A DEEP STRUCTURE CONNECTION: CHILD LABOR AND THE WORLD TRADE ORGANIZATION

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I would like to begin my remarks by making two utterly contradictory statements with regard to the relationship, as I see it, between the global phenomenon of child labor, and the World Trade Organization (WTO).

The first is that there is no relationship whatsoever between these two subjects, that the WTO has no institutional capacity to respond to concerns about even the worst forms of child labor; and indeed that much of the academic writing on the subject of a notional relationship between these topics has been largely wasted effort.

The other, contrasting, statement, is that attempts to imagine an effective and enforceable global regulatory response to child labor, as well as to other human rights abuses, is inextricably connected with the rise of World Trade Organization law since the mid 1990s, in the sense that a set of genuine "rights to trade" (with states acting as proxies for their most powerful transnational economic actors) has offered an irresistible model for the achievement of other kinds of global regulatory structures.[1]

The idea, however, that the WTO *as it is*, and with the name it carries, can or will influence the destiny of most or even many child laborers, is completely fanciful. For one thing, there is quite literally nothing in WTO law concerning child labor, apart from the abstract debate as to whether or not Article XX of the GATT should *allow* member countries to maintain import bans on the products of child labor. I would like to make clear that in stating that the WTO lacks capacity to be effective in this area, I am not motivated by hostility towards proposals for a WTO "social clause," one that might incorporate core labor standards as part of the necessary preconditions to state participation in the WTO system of trade rights and obligations. For the most part, advocates of a social clause have been well intentioned, seeking to preserve labor rights in the developed world, while assisting the workers of the developing world.[2] At the

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1. Much has been written on the "new legalism" of the WTO, as compared with the looser and more diplomatic structures of the former GATT system. *See, e.g,* Robert L. Howse, *The House That Jackson Built: Restructuring the GATT System*, 20 MICH. J. INT'L L. 107 (Winter 1999).

2. For a description of what a WTO "social clause" would look like, *see, e.g.,* Anjli Garg, *A Child Labor Social Clause: Analysis and Proposal for Action*, 31 NYU J. INT'L L. & POL. 473 (Winter/Spring 1999)

same time, it is clear to me that a legally binding "social clause," however vital to the creation of a fairly regulated global order, actually belongs elsewhere than within the WTO.

It is of course significant that the WTO is the ultimate symbol of globalization, as it is the legal mechanism for the dismantling of the national economic impulse.[3] The phenomenon of child labor, on the other hand, must be seen as the ultimate symbol of a failure to achieve a corresponding global protection for the vulnerable. The urgency with which the issue of child labor should be approached has little to do with the question of whether child labor has in fact increased specifically to service the "global economy." It would appear that a relatively small percentage of child labor in the developing world participates directly in the "global" or export economy, but this is beside the point, and in no way absolves global institutions and/or developed country governments from responsibility.[4] Globalization exists; strong transnational actors have access to global markets; and child labor of all kinds continues to exist and dominate the lives of a significant proportion of the world's children. Beyond this clear proposition, there is no necessity for attribution of blame; there is only a compelling reason to seek a solution.

It is very telling that the WTO's Singapore Ministerial Declaration of 1996 stated that the International Labor Organization (ILO) alone had the "competence" to enforce global labor standards.[5] This was particularly ironic, since the then newly minted WTO did in fact have enforcement "competence," albeit only as far as trade principles were concerned; whereas the ILO was well known not to enjoy such competence. While the ILO clearly has responsibility for generating international labor standards, it lacks the type of enforcement arm that sets the WTO apart from other international law systems.

(arguing that a social clause would provide a mechanism to deter hazardous and exploitative international child labor); *see also*, Adelle Blackett, *Whither Social Clause? Human Rights, Trade Theory and Treaty Interpretation*, 31 COLUM. HUM. RTS. L. REV. 1 (Fall 1999).

3. *See* Jeff Atik, *Global Trade Issues in the New Millennium: Democratizing the WTO*, 33 GEO. WASH. INT'L L. REV. 451 (2001). Atik writes: "The WTO is feared as a super-government, driven by the logic of free trade to override national preferences."

4. For recent statistics on the scale and nature of child labor worldwide, see *Every Child Counts: New Global Estimates on Child Labour*, I.L.O. (2002).

5. Certain member delegations had argued in favor of inclusion of a commitment to a "core labor standards" provision in the declaration, but this was ultimately defeated, mainly by the resistance of developing countries. *See* James L. Kenworthy, *U.S. Trade Policy and the World Trade Organization: The Unraveling of the Seattle Conference and the Future of the WTO*, 5 GEO. PUB POL'Y REV. 103 (2000). Kenworthy writes that "during the Singapore conference, the United States...had pushed for a significant statement by the ministers that could lead to future negotiations in the area of core labor standards and trade and environment. ...However, Washington was forced to give way on its demands for further work on labor standards in the WTO as the price of bringing Pakistan, India and some other hardline developing countries on board." *Id.* at 107.

"We renew our commitment," the Singapore Declaration states, "to the observance of internationally recognized core labor standards. The ILO is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them."[6] The Declaration goes on to say that "We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards." And most significantly, reflecting the suspicions of many developing countries, "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."

It has baffled me, as a long-time observer of writing on the topic of "trade and..."—trade and human rights, trade and labor, trade and the environment—that there has been a near-obsession by many academics with the question of what the WTO might, through the interpretation of GATT Article XX by panels and the Appellate Body, "allow."[7] Or what those two bodies could be induced to "take on board" in terms of a non-economic, human dimension. Or what the Appellate Body will "come to understand" with regard to an ultimate synthesis of conflicting state obligations arising from different and opposing treaties—trade versus labor, the environment, human rights. I have no doubt that such a synthesis must be carried out, but not by any organ of the WTO. Rather, the real and inescapable need is for another, as yet undefined, global institution to carry out this synthesis; not a trade organization the sole focus of which, the sole ethos and objective of which, is to facilitate trade.[8]

I would term the entire "Article XX" approach, with its narrow WTO focus, reductionist at best. At worst, it is a distraction that leads one to ignore the actual facts of global child abuse; the reality of child trafficking for the

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6. For a complete discussion of the history and characteristics of the ILO, see HECTOR J. BARTOLOMEI DE LA CRUZ ET AL., THE INTERNATIONAL LABOUR ORGANIZATION: THE INTERNATIONAL STANDARDS SYSTEM AND BASIC HUMAN RIGHTS (Boulder, Colo. And Oxford, England: Westview Press) (1996).

7. Article XX of the General Agreement on Tariffs and Trade deals with "general exceptions" to the substantive GATT requirements. With the caveat that trade restrictions covered by this article may not be "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 trade," GATT parties are allowed to maintain measures that can be justified for reasons of public morals, the protection of human, animal or plant life, relating to the products of prison labor, or to the conservation of exhaustible natural resources, and similar public interest objectives. For a general discussion of the relationship between Article XX and human rights issues, see Salman Bal, *International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT*, 10 MINN. J. GLOBAL Trade 62, 72 (2001).

8. For an exploration of the clash between trade and non-trade values, see Frank J. Garcia, *The Universal Declaration of Human Rights at 50 and the Challenge of Global Markets: Trading Away the Human Rights Principle*, 25 BROOK J. INT'L L. 51 (1999).

purposes of work in sweatshops and in the sex industry. That is why, in my view, the *fact* of a global economy leads inevitably to the need for a global solution to such economic outrages; at the same time, I maintain that the WTO itself, as an institution, is not the place to look for that solution.

There have been periodic bursts of academic speculation on the subject of what the WTO's Appellate Body would now do if clearly faced with a challenge to a national import restriction on imports of products made from child labor. The favored hypothetical in these discussions is the case of a WTO member country that creates an import ban on the products of child labor. (The US and EC do, in fact, maintain certain restrictions on the import of products of child labor, but these are far from comprehensive and of course cannot begin to identify all incoming products that might contain elements produced through the agency of child labor.[9])

By way of background to the "child labor hypothetical", the recent history of conflict between national regulation in the public interest and GATT rules probably dates most explicitly to the famous "Tuna Dolphin" (pre-WTO) cases of the early 1990s. The upshot of these two (unadopted) panel decisions was that (i) the US could not engage in "extraterritorial" imposition of its dolphin conservation law, by in essence demanding these standards of its GATT trading partners, and that (ii) under GATT principles, a party could only deal with the end "product"; in other words, could not justify differential treatment of that product based on the "process" through which the product was made, or in this case, caught. Though the Tuna-Dolphin panel reports remained unadopted, and thus without real legal effect, they caused a serious ripple of alarm across the environmental community worldwide; the message was that hard-won environmental regulation could be invalidated by the operation of GATT law.[10] The possible chilling effect on future environmental laws, at least those that relied on import restrictions as a means of national enforcement, was clear. Equally clear was that other non-trade, public interest values were also potentially at risk.[11]

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9. *See* Benjamin James Stevenson, *Pursuing and End to Foreign Child Labor Through US Trade Law: WTO Challenges and Doctrinal Solutions*, 7 UCLA J. INT'L L. & FOREIGN AFF. 129, 145 - 151 (2002) (describing the US framework of laws attempting to discourage imports of goods produced through child labor).

10. *See* United States—Restrictions on Imports of Tuna (Tuna Dolphin I), Report of the Panel, DS21/R-39S/155, 3 September 1991; and United States—Restrictions on Imports of Tuna (Tuna Dolphin II), DS 29/R, 16 June 1994. For a complete discussion of these attempts to rely on Article XX to defend national environmental laws, see Padideh Ala'I, *Free Trade or Sustainable Development? An Analysis of the WTO Appellate Body's Shift to a More Balanced Approach to Trade Liberalization*, 14 AM. U. INT'L L. Rev. 1129 (1999).

11. For early reaction to the Tuna-Dolphin reasoning, see Mary Ellen O'Connell, *Using Trade to Enforce International Environmental Law: Implications for United States Law*, 1 IND. J. GLOBAL LEG. STUD. 273 (1994).

Trade law specialists have made much of the fact that the more recent Shrimp/ Turtle cases have led to national conservation laws being treated more deferentially by the WTO's Appellate Body, and the objectives of the Convention on Trade in Endangered Species (CITES) at least acknowledged by the WTO bodies.[12] A supposed evolution in the thinking and sensitivity of the Appellate Body has been pointed to; sometimes even celebrated. Although in the Appellate Body's hands not an "Article XX" case per se, this positive tendency has also been noted in the "Asbestos" case, wherein a French ban on asbestos-containing products was allowed to stand, on the basis that the inherent danger of the products concerned legitimized the French difference in treatment of otherwise similar products--some with asbestos, some without.[13] These developments have been hailed by some as the end of the old Tuna Dolphin product/process line of reasoning. The logic of these discussions is that the Appellate Body will continue to pursue a more enlightened set of principles allowing for the happy co-existence of economic and non-economic principles, and national governments will supposedly be free to implement other international obligations through the device of import bans where these are felt to be central to the attainment of non-trade goals.

My dominant impression in reading such academic discussions has been: What on earth does this have to do with the broader effects of the momentum of globalization? With environmental degradation, with the frantic drive to develop, with the suffering of people caught up in these processes? And, as a very fundamental matter, it must be asked whether developed countries do in fact maintain import restrictions capable of dealing more than superficially with human rights and environmental abuses, based on consideration of the "processes" through which certain items are produced for export by trading partners in the developing world? Isn't it true that the products likely to be identified through such import bans represent only the tip of the iceberg, when it comes to child labour and other abuses? Aren't many academic discussions of Article XX wastefully theoretical, given the scale of the problem, and of the non-trade values at stake?

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12. *See* United States—Import Prohibition of Certain Shrimp and Shrimp Product, Report of the Appellate Body, WT/DS58/AB/R (October 12, 1998); United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia, Report of the Appellate Body, WT/DS58/AB/RW (October 22, 2001). For a complete discussion of the reasoning in both phases of the case, see Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 COLUM. J. ENVTL. L. 491 (2002).

13. *See* European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, Report of the Appellate Body, WT/DS135/AB/R (March 12, 2001). *See also* Laura Yavitz, *The World Trade Organization Appellate Body Report, European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, 11 MINN. J. GLOBAL TRADE 43 (2002) (describing the Appellate Body's decision as "positive and important").

Despite the fact that import restrictions on goods produced under abusive labor conditions may do little to ameliorate these conditions on any scale, we may nevertheless be about to see a showdown at the WTO between just such a set of import restrictions and free trade principles. This impending dispute, described below, is symbolic of the hostility so often expressed by developing countries towards the prospect of "trade and" restrictions by wealthy countries against products from the developing world that, in their production process, have offended against non-economic principles (such as core labor standards) derived from some other sector of international law.[14] And while the true "trade and human rights" debate goes far beyond the question of how the WTO bodies will treat national labor-based import restrictions, we should nevertheless take this opportunity to recognize the symbolic value of this upcoming dispute, described below.

In a perverse way, the very narrowness of the "trade and" academic debate to date has generated a "trade and" backlash on the part of developing countries in the WTO, who fear that the developed world is merely seeking a new set of excuses to deny market access to products from the developing world, where a production process does not meet certain externally imposed standards.[15] By way of background to the dispute alluded to above, both the US and the EC maintain certain import restrictions as preconditions on participation in their "generalized system of (tariff) preferences" for products from the developing world.[16] These GSP programs, dating from the early 1970s, were created under pressure from developing countries, and enjoy a specific GATT waiver allowing the wealthier GATT countries to offer preferential tariff terms to a wide variety of manufactured goods from the developing world. India's principal claim in the present dispute, still at consultation stage, is that the labor and environmental conditions being set by the EC as the cost of participation in its GSP program is not in accordance with the language of the original provisions

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14. Indian Minister for Commerce and Industry Murasoli Maran was reported to state that "developing countries have long opposed the linkage of trade with labor and environmental standards on the grounds that they might be used as an excuse to distort competition, undermine comparative advantage and provide a 'Trojan horse' of protectionism." *Maran Opposes New Non-Trade Issues at WTO Meeting*, THE HINDU, June 20, 2001.

15. Professor Jadish Bhagwati has been quoted as saying that "The bid to bring the social clause under the World Trade Organization must be resisted tooth and nail," and perhaps more disingenuously, that "[if] you change the WTO to reflect the Western view that everything is right with the West and is bad with developing countries, then you are putting a bomb under the WTO." *'Resist Bid to Bring Social Clause Under the WTO*, THE ECONOMIC TIMES OF INDIA, December 17, 2000.

16. The US Trade and Development Act of 2000 made a grounds of ineligibility to participation in the US GSP scheme that a country "has not implemented its commitments to eliminate the worst forms of child labor." Trade and Development Act of 2000, Pub. L. 114 Stat. 251. The same act also added to the general prohibition against the importation into the United States of the products of "convict labor," a prohibition against importing products made from the "forced or indentured child labor." *Id.* at § 411.

enabling the EC to deviate from GATT Article I in order to grant the preferences in question. The GATT language of the "enabling clause" demanded that "generalized non-reciprocal and non-discriminatory preferences" be "beneficial to the developing countries in order to increase the export earnings, to promote the industrialization, and to accelerate the rates of economic growth" and that the preferences should be designed "to facilitate and promote the trade of developing countries", and to "respond positively" to their developmental, financial and trade needs. India argues that the EC conditions cannot be reconciled with the original requirements, as they create "undue difficulties for India's exports to the EC."[17]

India is unlikely to prevail in this dispute, assuming it goes forward, for a number of reasons. More cautious and politically aware these days, the WTO bodies might well decide to interpret the GSP enabling language conservatively, and avoid a hot-button clash between trade and non-trade principles. However, if a violation of GATT law were to be found, the stage would be set for arguments under Article XX, to the effect that national concern for labor standards justifies the trade restriction—the very stuff of the academic hypotheticals! Whatever happens, it is significant that, just as the Indian Pharmaceuticals cases made us realize that the developed world was going to use TRIPS aggressively whatever the ultimate effects,[18] this current action by India demonstrates the level of hostility to the idea of "linage"—linking international trade law, and WTO law in particular, to non-trade values, resulting in import restrictions. This hostility obtains even where violation of core labor standards plainly amounts to violation of international human rights law, and can have little to do with anyone's traditional notion of "comparative advantage."

Interestingly, this hostility of developing world governments is aimed at a relatively modest attempt to influence labor standards extraterritorially:

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17. *See* European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries, Request for Consultations by India, WT/DS246/1/G/L/521-, (March 12, 2002). For a discussion of the EU's approach to GSP, see William H. Meyer & Boyka Stefanova, *Human rights, the UN Global Compact and Global Governance*, 34 CORNELL INT'L L.J. 501 (2001). They write: "The key features of the EU's GSP include tariff modulation, country-sector graduation, and special incentive arrangements. The special incentive arrangements, operational as of 1998, refer to labor rights and environmental protection. Special trade provisions are given to countries that comply with ILO Conventions Nos. 87 and 98 concerning the rights to organize and bargain collectively, and No. 138 with respect to the minimum age for employment." The more recent version of the EU scheme makes even stronger demands on developing countries, in terms of application of the ILO "core labor standards." *Id.* at 508.

18. *See* India—Patent Protection for Pharmaceuticals and Agricultural Chemical Products, Report of the Appellate Body, WT/DS50/AB/R (December 19, 1997). In this case and a similar complaint was brought by the EC against India. India was required to create a legally sound transitional "mailbox" system for the filing of patents; and in more general terms, to confront, soon after the coming into effect of the TRIPS Agreement, the deficiencies, from a developed country point of view, in its national patent law.

conditions on participation in a GSP program. We are not even in the realm of the "social clause" here—the social clause being a far more ambitious idea, one that would impose actual core standards on WTO members. We are not even near the possibility of making widespread reliance on child labor part of an accepted theory of unfair trade in the form of "social dumping."

We are probably now far enough removed from November/December 1999 that we can bear to think about the ministerial debacle of "Seattle." At the time, President Clinton made these famous remarks: "I believe the W.T.O. should make sure that open trade does indeed lift living standards, respect core labor standards that are essential not only to workers' rights, but to human rights. That's why this year the United States has proposed that the W.T.O. create a working group on trade and labor."[19] The rest is, of course, history. There was fierce resistance to Clinton's proposals from some of the most powerful of the developing countries, with India in the lead. Certain popular intellectuals, foremost among these Jagdish Bhagwati of Columbia University, were scathing in their criticism of the "pro labor standards"--and decidedly anti-WTO--street demonstrators who came to prominence at Seattle. Disorganized and divided as they were, the demonstrators had come to see the WTO as a main contributor to the death of national regulation in the public interest.

Oddly, depending on the issue, I both strongly agree and strongly disagree with Professor Bhagwati. On the one hand, he has come out in favor of a World Bank sponsored program of wealth transfers to deal with problems caused by adjustments to economic globalization in the developing world.[20] (It is, in my view, often this wealth transfer dimension that eludes the "pro-social clause" progressives who critique the WTO.) Bhagwati has also made the point, over and again, that trade sanctions and import restrictions will not "make a dent" in the problem of child labor. I believe he is correct in this. He cites to the frequently mentioned example of female children in the Bangladeshi textile industry who, having been let go under the threat of the Child Labor Deterrence

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19. *See* Clyde Summers, *The Battle In Seattle: Free Trade, Labor Rights, and Societal Values*, 22 U. PA. J, INT'L ECON. L. 61 (2001) [hereinafter Summers]. Summers writes: " [Clinton] further inflamed the issue by making an unplanned statement to a newspaper that the trade group should at some point use sanctions to enforce core labor rights around the world. Clinton's statement provoked an adamant response from developing countries, which saw any tying of trade to labor or environmental rights as disguised protectionism by developed countries to keep out exports from developing countries and stymie their development." *Id.* at 62.

20. "I have therefore argued that the Bretton Woods institutions must be geared to providing compensation or adjustment assistance to poor countries harmed by the freeing of trade at the WTO.... It is time to put the president of the World Bank to work systematically to buttress the world trading system and the helpful freeing of trade that the WTO oversees and encourages, by aiding the poor as necessitated by those WTO actions." Jagdish Bhagwati, *Afterword: The Question of Linkage*, 96:1 AM. J. INT'L L. 126-127 (2002).

(Harkin) Act of 1995 (unenacted), soon found themselves in far worse circumstances, particularly in the sex trade.[21]

His continued attacks on concerned young people in the West, however, fail to make sense, as most of these protestors are attempting to bring a human dimension to a globalizing world, an agenda that in itself can hardly be seen as anything but positive. In a recent article, Bhagwati decries the fact that many of these are young people trained in comparative literature, rather than economic, leading them into delusions about the nature of "global capitalism." "Capitalism," Bhagwati writes, "should be defended against ignorant, ideological, or strategic assaults."[22]

Who could seriously argue that there is in fact no gross disproportion between the laws favoring transnational economic activity on the one hand, and those devoted to human rights and labor concerns on the other? And who would advocate that this discrepancy continue *as is* into the indefinite future? To the extent that reliance on child labor, especially in its worst forms, is indicative of societal failure and economic breakdown, a quantitative assessment of the relationship between globalization and child labor is unnecessary. What matters is that the two phenomena co-exist. Whether or not there are certain elements in the United States motivated by job protectionism when they denounce reliance on child labor is equally irrelevant. Social dumping may well be a fact; there is no shame is wishing to preserve one's job; and the labor movement in the developed world does have important principles to preserve.[23]

It is important to recognize that denunciation of those who are advocating some version of good global governance and a fairer world trading order leaves us no nearer to solving the most pernicious forms of abuse, including child labor. At its most virulent, this sort of denunciation creates a false dichotomy between the interests of concerned citizens in the developed world and people in the developing world, who suffer the most from the gross disparities discussed above. One UPI correspondent goes so far as to say that many NGOs involved in the anti-globalization movement are peopled by "busybodies, preachers, critics, do-gooders, and professional altruists," encroaching "on state sovereignty in the name of international law."[24]

However, as Professor Clyde Summers asked in a recent article, we need to question how far some are willing to take the idea of comparative advantage.

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21. *See* Jagdish Bhagwati, *Coping with Antiglobalization; A Trilogy of Discontents*, FOREIGN AFFAIR,S January/February 2002-, at 2.

22. *Id.*

23. *See* George Ross, *Labor versus Globalization*, 570 ANNALS Am. ACAD.POL.& SOC. SCI. 78 (2000) (describing the empirical difficulties faced by the "international" labor movement in an age of globalization).

24. *See* Sam Vaknin, *Commentary: The Self-Appointed Altruists*, UPI, October 9, 2002.

He points out that it is not even an option for us to include within the stock of a nation's comparative advantage violations of ILO Convention 182 on the Worst Forms of Child Labor, since to say that such violations are merely the sovereign business of a particular state is to countenance human rights violations in the name of free trade—a plainly irrational position.[25] Summers also makes the point that many of the countries most adamantly opposed to using any trade-related device to enforce core labor standards have themselves ratified the relevant conventions and are bound by their (admittedly more or less unenforceable) obligations.[26]

Naturally enough, there is a fear that the wealthy developed countries might hide behind these standards to engage in some form of insidious protectionism. However, as Robert Howse has suggested, this need not be the case at all. As far as the "import restriction and Article XX" issue is concerned, even the WTO would at least carry out a review of the exact nature of the import restriction concerned.[27] If claims for the effectiveness of import restrictions in dealing with such abuses as the worst forms of child labor have been fanciful, then certainly the claims made regarding the protectionist dangers inherent in allowing such restrictions have also been wildly exaggerated.

But I have already made clear that my own focus is not the narrow question of whether or not national import restrictions may be maintained, within the terms of GATT Article XX. The WTO has no interpretive capacity to deal with larger human rights issues; no mandate; no substance. No national import restriction can in fact greatly influence the empirical fact of widespread labor abuses, such as the worst forms of child labor.

In the concluding section of this paper, I will suggest my own approach to the problem of "trade and child labor." My vision is not one of a new and more enlightened WTO; nor do I subscribe to the doctrine that "time alone" will bring about development that will of itself eliminate child labor and other economically-based human rights abuses.[28]

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25. See Summers, *supra* note 19, at 65-68, 86, 90.

26. Summers at 67.

27. For a positive view of the possibility of synthesizing core ILO principles and WTO obligations, see Robert Howse, *The World Trade Organization and the Protection of Workers' Rights*, 3 J. SMALL & EMERGING BUS. L. 131 (1999). (Howse writes of the 1998 Declaration on Fundamental principles and Rights at work, adopted by the ILO membership, as a "watershed," in that "the Declaration makes achievement of compliance with fundamental labor rights an obligation arising from the very status of membership in the ILO. When the issue is egregious violations of these rights—such as violent suppression of collective bargaining, gender discrimination, forced or slave labor, or exploitative child labor—trade measures are not necessarily a protectionist attempt to level the playing field. Instead they may resemble the kinds of sanctions against gross human rights violations that have been imposed by many members of the world community against South Africa under apartheid and, more recently, against Serbia." *Id.* at 133.

28. [Malaysian Prime Minister] Mahathir criticized some of the new WTO proposals, that link and

As far as methodology is concerned, there has been far too much attention paid to the study of the WTO in isolation from other global institutions, and indeed from empirical phenomena generally. Joseph Stiglitz has clearly identified the deeply flawed and ideologically based functioning of the IMF and World Bank, and it is plain that the WTO cannot serve as an instrument for development in the absence of a genuine "linkage" among all three of these institutions.[29] It is almost unthinkable that, in the absence of targeted investment mediated by a global finance body, there could be adequate levels "spontaneous" development attained in much of the developing world.

It could be said that the creation of the WTO, with its mechanisms of enforcement, highly unusual in the context of "international law," has generated a collective imagination in the direction of a more structured set of global institutions. This in turn must lead to a recognition of the need for a court-like body capable of synthesizing conflicting international obligations, including conflicts between trade rights and labor standards. Key to the success of such a global system is a redistributive body to fund programs proven effective in eliminating abuses like the worst forms of child labor.

I understand it when Professor Summers laments that "There is no international agency other than the WTO able to effectively exert pressure for observance of rights on a global basis."[30] But this absence of an alternative body is not adequate reason for allowing or expecting the WTO to do that which it does not know how to do. Summers is surely right, though, when he states that "freedom of international trade is subject to observance of internationally recognized basic human rights."[31] The concept of "subject to," however, is both mysterious and deeply ambiguous. How can we make countries "subject to" that which they insist they cannot afford? But how, on the other hand, can we countenance transnational corporations, many based in the developed world, continuing to profit from their access to resources and markets in the developing world, where widespread abuses against children proliferate?

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condition trade and investment to non-trade issues, such as labor standards, human rights, democracy, child labor. Making those conditional will retard the growth of many developing countries, he warned. He noted rich countries had taken more than a century to teach their present status of social and economic sophistication. 'It is unrealistic to expect developing countries to achieve such levels of sophistication overnight," he said. Sonia Jessup, *Malaysia PM decries globalization, WTO*, UPI, September 10, 2001.

29. *See* JOSEPH STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 12 - 13 (2002). As for the IMF, Stiglitz writes "[o]ver the years, since its inception the IMF has changed markedly. Founded on the belief that markets often worked badly, it now champions market supremacy with ideological fervor." And of the hand-in-glove activities of the IMF and World Bank during the 1980s, he writes that "[t]he IMF and World Bank became the new missionary institutions, through which these ideas [free market ideology] were pushed on the reluctant poor countries that often badly needed their loans and grants."

30. Summers, *supra* note 19, at 89.

31. *Id.* at 90.

A significant amount of attention has been paid to attempts to take action in US courts against US multinational corporations involved in serious labor/human rights abuses; as well as to the production of corporate "codes of conduct" meant to govern the conduct of developed world multinationals.[32] There have been a number of actions brought against US corporations under the Alien Tort Claims Act, a statute that allows alien plaintiffs to seek a remedy in US courts where another party has acted "in violation of the law of nations or treaty of the United States."[33] While such actions are very important devices for drawing attention to abusive conduct by US corporations, the statute is quite difficult to use, in that it applies to only a small band of corporate acts. One must link the conduct to international law principles; normally by demonstrating that a US corporation has been complicit in the abusive conduct of a repressive foreign regime. This kind of legal action bears little relationship with the mass phenomenon of child labor, though it is conceivable that certain particularly egregious corporate conduct could fall within the net of the statute. As for self-regulatory codes, these too are potentially significant, but are unlikely to have any generalized effects on the general problem of child labor. Although one might argue over the precise figures, it should be recalled that only a certain, perhaps small, proportion of labor abuses against children involve Western multinationals.

Without either fetishizing or ignoring the connection between international trade law and child labor, I would propose a multifaceted approach to eliminating the worst forms of child labor, a task which must be seen as an international obligation falling on all parties having any degree of influence over the process of globalization. First of all, the reality of the contentious divide between the views of the developed and developing worlds with regard to the fairness of relying on import restrictions as a device to promote higher labor standards must be recognized. Penalizing countries with the most vulnerable economic profiles actually makes little sense, and cannot have the desired global effect, despite the reams of academic writing on the subject of "trade and labor, and the role of GATT Article XX".

Where OECD-based multinationals are involved in the exploitation of children for economic gain, any sanctions should be against the corporations in question. This would involve the creation of a far more effective set of OECD

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32. On actions brought in US courts, see Andrew Ridenour, *Doe v. Unocal Corp., Apples and Oranges: Why Courts Should Use International Standards to Determine Liability for Violation of the Law of Nations Under the Alien Tort Claims Act*, 9 Tul. J. INT'L & COMP. L. 581 (2001) (discussing reliance on the Alien Tort Claims Act in US courts); and on voluntary international codes of conduct for MNEs, see Meaghan Shaughnessy, *The United Nations Global Compact and the Continuing Debate About the Effectiveness of Corporate Voluntary Codes of Conduct*, 2000 COLO. J. INT'L ENVT'L L. & POL'Y 159 (2000).

33. 28 USC § 1350 (1993), stating that "district courts shall have original jurisdiction of any civil action by an alien in tort only, committed in violation of the law of nations or treaty of the United States."

rules, with mandatory national implementation, than anything that exists to date.[34] I could not in good conscience state that such a development is politically likely. Nevertheless, it is clear that where developed world MNEs are directly involved in labor/human rights abuses, regardless of the minimal or nonexistent labor standards of the host country, the proper target of sanctions in most cases is the MNE, not the host country.[35] (I make the point below that sanctions against the host country could become appropriate, but only after a transition period during which significant investment had been made in programs to eliminate the worst forms of child labor and other abusive labor practices.)

As has been pointed out, most child labor is tied to a given national economy, and does not bear any direct relationship to MNEs. Nor is most child labor related to export trade, although clearly some is. Relying on GATT Article XX to justify import bans in such cases is certain to generate more hostility, and have little effect on the underlying problem. Where there is no relationship of the labor exploitation to exports, GATT Article XX is essentially irrelevant in any case.

I would like to posit a "deep structure linkage," in which the very fact of globalization means that the global economic institutions should be required to act in a concerted manner to invest in the elimination of particular abuses. This would necessitate a reorientation of the agendas of the IMF and World Bank in particular. Whether seen in the context of human rights or long term economic development, the elimination of the worst forms of child labor would be a starting point for such targeted investment. While far too small in scale, there are model programs, such as the ILO's International program on the Elimination of Child Labour (IPEC), designed to allow countries to eliminate child labor, by giving children access to school and replacing child labor with adult labor--a far more certain route to development than waiting for market liberalization to work its magic.[36] The IMF and World Bank should be held to the achievement of specific, empirically based goals, derived from the principles contained in international conventions, including those of the ILO.

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34. See for instance, the OECD's aspirational Declaration on International Investment and Multinational Enterprises of 1976. The OECD emphasis in that document and its annexes was to ensure that MNEs should meet the employment standards of the *host* country.

35. I use the phrase "in most cases" to distinguish between general sanctions brought to bear against a generally repressive and illegitimate regime; and the situation where a poor country lacks the resources to eliminate the exploitation of child labor in its less virulent forms.

36. *See* Mary Gray Davidson, *The International Labour Organization's Latest Campaign to End Child Labor: Will It Succeed Where Others Have Failed?* 11 TRANSNAT'L L. & CONTEMP. PROBS. 203 (2001) (describing the IPEC campaign, which is based on assistance for a phased elimination of the worst forms of child labor).

My own perspective on the WTO is that it provides a model of international regulation; not in its substance so much as in its "non-voluntariness". Assuming that there was an international fund to assist in the elimination of child labor, at that point developing countries and developed countries should indeed have their participation in bodies like the WTO conditioned on their good faith efforts to bring about results. The expansion of global economic activity does bear a logical relationship to the impulse towards global regulation. The WTO is possessed of an unusual and even exciting non-voluntary quality, contributing to the prospect that non-trade law, including labor and human rights law, might share that same non-voluntariness. How one counters the economic forces that created the WTO with non-trade values, such that a similar urgency could inform a project to eliminate the worst forms of child labor, is a difficult political problem. For a start, there should be a redirection of the content of anti-globalization protests, through the creation of a list of firm "trade and" demands. The message of the global dissidents should be more focused, centered on the principle that the right of developed countries to profit from global business activity should depend on the contribution of those same countries to high levels of targeted investment in a global regime to protect core labor standards.