECONOMIC POLICY COUNCIL, *supra* note 124, at 37 (stating that ILO's role should be "to provide the necessary training and support for countries and industries as they attempt to improve labor conditions"); Edgren, *supra* note 13, at 530-31 (suggesting ILO could function as research agency studying compliance with labor standards in joint enforcement regime).

382. For a description of GATT/WTO, see *supra* notes 240-366 and accompanying text.

383. See *supra* notes 284-285, 365-366 and accompanying text.

384. See ECONOMIC POLICY COUNCIL, *supra* note 124, at 37 ("GATT is the venue for imposing economic penalties on those countries and industries not in compliance with international norms of trading conduct"); TIME FOR A LINK, *supra* note 14, at 46-47; ICFTU Technical Note, *supra* note 380, at 3; Charnovitz, *supra* note 144, at 77.

work illustrates the above points. The regime would bifurcate its procedure. In the initial determination phase, an ILO-GATT/WTO commission would ascertain whether a state exhibited a consistent pattern of gross and reliably attested violations of forced or child labor standards and would determine the extent of those practices. The second phase would be remedial, determining the appropriate measures to eliminate those practices and setting a realistic timetable for compliance. However, the ILO and GATT/WTO should not separate their activities under this bifurcated enforcement regime.³⁸⁵ Both organizations' expertise is required in each phase. During the first phase, the ILO can determine whether a consistent pattern of gross and reliably attested violations of forced or child labor exists and the extent of those violations. GATT/WTO, on the other hand, can assess those practices in terms of trade flows. During the second phase, coordination between the ILO and GATT/WTO is essential to eliminate such practices from the international trading system. The ILO can monitor whether the labor practices have stopped and provide assistance in developing and implementing technical cooperation programs, while GATT/WTO can again monitor those practices in terms of trade flows, evaluate and oversee the compliance program, determine the proper level of sanctions, or ensure observance of product bans. The organizations must work together because neither has the skill to administer either phase by itself. Additional benefits of cooperation could include synergies and greater appreciation of the symbiotic relationship between trade and labor practices.

A violation under this proposed system would occur when a consistent pattern of gross and reliably attested practices of forced or child labor exists in the production of goods that enter the international trading system.³⁸⁶ Whether the state's complicity in such a consistent pattern involved direct or negligent conduct would be irrelevant. In either case, the offending party would be subject to enforcement procedures.

Countermeasures and economic sanctions would be applied only as a last resort against recalcitrant states that do not respond to less drastic means.³⁸⁷

385. More than one commentator has maintained that the ILO should only be used as a research agency or as the body that determines whether a violation has occurred and should not involve itself in the remedial phase. See, e.g., ECONOMIC POLICY COUNCIL, *supra* note 124, at 36-37, 49-50; Edgren, *supra* note 13, at 530-31; Int'l Labour Office, Minimum International Standards Resume of Meeting of 13 December, 1988: Minimum International Labour Standards Analysis of Responses 3 (from files of Lee Swepton of ILO, Geneva) (notes on file with author).

386. The phrase "consistent pattern of gross and reliably attested" is derived from Resolution 1503 of the United Nations Economic and Social Council. E.S.C. Res. 1503, U.N. ESCOR, 48th Sess., Supp. No. 1A at 8, ¶ 1, U.N. Doc. E/4832/Add.1 (1970) [hereinafter Res. 1503]. Under Resolution 1503, the United Nations Commission on Human Rights and its Sub-Commission on the Prevention of Discrimination and Protection of Minorities are allowed to consider communications in order to determine whether "a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms" is occurring in a state. *Id.* at 8-9.

A "consistent pattern" refers to widespread practices or a large number of cases as opposed to random or isolated violations. See FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS 121 (1990). "Gross" refers to violations that are "particularly shocking because of the gravity of the violation." RESTATEMENT OF FOREIGN RELATIONS, *supra* note 17, § 702 cmt. m. "Reliably attested" lays out a standard of proof that a complaining party must meet in order to have a pattern of practices deemed a violation of forced or child labor.

387. ICFTU Technical Note, *supra* note 380, at 3; *The Social Clause Explained*, ITGLWF NEWSLETTER (Int'l Textile, Garment, and Leather Workers Fed'n), June 1992, at 12 (on file with author).

Initially, the ILO would set up and administer a technical cooperation program. A certification program might also be established to ensure that products made with forced or child labor do not enter the international trading system. The technical cooperation program would include a strict timetable so that violating states could not delay implementation under the pretense of cooperation. Economic sanctions, applied only in extreme cases, would increase in severity over time. These sanctions would range from banning imports produced with forced or child labor to a wider ban on other products. The ILO and GATT/WTO would coordinate the entire process so that the timetable for compliance would be fair and realistic.

In addition to states, employers' and workers' associations would have access to the enforcement regime. Allowing only states to initiate complaints would be insufficient to prevent forced and child labor violations because states are reluctant to criticize each other on human rights issues.³⁸⁸ The fact that these practices directly affect each nation's material interests somewhat ameliorates the problem, yet states may still hesitate to confront each other on the use of these practices for fear that such action will be seen as hostile. Therefore, carefully controlled access by employers' and workers' associations, as in current ILO practice, should be permitted.³⁸⁹ Not only would greater use and more consistent compliance result, but as use of this procedure became more frequent, states would cease to view complaints as politicized, hostile, biased, and unfounded acts.³⁹⁰

Complaints by employers' or workers' associations would be barred only if the implicated member state successfully challenged that organization's authenticity. If a challenge occurred, an ad hoc joint ILO-GATT/WTO commission would be formed to resolve the issue. This commission would consist of six representatives from the ILO and six representatives from GATT/WTO. The ILO representatives would be chosen by the chair of the ILO Governing Body ("GB") in consultation with the ILO Director-General. Likewise, the chair of the GATT/WTO General Council ("Council") in consultation with the GATT/WTO Director-General, would choose the GATT/WTO representatives.

The actual determination of whether an employers' or workers' organization is authentic is a factual question. To resolve it, the ad hoc commission would consider several factors, including the organization's charter and bylaws, membership, and history. If challenged, the organization bringing the complaint would have the burden of proving its legitimacy and the commission's determination would be final.

The makeup of this ad hoc joint ILO-GATT/WTO commission illustrates an important point. All of the deliberative bodies of this joint ILO-GATT/WTO enforcement regime would have equal representation from both organizations. Neither organization would then be able to take over the

388. See Leckie, *supra* note 115, at 253-55; van Liemt, *supra* note 12, at 445.

389. For a discussion of the ILO's Representation procedure and the ability of employers' and workers' organizations to initiate proceedings under that procedure, see *supra* notes 188-224 and accompanying text.

390. In addition, complaints initiated by employers' and workers' associations would not be seen as interstate complaints, with the consequent ramifications. See Leckie, *supra* note 115, at 253-55.

enforcement process, and all decisions would receive equal input from both. Each organization would provide a different perspective and focus to the proceedings, ensuring the enforcement regime's impartiality, fairness, competency, and legitimacy.

B. *Joint ILO-GATT/WTO Enforcement Regime: Promoting Effective Compliance*

Any member state of the ILO or GATT/WTO or any authentic employers' or workers' association would be able to file a complaint and initiate this enforcement process. The process would begin by screening the complaint for admissibility. An admissible complaint would trigger the determination phase and the establishment of a joint ILO-GATT/WTO Dispute Panel ("Dispute Panel").

An admissible complaint would have to meet the following criteria. First, it would be in writing and addressed to the International Labour Office or the GATT/WTO Secretariat. Second, it would be filed by either a member state of the ILO or GATT/WTO or a bona fide employers' or workers' association. If the complaint was filed by an association, the association would have to identify itself and include information sufficient to establish its authenticity. Third, the complaint would concern activities in a member state of the ILO or GATT/WTO. Fourth, it would allege that a consistent pattern of gross and reliably confirmed practices of forced or child labor exists in the implicated state for the production of goods that enter the international trading system. Some documentary evidence would be needed to support this allegation. Moreover, to meet this criterion, the complaint would specify how the state has failed to secure effective observance of labor standards within its jurisdiction.³⁹¹ Finally, the complaint would identify the specific industry or sector in which these violations occur and the products implicated. These admissibility criteria are modeled on those used by the ILO³⁹² and by the regional human rights regimes.³⁹³ The admissibility procedure would, of course, dismiss illegitimate complaints or those beyond the competency of the joint enforcement regime.

These admissibility determinations would be the province of a permanent "Admissibility Committee," whose members would have expertise in either international labor matters (preferably in forced or child labor) or international trade. Members would serve in their individual capacities for staggered two-year terms. The committee would consist of four members appointed by the chair of the GB, four members chosen by the chair of the Council, and one member jointly appointed by the ILO and GATT/WTO Directors-General.

391. The complaint would normally indicate whether the violation was caused by direct state action or by a failure of the state adequately to police infractions in accordance with domestic legislation.

392. The receivability criteria utilized by the ILO are detailed at *supra* note 191.

393. *See, e.g.*, American Convention on Human Rights, *supra* note 118, arts. 46-47; European Convention on the Protection of Human Rights and Fundamental Freedoms, *supra* note 118, arts. 25-27. The admissibility requirements of both systems are similar. Gates Garrity-Rokous & Raymond H. Brescia, *Procedural Justice and International Human Rights: Toward a Procedural Jurisprudence for Human Rights Tribunals*, 18 YALE J. INT'L L. 559, 589 (1993).

The Admissibility Committee would decide if a complaint is admissible based on the aforementioned criteria. The Committee may notify the accused member state in order to give that state an opportunity to reply. Once the Admissibility Committee made its decision, it would notify all parties concerned, the GB, and the Council. The Admissibility Committee's determination would be final.

This admissibility procedure would dismiss complaints on their face, thereby ensuring that the other procedures in this enforcement regime address only cognizable complaints.³⁹⁴ This winnowing-out process is especially important in an enforcement regime where employers' or workers' associations could flood the system with complaints and keep it from functioning properly. Furthermore, member states would likely refuse to consent to the regime's jurisdiction if every complaint, no matter how frivolous, were allowed to proceed; the enforcement regime's legitimacy would suffer accordingly.³⁹⁵

Once declared admissible, the complaint would proceed to the determination phase before a joint ILO-GATT/WTO Dispute Panel. Seven prominent and professional persons, acting in their personal capacities, would serve on the Dispute Panel. These committee members would be chosen on the basis of their expertise in either international labor matters or international trade. They would have a judicial temperament, a reputation for fairness, sufficient formal training or practical experience in international legal rules, and good character and ability. After being appointed, members would be required to swear to perform their duties honorably, faithfully, impartially, and conscientiously.

The ILO and GATT/WTO would each provide three members to this Dispute Panel, with the remaining member appointed jointly by the ILO and GATT/WTO Directors-General. ILO panelists would be selected from the current members of the Committee of Experts or from a specially created pool of potential panelists formulated by the ILO.³⁹⁶ GATT/WTO panelists would come from the current list of governmental and nongovernmental panelists.³⁹⁷ Structuring the panel in this manner would ensure impartiality, independence, and objectivity.

In the case of an interstate complaint, the states would be given the opportunity to agree on the panelists drawn from ILO and GATT/WTO pools that each organization has made available. If the states could not agree, either party could ask ILO or GATT/WTO Director-General to appoint the remaining panel members.³⁹⁸ The Directors-General, in selecting the remaining panelists, would consult with both parties but make the final determination

394. See Garrity-Rokous & Brescia, *supra* note 393, at 592 (discussing admissibility procedures of human rights regimes).

395. *Id.* at 559-60.

396. For an explanation of the current selection procedures of the members of the ILO Committee of Experts, see *supra* notes 170-171 and accompanying text. A pool of potential panelists could also be appointed for three-year renewable terms by the GB on the proposal of the ILO Director-General. The criteria for appointment would be similar to that used for members of the ILO Committee of Experts.

397. For information pertaining to the list of governmental and nongovernmental panelists, see *supra* note 320 and accompanying text.

398. Of course, the ILO Director-General would appoint the remaining ILO panelists while the GATT/WTO Director-General would appoint the remaining GATT/WTO panelists.

themselves. When a complaint was initiated by an employers' or workers' association, the ILO and GATT/WTO Directors-General would appoint the panelists. Employers' and workers' groups would not have any input into the choice of panelists because, unlike states, these groups are not members of either organization. Moreover, their initiation of a complaint is made not on their own behalf, but on behalf of the ILO-GATT/WTO joint enforcement regime.

The Dispute Panel would assess the complaint and prepare a report of its findings on all relevant questions. The report would include what the Dispute Panel deemed to be a reasonable period of time for compliance, recommendations and programs to help achieve compliance (i.e., technical assistance programs and certification procedures), and possible countermeasures.

The Dispute Panel would arrive at its conclusions after engaging in a quasi-judicial inquiry by giving all parties the opportunity to prepare submissions, while ensuring that the resolution of the matter occurred expeditiously. The determination phase would proceed according to a fixed timetable for presentation and deliberations, developed in consultation with the parties within a week of the panel's formation. Normally, the complainant would be the first to provide written submissions for the panel, and all other parties would then have the same opportunity. The respondent party would receive a copy of the complainant's submission and have twenty days to prepare its submission and respond to the complaint's allegations.

After receiving the submissions, the panel would hold oral hearings during which each side would present its arguments and answer questions with the other party present. A second round of written submissions and oral hearings would then follow. During this investigatory stage, the panel could examine witnesses, who would appear at the request of either the parties or the panel. It could also seek information and technical advice from outside experts, use the reports of the Committee of Experts and other international bodies, and conduct on-the-spot investigations. States that bordered on or had significant trade relations with the country involved in the complaint would be asked to provide any relevant information to the Dispute Panel regardless of whether they were directly involved in the complaint. All of these proceedings would be private and strictly confidential.

Employers' and workers' associations would not present submissions and oral arguments directly to the Dispute Panel. Rather, a joint committee of GATT/WTO and ILO officials with expertise in dispute resolution procedures, appointed by the Directors-General of the ILO and the GATT/WTO, would prepare the case in consultation with the original complainant.³⁹⁹ The task of this joint committee would be to uphold the interests of both the ILO and GATT/WTO in preventing the use of forced or child labor to produce goods that enter the international trading system. The Dispute Panel could accept written submissions from the original complainants and could even allow them to appear before the panel as witnesses, but the original complainants would

399. Joint committee members could not have been involved in any matter that would prevent them from effectively representing the ILO and the GATT/WTO in these proceedings.

have no standing before the panel. Taking responsibility for the complaint from the workers' or employers' organization would allow the joint enforcement regime to fulfill its mission of preventing violations of forced or child labor without requiring states to offend nonstate actors in international law. This shift in responsibility would make the enforcement regime more palatable to all states. Moreover, this procedure would depoliticize the process and give it greater legitimacy.

After completion of the inquiry, panel deliberations would culminate in the drafting of a three-section report. The first section would describe the disputants' arguments and include the panel's findings of fact. Disputants would preview this section and make comments before completion of the final report. The second section of the report would state whether a violation of forced or child labor standards occurred and, if so, the industry, sector, and products implicated. The third section would suggest a reasonable period of time for compliance, programs to aid in compliance (i.e., technical assistance programs and certification procedures), and possible countermeasures. The determination phase, from establishment of a panel to completion of this final report, would normally not exceed nine months and would never take longer than twelve months. Aggrieved parties would thus achieve redress in an expedient yet fair manner.

The Dispute Panel report would be circulated to all Council and GB members and would be available to any member state of the ILO or GATT/WTO. The "consensus" rule would be followed with respect to Dispute Panel reports. That is, the first two sections of the Dispute Panel report would automatically be adopted unless a consensus of either the Council or GB decided otherwise. At the meeting following the report's presentation, either the Council or the GB could, by consensus, decide to withhold adoption, delay consideration, or reject the report.⁴⁰⁰ If this rejection were to occur, the dispute process would be completed and no violation would have been found to exist. Furthermore, no subsequent actions would be necessary.

Any contracting parties having concerns about the panel report would be required to circulate a detailed, written objection to all GB or Council members at least ten days before the meeting of either body at which the panel report was to be considered. The disputants would have a right to participate in the GB or Council deliberations, and their views would be recorded. The entire dispute settlement process, from the filing of a complaint to the decision on the Dispute Panel report, should not exceed eighteen months.

If the report were adopted, the implicated state would have up to three months to appeal the determination of the joint ILO-GATT/WTO enforcement regime to the ICJ, which would either affirm, reverse, or modify the Dispute Panel's findings and conclusions. The decision of the ICJ would be final. During this three-month period, the implicated state would also have the

400. If the GB decided to delay adoption, it would hold a special meeting to consider adoption within 30 days of the GB session in which it had decided upon a delay. A special meeting would be necessary to ensure that the determination phase is completed in 12 months. Because the GB only meets three times per year, waiting for the next regularly scheduled meeting would add four months to the process, which would be unacceptable.

opportunity to develop a technical cooperation program⁴⁰¹ with the ILO that was specifically geared to eliminating forced or child labor. The ILO Director-General and the appropriate state official would have to approve this program within six months of the adoption of the Dispute Panel report.

The offending state's technical cooperation program would incorporate a timetable for compliance with an evaluation of the state's progress at each of a number of interim phases during the program's implementation. While the technical cooperation program would allow for some flexibility, states would have no longer than two years from the adoption of the panel report before the ILO-GATT/WTO regime required either full compliance or implementation of an export ban on all products made in violation of the prohibitions against forced or child labor.⁴⁰²

Besides developing a technical cooperation program, the GB and Council, with the assistance of officials from the International Labour Office and the GATT/WTO Secretariat, would jointly develop a remediation plan. This plan would require the violating state to take specific actions necessary to comply with the adopted report's ruling. This joint ILO-GATT/WTO remediation committee⁴⁰³ would formulate a timetable for economic sanctions. It would also oversee compliance monitoring of the violating state. The committee would use the third section of the Dispute Panel report as the starting point for the development of this remediation plan and timetable and could either accept or alter the Dispute Panel's recommendations. It would be required to complete its plan and timetable within two months.

Once devised, the remediation committee would submit its plan to the GB and the Council, which would adopt the plan automatically unless a consensus of either group rejected it as formulated. If either group did reject the plan, the committee would revise it. If the Council or GB rejected the plan a second time, a third plan would then be formulated by the two Directors-General and the chairs of the GB and the Council. This special unit would seek input from all interested states but would make the final determination as to the content of the remediation plan. The unit would be required to complete this plan within two months. This third plan would be automatically adopted and would require neither submission to, nor approval from, the GB or the Council.

Compliance would normally occur within one year of the adoption of the Dispute Panel's report and would never take longer than two years. If violations continued beyond the period of time designated in the remediation

401. The technical cooperation program could involve a number of activities, including rewriting domestic legislation; imposing stiffer penalties on domestic violators; strengthening state inspection and enforcement; instituting education campaigns aimed at employers, workers, religious institutions, schools, judges, law enforcement officials, etc.; developing more efficient production processes; generating poverty eradication programs; and instituting compulsory education programs.

402. If, during implementation, the joint committee found that the technical cooperation program was not working, it would reconfigure the program so that progress could be made. If, in attempting to revise the technical cooperation program, the ILO discovered that the violating state had only been feigning cooperation in order to delay countermeasures or sanctions, the program would be terminated immediately and all products produced with forced or child labor and listed in the Dispute Panel report would be banned.

403. The committee would consist of ten members, five from the GB and five from the Council, who would be appointed by their respective chairs in consultation with their respective Directors-General, and would be established within ten days from the adoption of the Dispute Panel report.

plan for full compliance, countermeasures and/or sanctions would be instituted. The ILO-GATT/WTO enforcement regime would initially ban any products made in the violating state with forced or child labor. If a product implicated in the Dispute Panel report is later certified as actually being produced by a legal labor source, it would be permitted to enter the international trading system. However, if after an additional period specified in the remediation plan⁴⁰⁴ the violating state had still not stopped producing export goods with forced or child labor, wider trade sanctions or bans would be instituted and would intensify over time until the violations were eradicated.

The ILO-GATT/WTO enforcement regime would also develop and implement a certification procedure for identifying any products implicated in the adopted Dispute Panel report that were not actually made with forced or child labor. The joint ILO-GATT/WTO remediation committee would approve the mechanics of this certification procedure and would include it in the remediation plan.⁴⁰⁵ Failing the implementation of a certification procedure, all implicated products could be banned as soon as the period for compliance had expired. To be effective, this certification would require mandatory inspections by a joint team of International Labour Office and GATT/WTO Secretariat employees. The team would periodically and without prior warning enter and inspect all facilities where implicated products were made, including facilities of subcontractors and other intermediate producers. Only those products certified as being produced without forced or child labor to the satisfaction of the procedures agreed to in the remediation plan would be authorized for export.

The ILO and GATT/WTO, through the joint ILO-GATT/WTO remediation committee, would periodically review the progress of the violating state. The committee would meet every three months to discuss the violating state's progress towards compliance with the Dispute Panel's rulings and remediation plan, relying in part on mandatory reports from the violating state detailing the steps it had taken. If the violating state had entered into a technical cooperation program, the ILO would be required to report on the progress that had been achieved. If a certification procedure had been implemented, then the remediation committee would also examine reports on the status of that procedure, including reports by the inspection team. In addition, the remediation committee could seek information and hear witnesses from any other pertinent sources in order to evaluate compliance. Member states of the ILO or GATT/WTO and employers' and workers' organizations could also furnish information. Furthermore, the remediation committee or a surveillance team composed of International Labour Office and GATT/WTO Secretariat employees, with the permission of the violating state, could conduct on-the-spot visits. Based on all the information received, the joint ILO-GATT/WTO remediation committee would draft a report to the GB and the Council.

404. This period would normally be an additional 12 months from the institution of the certification procedure.

405. This certification procedure would be part of the entire remediation plan subject to the approval of the GB and Council.

The GB and the Council would consider compliance four months after implementation of the remediation plan and would review the ILO-GATT/WTO remediation committee report every four months thereafter until the offending state achieved full compliance. The chair of the joint ILO-GATT/WTO remediation committee would be present at each of these review sessions to present the committee's reports and answer questions. If monitoring efforts were deemed ineffective, the chair of the remediation committee would meet with the chairs of the GB and the Council and the Directors-General of the ILO and GATT/WTO to formulate a revised monitoring strategy.

Again based on all the information received, the joint ILO-GATT/WTO remediation committee could decide that the implicated state had achieved full compliance. Alternatively, the implicated state could at any time declare that it had achieved full compliance and request that an inspection team visit to verify compliance. Once the remediation committee determined that the state had achieved full compliance, it would file a report to the GB and Council certifying its finding. The GB and Council would each discuss the matter and either adopt the full compliance finding or reject it by consensus, in which case the monitoring procedure and the remediation plan would remain in place.

All economic sanctions would cease once the GB and Council adopt a finding of full compliance, but the certification procedure would remain in effect. The joint ILO-GATT/WTO remediation committee would continue to monitor the state for one additional year and continue to submit reports to the GB and Council every four months. During this period, intermittent and unannounced inspections of production facilities suspected of using forced or child labor would take place. If no consistent pattern of gross and reliably confirmed violations was uncovered during the additional year, all countermeasures, export bans, and certification procedures would be terminated.

VI. CONCLUSION

The twentieth century has seen unprecedented concern with the protection of human rights on an international scale. This phenomenon has produced a proliferation of international, regional, municipal, and local organizations dedicated to optimizing world public order through the establishment of "a world community of human dignity."⁴⁰⁶ Such a world can be effectuated only by protecting those basic rights fundamental to all human beings.

The world's commitment to the protection of human rights is revealed, not only by the proliferation of organizations, but also by the rapid enunciation, prescription, and adoption of human rights standards. All nations are committed to some level of human rights protection and are parties to at least one international human rights instrument. The prolific international lawmaking activities within the field of human rights, especially since World War II, have

406. CHEN, *supra* note 110, at 4. *See generally* MYRES MCDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER (1980) (outlining framework for human rights questions and offering recommendations for achievement of world order characterized by respect and common participation in shaping of values).

been the crowning achievement of the international human rights movement to date.

Unfortunately, the implementation of human rights standards remains woefully inadequate. Current international and regional human rights regimes, which rely primarily on monitoring, reporting, publicity, and moral persuasion to enforce their norms, are unable to deter states from violating their human rights obligations. As long as states view human rights as a domestic concern, incentives to punish violators will remain weak. States will remain reluctant to criticize each other about human rights issues, and therefore effective enforcement of even widely accepted human rights standards, rooted as they are in *moral* interdependence, will continue to be problematic.

States are much more apt to take action against each other when their material interests are implicated. With increased globalization, the material interests of states become more interdependent. When these material interests remain interdependent over an indefinite period of time, each state has the unilateral power to prevent the enjoyment of the other's benefits. Each state has a strong incentive to cooperate and to adhere to a set of mutually agreed upon standards in order for each nation to reap the benefits of this material relationship.⁴⁰⁷

International trade implicates states' material interests and is enormously important for a nation's growth and development. Because increased international trade has rendered states materially interdependent, an elaborate set of rules and standards governs international trading relationships. States generally follow these rules and standards and are scrupulous about policing each other's adherence to them.

GATT/WTO has become the premier international institution for the regulation of international trade, developing a large body of international trading rules and standards as well as an effective and frequently used dispute resolution system. Through its contributions, GATT/WTO has succeeded in liberalizing international trade. Largely as a result of GATT/WTO activities, the international trading system has flourished by increasing the volume of trade through the enforcement of a set of mutually beneficial rules and standards of conduct.

A number of international human rights standards are also international labor standards. The setting and enforcement of international labor standards has been a concern of the world community since the ILO was founded at the end of World War I. The ILO has emerged as the principal international body with expertise in the area of labor issues. Its well-developed, integrated and intricate standard-setting and enforcement machinery successfully persuaded states to adhere to their international labor obligations. To a great extent, the organization's success is due to its unique tripartite structure, in which employers' and workers' associations participate fully with states in all ILO activities.

However, the tools that the ILO uses to attain compliance are limited to

407. See, e.g., ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984); see also Donnelly, *supra* note 10, at 616-19 (arguing that states' material interests increase both pressure to conform to certain behavior and incentives to police each other's actions).

moral persuasion, publicity, shame, diplomacy, dialogue, and technical assistance. While able to obtain some positive results, gross and persistent violations of international labor standards continue in a number of countries. Prohibitions of forced or child labor have been part of the ILO's international labor code for many years, but these practices persist in many ILO member countries. The ILO has proven incapable of dealing effectively with these countries using its current arsenal of enforcement.

This paper has examined two international labor and human rights standards — prohibitions on the use of forced and child labor. While violations of these standards are currently recognized as international human rights and labor rights violations, they can also be viewed as unfair trade practices that breach obligations under the international trading system. Labor is a major input in the production of goods that enter the international trading system. Thus, use of forced or child labor in the production of goods gives producers in the violating state an unfair competitive advantage.

Under current GATT/WTO provisions, the use of forced or child labor can be credibly interpreted as an unfair trading practice. First, these practices are a form of "social dumping." Second, they are identical to state subsidies to producers of those goods. The failure to police violations of these standards therefore gives the state and its producers an unfair competitive advantage in their trading relations with other countries. Third, the general exceptions provision of GATT/WTO allows the importing country to prohibit the importation of goods made by prison labor and to adopt measures necessary to protect public morals. A single nation should thus be able to protect all people from having to engage in forced or child labor.

Because the ILO is the international organization with the greatest competency in international labor and GATT/WTO has the most expertise in international trade, the melding of these two organizations into a unified enforcement regime would better compel adherence to international labor and human rights standards with respect to goods that enter the international trading system. Linking the ILO and the GATT/WTO would also create a precedent for cooperation between multilateral organizations to protect international human rights and contribute to world public order.

This Article has proposed the establishment of a joint ILO-GATT/WTO enforcement system that relies upon the expertise and cooperation of both organizations to prevent forced and child labor. This regime would include an objective and fair determination procedure and remediation phase. The determination procedure would use an impartial panel of international trade and labor experts to decide whether a state exhibited a consistent pattern of gross and reliably confirmed violations of forced or child labor in the production of export goods. The remediation phase would determine the measures necessary to eliminate those practices and set a timetable for compliance. It would rely on technical cooperation programs, certification programs, and economic sanctions to achieve its objectives, although the most extreme remedy, sanctions, would only be used when a state failed to respond to less severe pressure.

The international trading system and the world economy would benefit from the operation of this joint regime. By enforcing labor standards, the

international trading system would signal its seriousness about enforcing rules that promote fair competition and trade. Enforcement would also ensure that the benefits of an open trading system are received by all, not only by those who exploit their workers. In addition, human resources would be used more efficiently, thereby expanding the world economy. A multilateral enforcement regime of international labor standards would also increase the amount of world trade controlled by multilateral institutions and consequently decrease calls for protectionism. Finally, lesser developed countries could promote social and economic development without having to compete against nations that do not respect these standards.

Although many developing nations oppose the enforcement of international labor standards, some developed countries are considering the enforcement of these standards on a unilateral basis. The United States has already included workers' rights provisions in its trade laws and has taken unilateral action against a number of countries.⁴⁰⁸ These demands will increase in number over time. Thus, a multilateral enforcement regime would be in the best interests of developing nations because it would allow them to participate in the formulation and implementation of these procedures.

By viewing violations of forced and child labor laws not only as international human rights and labor rights violations, but also as unfair trade practices, states could more readily recognize the implications of these practices on their material interests. Strong incentives would thus be created for states to protect their interests by sanctioning transgressor states and preventing future violations. In effect, the self-interests of each state would be harnessed to promote and enforce human rights for all.

408. For a description and critique of workers' rights provisions in U.S. trade laws, see, e.g., LAWYERS COMMITTEE FOR HUMAN RIGHTS, HUMAN RIGHTS AND U.S. FOREIGN POLICY: WORKER RIGHTS UNDER THE U.S. TRADE LAWS (1989); TRADE'S HIDDEN COSTS, *supra* note 13; Amato, *supra* note 375; Mandel, *supra* note 149.

