A Call for an Agreement on Trade-Related Aspects of Labor: Why and How the WTO Should Play a Role in Upholding Core Labor Standards

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I. Introduction

Despite repeated proclamations that “the International Labor Organization is the competent body to set and deal with . . . [labor] standards,”1 the World Trade Organization (“WTO”)2 nevertheless 

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1 World Trade Organization, Singapore Ministerial Declaration,
regularly finds itself subjected to pressure to build labor standards into its legal architecture.\(^3\) The climax in the efforts to directly link labor standards and the international trading regime came in 1999 at the WTO Ministerial Meeting in Seattle, when the United States,\(^4\) European Communities ("EC"), and Canada all submitted proposals on labor standards and trade,\(^5\) and nearly 50,000 protesters gathered to demand, inter alia, a fairer trading system that upholds at least internationally recognized minimum labor standards.\(^6\) Yet, developing countries vehemently opposed the idea that trading rights could be conditional on compliance with labor standards,\(^7\) ensuring that even the most innocuous proposals

WT/MIN(96)/DEC, 36 I.L.M. 218, 220 (1997).

\(^2\) Marrakesh Agreement Establishing the World Trade Organization, April 15, 1994, 33 I.L.M. 1125, 1144 [hereinafter WTO Agreement].

\(^3\) See infra Part II ¶ 2.

\(^4\) World Trade Organization, Communication from the United States: Preparations for the 1999 Ministerial Conference – WTO’s Forward Work Program, WT/GC/W/382 (Nov. 1, 1999), available at http://docsonline.wto.org (click on simple search, then enter WT/GC/W/382 as the document number and click “search”) (proposing “the establishment of a WTO Working Group on Trade and Labor”). U.S. President Clinton controversially weighed in on the debate during the Seattle Ministerial, stating:

What we ought to do first of all is to adopt the United States’ position on having a working group on labor within the WTO, and then that working group should develop these core labor standards, and then they ought to be a part of every trade agreement, and ultimately I would favor a system in which sanctions would come for violating any provision of a trade agreement.


\(^6\) Of course, many of the protestors were also demanding a fairer trading system to better meet the needs of developing countries, while others were advocating for the environment, raising issues of consistency. See Andrew Samet, Doha and Global Labor Standards: The Agenda Item That Wasn’t, 37 INT’L LAW. 753, 756 (2003). See generally Clyde Summers, Battle in Seattle: Free Trade, Labor Rights, and Societal Values, 22 U. PA. J. INT’L ECON. L. 61 (2001) (discussing minimum labor standards).

\(^7\) India is among those countries most strongly opposed to linking trade and labor. See, e.g., Kevin Kolben, The New Politics of Linkage: India’s Opposition to the Workers’ Rights Clause, 13 IND. J. GLOBAL LEGAL STUD. 225 (2006) (discussing the obstacles to adopting labor standards through the WTO and suggesting alternative methods such as bilateral treaties).
dealing with the trade-labor linkage were stillborn. Continued resistance from developing countries, coupled with the Bush administration’s refusal to promote the issue at the subsequent WTO negotiating round (the so-called “Doha Development Agenda” or “Doha Round”), meant that the trade-labor question has since been moved off the agenda for the WTO.

Despite being ignored in the current Doha Round, the issue of whether labor standards should be incorporated into the WTO continues to evoke heated discussion at the domestic, regional, and international levels and features prominently in academic and non-governmental organization (“NGO”) discourse. More
importantly, while the WTO's Dispute Settlement Body ("DSB") has not been asked to determine whether unilateral trade restrictions on goods produced in violation of labor standards are consistent with the General Agreement on Tariffs and Trade\(^\text{13}\) ("GATT") or any other WTO covered agreement, it has repeatedly been called upon to identify some of the contours of the

\(\text{Settlement, in } \text{HUMAN RIGHTS AND INTERNATIONAL TRADE 205 (T. Cottier, J. Pauwelyn & E. Bürgi eds., 2005) ("There are two main avenues or paradigms to integrate human rights into trade agreements, including the WTO: one would use the WTO to enforce compliance with human rights . . . another relies on human rights to temper or detract from WTO obligations."); Ernst-Ulrich Petersmann, Human Rights and International Trade Law: Defining and Connecting the Two Fields, in } \text{HUMAN RIGHTS AND INTERNATIONAL TRADE 29 (T. Cottier, J. Pauwelyn & E. Bürgi eds., 2005) ("GATT rules should be perceived not only as foreign policy instruments . . . but also as domestic policy instruments that could serve not only economic functions . . . but also "constitutional functions."); Jan Martin Witte, Realizing Core Labor Standards: The Potential and Limits of Voluntary Codes and Social Clauses 15-21 (2008), available at http://www.gtdforum.org/files/11-09-08-9-47-56_Studie-CLS-endfassung.pdf (analyzing the framework and potential of international core labor standards); Susan A. Aaronson, Seeping in Slowly: How Human Rights Concerns are Penetrating the WTO, 6 WORLD TRADE REV. 413 (2007) ("Some of the most forceful critics argue that the WTO system of rules makes it harder for member states to meet their obligations to respect, protect and advance human rights as delineated in the Universal Declaration of Human Rights . . . ."); Jose E. Alvarez, Symposium: The Boundaries of the WTO, 96 AM. J. INT'L L. 1 (2002) (discussing linkage and potential future WTO boundaries); Christine Kaufmann & Laura Meyer, Trade and Human Rights, 1 HUM. RTS. & INT'L LEGAL DISCOURSE 61 (2007) (comparing the various methods available to solve conflicts arising between human rights and international trade); Gabrielle Marceau, WTO Dispute Settlement and Human Rights, 13 EUR. J. INT'L L. 753, 754 (2002) ("It is suggested that a good faith interpretation of the relevant WTO and human rights provisions should lead to a reading of WTO law coherent with human rights law.").}

\(\text{13 General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]. The GATT is now included as one of several covered agreements in the WTO. In 2004, the DSB narrowly avoided having to rule on a human rights-motivated procurement directive promulgated by the State of Massachusetts in which the European Communities and Japan challenged Massachusetts' procurement law barring state agencies from doing business with entities that were engaging with Burma as a violation of the WTO Agreement on Government Procurement. Request for Consultations by the European Communities, } \text{United States–Measure Affecting Government Procurement, WT/DS88/1 (June 26, 1997), available at http://trade.ec.europa.eu/doclib/docs/2004/september/tradoc_118765.pdf. The dispute was averted when the U.S. Supreme Court invalidated the Massachusetts law on constitutional grounds. See Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000).}
relationship between trade and non-trade issues. To date, the DSB has not been asked to determine whether conditioning preferential market access through Generalized System of Preferences ("GSP") schemes on compliance with certain labor standards is consistent with the WTO's Enabling Clause. It is,


15 For instance, under the GSP established in the U.S. Trade Act of 1974, the President must consider whether a potential recipient county has taken steps to implement internationally recognized workers' rights in determining its eligibility for beneficiary developing status, and this decision can be reviewed upon request. Trade Act of 1974, 19 U.S.C. § 2462 (2002) [hereinafter Generalized System of Preferences]. The European Union's GSP+ system also allows granting additional tariff preferences to developing countries that are committed to ratifying and implementing a list of human rights and good governance conventions. Council Regulation 732/2008, 2008 O.J. (L 211) 1, 3 (EC). For a further discussion on this topic, see infra Part II.A.1.

16 Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, L/4903 (Nov. 28, 1979), available at www.wto.org/gatt_docs/English/SULPDF/90970166.pdf, [hereinafter Enabling Clause]. However, the Appellate Body held that preference schemes under the Enabling Clause—a clause allowing preferences to be given by developed WTO Member countries to developing states notwithstanding the non-discriminatory clauses contained in the GATT—are not unconstrained. Appellate Body Report, European Communities—Conditions For The Granting Of Tariff Preferences To Developing Countries, WT/DS246/AB/R (April 4, 2004) [hereinafter E.C. Tariff Conditions] (upholding an earlier Panel decision regarding "Drug Arrangements" promulgated by the E.C. which eliminated tariffs for only certain developing countries and which found that the E.C. regulations had not met the requirements for the Enabling Clause Exceptions to the GATT Equal Treatment provisions). More specifically, the Appellate Body found that "only preferential tariff treatment that is 'generalized, non-reciprocal and non-discriminatory' is covered under paragraph 2(a) of the Enabling Clause," and that "paragraph 3(c) [of the Enabling Clause] suggests that tariff preferences under GSP schemes may be 'non-discriminatory' when the relevant tariff preferences are addressed to a particular 'development, financial [or] trade need' and are made available to all beneficiaries that share that need." Id. §§ 147, 165. At least one commentator argues that the GSP+ arrangement remains inconsistent with the standard and would be in violation of the GATT. See Lorand Bartels, The WTO Legality of the EU's GSP+ Arrangement, 10 J. INT'L ECO N. L. 869, 870 (2007) ("[T]he substantive criteria chosen by the EU to select GSP+ beneficiaries . . . do not meet the Appellate Body's criteria for differential tariff treatment of developing countries . . . [and] the EU's requirement that would-be beneficiaries must have applied by a certain date, replicates the problem of the 'closed list' of beneficiaries that was fatal to the earlier incarnation of the EU's GSP."). For a historical overview of GATT and the Enabling Clause, and background on
however, likely that a WTO dispute on one or more of these issues will arise, and the inevitable arguments in support of interpreting trade and economic rules in conformity with human rights obligations will require discussion, analysis, and interpretation.

Given the uncertainty surrounding the consistency of unilateral trade restrictions for goods produced in violation of labor standards under the GATT, along with the rapid increase in labor standards and provisions appearing in GSPs and recently concluded bilateral and regional free trade agreements ("FTAs"), the time is ripe to review the trade-labor link and to consider what, if any, role the WTO should play in upholding labor standards without jeopardizing its key objectives of enhancing trade liberalization and eliminating discrimination in international trade relations.

preference schemes (with an American focus), see generally JEANNE J. GRIMMETT, CONG. RESEARCH SERV., RS 22183, TRADE PREFERENCES FOR DEVELOPING COUNTRIES AND THE WTO (2008).

17 See Int'l L. Assn. Comm. on Int'l Trade L., Resolution No. 5/2008 (2008), available at http://www.ila-hq.org/download.cfm/docid/96BD6A70-864B-4BAE-970837A51F65B250 ("[I]t is likely that WTO dispute settlement bodies will be confronted—as has happened in national and regional economic courts and arbitral tribunals—with human rights arguments in support of interpreting trade and economic rules in conformity with the human rights obligations of the countries concerned, or with related requests for 'judicial comity' or 'judicial deference.'").


19 See WTO Agreement, supra note 2, at 9 (listing the following objectives for the WTO:

[R]aising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.).

See also Doha Declaration, supra note 11, at 746 (affirming the objectives of the WTO).
This article proceeds as follows: Part II assesses the normative question of whether the WTO is the appropriate forum to enforce compliance with labor standards. It not only demonstrates why much of the concern surrounding the WTO's engagement with the "non-trade" issue of labor rights is overstated and can be overcome, but also offers salient insight into why the WTO should view trade restrictions which encourage compliance with Core Labor Standards ("CLS") as compatible with the philosophical underpinnings of the WTO and key principles of public international law. Having established that the WTO should play a role in the enforcement of CLS, Part III proceeds to evaluate the implementation options. The section first evaluates the "judicial method," whereby the DSB would permit Members to differentiate between goods produced in violation of the International Labor Organization's Declaration on Fundamental Principles and Rights at Work ("ILO Declaration") either by: (1) Narrowing the current interpretation of 'like' products so as to ensure that differentiating between products produced in violation of the ILO Declaration do not violate GATT provisions, such as most favored nation ("MFN") and national treatment ("NT"); or (2) ensuring that such restrictions fit into the interpretive framework of an exception contained in Article XX of the GATT.

Part III then considers the possibility of a legislative response to the issue and recommends that, although the legislative approach offers significantly more legitimacy than does judicial incorporation of CLS, political difficulties make it an unviable alternative, and any movement on the issue would have to be

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20 For the purpose of this article, we consider the four CLS contained in the International Labor Organization's 1998 Declaration on Fundamental Principles and Rights at Work ("ILO Declaration"): (1) Freedom of association and the effective recognition of the right to collective bargaining; (2) the elimination of all forms of forced and compulsory labor; (3) the effective elimination of child labor; and (4) the elimination of discrimination in respect of employment. Int'l Labour Org., ILO Declaration on Fundamental Principles and Rights at Work, art. 2, 37 I.L.M. 1233 (June 18, 1998) [hereinafter ILO Declaration]; see also World Summit for Social Development, March 6-12, 1995, Copenhagen Report of the World Summit for Social Development, Commitment 3(i), U.N. Doc A/CONF.166/9 (Apr. 19, 1995) ("[W]e will] safeguard the basic rights and interests of workers and to this end, freely promote respect for relevant International Labor Organization conventions, including those on the prohibition of forced and child labor, the freedom of association, the right to organize and bargain collectively, and the principle of non-discrimination.")
accomplished through the dispute settlement mechanism. Part IV concludes.

II. Do Labor Standards Belong in the WTO?

Critics, such as Jagdish Bhagwati, argue that labor standards have no place in the WTO because it is an organization that exists primarily to promote mutually beneficial, non-coercive trade through reciprocal and mutually advantageous arrangements aimed at reducing barriers to trade. Under this view, the incorporation of labor standards for the purpose of upholding certain rights within a Member State is not a concern of the WTO, which has as its key objective the furtherance of Member rights regarding market access to other Members by upholding mutually agreed upon tariff rates and other concessions.

Bhagwati's view that the WTO's role is limited to regulating "pure" trade issues for the purposes of trade liberalization ignores that the GATT and WTO, as well as human rights treaties and organizations, were created for the purpose of increasing human welfare, and for the considerable evolution of the aims, objectives, and roles of the international trading regime, starting from the establishment of the GATT in 1947. For example, the

21 See Jagdish Bhagwati, Afterword: the Question of Linkage, 96 AM. J. INT'L L. 126, 127-128 (2002) (discussing the inclusion of special interest considerations in the WTO, such as the environment or labor rights); see also Jagdish Bhagwati et al., Third World Intellectuals and NGOs Statement Against Linkage (Nov. 1999), available at https://www2.bc.edu/james-anderson/twin-sal12.pdf (concluding that linking labor and trade will serve to protect developed countries from developing country competition); Robert M. Stern & Katherine Terrell, Labor Standards and the World Trade Organization (Ford Sch. of Pub. Pol'y Res. Seminar in Int'l Econ., Discussion Paper No. 499, 2003), available at http://www.fordschool.umich.edu/rsie/workingpapers/Papers476-500/r499.pdf (arguing that the WTO and similar organizations are not the vehicles through which to achieve increased labor standards because "[t]he process of economic change is complex and cannot be managed by mandates").

22 See Bamali Choudhury et al., A Call for a WTO Ministerial Decision on Trade and Human Rights, in THE PROSPECTS OF INTERNATIONAL TRADE REGULATION: FROM FRAGMENTATION TO COHERENCE (Thomas Cottier & Panagiotis Delimatis eds., 2011) (discussing the linkage between welfare aspects of the post-World War II creation of the GATT); see also Martii Koskenniemi & Paivi Leino, Fragmentation of International Law? Postmodern Anxieties, 15 LEIDEN J. OF INT'L L. 553, 572 (2002).

23 Of particular note was the addition of Part IV of the GATT, entitled "Trade and Development," in 1965. See GRIMMETT, supra note 16, at 2.
preamble to the WTO Agreement cites "sustainable development" as an objective to be balanced against economic objectives. To most, human rights would be considered an element of "sustainable development" and thus implicitly included within the scope of the WTO. More directly, the WTO has expanded its coverage beyond "border measures," such as import tariffs, to include other policies which might affect trade—for instance, domestic policies concerning government regulation of investment, product and health standards, agricultural policy, and government procurement. The primary purpose of regulation on such topics has little, if anything, to do with trade, but instead concerns the fact that regulation in these areas could affect foreign producers and trade more generally. Furthermore, the Agreement on Trade-Related Intellectual Property Rights ("TRIPS Agreement") offers a cogent example of obligations imposed on wholly domestic activities, where such activities may affect


25 See Choudhury et al., supra note 22; Salman Bal, International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT, 10 MINN. J. GLOBAL TRADE 62, 63 (2001) ("[T]here is a direct and appropriate involvement by international trade in the protection of human rights.").


Despite its name, the TRIPS Agreement sets minimum standards and requirements on a range of issues which until now, were considered purely domestic considerations (ranging from the term of protection for a patent to the availability of judicial review and the criminal sanctions for certain infringements).

It is therefore a gross overstatement—and, in fact, simply incorrect—to state that the WTO has an inherent institutional difficulty imposing obligations that could be viewed as wholly internal. Of course, the WTO cannot incorporate every area or subject matter which merely may have an effect on trade and traders; there must be some criteria upon which to assess the suitability of incorporation. This is not to say that whether a topic is “trade-related” or “affects” trade is irrelevant. On the contrary, it should be a factor upon which to assess the suitability of a topic for incorporation into the WTO. Using the inclusion of intellectual property rights (“IPRs”) into the WTO as a guide, three other relevant factors emerge. First, IPRs were seen to “have a significant enough impact on the international economy that they should be regulated internationally even when no foreign party is directly involved.” More specifically, since IPRs are a body of standards which positively affect trade flows, their under-enforcement was an impediment to the WTO’s fundamental intention to expand international trade. Second, rights holders and governments alike realized that the existing international

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29 For example, Article 33 of the TRIPS Agreement requires patents to be granted for a period of at least twenty years, to be counted from the filing date. See id. art. 33. Articles 42 through 49 focus on civil and administrative procedures and remedies, and Article 61 addresses criminal procedures, stating that “[m]embers shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale.” See id. arts. 42-49, 61.


31 The Preamble to the GATT states that its purposes involve “expanding the production and exchange of goods,” while the Preamble to the WTO Agreement contains a commitment to “expanding the production of and trade in goods and services.” GATT, *supra* note 13, Preamble; WTO Agreement, *supra* note 2, Preamble.
mechanism for enforcing international IPRs was insufficient.\textsuperscript{32} Those same parties also viewed the World Intellectual Property Organization ("WIPO") treaties as failing to adequately protect IPRs (both in scope and coverage), and realized that in order to increase protection to an acceptable level, the forum of negotiations must be shifted.\textsuperscript{33} Third, many simply believed that IPRs were inherently deserving of protection.\textsuperscript{34}

By applying the same reasoning to CLS, the following four criteria would need to be satisfied in order for one to consider incorporation of CLS into the WTO framework: (1) CLS must be "trade-related"; (2) protection of CLS would positively affect international trade flows; (3) CLS are not sufficiently protected and enforced; and (4) CLS would need to be viewed as inherently deserving of protection. Even if one is not convinced that satisfying the above four criteria is justification for incorporating CLS into the WTO, there are several textual-based arguments from the GATT which favor such incorporation. The remainder of this section explores both issues. Part A analyzes whether the CLS satisfy each of the four criteria. Part B explores additional GATT-based arguments supporting the incorporation of CLS into the WTO framework.

\textbf{A. Core Labor Standards Deserve Protection}

\textbf{1. Core Labor Standards Are "Trade-related"}

The fact that labor directly affects market share and activity is relatively uncontroversial.\textsuperscript{35} Labor is by nature an "intrinsic part

\textsuperscript{32} Although all of the notable WIPO-administered treaties contained provisions relating to dispute settlement and even envisaged involvement of the International Court of Justice ("ICJ"), no dispute was ever referred to the ICJ based on these provisions. See, e.g., Caroline Dommen, \textit{Raising Human Rights Concerns in the World Trade Organization: Actors, Processes and Possible Strategies}, 24 HUM. RTS. Q. 12 (2002); Bryan Mercurio, \textit{Reconceptualising the Debate on Intellectual Property Rights and Economic Development}, 3(1) L. & DEV. REV. 65, 71 (2010).

\textsuperscript{33} See Mercurio, supra note 32, at 71-72.

\textsuperscript{34} Thomas, supra note 30, at 794.

\textsuperscript{35} Linkages between labor, trade, and regulation date as far back as the late-eighteenth century and serious efforts to formulate international standards were made in the late-nineteenth century. \textit{Bob Hepple, Labor Laws and Global Trade} 25-29 (2005) (detailing the efforts made as early as 1788 to consider the issue of workers' rights on an international scale when France considered abolishing a law requiring
of the production process that culminates in the manufacture of goods and services for trade." 36 Simply stated, the conditions under which a product is manufactured or produced impact the quantity and cost of the product in the world market. 37 As such, it seems only natural that labor standards should be viewed as an indispensable part of the effective trade in goods.

Additional evidence of this can be seen by the fact that the drafters of the United Nations Havana Charter, 38 which sought to establish the failed International Trade Organization ("ITO"), explicitly recognized the link and impact that labor has on international trade by including a provision on labor. Specifically, Article Seven of the Havana Charter (titled "Fair Labor Standards") stated that "unfair labor conditions, particularly in production for exports, create difficulties in international trade... [and] each member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory." 39 Thus, not only did trade negotiators in the 1940s identify the link between labor and international trade, they also recognized that unfair labor conditions create difficulties or distortions in the market by lowering the price of goods below what would normally exist in a competitive market and should be eliminated. 40 It is clear that the drafters explicitly recognized labor as being related to trade. 41

Sunday to be a day of rest in order for France to increase its competitive advantage in the market. In the early nineteenth century, England passed one of the first true pieces of industrial worker protection legislation when it limited the hours of child workers in cotton factories.).


37 See id.


40 See generally Daniel Zaheer, Breaking the Deadlock: Why and How Developing Countries Should Accept Labor Standards in the WTO, 9 STAN. J. L. BUS. & FIN. 69, 75 (2004) ("The WTO should incorporate labor standards because labor is a factor of production, and failure by a government to regulate the means by which labor is utilized constitutes a trade distortion... [T]he WTO seeks to decrease trade distortions.").

41 Shortly thereafter, the United States unsuccessfully attempted to include labor
Finally, the major industrialized countries already link labor rights with trade in a similar fashion to the pre-TRIPS situation with regard to IPRs. For instance, the United States links labor and trade in at least three different ways. First, the United States requires GSP beneficiaries to observe "internationally recognized work rights" and be actively taking steps to implement certain labor rights (as determined under the Act, and slightly differing from the CLS) as a condition of receiving the preferential treatment. Countries that have not complied with international commitments to eliminate the worst forms of child labor are per se ineligible to receive GSP preferences.

Second, the United States includes labor provisions in its standards in the GATT by proposing the following: "The Contracting Parties recognize that all countries have a common interest in the achievement and maintenance of fair labor standards related to the productivity, and thus the improvement of wages and working conditions... and that unfair labor conditions... particularly in the production for export, may create difficulties for international trade which nullify or impair benefits under this Agreement." Commission on Foreign Economic Policy, Report to the President and the Congress, H.R. Doc. No. 290 (1954), Staff Papers, 437-438. In 1983, the European Communities unsuccessfully submitted a similar proposal to the GATT. See Robert Howse, Brian Langille & Julien Burda, The World Trade Organisation and Labour Rights: Man Bites Dog, in SOCIAL ISSUES, GLOBALISATION AND INTERNATIONAL INSTITUTIONS: LABOUR RIGHTS AND THE EU, ILO, OECD AND WTO 177-78 (Virginia A. Leary & Daniel Warner eds., 2006).

James Gathii argues that even regional trade tribunals in Africa are now entertaining human rights-related claims, even when there is no explicit treaty basis for the tribunals to assume jurisdiction. See James Gathii, The Under-Appreciated Jurisprudence of Africa's Regional Trade Tribunals, 13 OR. REV. INT’L L. (forthcoming 2011).


Beginning with the North American Trade Agreement ("NAFTA") in 1994 and becoming standard practice since the U.S.-Jordan FTA in 2000, labor provisions were codified by the Bipartisan Trade Promotion Authority of 2002 ("BTPAA"), which, inter alia, directs the President and trade negotiators to (1) "ensure that a party to a trade agreement . . . does not fail to effectively enforce its . . . labor laws, through a sustained or recurring course of action or inaction in a manner affecting trade," (2) recognize that parties have the right to exercise discretion with respect to labor law enforcement and regulation, and (3) "strengthen the capacity of United States trading partners to promote respect for core labor standards." The BTPAA expired in 2007, but was quickly replaced with a compromise agreement reached between leading Democrats in Congress and the Bush administration, which also directly linked labor with trade. Entitled "A New Trade Policy for America," the agreement begins with calls to "[e]nsure that U.S. free trade agreements raise standards of living [and] create new markets for U.S. goods," to require countries "to adopt, maintain, and enforce in their laws and practice, the basic international labor standards as stated in the 1998 ILO Declaration," and to "[e]nsure that government procurement promotes basic worker rights and acceptable conditions of work." The agreement further required the addition of four elements, pending and all future U.S. FTAs: (1) Fully enforceable commitments that the FTA partner countries


46 Note that the first two FTAs negotiated by the United States with Israel in 1985 and Canada in 1988 did not include any provisions regarding labor standards. Id. at 2.

47 Bolle includes in a list of reasons behind the shift in U.S. policy towards the inclusion of labor standards in FTAs that "it became increasingly accepted that labor issues were related to trade and trade policy," as well as that producers in developing countries tended to reduce wages in order to compete in the markets for low-cost goods. Id.


49 Id. § 3802(b)(11)(B).

50 Id. § 3802(b)(11)(C).


52 Bolle, supra note 45, at 4.
would adopt and maintain in their laws and practices the ILO Declaration; (2) fully enforceable commitments against FTA partner countries that lower their labor standards; (3) new limitations on discretionary "prosecution" and "enforcement" of labor provisions; and (4) ensuring that labor provisions are subject to the dispute-settlement mechanisms (and any resulting penalties) of the FTAs. 53

Third, the United States links labor and trade through §301 of the U.S. Trade Act of 1974, which permits trade sanctions against states which fail to observe workers' rights. 54 Under that Act, the administration can initiate an investigation, or any interested person can file a §301 petition requesting that the U.S. administration investigate claims regarding unfair trade practices, and take steps to remedy these practices. 55 While an investigation has never been initiated or a petition filed, the point is that the U.S. Trade Act of 1974 already links labor with trade and, in doing so, tacitly deems labor to be "trade-related." 56

Likewise, the European Union ("EU") retains a similar scheme whereby GSP benefits from general and special incentive


arrangements for sustainable development and good governance, with specific reference to certain human rights treaties. Unlike the carrot and stick approach of the United States, the EU’s special incentive arrangements do not take a trade sanctions-based approach to the issue. Rather, special incentive arrangements offer additional incentives to beneficiaries who have ratified and effectively implemented sixteen specific human rights conventions and at least seven conventions related to environment and governance. Special preferences can be withdrawn if the beneficiary fails to implement human rights or labor rights. Moreover, the EU similarly furthers the labor-trade link in its FTAs with the majority of its agreements obliging FTA partner countries to, inter alia, conform to a comprehensive set of labor standards, or simply referencing labor conditions without any accompanying obligation.


59 Council Regulation, supra note 57, art. 16(2).

60 See, e.g., The Trade, Development, and Cooperation Agreement, EU-S. Afr., Oct. 11, 1999, 1999 O.J. (L 311) 1, at Preamble, arts. 2, 4, 27, 65, 66, 68; EU-Chile Association Agreement, Dec. 30, 2002, 2002 O.J. (L 352) 1, arts. 1, 12, 16, 43, 44, 135; Economic Partnership Agreement, EU-CARIFORUM, Oct. 30, 2008, 2008 O.J. (L 289) 1, Preamble, arts. 8, 72, 73, 191-196, 224 [hereinafter EU-CARIFORUM]; the EU-South Korea Free Trade Agreement, 2011 O.J. (L 127) 1, arts. 13. Note, however, that Article 13 provides its own limited form of dispute settlement which involves a committee of experts “endeavour[ing] to agree on a resolution of the matter” and making their resolution public (unless the Committee otherwise decides). Id. The dispute settlement provisions of Article 14 (which include the possibility of trade retaliation) are not available to claims under Article 13. See id. arts. 13.14-13.16.

2. **Protection of Core Labor Standards Would Positively Affect International Trade Flows**

The incorporation of IPRs into the WTO framework indicates that governments are willing to allow for the regulation of internal activity if such regulation has the net effect of expanding the volume of world trade and, in so doing, increasing the security and predictability of markets. Yet, developing country governments, industry associations, certain economists, and some developing country NGOs often argue that the inclusion of CLS into the WTO would not expand trade volumes, but would rather operate as disguised protectionism to undermine developing countries' comparative advantage in cheap labor vis-à-vis developed countries. Thus, it is claimed that allowing Members to impose ...
restrictive measures on products manufactured in contravention of CLS would have the net effect of reducing world trade—a result that is irreconcilable with the WTO’s objective to further promote trade-liberalization and the expansion of trade.65

Some commentators pursue this trajectory even further and argue that the imposition of CLS is philosophically incompatible with the WTO’s goal of removing barriers to trade. Under this logic, the imposition of CLS on Members implies that a “fixing” of standards between countries, incompatible with market principles as regulatory policy, is a matter of comparative advantage. In other words, some argue that the imposition of artificial international standards into the domestic regulatory structure interferes with the market and thus impedes efficiency and stifles competition.66

Before responding to these arguments, it is useful to briefly return to the four CLS in the ILO Declaration: (1) Freedom of association and the effective recognition of the right to collective bargaining; (2) the elimination of all forms of forced and compulsory labor; (3) the effective elimination of child labor; and (4) the elimination of discrimination in respect of employment and perceptions that they will be the losers from freer trade.” Jose Salazar-Xirinachs, The Trade-Labor Nexus: Developing Countries’ Perspectives, 3 J. INT’L ECON. L. 377, 380 (2000); see also Nigel Grimwalde, The GATT, the Doha Round and Developing Countries, in THE WTO AND DEVELOPING COUNTRIES 1 (Homi Katrak & Roger Strange eds., 2004) (calling the introduction of human rights into the WTO framework as “having one purpose only—to provide developed countries with carte blanche to introduce trade restrictions on their products under the guise of protecting human rights.”); Brian A. Langille, Eight Ways to Think About International Labor Standards, 31 J. WORLD TRADE 27, 31 (1997) (“In developing nations there is a widespread view that the motivations behind the pursuit of the labor standards agenda are nothing more than disguised protectionism on the part of the developed nations.”).

65 Brown et al., supra note 27, at 240 (noting that a common standard set by all countries would lead to a rise in the world price).

occupation. Critically, these rights do not encompass a "fair minimum wage" or compliance with occupational health and safety measures. It is generally accepted that low wages are a legitimate comparative advantage in international trade and that developing countries should not be denied that advantage; thus, rather than seeking to "equalize" the comparative advantage related to labor standards, the CLS concern practices that are not determined or fixed by market mechanisms—the absence of regulations actually denies workers comparable rights to use the freedom they otherwise would have to enable them to seek out better conditions of employment.\(^67\) Therefore, in denying the workers the freedom to seek out better working conditions, the absence of worker rights actually forecloses any possibility of a "natural market correction."\(^68\) In this sense, far from being incompatible with market philosophy, the decision not to enforce CLS in a domestic market is itself an interference with the free market.

The realization that CLS are not about the equalization of domestic market regulations allows for a more rational analysis of the evidence available as to the economic effects of the enforcement of CLS for both world trade and developing countries. Significantly, the Organization for Economic Co-Operation and Development ("OECD") published a study in 1996 questioning much of the "evidence" regarding CLS "leveling the playing field" or undermining developing countries' comparative advantage. The OECD report concluded that "it is conceivable that the observance of core standards would strengthen the long-term economic performance of all countries."\(^69\) Furthermore, the

\(^{67}\) Summers, supra note 6, at 66.

\(^{68}\) Importantly, compliance with CLS is also theoretically and empirically compatible with a liberal trading regime. This is because CLS preserve freedom of choice for employees, while trade liberalization seeks to ensure other human freedoms, including the right of individuals to trade with other individuals without discrimination on the basis of country of location. See Christopher McCrudden & Anne Davis, A Perspective on Trade and Labor Rights, 3 J. INT'L ECON. L. 43, 51-52 (2000); see also Sarah Cleveland, Human Rights Sanctions and International Trade: A Theory of Compatibility, 5 J. INT'L ECON. L. 133 (2002); Ernst-Ulrich Petersmann, The WTO Constitution and Human Rights, 3 J. INT'L ECON. L. 19, 22-23 (2000).

report rejected the theory that countries which refuse to comply with CLS enjoy better export performance than those countries which do comply with CLS. Another OECD report published in 2000 was even more explicit in detailing what it saw as the source of the benefits of complying with CLS: "Countries which strengthen their core labor standards can increase economic efficiency, by raising skill levels in the workforce and by relating an environment which encourages innovation and high productivity." An OECD report in 2005 affirmed the earlier findings and concluded: "Countries do not gain sustained improvement in competitiveness by disregarding core labor standards. Indeed, to the contrary, improved working conditions are found to contribute importantly to growth and development, a point made in the final report by the ILO’s World Commission on the Social Dimension of Globalization." These findings and conclusions are supported by independent economic analysis,

70 Id.; see also Organisation for Economic Co-Operation and Development, International Trade and Core Labour Standards, 3, Policy Brief (October 2000) [hereinafter OECD Policy Brief] (noting, however, that the situation is different with regard to certain other worker rights, finding that some States that did not comply with non-core worker rights could occasionally gain a comparative advantage over those States that did comply with non-core worker rights).

71 OECD Policy Brief, supra note 70, at 3.


73 For instance, Keith Maskus concludes that deficient provisions of core labor standards generally diminish export competitiveness rather than improve it because of the distorting effects of those deficiencies. Keith E. Maskus, Should Core Labor Standards be Imposed Through International Trade Policy? (World Bank Working Paper No. 1817, 1997), available at http://ctrc.sice.oas.org/geograph/labor/maskus.pdf; see also, Keith E. Maskus, Trade and Competitiveness Aspects of Environmental and Labor Standards in East Asia, in EAST ASIA INTEGRATES: A TRADE POLICY AGENDA FOR SHARED GROWTH 163 (Kathie Krumm & Homi Kharas eds., 2004) (concluding that improving protection of fundamental labor rights and environmental standards "would not reduce [East Asia's] ability to export labor-intensive goods or pollution-intensive goods; indeed, export growth can be compatible with raising core labor standards and environmental protection."). Likewise, Rodrik finds some evidence that FDI is lower than expected in countries with limited CLS. Dani Rodrik, Labor Standards in International Trade: Do They Matter and What Do We Do About Them?, in Emerging Agenda for Global Trade: High Stakes for Developing Countries 35, 57 (R. Lawrence et al., 1996); see also David Kucera, The Effects of Core Workers Rights on Labor Costs and Foreign Direct Investment: Evaluating the "Conventional Wisdom" (Int'l Labor
well as by ILO investigations, which find a positive correlation between long-term economic success within the world trading system and the observance of CLS.\textsuperscript{74} Indeed, the findings of the OECD and ILO correspond with the conclusions of a World Bank report published in 2001, stating: "Keeping labor standards low is not an effective way of gaining a competitive advantage over trading partners. Indeed low labor standards are likely to erode competitiveness over time because they reduce incentives for workers to improve skills and for firms to introduce labor saving technology."\textsuperscript{75}

Thus, three major international organizations and several leading economists all conclude that the imposition of fundamental worker rights can be pursued without necessarily injuring a nation’s capacity to effectively export and trade with the world system. Furthermore, evidence suggests that many developing countries have (in taking a myopic view of the issue) completely ignored the benefits that acceptance of universal labor

\textsuperscript{74} In general, the literature finds child labor detrimental to development since it means that the next generation of workers will be unskilled and less well-educated; curtailed innovation and productivity stymies society’s and the economy’s ability to manage external shocks (such as financial crises and natural disasters) and may affect foreign direct investment. See INTERNATIONAL LABOUR OFFICE, THE FINANCIAL AND ECONOMIC CRISIS: A DECENT WORK RESPONSE 52 (2009), available at http://www.ilo.org/public/english/bureau/inst/download/tackling.pdf (stating that maintaining labor standards helps support confidence and thus contributes to activating the economy); INTERNATIONAL LABOUR OFFICE, RULES OF THE GAME: A BRIEF INTRODUCTION TO INTERNATIONAL LABOR STANDARDS 9-10, 30 (2005) (describing the value of CLS in protecting countries in times of economic crises, particularly during the Asian financial crisis, and warning of the debilitative effects of child labor); OECD Policy Brief, supra note 70, at 32; David Kucera, Core Labor Standards and Foreign Direct Investment, 141 Int’l Lab. Rev. 31 (2002). See generally JANSEN LEE & EDDY LEE, TRADE AND EMPLOYMENT—CHALLENGES FOR POLICY RESEARCH (2007), available at http://www.who.int/IP/public/english/bureau/inst/download/cuddy.pdf (giving general background information on the topic).

\textsuperscript{75} Development Prospects Group, Global Economic Prospects and the Developing Countries 82, World Bank (2001).
standards could bring and the correlative role that acceptance could play in the expansion of the world market.\(^\text{76}\)

3. **Core Labor Standards Suffer from Significant Under-enforcement**

Similar to the pre-TRIPS situation with regards to IPRs, CLS suffer from significant under-enforcement, with the existing international agency— that is, the ILO— seemingly impotent to enforce standards and curb widespread violations.\(^\text{77}\)

Despite being the body responsible for the protection of CLS, the ILO’s enforcement record to date has proven to be consistently inadequate. This is not due to lack of effort; the ILO has adopted 188 binding conventions and approximately 200 nonbinding resolutions since its creation in 1919.\(^\text{78}\) While it is difficult to pinpoint the precise reasons for the lack of enforcement, several impediments can be identified. One such impediment is that the ILO suffers from a disparate, and sometimes rather low, rate of ratification of its treaties (including by leading developed countries such as the United States).\(^\text{79}\) This, in turn, creates a “patchwork of inconsistent legal obligations” and serves as a major impediment to the global enforcement of labor standards.\(^\text{80}\)

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\(^\text{76}\) See Narendar Pani, *Who’s Afraid of Labor Standards?*, INDIAN ECON. TIMES, Apr. 22, 1994, at 48 (noting that universal labor standards would improve the relative attractiveness of India for foreign capital, and would also reduce the disadvantage of competing with less democratic competitors from the developing world, such as China). This is especially the case for developing country governments that already substantially comply with CLS. See William J. Martin & Keith E. Maskus, *The Economics of Core Labor Standards: Implications for International Trade Policy*, 9 REV. INT’L ECON. 317 (2001).

\(^\text{77}\) See International Organisation of Employers, *The Evolving Debate on Trade & Labor Standards* 2-3 (2006) (stating that the real problem with labor issues is not the laws on the books, but rather the enforcement of those laws).


\(^\text{80}\) Chantal Thomas, *Should the WTO Incorporate Labor and Environmental Standards*, 61 WASH. & LEE L. REV. 348, 350 (2004). However, it should also be noted
Moreover, a number of ILO conventions are ratified but not implemented.\footnote{Werner Sengenberger, \textit{International Labor Standards in the Globalized Economy: Obstacles and Opportunities for Achieving Progress, in Globalization and the Future of Labor Law} 331, 332 (John D. Craig \& Michael S. Lynk eds., 2006).}

Another impediment is that while in theory the ILO Constitution authorizes sanctions in the event of non-compliance,\footnote{Article 33 states that “the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith.” \textit{ILO Constitution}, ILO, \url{http://www.ilo.org/ilolex/english/constq.htm} (last visited Feb. 3, 2011).} in practice the organization prefers to adopt a “soft” approach to the enforcement of its norms, relying on public identification, embarrassment and shaming, and technical assistance to promote compliance.\footnote{Michael J. Trebilcock \& Robert Howse, \textit{Trade Policy and Labor Standards}, 14 \textit{Minn. J. Global Trade} 261, 274 (2005).} The ILO does not even do this very well, as the ILO’s “special list” of transgressions of CLS garners little international publicity and even less government attention; in fact, the list has not produced any substantial improvements in compliance with CLS.

One recent example of the limitations of the ILO’s enforcement capacities is the ILO’s response to Myanmar’s use of forced labor for both private and public purposes, which the ILO “has been considering for over thirty years.”\footnote{ILO, \textit{Report of the Commission of Inquiry Appointed Under Article 2 of the Constitution of the International Labor Organization to Examine the Observance by Myanmar of the Forced Labor Convention 1930} (No. 29), ¶ 543, ILO Official Bulletin, Vol. 81 (Series B, Special Supp.) (July 2, 1998), \url{available at http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar5.htm}.} In the case of Myanmar, following a formal complaint by twenty-five worker delegates, an ILO Commission of Inquiry investigated and found extensive violations of the Forced Labor Convention, amounting to a “saga of untold misery and suffering, oppression and exploitation of large sections of the population inhabiting Myanmar by the Government, military and other public officers.”\footnote{\textit{Id.}} The Commission of Inquiry made several recommendations, namely that Myanmar’s government should bring several of its laws into compliance with the Forced Labor
Convention by May 1, 1999 at the latest; that Myanmar should publicly renounce the practice of forced labor and take concrete steps to eliminate it in all its forms; and that it should strictly enforce a long-neglected provision of the Myanmar Penal Code that provides for the prosecution and punishment of those who exact forced labor. Importantly, the Governing Body took action under Article 33 of the ILO Constitution and recommended, for the first time in the ILO’s history, that the International Labor Conference “take such action as it may deem wise and expedient to secure compliance” by Myanmar with the recommendations and with Myanmar’s obligations under Convention Number 29 on Forced Labor. Nonetheless, no ILO Member State actually initiated any further sanctions (in large part due to concern that such an effort would violate WTO rules). It was not until 2003 that the United States banned all trade with Myanmar under the Burmese Freedom and Democracy Act. In passing the legislation, members of the U.S. Congress argued in the face of considerable opposition that sanctions were justified under Article XX of the GATT. By contrast, a number of Member States, including China and India, continued to engage with Myanmar while the EU’s and Australia’s trade restrictions continued to target only the military junta and their family members. Importantly, these sanctions cannot be considered a response to

86 Id. ¶¶ 539-40.
the ILO Resolution, but rather to the repressive political developments in Myanmar in 2007, including the detention of democracy leader Aung San Suu Kyi.93

Myanmar remains in non-compliance with the Convention and the ILO continues to report that forced and compulsory labor remains prevalent in many areas of the country in circumstances of severe cruelty and brutality. 94 In November 2010, the ILO reported that very few of the recommendations from the Commission of Inquiry had been effectively implemented.95

Statistics on compliance with CLS provide further testimony as to the need for a stronger enforcement mechanism. Simply put, it is a generally accepted fact that large numbers of violations of CLS occur everyday.96 For instance, the ILO estimates that 153 million children aged five to fourteen are engaged in child labor,

93 Id. at 2.

94 See Press Release, ILO News, ILO Conclusions on Myanmar Regarding Forced Labour (June 18, 2004), available at http://www.ilo.org/asia/info/public/pr/lang--en/WCMS_BK_PR_96_EN/index.htm. In 2007, the Understanding Between the Government of the Union of Myanmar and the International Labor Office concerning the appointment of an ILO Liaison Officer in Myanmar was secured. Press Release, ILO News, Supplementary Understanding Between the Government of the Union of Myanmar and the International Labour Office (Feb. 15, 2007), available at http://www.ilo.org/yangon/info/WCMS_106131/lang--en/index.htm. The Understanding provided that alleged victims of forced labor in Myanmar will have full freedom to submit complaints to the ILO Liaison Officer in Yangon. Id. The Liaison Officer will then make a confidential preliminary assessment as to whether a case involves forced labor, so that such cases can be investigated by the Myanmar authorities and appropriate action taken against the perpetrators. Id. Nonetheless, the ILO stated in July 2007 that, despite the mechanism, there was still widespread use of forced labor in Burma. Id. The issue of non-compliance was thus back on the agenda for the 97th ILO Session in May 2008 and the ILO. Press Release, ILO News, 97th International Labor Conference to Address Wide Range of Issues, Including Reducing Rural Poverty, Enhancing Skills and Labor Rights – Conference will have high-level discussion on food crisis (May 27, 2008), available at http://www.ilo.org/global/about-the-ilo/press-and-media-centre/news/WCMS_093673/lang--en/index.htm.


including an estimated fifty-three million in hazardous work. Furthermore, child labor makes up approximately 26% of the total workforce in Africa, with one in four children engaged in child labor (approximately sixty-five to eighty million children) and 15% of all Sub-Saharan African children engaged in some form of hazardous work. In Asia, an estimated one in eight children are child laborers, with a total of 5.6% of Asian children engaged in hazardous work. Moreover, an OECD study found that only nine out of sixty-seven non-OECD countries complied with the right to freedom of association and fifteen out of sixty-seven countries upheld the right to collective bargaining. It is also clear that bonded labor continues to be widely practiced in several countries, and that organizing and bargaining rights are repressed or otherwise absent in export processing zones across the world. Indeed, this body of evidence led the OECD to


98 Accelerating Action Against Child Labor, supra note 97, at 10; The End of Child Labor, supra note 97, at 8.

99 Accelerating Action Against Child Labor, supra note 97, at 10.

100 OECD TRADE AND STRUCTURAL ADJUSTMENT, supra note 72, at 66-67.


conclude that there is "no indication in recent years of substantial progress overall in reducing non-compliance with respect to freedom of association and the right to collective bargaining across the sample of sixty-nine countries that have ratified the two corresponding ILO fundamental conventions."  

4. Core Labor Standards Are Inherently Deserving of Protection

The fact that CLS are human rights is uncontroversial; no Member State voted against the ILO Declaration when it was put forth at the 86th Session of the General Conference of the ILO in June, 1998. The ILO Declaration itself acknowledges CLS have a special status within the international labor law hierarchy in that the CLS are imposed upon ILO Members by virtue of them simply being Members of the organization. Thus, Member States that have not ratified the relevant conventions are nevertheless bound to promote and realize the basic principles concerning the four CLS. Regardless of this requirement, all of the respective seven Conventions dealing with the standards currently enjoy almost universal acceptance, with the highest rate of ratification among all ILO conventions. The four principles are also broadly articulated in the Universal Declaration of Human Rights ("UDHR"), the International Covenant on Civil and Political Rights ("ICCPR"), the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), and a number of other


104 See ILO Declaration, supra note 20, at 2.

105 See id.

106 Id.

107 International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. Article 8 of the ICCPR prohibits forced or compulsory labor, while Article 21(1) refers to the right "to freedom of association with others, including the right to form and join trade unions for the protection of his interests." Id.

key human rights conventions, which signify the commitment of Members to protect workers on a much wider scale than that proposed by the CLS.\footnote{109}

With such a high ratification rate and widespread endorsement within the broader international human rights system, the CLS do not simply constitute rights that belong to workers, but rather constitute rights that belong to individuals as human beings.\footnote{110} Thus, child labor is prohibited not because the labor is cheaper than adult labor, but rather because the growth and development of children should not be undermined through labor; the operative principle is that children should be shielded from the burdens of labor, and concerns regarding the rate of pay a child receives are irrelevant by comparison.\footnote{111} Similarly, forced labor is prohibited not because it creates an economic distortion, but rather because it denies workers their freedom.\footnote{112} While prohibition of discrimination reaches beyond wage costs to protect workers' equal right to work and the right to equal treatment as part of the human right to be treated equally, freedom of association serves broader political and social goals than merely permitting unionization.\footnote{113}

Given the above, any comparative advantage gained by non-compliance with these standards is not an advantage that should be shielded or trumped by liberalized trade. This is not a controversial statement; in fact, the vast majority of countries agree with such an edict.\footnote{114} It is, therefore, extremely rare (if not completely unheard of) for a trade representative to publicly state

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\footnote{110} Summers, \textit{supra} note 6, at 68. The OECD has also accepted that the UDHR rests firmly on accumulated principles of international human rights law. \textit{Id.}

\footnote{111} \textit{Id.} at 66.

\footnote{112} \textit{Id.}

\footnote{113} \textit{Id.}

\footnote{114} \textit{See id.}
that their country's comparative advantage is in child labor and the prohibition of unionization.115

As human rights, the CLS are worthy of inclusion as a GATT-protected norm. By viewing CLS as human rights and not merely as an attempt to level the playing field, the case for the WTO incorporating the rights and correspondingly playing a role in their enforcement becomes clear for at least two reasons. First, when viewed as basic human rights, CLS can be seen to be promoting human freedom of choice. Such freedom of choice is entirely consistent with a liberal trading regime that seeks to ensure other human freedoms, particularly the right of individuals to engage in market transactions without discrimination on the basis of country of origin.116 Indeed, on a practical level, the sovereignty argument does not stand up to scrutiny when one considers that all Members of the WTO (including developing countries) allow some degree of sovereignty erosion by virtue of membership in the organization (or, in fact, by membership in any international organization). In exchange for the reduced sovereignty, Member States receive the benefits of membership in an organization which assists in making trade more stable, predictable, and free, and in improving the overall wealth of its citizens.117

Second, the human rights approach shows that imposing trade restrictions on products manufactured in a manner that fails to comply with universally acknowledged human rights is not an economic regulation per se, but rather a form of international social regulation driven by the fundamental premise that human rights are universal and indivisible. Viewed in this manner, it becomes clear that the enforcement of human rights is not merely a convenient opportunity to engage in protectionism, but an obligation to respect, protect, and fulfill their responsibilities under international human rights treaties, including the ILO

115 See Summers, supra note 6, at 66. (discussing the prohibition of child labor as a human right).
116 Trebilcock & Howse, supra note 83, at 273.
117 For instance, members are required to limit tariff rates within their bound rate, to apply trade remedy mechanisms within the parameters of certain substantive and procedural rules, and to abide by and enforce certain intellectual property rights. Id. Failure to observe and enforce any of these or other standards could lead to dispute settlement and the possibility of retaliatory trade measures. See id.
Declaration. It is thus no answer to claim that the imposition of trade restrictions for products manufactured in violation of CLS interferes with the internal regulatory policy of another state; in the contemporary world, human rights concerns are matters of international, rather than domestic, concern. All states have an interest in compelling compliance with human rights norms, regardless of whether the violating state’s conduct directly impacts other states’ interests in the traditional sense. As Michael Trebilcock and Robert Howse observe, linking trade rights to compliance with CLS will not impose a discriminatory set of conditions on Members’ exercise of their trading rights; rather, the “condition” is, in effect, something that they are all already committed to do, inasmuch as they are Members of the ILO and signatories to the ICCPR and the ICESCR human rights treaties.

B. Textually-based Justifications for the Incorporation of Core Labor Standards

In addition to satisfying the above four criteria as a subject inherently worthy of WTO incorporation, there are several GATT-based arguments which further support incorporation. Foremost, an argument can be made that any panel or Appellate Body report finding efforts to restrict or prohibit the importation of products made in contravention of CLS inconsistent with the GATT would undermine the sovereignty of the importing Member. While such

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118 On this basis, it is not open for developing countries to argue that labor rights are a luxury good which will improve as economic conditions develop. See id. While this may be true of low wages, the process of development cannot justify violation of core human rights that are inherent and inalienable, regardless of the country’s rate of economic development.

119 Cleveland, supra note 68, at 160.

120 Trebilcock & Howse, supra note 83, at 289. The ILO Declaration obligates members of the ILO to “respect, promote and realize in good faith” the four fundamental rights, regardless of whether the member state has ratified the relevant ILO Conventions. ILO Declaration, supra note 20, at 2. Clyde Summers observes in this context that it is ironic that Egypt, Brazil, Indonesia, and Pakistan, which were among the most vocal opposition to the Clinton proposal, have ratified conventions on all the subjects of the ILO Declaration, with the sole exception being Pakistan’s failure to ratify a convention on child labor. Summers, supra note 6, at 67. It should be noted that the non-member states to the ILO are as follows: Andorra, Monaco, Liechtenstein, Bhutan, North Korea, Palau, Micronesia, Nauru, Tonga, Cook Islands, Niue, and Vatican City; of these, only Liechtenstein and Tonga are members of the WTO, while Andorra and Vatican City have observer status at the WTO. See ILO Declaration, supra note 20.
an argument appears to turn the logic of the world trading system on its head, it should be remembered that under human rights principles states are legally entitled to disassociate themselves from products manufactured in a manner that is contrary to their international human rights obligations, as well as to refuse to import such products in order to avoid further perpetuation of those human rights violations. Indeed, the clear and consistent view of the U.N. Committee on Economic, Social and Cultural Rights is that states must respect human rights, both within their own country and abroad. Critically, this does not require the exporting Member to comply with CLS; the Member remains free to continue the practice for domestic consumption and for export elsewhere. In addition, upon closer inspection, the GATT itself recognizes the legitimacy of such an approach—far from creating a general right of access to the markets of other Members, the GATT merely imposes a negative right that access shall not be restricted by discriminatory measures.

The GATT/WTO regime does not support and has never supported “free” trade; instead, what is promoted is a more liberalized, “freer” trade in combination with principles of security, predictability, and equality of opportunity. Such aims and objectives are reflected in numerous places in the WTO agreements, notably in allowing safeguard measures to counter purely legitimate trade in certain instances and in enumerated

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123 Howse & Regan, supra 121, at 257.

124 See WTO Agreement, supra note 2.
exceptions (i.e., Article XX of the GATT).\textsuperscript{125} The GATT/WTO has also always recognized the balance between trade and legitimate social values; for example, by allowing Members to take measures to protect national historic treasures and national security.\textsuperscript{126}

When viewed in this manner, the incorporation of CLS into the WTO framework is not a revolutionary concept, but more of an extension of existing action. For instance, Article XX(e) of the GATT reflects the drafters’ consideration of workers’ rights in creating an exception from GATT commitments and obligations for purposes “relating to... the products of prison labor.”\textsuperscript{127} Considering that the GATT was drafted in 1947 when coerced labor was the only widely prohibited international human rights norm, it is not a stretch to interpret the inclusion of Article XX(e) as an indication of the original drafters’ awareness of the need to create an exception for the prevailing human rights norms of the period when assessing compliance with the GATT.\textsuperscript{128} Such an interpretation provides credence to the view that the GATT should be read in such a way that it is compatible with contemporary human rights norms. As such, it should come as no surprise that there was a distinct absence of criticism from the delegates of the WTO for the United States’ unilateral ban against the import of products produced in Myanmar in 2003, with the legislation not even rating a mention at the U.S. Trade Policy Review at the WTO.\textsuperscript{129}

The contrary position, which would not allow Members to take trade-related measures to protect human rights, could potentially produce some deeply disturbing results. Most irrationally, such a position would mean that Members would be allowed to use trade measures to target prison labor (as in Article XX(e) of the GATT),\textsuperscript{130} but that trade measures targeting slave labor—which is

\textsuperscript{125} GATT, supra note 13, art. XX.
\textsuperscript{126} Id. arts. XX(f), XXI.
\textsuperscript{127} Id. art. XX(e).
\textsuperscript{128} Cleveland, supra note 68, at 161.
\textsuperscript{129} Howse & Trebilcock, supra note 91, at 568.
\textsuperscript{130} Article XX(e) of the GATT states,
Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction
generally viewed a more egregious human rights abuse—would be inconsistent with the GATT. Such an outcome is deeply troublesome in the contemporary global environment where concern for the protection of international human rights beyond borders is widespread and systematic, and where an existing international obligation to promote, protect, and fulfill basic human rights and labor standards already exists. Given the good faith obligation to comply with international obligations and the WTO’s recognition of CLS at the Singapore Ministerial Conference, Gabrielle Marceau, Counselor at the Legal Affairs Division of the World Trade Organization, poignantly summarized:

[A]ll WTO members must comply with their human rights obligations and with their WTO obligations at the same time without letting a conflict arise between the two sets of legislation. Hence, it is only reasonable to expect that the WTO adjudicating bodies would interpret WTO provisions taking account all relevant obligations of WTO disputing states.

Indeed, if the WTO were to refuse to take into account legitimate non-trade rules when assessing the validity of a restrictive trade measure, the organization would in fact assume a fundamental role in constraining the enforcement of a key global norm.

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131 Cleveland, supra note 68, at 147.

132 One clear example of this is the international community’s use of sanctions against the regime supporting apartheid in South Africa, as well as the international community’s decision to intervene in the conflict in the former Republic of Yugoslavia for reasons relating to humanitarian concern. See Sanctions Against South Africa, Bureau of Educational and Cultural Affairs (1986) http://eca.state.gov/education/engteaching/pubs/AmLnC/br56.htm (last visited Feb. 3, 2012); Jan Nederveen Pieterse, Sociology of Humanitarian Intervention: Bosnia, Rwanda and Somalia Compared, 18 INT’L POL. SCI. REV. 71, 79-83.

133 Marceau, supra note 12, at 234; see also Gabrielle Marceau, Trade and Labor, in THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW 541-42 (Daniel Bethlehem, Donald McRae, Rodney Neufeld, & Isabelle Van Damme eds., 2009).

134 See Marceau, supra note 12, at 202.
The WTO has not approached human health similarly, which the WTO has supported and protected in two distinct ways. First, the WTO has promoted the protection of human health over any trade concerns on the issue of access to medicines in the developing world.\textsuperscript{135} These efforts began with the Doha Declaration on the TRIPS Agreement and Public Health, which reiterated the importance of the issue and re-affirmed both the flexibilities existing within the TRIPS Agreement and the fact that the Agreement "does not and should not prevent Members from taking measures to protect public health."\textsuperscript{136} The Doha Declaration also recognized that Members with "insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement" and instructed Members to find an "expeditious solution to th[e] problem."\textsuperscript{137}

The solution came on August 30, 2003 in the form of a waiver that created a mechanism whereby Members can issue compulsory licenses to export generic versions of patented pharmaceuticals to Members with "insufficient or no manufacturing capacity in the pharmaceutical sector for the product(s) in question."\textsuperscript{138} The importing Member must also be issued a compulsory license in accordance with certain conditions.\textsuperscript{139} In 2005, Members agreed


\textsuperscript{136} Id. ¶¶ 4-5.

\textsuperscript{137} Id. ¶ 6.


\textsuperscript{139} Id. ¶ 3; see also World Trade Organization, General Council Chairperson's Statement of 13 Nov. 2003, WT/GC/M/82, available at http://www.wto.org/english/tratop_e/trips_e/gc_stat_30aug03_e.htm (discussing the reasons for the implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health). This decision has sparked much discussion, comment, and criticism. See generally Duncan Matthews, \textit{WTO Decision on Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health: A Solution to the Access to Essential Medicines Problem?}, 7 J. INT'L ECON. L. 73, 73
to permanently amend the TRIPS Agreement to include the waiver. The value of this action cannot be overstated, as the GATT/WTO had never before agreed to amend any of its covered agreements.

The DSJ also has a proven track record in promoting the protection of human health. For instance, while the panel in *EC-Asbestos* found the European Communities’ measure banning the importation and sale of asbestos a violation of Article III.4, but justified it under Article XX(b) as a measure “necessary” to protect human life or health, the Appellate Body approach gave even greater weight to human health. More specifically, the Appellate Body included the health risks of asbestos into its “like product” analysis of Article III.4, concluding that asbestos fibers were not “like” PVA, cellulose, and glass fibers.

Likewise, both the panel and Appellate Body in *Brazil-Tyres* accepted Brazil’s argument that its measure banning the importation and use of retreaded tires fit within the scope of Article XX(b) as being “necessary to protect human, animal and plant life” due to the threat posed by the accumulation of discarded tires, given that the tires provided a breeding ground for mosquitoes (which carry diseases) and released harmful toxins.

("Compulsory licensing is one of a range of policy approaches that will ultimately assist in improving access to essential medicines in developing countries," and that "the debate about the Doha Declaration and compulsory licensing is part of a much wider problem and the solution requires a mix of policy initiatives."); Bryan Mercurio, *TRIPS, Patents and Access to Life-Saving Drugs in the Developing World*, 8 Marq. Intell. Prop. L. Rev. 211, 214-15 (2004) (arguing that, because the “majority of the drugs used to combat public health epidemics such as HIV/AIDS and malaria are off-patent or not patented in many developing countries and LDCs, the agreement will do very little to assist those nations in preventing and treating public health crises and epidemics," and that there are other important considerations that were not addressed by the agreement.); Frederick M. Abbott & Rudolf V. Van Puymbroeck, *Compulsory Licensing for Public Health: A Guide and Model Documents for Implementation of the Doha Declaration Paragraph 6 Decision* (World Bank, Working Paper No 61, 2005) (providing a guide to compulsory licensing and fleshing out the implications of the declaration).

140 World Trade Organization General Counsel, Amendment of the TRIPS Agreement: Decision of 6 December 2005 WT/L/641 (Dec. 8, 2005).


into the air when burned. The Brazilian measure was ultimately deemed not to satisfy the chapeau to Article XX, the panel and Appellate Body’s analysis of whether the measure was “necessary” for the “protection of human, animal and plant life” or health were deferential to Brazil’s view. These decisions indicate the willingness of WTO panels and the Appellate Body to provide Members with a wide scope in crafting measures for the protection of human, animal, and plant life and health; it is only when such measures become discriminatory that the measures will be deemed to be inconsistent with the GATT.

A similar pattern can be seen with regard to the environment, where WTO panels and the Appellate Body demonstrate a willingness to apply an almost deferential standard to the issue of whether a Member’s conduct fits within the scope of Article XX(g) as “relating to the conservation of exhaustible natural resources.” For instance, the Appellate Body in U.S.-Gasoline found that U.S. measures promulgated as part of the U.S. Clean Air Act on the composition and emission effects of gasoline—including the requirement that certain areas of the United States sell only “reformulated gasoline” (a cleaner-burning fuel) to consumers and other areas sell gasoline no dirtier than that sold in 1990—is “related to” the “conservation of an exhaustible natural resource” (in this case, clean air) and therefore within the


144 See id. ¶ 252. The Brazilian measures ultimately failed to satisfy the conditions of the chapeau to Article XX for two reasons: first, “the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination,” and second, “the imports of used tyres through court injunctions...resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination.” See id. ¶¶ 224-33, 240-246.

145 See id. ¶ 170 (“Brazil’s chosen level of protection is the reduction of [these] risks...to the maximum extent possible, and that a measure or practice will not be viewed as an alternative unless it preserve[s] for the responding Member its right to achieve its desired level of protection with respect to the objective pursued.”) (internal quotations omitted).

146 GATT, supra note 13, at art. XX.

scope of Article XX(g). Similar to the result in Brazil-Tyres, certain aspects of the application of the measure constituted "unjustifiable discrimination" against foreign refiners and a "disguised restriction on international trade," and therefore failed to satisfy the requirements of the chapeau to Article XX.

The Appellate Body report in U.S.-Shrimp demonstrated an even more deferential approach when it found that U.S. measures forcing foreign shrimp trawlers to reduce incidental "take-rates" of migratory sea turtles (essentially through the use of costly "turtle excluder devices") were "relat[ed] to the conservation of an exhaustible natural resource" (in this case, migratory sea turtles). In finding a live animal species to be an exhaustible natural resource, the Appellate Body stated that "living resources are just as finite as petroleum, iron ore and other non-living resources." The Appellate Body justified its interpretation by stating that the textual language of Article XX(g) must be interpreted "in light of [the] contemporary concerns of the community nations about the protection and conservation of the environment." Moreover, the Appellate Body pointed to the mention of "sustainable development" in the preamble of the WTO Agreement as evidence that Members were "fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy." The Appellate Body also pointed to other "modern [non-WTO] international conventions and declarations [which] make frequent references to natural resources as embracing both living and non-living resources.

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148 See id. at 19.
149 See Brazil-Tyres, supra note 143, ¶ 252.
150 See U.S.-Gasoline, supra note 147, at 28-29. In short, the U.S. measures treated foreign refiners less favorably than domestic refiners as domestic refiners in operation for at least six months in 1990 could establish individual refinery baselines, which represented the quality of gasoline produced by that refiner in 1990, while foreign refiners in operation for at least six months in 1990 were assigned a statutory baseline established by the Environmental Protection Agency (reflecting average U.S. gasoline quality in 1990). See id. at 5-6.
151 U.S.-Shrimp, supra note 14, ¶¶ 2-4, 141-42.
152 Id. ¶ 128.
153 Id. ¶ 129.
154 Id.
resources. Like U.S.-Gasoline, the U.S. measures were ultimately found to constitute "unjustifiable discrimination" against foreign trawlers and a "disguised restriction on international trade," and therefore failed to satisfy the requirements of the chapeau to Article XX. Importantly, however, the Appellate Body detailed the unjustifiable and discriminatory aspects of the measure and essentially provided a roadmap to the United States for coming into compliance with the decision. The United States subsequently revised these measures, which were then found to be consistent with Article XX(g) of the GATT, including the chapeau.

While the WTO's actions and jurisprudence relating to the above issues are imperfect and have been subjected to criticism, the WTO has unquestionably taken steps towards realizing the importance of and further protecting norms concerning human health and the environment. To date, this has not been the case with human rights and, by association, CLS. Thus, not only have the WTO and its Members failed to appreciate the ethically desirable results that could flow from the incorporation of universal human rights into the WTO's interpretative architecture, but they have also failed to capitalize on the potential public legitimacy gains to be realized with the incorporation of CLS. More importantly, the WTO and its Members have failed in their legal obligation to "interpret and apply WTO rules in conformity with the human rights obligations of WTO Members under international law." For these reasons, one has to ask whether the WTO has become a "shelter to protect human rights

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155 Id. ¶ 130.
156 See U.S.-Shrimp, supra note 14, ¶ 186.
157 See id. ¶¶ 160-186.
159 See Caroline Dommen, Safeguarding the Legitimacy of the Multilateral Trading System: The Role of Human Rights Law, in INTERNATIONAL TRADE AND HUMAN RIGHTS: FOUNDATIONS AND CONCEPTUAL ISSUES 125 (Fredrick M. Abbott et al. eds., 2006).
160 See id. at 125-130.
This is not to suggest that human rights should trump trade law or that evidence of a single breach of a core labor right should allow a trading partner to immediately suspend its existing international trade concessions. Instead, what we propose is substantially less ambitious—the WTO should not automatically consider the pursuit of human rights objectives through trade measures an illegitimate burden on trade. As one of the leading (and most successful) international organizations, the WTO should not simply state that labor and human rights issues belong elsewhere; rather, it should recognize that compliance with universal human rights standards is a legitimate and worthy objective that should be taken into account in assessing the validity of a trade restriction that counterbalances the losses resulting from the exporting country’s failure to apply CLS. The following section evaluates several models for the incorporation of CLS into the WTO.

III. Incorporation of CLS – How It Would Work

Despite the economic, moral, and legal justifications for the incorporation of CLS into the WTO, developing countries continue to fear that the imposition of trade barriers for violations of CLS could be used in a protectionist manner. This fear could threaten to undermine the entire multilateral trading regime, and it is therefore essential that any model incorporating CLS into the WTO adequately address this protectionist concern.

The remaining portion of this section is separated into three subsections: Subsection A discusses potential incorporation of CLS into the WTO by “judicial” means; Subsection B discusses incorporation by “legislative” means; and Subsection C evaluates the options and offers the preferred model for incorporation.

A. Incorporating CLS by “Judicial” Means

This subsection evaluates two different interpretive approaches that Panels and the Appellate Body could take as a way of incorporating CLS into the WTO framework. Under the first approach, production differences in determining the “likeness” of

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162 See Cleveland, supra note 68, at 148.
163 See Langille, supra note 64, at 31.
products could be accounted for. Under the second approach, CLS could be incorporated as an exception under Article XX of the GATT. Each is discussed in turn.

1. Model One: Unravel the Process and Production Method ("PPM") Distinction

The first option for the incorporation of CLS into the WTO would allow for the validation of unilateral trade measures to restrict imports made in violation of CLS simply by finding that such products are not "like" products. In other words, since the use of child labor can be determined by objective criteria recognized by international human rights law, goods that are made with child labor can be distinguished from those that are made without; thus, treating the importation of such products differently cannot be said to be inconsistent with the non-discrimination provisions contained in Article I or Article III of the GATT. Simply stated, the standards would be inapplicable as the principle of non-discrimination only extends to "like" products.

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164 See infra text accompanying notes 166 and 167 for a more thorough explanation of the "likeness" standard.

165 See GATT, supra note 13, art. I.1 ("[A]ny advantage, favour, privilege, or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties." (emphasis added)).

166 See id. art. III.4 ("The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.").

While such a model relies upon the WTO explicitly considering other rules of international law, including those surrounding the agreements the respective parties have signed concerning the protection of CLS, this by itself does not inherently conflict with current WTO practice. In fact, "WTO panels and the Appellate Body have applied other rules of international law independently of construing a given WTO provision." Given this background, it seems possible for a respondent Member defending its restriction on the importation of goods produced by child labor to rely on the ILO Declaration in support of its claim that, under international law, such a product is not "like" a product produced in a CLS-compliant manner. Critically, this model would not allow labor rights to "trump" trade rights in case of conflict; rather, it would encourage a broad interpretation of WTO provisions to facilitate compatibility with obligations under international labor rights law.

A review of the GATT/WTO jurisprudence, however, leaves one doubtful of whether a panel or the Appellate Body would adopt such a nuanced interpretation of "like" products under Article I and III. For example, the GATT panel in U.S.-Tuna maintained that "like" products are those which are alike in their physical properties regardless of their processing histories. It is questionable, however, whether this GATT panel report remains good law. For instance, the Appellate Body in E.C.-Asbestos neither endorsed nor rejected the assertion that process and production methods are relevant for an assessment of likeness, but did hold that potential health risks should be included as a relevant factor when determining likeness under Article III. The Appellate Body's novel approach to determining "likeness" also "strongly suggests" differentiation "based on consumer tastes

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170 See E.C.-Asbestos, supra note 141, ¶¶ 84-148.
171 See id.
and habits.” 172

While the Appellate Body report in E.C.-Asbestos advanced the jurisprudence, its applicability to the incorporation of CLS is limited. Simply stated, products may have the same physical characteristics whether or not they are made in accordance with CLS. 173 Thus, the factual basis for the Appellate Body’s reasoning in E.C.-Asbestos can be distinguished from those in which there is a potential dispute over CLS.

While the product/process distinction might pose a challenge to incorporating CLS, there are strong reasons to find that the text of the GATT does not support it. 174 Interpreting the text of the GATT in accordance with Article 31 of the Vienna Convention on the Law of Treaties (“VCLT”), 175 one could plausibly find that origin-neutral discrimination of how a product is made is supported by the GATT, while trade restrictions based on where a product is made constitutes discrimination (as per, for instance, Articles I and/or III). 176 Howse and Regan adopt such an interpretation, arguing that “like” in the GATT actually means “not differing in any respect relevant to an actual non-protectionist policy.” 177 Such an interpretation draws support from at least two earlier GATT disputes concerning Article III as applied to regulatory taxes, both of which found that whether “like” products were treated alike depends on the regulatory purpose being considered. 178 Furthermore, abandoning the product/process

172 See Trebilcock & Howse, supra note 83, at 288.

173 It is of note that there has been a rise in public support for ‘ethical products’ in recent years. For instance, there was a high level of public support for a boycott of soccer balls produced in Pakistan by child labor, which ultimately led to reform in the relevant factory. See Pakistan Soccer Ball Industry Seeks End to Child Labor, CNN WORLD (Apr. 8, 1998), http://articles.cnn.com/1998-04-08/world/9804_08_pakistan.soccer_1_child-labor-soccer-ball-factories?_s=PM:WORLD.


176 See Howse & Regan, supra note 121, at 269-72.

177 See id. at 260-62.

178 See U.S. – Taxes on Automobiles, supra note 167, ¶ 5.5-5.10 (Oct. 11, 1994);
distinction would not unduly create and expand loopholes available for Members to circumvent their GATT obligations, as any assessment of a process-based import restriction would have to ensure that it was not being applied in such a way that affords protection to the domestic industry, taking into account both the timing of the measure and the effect it has on similar industries within the Member state.¹79

Even if products manufactured in compliance with CLS were found to be "like" products produced in violation of CLS, an evolutionary interpretive approach could still lead to a finding consistent with Articles I and III of the GATT. For example, the panel in Canada-Autos held that origin-neutral conditions were permissible and thus not inconsistent with Article I of the GATT.¹80 Under such an approach, an origin-neutral, non-discriminatory condition relating to the CLS may be viewed as consistent with Article I.1 of the GATT, even if the product manufactured in violation of CLS is considered a "like" product.¹81 Similar reasoning can be applied to Article III, where one could argue that, as virtually all WTO Members are also Members of the ILO (and thus already obligated to respect and protect the CLS), there is no difference in treatment between a group of domestic products and a group of "like" imported products—thus allowing for less favorable treatment to the imported products.¹82


¹79 See Trebilcock & Howse, supra note 83, at 289.

¹80 See Panel Report, Canada – Certain Measures Affecting the Automotive Industry, ¶¶ 10.22-10.25, 10.39-10.40, WT/DS139/R, WT/DS142/R, (Feb. 11, 2000), available at http://www.worldtradelaw.net/reports/wtopanels/canada-autos(panel).pdf [hereinafter Canada-Autos] ("We therefore do not believe that, as argued by Japan, the word 'unconditionally' in Article 1.1 must be interpreted to mean that making an advantage conditional on criteria not related to the imported product itself is per se inconsistent with Article 1.1, irrespective of whether and how such criteria relate to the origin of the imported products.").


¹82 See E.C.-Asbestos, supra note 141, ¶ 100; see also Panel Reports, European Communities—Measures Affecting the Approval and Marketing of Biotech Products, ¶ 7.2509-2516, WT/DS291/RWT/DS292/R, WT/DS293/R, (Sept. 29, 2006); Appellate
We understand that the above reasoning departs from current WTO jurisprudence on discrimination, but nevertheless, the product/process distinction is not in accordance with the text of the GATT; thus, production method can be a factor in determining the "likeness" of products. We further argue that even if products produced in accordance with CLS are found to be "like" products produced in violation of CLS, it would not necessarily constitute "discrimination" to find the latter to be in violation of Article I or III of the GATT.\textsuperscript{183}

2. Model Two: Incorporation through Article XX
Exceptions

This should be considered a fall-back position in the event that differentiating between the conditions under which a product is produced is found to violate the non-discrimination provisions contained in the GATT, where differing treatment can be considered a justified exception under Article XX(a) of the GATT\textsuperscript{184} as a measure necessary for the protection of "public morals."\textsuperscript{185} For example, the Appellate Body in \textit{U.S.-Gambling} accepted America's submission that its ban on internet gambling

\textsuperscript{183} Provided, of course, that measures target products made in violation of CLS from all countries. If measures targeted some but not all, it is likely that members would be found to be in violation of Article I of the GATT.

\textsuperscript{184} See GATT, \textit{supra} note 13, art. XX, which states:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(a) necessary to protect public morals;

(b) necessary to protect human, animal or plant life or health.

\textsuperscript{185} See id. It could also be argued that the measure is necessary to protect 'human life and health' under Article XX(b). However, this argument is less likely to be successful given that the human life and health to be protected is in the territory of the exporting member as opposed to that of the importing member. While we will not address the point here, it could be argued that exceptions to measures 'relating to the products of prison labor' under Article XX(e) could be read so as to include products made in violation of the CLS. See \textit{id}.
was provisionally justified under Article XIV(a) of the GATS (the equivalent to Article XX(a) of the GATT) as being designed to protect public morals and maintain public order. In so doing, the Appellate Body seemingly agreed with the Panel that “the term public morals denotes standards of right and wrong conduct maintained by or on behalf of a community or nation,” and that the “definition of the word ‘order,’ read together with footnote 5 [of the GATS], suggests that ‘public order’ refers to the preservation of the fundamental interests of a society, as reflected in public policy and law.”

Other examples could include the prohibition on the importation and sale of alcohol or pornography. Given this, it is plausible that Article XX(a) could be interpreted in a manner which allows Members to differentiate between goods on the basis of whether they were made in a manner consistent with CLS. Professor Howse argues that “the interpretation of public morals should not be frozen in time,” and “with the evolution of human rights as a core element in public morality in many post-war societies, the content of public morals extends to include” measures aimed at inducing compliance with universal core labor rights.

187 See id. ¶ 6.465.
188 See id. ¶ 6.467.

Even if one thinks that Article XX(a) is somehow limited to matters such as the regulation of pornography, imposing a limitation on its scope to measures on “products” would prevent a country from banning imports of pornographic films made with children or involving (but not necessarily depicting) involuntary acts of sex and other illegal violence. One has only to think of this example to see how unduly and irrationally restrictive of the ability of members to protect public morals Article XX(a) would be if it excluded PPM-based measures. Indeed, unless independently harmful, any product manufactured in the context of racketeering or organized crime would have to be given the full protection of GATT!
190 See id. at 142; see also Trebileock & Howse, supra note 83, at 289-90. But see Carlos Manuel Vásquez, Trade Sanctions and Human Rights—Past, Present, and Future, 6 J. INT’L ECON. L. 797, 819 (2003) (“The attempt to read these articles as
Interpreting Article XX(a) to allow for the prohibition of the importation and sale of products manufactured in violation of CLS would allow importing nations to protect their citizens from an internationally condemned practice which offends both deeply held beliefs and core values of their citizens. In this regard, FTAs are being utilized to ensure that certain labor standards are deemed to fall within the scope of the “public morals” exception. For example, footnote 1 of Article 224(1) of the EU–CARIFORUM FTA reads: “The Parties agree that... measures necessary to combat child labor shall be deemed to be included within the meaning of measures necessary to protect public morals or measures necessary for the protection of health.”

Furthermore, interpreting “public morals” to include CLS would adhere to the Appellate Body’s acknowledgement in its first report that the GATT “is not to be read in clinical isolation from public international law.” Moreover, Article 31(3)(c) of the Vienna Convention on the Law of Treaties directs treaty interpreters to use “[a]ny relevant rules of international law applicable in the relations between the parties [to the WTO]” as relevant legal context for interpreting provisions of the WTO. In practice, this means that panels and the Appellate Body must, when necessary, draw on provisions and principles found in other international treaties to assist in the interpretation of WTO provisions. Such usage of other international treaties occurred in U.S.-Shrimp, where the Appellate Body considered an assortment of international environmental agreements (even though not all WTO Members had ratified all of these agreements) when attempting to define the term “exhaustible natural resources” permitting states to impose outwardly directed measures if, but only if, a violation of international human rights norms is the predicate for the trade measure strikes me as an attempt to fit a square peg into a round hole.”

191 See EU-CARIFORUM, supra note 60, at art. 224, ¶ 1, n.1.
193 See Vienna Convention on the Law of Treaties, supra note 175, art. 31.3(c).
contained in Article XX(g). In so doing, the Appellate Body specifically stated that the terms of a treaty must be read "in the light of contemporary concerns of the community of nations about the protection and conservation of the environment." A similarly "dynamic" interpretation of Article XX(a) that incorporates measures aimed at inducing compliance with CLS is possible, particularly given that all the parties to the WTO explicitly endorsed the norms contained in the ILO Declaration at the 1996 Singapore Ministerial. While some argue that such an interpretative methodology is contrary to the Dispute Settlement Understanding ("DSU"), this argument cannot be sustained. The DSU only limits the applicable law before the panel and Appellate Body; thus, a party could invoke a non-WTO rule or treaty to substantiate a trade restriction based on Article XX(a) if it could be shown that that party as well as the complainant party was

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194 U.S.-Shrimp, supra note 14, ¶ 133.
195 Id. ¶ 129.
196 See Howse & Regan, supra note 121. Kolben, however, questions whether the need to rely on a “dynamic” interpretation “might be stretching both the original intent and contemporary conceptions of the clause.” Kevin Kolben, The WTO Distraction, 21 STAN. L. & POL’Y REV. 461, 478 (2010). The relevant part of the Singapore Ministerial Declaration reads, in full:

We renew our commitment to the observance of internationally recognized core labor standards. The International Labor Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalisation contribute to the promotion of these standards. We reject the use of labor standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and the ILO Secretariats will continue their existing collaboration.

For a discussion of this, see Hughes & Wilkinson, supra note 36, at 375.

[U]like the [Law of the Sea] Convention and the Statute of the ICJ, the DSU does not include an explicit provision on ‘applicable law.’ . . . [N]othing in the DSU or any other WTO rule precludes panels from addressing and, as the case may be, applying other rules of international law so as to decide the WTO claims before them.

Pauwelyn, supra note 168, at 561.
bound by the rule. Given that virtually all WTO Members are signatories to the ILO Declaration and all Members explicitly endorsed the principles enshrined at the Singapore Ministerial, there should be no impediment to reliance on the ILO Declaration in WTO dispute proceedings.\textsuperscript{198}

Moreover, the panel could, under Article 13 of the DSU, invite the ILO to provide evidence of where the consensus lies and what practices constitute an unambiguous violation of the universal content of the rights contained in the ILO Declaration.\textsuperscript{199} Specifically, Article 13(1) grants panels the “right to seek information and technical advice from any individual or body which it deems appropriate,” while Article 13(2) provides that a panel “may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter.”\textsuperscript{200} With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group.\textsuperscript{201}

Through these provisions, the ILO may, for instance, indicate that there is a relative consensus that employing children under the age of six constitutes a violation of the prohibition on child labor, while noting that there is controversy and no consensus as to whether fourteen-year-old children working is a violation of the ILO Declaration. In the former case, such evidence would support a determination that unilateral trade restrictions are permitted, whereas in the latter case, the evidence may support a finding that the measure constitutes an unjustifiable burden that is inconsistent with the GATT. In other words, the possibility of such a cooperative approach with the ILO indicates that concerns over the justifiability of the CLS, and the appropriateness of the WTO in interpreting the content of those rights, are misplaced.

Further, it must be remembered that neither “the basic purpose or structure of Article XX renders it inapplicable” to trade restrictive measures based on production methods. Such a view is explicitly supported by the inclusion of Article XX(e), which

\textsuperscript{198} See id. at 576.

\textsuperscript{199} See DSU, supra note 197, at art. 13.

\textsuperscript{200} Id.

\textsuperscript{201} See Howse & Regan, supra note 121, at 143.
allows Members to take restrictive trade measures against products made with prison labor. Likewise, the Appellate Body in *U.S.-Shrimp* emphatically rejected an argument suggesting that Article XX might be incompatible with policies relating to the manner of production of goods produced by another Member (i.e., outside of one's own borders or overseas). More specifically, the Appellate Body stated:

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

In practical terms, a WTO panel could rely on the ILO and other relevant agencies (such as the U.N. Human Rights Council, Office of the High Commissioner for Human Rights, the ICESCR Committee, and/or the ICCPR Committee) to assist in fact finding; for instance, these organizations could relate observations of practices relating to the production processes for a specific product in a specific country. The information thus garnered could assist in establishing whether there is a legitimate and serious labor rights issue with regards to the exported product.

A potential hurdle to success under Article XX is the fact that panels and the Appellate Body have interpreted the “necessity” requirement to imply a strict justification of the measures undertaken as the least trade-restrictive measure available to achieve the goal. In other words, a measure would not be “necessary” if a least trade-restrictive alternative was reasonably available which would achieve the objective in question. The Appellate Body in *Korea-Beef* clarified the necessity test by introducing a “weighing and balancing” of three factors:

1. The contribution made by the compliance measure to the

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202 See id.
203 *U.S.-Shrimp*, supra note 14, ¶ 121 (emphasis added).
enforcement of the law or regulation at issue; (2) the importance of the common interests or values protected by that law or regulation; and (3) the accompanying impact of the law or regulation on imports or exports.\textsuperscript{205}

These factors state that a measure that is necessary can fall between "indispensable" and "making a contribution to," and such a measure can also emphasize the significance of the "relative importance" of the non-trade policy objective in assessing where a measure falls within the "continuum."\textsuperscript{206} In terms of measures taken in furtherance of CLS, Marceau states that the test "would call for the weighing and balancing of whether the specific measure protects fundamental values and public morals, whether it contributes to the respect of the policy goal and the importance of the trade impact."\textsuperscript{207}

Given these clarifications, the question in relation to CLS and the necessity test then becomes whether less trade-restrictive alternatives to sanctions are reasonably available. While several alternatives can be posed, including ILO action, diplomatic protests, boycotts, social labeling, and the like, such alternatives are unlikely to be reasonably available. Simply stated, the alternatives lack real credibility and it is highly doubtful that any will influence the laws and practice of the exporting Member.\textsuperscript{208}

The most credible alternative—that the importing Member


\textsuperscript{207} See Trade and Labor, supra note 133, at 551.

\textsuperscript{208} See, e.g., Witte, supra note 12, at 52-76 (reviewing the literature on the benefits and limits of codes of conduct). But see Carlos Manuel Vásquez, Trade Sanctions and Human Rights—Past, Present, and Future, 6 J. Int'l Econ. L. 797, 819-20 (2003) (arguing there are always other ways to advance human rights goals, and thus trade sanctions will never be “necessary”).
should utilize the ILO instead of taking trade action—could be overcome by simply waiting to initiate a WTO dispute until action that has been taken under the ILO (such as representations and negotiations) has proven unsuccessful. The history of the exporting party’s relationship with the ILO could also be used to establish whether there is a record of non-compliance or non-cooperation towards resolving compliance issues to establish whether alternatives to trade restrictions are appropriate. Further, the DSB could also take into account that state obligation under the ILO Declaration entails a progressive realization of the full content of fundamental labor rights, which may involve technical assistance and advisory services. Thus, evidence that the violating state was genuinely co-operating with the ILO, given the resources and its economic development, would act as a substantial bar to finding that the measure was “necessary” to protect public morals.

While the above analysis supports the conclusion that the CLS could fall within the scope of the “public morals” exception of Article XX of the GATT, we do not suggest that the Panel/Appellate Body must conclude that every trade measure adopted is to restrict the import and sale of products manufactured in a manner which violates a core labor standard. In addition to fitting within and meeting the substantive requirements of Article XX, the chapeau (or introductory clause) of Article XX contains two additional disciplines to prevent measures that are either arbitrarily or unjustifiably applied or are a disguised protectionism from becoming justifiable exceptions under Article XX.

The chapeau could be used to effectively filter out “disguised protectionism” and “unjustifiable discrimination.” It mandates that the application of any measures to be justified under any paragraph of Article XX must not constitute “a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international

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209 See Howse & Regan, supra note 121, at 168. Indeed, Myanmar’s unwillingness to engage with the ILO and implement its recommendations was a large part of the justification used by the United States for its sanctions against Myanmar. See also Howse & Trebilcock, supra note 91, at 568.

210 See de Wet, supra note 66, at 452-54.

trade.\textsuperscript{2}\textsuperscript{212} The Appellate Body has interpreted this condition as requiring that a trade-restrictive measure be reasonably necessary to achieve the state's valid non-commercial purpose, in what could be described as imposing a proportionality requirement on Article XX.\textsuperscript{2}\textsuperscript{213} In practice, this would mean that trade restrictive measures will be "unjustified discrimination" if the Member imposing the measure fails to exclude all goods made in violation of CLS from any country. Further, trade restrictions imposing specific requirements on exporting Members to preserve CLS on the labor policies would not be permissible, as WTO jurisprudence makes clear that the Member evoking the restriction must allow states to adopt other comparably effective policies.\textsuperscript{2}\textsuperscript{214}

The preceding analysis demonstrates that use of the "public morals" exception contained in Article XX as a means to incorporating labor rights into the WTO is feasible, and that it also would not require an overhaul to the WTO's current interpretive methodology. The Appellate Body has repeatedly struck the appropriate balance between discrimination and general exceptions for legitimate social values, and has proven to be especially adept at detecting "protectionist" measures.\textsuperscript{2}\textsuperscript{215} There is no reason to assume that the jurisprudence regarding the incorporation of CLS would evolve any differently. Measures would be evaluated on a case-by-case basis and appropriate benchmarks to establish noncompliance with CLS would be developed, likely drawing from the expertise of the ILO, relevant international law, and the likely consequences of the measure, to ensure that it could adequately detect when sanctions were being used by Members for protectionism.

\begin{itemize}
\item \textsuperscript{212} See GATT, supra note 13, art. XX.
\item \textsuperscript{213} See U.S.-Shrimp, supra note 14, ¶ 161-84; see also Appellate Body Report, Article 21.5 Compliance, U.S.-Shrimp, ¶ 5.43-5.144; E.C.-Asbestos, supra note 141, ¶ 8.224-8.240; U.S.-Gasoline, supra note 147, at 22-30; Arwel Davies, Interpreting the Chapeau of GATT Article XX in Light of the 'New' Approach in Brazil-Tyres, 43 J. WORLD TRADE L. 507 (2009) (arguing that the Appellate Body's interpretation considers the chapeau's purpose to be to catch "unjustifiable" discrimination, which includes any country-based discrimination).
\item \textsuperscript{214} See U.S.-Shrimp, supra note 14, ¶ 161-84.
\item \textsuperscript{215} But see DAVID KINLEY, CIVILISING GLOBALISATION 71 (Cambridge University Press ed., 2009) (calling the WTO jurisprudence on human rights and Article XX "tangential, eclectic and inconsistent").
\end{itemize}
B. Incorporating CLS by “Legislative” Means

The third possible way to incorporate CLS into the WTO framework is the more radical approach—the creation of an “Agreement on Trade-Related Aspects of International Labor Standards” (“TRILS Agreement”). Reflecting the CLS contained in the ILO Declaration and imposing a positive obligation on all Members, a TRILS Agreement would ensure the introduction of minimum labor standards in a manner which does not constitute or have capacity to constitute barriers to trade while also avoiding many of the negative implications and potential legitimacy issues resulting from “judicial” incorporation of CLS.

While it is beyond the scope of this article to even attempt to design such an agreement, the precise scope and nuances of which would be determined through complex negotiations between Members, it is worth mentioning several worthy features which could be present in an agreement. First, the TRILS Agreement could begin by recognizing the link between trade and human rights before acknowledging and affirming existing legal obligations under human rights law. Next, the TRILS Agreement could then reiterate the commitment of Members to paragraph 4 of the Singapore Ministerial Declaration to “renew our commitment to the observation of internationally recognized core labor standards” and to “reject the use of labor standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question.”

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216 As an alternative, members could opt for a “decision” on trade and human rights, or even simply amend Article XX to specifically allow measures necessary to enforce labor standards. See Choudhury et al., supra note 22; see also Debra P Steger, *Afterword: The “Trade and...” Conundrum—A Commentary*, 96 Am. J. Int’l L. 135 (2002).

217 See, e.g., Andrew T. Guzman, *Trade, Labor, Legitimacy*, 91 Calif. L. Rev. 885, 887-88 (2003) (arguing that the Appellate Body is “ill-suited” to decide policy issues and pointing out that in such instances the Appellate Body will be criticized regardless of what actions it takes).

218 Such legal obligations include not only the ILO Declaration but also obligations stemming from core international human rights treaties and even the U.N. Charter. U.N. Charter art. 55-56.

then affirm paragraph I.A(iv) of ILO’s 2008 Declaration on Social Justice for Fair Globalization, which states “that the violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage.” 220 The TRILS Agreement could then follow the U.N. High Commissioner on Human Rights’ recommended “human rights approach to trade”:

(a) Sets the promotion and protection of human rights among the objectives of trade liberalization;
(b) Examines the effects of trade liberalization on individuals and seeks trade law and policy that take into account the rights of all individuals, in particular vulnerable individuals and groups;
(c) Emphasizes the role of the State in the process of liberalization—not only as negotiators of trade law and setters of trade policy, but also as the primary duty bearer of human rights;
(d) Seeks consistency between the progressive liberalization of trade and the progressive realization of human rights;
(e) Requires a constant examination of the impact of trade liberalization on the enjoyment of human rights;
(f) Promotes international cooperation for the realization of human rights and freedoms in the context of trade liberalization. 221

Finally, and similar to Article 17, footnote 1 of the U.S.-Peru FTA, the TRILS Agreement could require a complaining party to demonstrate that the failure to adopt or maintain a CLS has been “in a manner affecting either trade or investment.” 222 The addition of such a safeguard could help ensure the Agreement is not used in a protectionist or unjustified manner.

The TRILS Agreement could be operationalized through a two-stage process: First, through moral suasion in accordance with ILO procedures; and second, through economic pressure applied

222 United States—Peru Trade Promotion Agreement, art. 17, n. 1, Apr. 12, 2006.
by WTO Members using a provision similar to Article XXIII of the GATT\textsuperscript{223} following proper investigation and consultation with the ILO regarding the target Member’s compliance with the norms contained in the ILO Declaration.\textsuperscript{224} Unlike incorporation through the dispute settlement mechanism, a TRILS Agreement envisages multilateral negotiations and consultations with an intergovernmental organization before trade restrictions can be implemented. In this regard, a Committee on Trade and Labor Standards ("CTLS") could be formed with the mandate to establish policies and review Members’ laws and behavior.\textsuperscript{225} When a Member is accused of violating CLS, and thus the TRILS Agreement, the CTLS would allow the Member concerned to respond and provide a buffer time period for the accused Member to rectify the violations, as per ILO agreements. If the Member challenges the accusation or otherwise refuses to amend its policies or practices, WTO Members would be allowed to file a complaint with the DSB. If consultations do not resolve the dispute, a panel would be formed and the ILO would be called to evaluate and comment on whether the Member is fulfilling its obligations.\textsuperscript{226} As with violations of other covered agreements, a

\textsuperscript{223} On Article XXIII of the GATT, see \textit{E.C.-Asbestos, supra} note 141, ¶ 185:

Article XXIII.1(a) sets forth a cause of action for a claim that a Member has failed to carry out one or more of its obligations under the GATT 1994. A claim under Article XXIII.1(a), therefore, lies when a Member is alleged to have acted inconsistently with a provision of the GATT 1994. Article XXIII.1(b) sets forth a separate cause of action for a claim that, through the application of a measure, a Member has ‘nullified or impaired’ ‘benefits’ accruing to another Member, ‘whether or not that measure conflicts with the provisions’ of the GATT 1994. Thus, it is not necessary, under Article XXIII.1(b), to establish that the measure involved is inconsistent with, or violates, a provision of the GATT 1994. Cases under Article XXIII.1(b) are, for this reason, sometimes described as ‘non-violation’ cases; we note, though, that the word ‘non-violation’ does not appear in this provision.

\textsuperscript{224} See \textit{de Wet, supra} note 66, at 456-58.

\textsuperscript{225} Alternatively, this task could be included in the mandate of the Trade Policy Review Mechanism. See \textit{Guzman, supra} note 217 (arguing for incorporation of CLS through the formation of a labor department in the WTO in the hopes of bringing about slow, incremental change, but declining to support corresponding dispute settlement). For criticism of such an approach, see \textit{Kolben, supra} note 196, at 484-85 (arguing against WTO incorporation of labor issues in favor of an “integrative linkage” approach focusing on bilateral and regional developmentally-based systems).

\textsuperscript{226} This would be modeled on Article 7(3) of the Havana Charter, which stated: “In all matters relating to labor standards that may be referred to the Organization in
violation of the TRILS Agreement would be subject to retaliatory measures.\textsuperscript{227}

Despite its attractiveness, the feasibility of a TRILS Agreement is questionable given widespread developing country opposition to the trade-labor linkage and consensus decision-making in the WTO (meaning all Members would even have to agree to the negotiation of the agreement). That being said, the very existence of the TRIPS Agreement demonstrates the possibility of countering extreme opposition to the imposition of positive trade-related obligations. In the present situation, developed country Members would without a doubt have to offer significant trade concessions (i.e., increased market access in agricultural products) and assistance (both technical and financial)\textsuperscript{228} in exchange for the negotiation of a new agreement.\textsuperscript{229}

While this arrangement may prove difficult, at the very least,

\begin{quote}
\textsuperscript{227} It must be noted that evidence on whether sanctions actually initiate change in trade policy is equivocal. See GARY CLYDE HUFBAUER ET AL., ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY (Inst. for Int'l Econ., 2d ed. 1990); see also Farkhanda Mansoor, Laughter and Tears of Developing Countries: The WTO and the Protection of International Labor Standards, 14 CURRENTS: INT'L TRADE L.J. 60, 63-64 (2005) (arguing that “[u]nilateral sanctions are unlikely to be effective because they simply cause a state in question to seek alternate markets or sources of supply”). Jagdish Bhagwati has similarly stated that “trade sanctions, or their threat, have been not just unproductive, but also counterproductive” and noted that “the Harkin Bill on banning products using child labor that was being considered in the U.S. Congress led to the discharge of female children in textiles [in Bangladesh], who were often forced instead into prostitution by destitute parents.” See Bhagwati, supra note 21, at 132; see also Kolben, supra note 196, at 482-84 (noting the limitation of trade sanctions); Maskus, Should Core Labor Standards be Imposed, supra note 73, at 26. Clyde Summers disputes this view, pointing to empirical evidence demonstrating that the Rugmark program has reduced child labor in the Indian carpet industry and directly resulted in more children in school, and there have been similar results in Pakistan for children phased out from manufacturing footballs. Summers, supra note 6, at 78.

\textsuperscript{228} Such clauses have been effectively negotiated in environmental agreements, with many including provisions for technology transfer and funding mechanisms to aid developing countries in compliance efforts. See Thomas, supra note 80, at 403.

\textsuperscript{229} Id. at 401-03 (noting that “developing countries’ interests . . . run counter to IP protection as well as to labor and environment concerns.” Thus, at the Uruguay Round negotiations, TRIPS was only successfully established via a quid pro quo approach, with textile and agriculture subsidy reductions exchanged.)
\end{quote}
developed country Members should see the benefit in offering such incentives, while developing country Members that comply with CLS should realize that it is in their economic interest to promote the adoption of a TRILS Agreement.

C. Model Evaluation and Recommendations

From a purely practical point of view, the above two models incorporating CLS through an evolving understanding of the GATT Agreement is the easiest way to protect CLS because the standards would simply be incorporated by jurisprudential fiat without the need for inter-governmental negotiations and action. This approach would also permit a panel or the Appellate Body to take account of the measures taken by an exporting Member in furtherance of the protection of CLS by allowing the ILO to identify whether the party is satisfactorily cooperating in order to find an adequate solution to the recurring violations. This has the advantage of offering countries a powerful incentive to cooperate with the ILO, as the failure to cooperate with the ILO could potentially harm their interests in any potential WTO dispute.

The incorporation of CLS into the WTO through dynamic interpretation of the GATT suffers from at least three key defects. First, incorporation of labor standards via panel or Appellate Body interpretation would be a controversial departure from existing WTO jurisprudence and require a great deal of “judicial activism.” This is problematic for a number of reasons. Foremost, Article 3.2 of the DSU limits the mandate of the DSB—and with it, any notion of “judicial activism”—by setting out its role to “preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.” It further states that “[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.” Just as importantly, the legitimacy of the dispute

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230 For similar arguments against “judicial” incorporation, see Guzman, supra note 217, at 896-98.
232 Id.
settlement mechanism depends upon Members’ continued respect for and confidence in the system, and the seriousness with which Members take the “member-driven” nature of the organization should not be underplayed. Judicial activism has for the most part been avoided in the WTO, and it is clear that Members do not welcome such activism.

Second, incorporation of CLS via the dispute settlement system is somewhat disappointing as it prima facie depends upon unilateral action to restrict trade prior to adjudication by the WTO. This, in the words of John H. Jackson, would “open a Pandora’s box of problems that could open large loopholes in the GATT.” Thus, even though both judicial models presented in Part III. A. of this article contain sufficient safeguards against abuse, the risk remains that an innocent Member could have suffered substantial and significant losses as a result of unwarranted usage of trade restrictive measures. Moreover, the affected industry would have to convince its government to initiate and litigate a dispute in the WTO in order to have the unwarranted trade restrictions lifted. Such risks are compounded by the fact that the DSU does not allow for retrospective trade retaliation, any form of financial compensation, or any direct assistance to the affected industry. For these reasons, allowing states to unilaterally exclude goods produced in violation of CLS has the potential to unravel the certainty and predictability of the international trading system before the matter arrives at the WTO by “institutionalizing

unilateralism in a multilateral context." 237

Third, by failing to impose any affirmative obligation on governments to adopt labor protection, "judicial" incorporation may be inherently limited in its capacity to induce other non-exporting states to alter their labor practices. The argument presented throughout this article is that Members are already obliged under international law to comply with CLS.

By contrast, incorporation of CLS through a TRILS Agreement provides substantial evidence that the WTO will not allow its Members to benefit by violating certain recognized human rights obligations. Furthermore, such an approach maintains the "member-driven" nature to the organization and does not rely on creative jurisprudence to create, structure, and develop the contours of the relationship between CLS and the covered agreements. Unlike the judicial approach, a TRILS Agreement would provide absolute procedural and substantive standards and obligations on which Members could base their behavior while also shifting the burden of proof from the Member taking trade measures in furtherance of CLS to the Member exporting goods in contravention of the CLS. Thus, while we acknowledge the political difficulties in negotiating a TRILS Agreement and agree with Robert Howse that "[t]he most promising short- and medium-term possibility [of incorporating labor standards] is that WTO jurisprudence might evolve to allow a coherent approach," 238 we are of the belief that the negotiation of a TRILS Agreement is ultimately in the interests of all interested parties and stakeholders.

IV. Conclusion

This article attempts to prove not only that international trade and labor are inextricably linked, but more importantly that the WTO must take action to ensure that legitimate measures taken in furtherance of ILO conventions and treaties do not conflict with WTO rules and obligations. The analysis in this article

237 See Salazar-Xirinachs, supra note 64, at 382; see also Maskus, Should Core Labor Standards be Imposed, supra note 73, at 60 (noting that the use of Article XX to enforce labor standards "would invite unilateral action against labor standards on a heretofore-unseen scale," endangering the very existence of a liberal trading order).

238 See Howse & Regan, supra note 121, at 168.
demonstrates why CLS should be incorporated into the WTO from a moral perspective, as well as from a textual analysis of the GATT. Moreover, the article countered many of the arguments against the linkage of trade and labor and revealed them as being misconceived, exaggerated, and based on the ethically and economically questionable premise that non-compliance with core labor standards risks undermining a country’s comparative advantage.

Crucially, this article showed how the WTO already has certain tools at its disposal to find a suitable balance to oversee unilateral sanctions, namely through a DSB determination, either that products manufactured in compliance with CLS are not “like” products manufactured in violation of CLS, or through the Article XX(a) exception for public morals. That being the case, important legitimacy implications resulting from judicial incorporation of labor standards provide strong incentives for Members to muster the necessary political will to institute a social clause into the WTO dealing with core labor rights. Thus, this article calls for WTO Members to draft a TRILS Agreement that respects both Member rights to legitimate trade advantages as well as the CLS recognized in other international agreements.