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Outlawing the Trade in Child Labor Products: Why the GATT Article XX Health Exception Authorizes Unilateral Sanctions

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Outlawing the Trade in Child Labor Products: Why the GATT Article XX Health Exception Authorizes Unilateral Sanctions

Keywords

Child labor, World Trade Organization (“WTO”), Trade and Development Act, General Agreement on Tariffs and Trade (“GATT”)

COMMENT

OUTLAWING THE TRADE IN CHILD LABOR PRODUCTS: WHY THE GATT ARTICLE XX HEALTH EXCEPTION AUTHORIZES UNILATERAL SANCTIONS

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* Senior Note & Comment Editor, *American University Law Review*; J.D. Candidate, 2003, *American University*, *Washington College of Law*; B.A., 2000, *Washington University in St. Louis*. I would first like to thank my family for their unconditional and enduring support, without which I would not have accomplished many things, including the completion of this Comment. Special thanks goes to my editor, Andrea Mack, and my international trade professor, Padideh Ala'i, for their guidance and knowledge. I am also indebted to the cite-checkers, first-liners, and final editors of the *American University Law Review* for their patience and diligence. If this article spurs only one discussion on the appropriate role of the WTO in remedying and preventing child labor, I will consider it a success.

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INTRODUCTION

The global interests of protecting public health and of liberalizing trade frequently intersect and conflict.¹ Recently, certain Members of the World Trade Organization (“WTO”)² have banned the import of cigarettes,³ asbestos,⁴ and hormone-treated meat⁵ on public health

1. See, e.g., *WTO: India Down on Doha Draft Declaration, Threatens to Leave WTO to Protest Agenda*, BNA INT’L TRADE DAILY NEWS, Nov. 5, 2001, at 10 (outlining an Indian claim that certain WTO provisions prevent nations from ensuring affordable medicine to protect public health); *Food Safety: Food Safety Concerns Emerging as Hurdle to Launch of New Round*, BNA INT’L TRADE DAILY NEWS, July 30, 2001, at 12 (detailing conflict between the European Union and the United States over trade-restrictive food safety regulations based on uncertain evidence of health risks); *WTO Ministerial: Massive Union Rally Urges Support for Worker Concerns in WTO Accords*, BNA INT’L TRADE DAILY NEWS, Dec. 1, 1999, at 5 (summarizing fears of labor activists that national and state regulations of public health will be subjected to a “global veto” by WTO); *Wood Packaging: Hong Kong Registers WTO Complaint Over U.S. Wood Crate Ban; Canada to Follow*, BNA INT’L TRADE DAILY NEWS, Nov. 13, 1998, at 8 (elaborating the United States and other Members’ claims that a Swiss law prohibiting hormone-treated beef and poultry imports on public health grounds is unscientific and politically-motivated).

2. See Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], arts. XI, XII, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1226 (1994) (requiring all ratifying Members to accept agreements settled at the Uruguay Round of trade negotiations). Between 1986 and 1994, the negotiators at the Uruguay Round created an intergovernmental organization (the WTO) that would enshrine the principles of the previous General Agreement on Tariffs and Trade (the GATT) relating to the trade in goods while adding agreements on trade in services, trade-related intellectual property, dispute settlement, and other supplemental agreements. See generally RAJ BHALA & KEVIN KENNEDY, WORLD TRADE LAW 8-15 (1998) (explaining WTO’s creation and mandate).

3. See GATT Panel Report on Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes, Nov. 7, 1990, GATT B.I.S.D. (37th Supp.), at 200 (1990) [hereinafter Thai Cigarettes] (Thailand banned imports of foreign cigarettes and tobacco products on the grounds that the measure protected its citizens from health risks associated with foreign cigarettes).

4. WTO Appellate Body Report on European Communities—Measures

grounds. The General Agreement on Tariffs and Trade (“GATT”),⁶ the central legal text of the WTO, provides that WTO Members (“Members”)⁷ should not place quantitative restrictions on trade because each Member has agreed to grant reciprocal access to their markets.⁸ For this reason, Members who export these harmful products complain that the trade restrictions violate the GATT.⁹ Under GATT Article XX(b), however, such violations are permissible when the disputed measure is “necessary for the protection of human health”¹⁰ and not a “disguised restriction on international trade.”¹¹ In theory, this exception should protect measures taken by a Member acting in good faith to protect human health.¹²

The debate over how to liberalize trade while preventing child labor raises the issue of balancing a nation’s sovereignty against the health of its citizens. Child labor certainly poses the kind of serious

Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter EU Asbestos] (France banned imports of asbestos on the grounds that the measure protected its citizens from health risks posed by asbestos), *available at* <http://docsonline.wto.org> (last visited Feb. 14, 2002).

5. *See* WTO Appellate Body Report on European Communities—Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter Beef Hormones] (E.U. banned hormone-treated meat imports on the grounds that the measure protected its citizens from various health risks), *available at* <http://docsonline.wto.org> (last visited Feb. 14, 2002).

6. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT]. During the Uruguay Round, negotiators proposed revisions of the 1947 version of the GATT and also decided to draft new side agreements on specific GATT-related issues. *See* JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT 290-91 (3d ed. 1995) (discussing how the WTO amended the GATT). The revised main document, GATT 1994, is essentially the same as the 1947 version with some modifications made by the Uruguay Round negotiators. *See* WTO Agreement, *supra* note 2, at Annex 1A (incorporating GATT 1947 into the WTO). A WTO dispute settlement body enforces GATT 1947 unless GATT 1994 or another WTO Agreement amends the relevant provision. *See* BHALA & KENNEDY, *supra* note 2, at 12-15 (addressing the effect of the Uruguay Round on dispute settlement interpretation). In this Comment, a reference to GATT will mean GATT 1947 unless otherwise noted.

7. *See* WTO Agreement, *supra* note 2, art. I (transforming the “contracting parties” of GATT, a provisional contract, into “Members” of the WTO, a permanent institution).

8. *See* GATT, *supra* note 6, art. XI (prohibiting trade restrictions other than duties, taxes, or other charges); WTO Agreement, *supra* note 2, at pmb1. (committing importing Members to granting non-discriminatory market access to exporting Members while promoting sustainable development).

9. *See supra* notes 3-5 and accompanying text (citing cases where complaining Members have brought dispute settlement claims against other Members for restricting trade on health grounds).

10. GATT, *supra* note 6, art. XX(b).

11. *Id.* art. XX chapeau. In this Comment, a reference to the GATT Article XX chapeau will mean a reference to the introductory sentence of Article XX.

12. *See infra* notes 79-80 and accompanying text (explaining use of the Exceptions Clause).

human health risk that is difficult for the international community to ignore.¹³ Nonetheless, the trading community has yet to pay serious attention to child labor as a public health issue despite widespread agreement on its dangers.¹⁴ In 1994, the World Health Organization (“WHO”) estimated that occupational accidents injure 100 million workers and kill 200,000 each year.¹⁵ Additionally, each year 68-157 million new cases of occupational disease are attributed to hazardous exposures and workloads.¹⁶ In 1997, the International Labor Organization (“ILO”) surveyed many of the countries that employ child labor routinely.¹⁷ The ILO studies indicate that more than two-thirds (69%) of child laborers in some countries are exposed to workplace hazards.¹⁸ National surveys in several countries have shown

13. See generally Kristin Weldon, *Piercing the Silence or Lulling You to Sleep: The Sounds of Child Labor*, 7 WIDENER L. SYMP. J. 227, 227 (2001) (noting the efforts of international organizations and countries to eliminate child labor); David M. Smolin, *Conflict and Ideology in the International Campaign Against Child Labour*, 16 HOFSTRA LAB. & EMP. L.J. 383, 419 (1999) (recognizing that the vast majority of nations have agreed to abolish child labor, but that nations disagree fundamentally on enforcement of the abolition); Anjali Garg, Note, *Child Labor Social Clause: Analysis and Proposal for Action*, 31 N.Y.U. J. INT’L L. & POL. 473, 484-86 (1999) (citing opinion polls that show that the public in many nations opposes trade in goods produced by child labor); Kebebew Ashagrie, *Statistics on Working Children and Hazardous Child Labour In Brief*, International Programme on the Elimination of Child Labour, International Labour Office, Geneva (rev. Apr. 1998) [hereinafter Ashagrie, *Working Children Statistics*] (estimating that half of all children work full-time and that three in every hundred children stop working because of debilitating work injuries), available at <http://www.ilo.org/public/english/standards/ipecc/simpoc/stats/child/stats.htm> (last visited Feb. 14, 2002). In this Comment, a reference to “child labor” will mean labor harmful to the health or development of children as defined by ILO 182 and/or the UN Convention on the Rights of the Child unless otherwise noted. See ILO Convention 182, Concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labour, June 17, 1999, art. 3(d), 38 I.L.M. 1207 [hereinafter ILO 182] (prohibiting work likely to harm the health and safety of children), available at <http://ilolex.ilo.ch:1567/english/convdsp1.htm> (last visited Feb. 14, 2002); Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, art. 32(1), U.N. Doc. A/44/49 (1989), adopted Nov. 20, 1989, entered into force Sept. 2, 1990, reprinted in 28 I.L.M. 1448 (1989) [hereinafter UN Child Convention] (“States Parties recognize the right of the child to be protected from . . . performing any work that is likely to be . . . harmful to the child’s health or physical, mental, spiritual, moral or social development.”), available at <http://www.unhchr.ch/html/menu3/b/k2crc.htm> (last visited Feb. 14, 2002).

14. See *infra* notes 15-19 and accompanying text (discussing occupational health hazards).

15. World Health Organization, *Declaration on Occupational Health For All* (Oct. 14, 1994) (referring to occupational health as one of the most important factors in improving the health of the world’s population), available at http://www.who.int/environmental_information/Occuphealth/declarationang.htm (last visited Feb. 14, 2002).

16. See *id.* (emphasizing disparate effect on developing world where seventy percent of the world’s workers reside).

17. See Ashagrie, *Working Children Statistics*, *supra* note 13 (citing results of surveys conducted in twenty-six countries).

18. See *id.* (reporting that hazards are due primarily to biological, chemical, and environmental sources).

that more than twenty percent of working children suffer workplace injuries.¹⁹

The Pakistan brick-kiln industry vividly demonstrates the physical damage children suffer from excessive and unsafe labor.²⁰ Seema, a nine-year-old girl, works many hours every day making mud bricks.²¹ For some time, she has had a serious eye infection that is aggravated by constant exposure to the fumes of the brick-kiln.²² Her family cannot afford to send her to a doctor for treatment.²³ Unfortunately, Seema's condition is not unusual.²⁴ Because children in the brick kiln industry inhale fine clay dust and noxious gases from the kilns, they suffer fifty percent more chronic illnesses than their counterparts in other villages.²⁵ Although these children begin work at dawn and work into the late afternoon in more than 100-degree heat during the hot season, they are not paid for their toil.²⁶ Children comprise a large proportion of Pakistani brick-kiln workers and suffer from a high mortality rate.²⁷ Despite this harmful production process, the United States currently permits the importation of these bricks.²⁸

To address the problem of child labor, the U.S. Congress passed the Trade and Development Act of 2000 ("TDA" or "the Act").²⁹ The

19. Kebebew Ashagrie, *Youngest Workers and Hazardous Child Labour*, International Programme on the Elimination of Child Labour, International Labour Office, Geneva (1999) [hereinafter Ashagrie, *Youngest Workers*], at <http://www.ilo.org/public/english/standards/ipecc/simpoc/stats/child/summary.htm> (last visited Feb. 14, 2002).

20. See generally FARHAD KARIM, CONTEMPORARY FORMS OF SLAVERY IN PAKISTAN (Human Rights Watch, 1995) (detailing abusive child labor practices in Pakistani export industries).

21. See *id.* at 44 (recounting an interview by Human Rights Watch/Asia at a brick-kiln on the outskirts of Lahore in October 1993).

22. See *id.* (describing Seema's illnesses and their causes).

23. *Id.*

24. See *id.* at 43 ("[A]fflictions common among child brick-kiln workers include deteriorating eyesight and even blindness.").

25. Dr. Tufael Mohammad Khan, CHILDREN OF THE BRICK KILNS IN NORTHWEST FRONTIER PROVINCE (Peshawar: UNICEF, 1990), cited in KARIM, *supra* note 20, at 43.

26. See National Commission for Child Welfare and Development, Special Education and Social Welfare Division, Government of Pakistan and UNICEF, DISCOVER THE WORKING CHILD, at 16 (Pakistan, 1990) (explaining that children of Pakistani brick-kilns also frequently suffer psychological trauma), cited in KARIM, *supra* note 20, at 44.

27. See *id.* (referring to UN reports presented to the Pakistani government illustrating long hours worked by young children, often between six and eight years of age).

28. See United States Customs Service, Convict/Forced/Indentured Labor Issuances, Detention Orders and Findings [hereinafter Customs Detention Orders] (failing to include Pakistani hand-made bricks on list of products prohibited from entering the United States because of the use of child labor in production), available at <http://www.customs.gov/enforcem/dofindin.htm> (last visited Feb. 14, 2002).

29. Pub. L. No. 106-200, 114 Stat. 251 (codified in scattered sections of 19

majority of the legislation grants preferential trading terms to developing countries.³⁰ A more discrete but equally important section of the TDA³¹ amends Section 307 of the 1930 Tariff Act.³² The TDA amendment prohibits imports made by indentured or forced child labor.³³ Pursuant to an Executive Order,³⁴ in January 2001 the Departments of Labor, State, and Treasury prohibited federal contractors from using Pakistani hand-made bricks because they are “mined, produced, or manufactured by forced or indentured child labor.”³⁵ Under the TDA, the U.S. Customs Service (“Customs”) could similarly classify Pakistani bricks and deny their importation into the United States.³⁶

If its bricks did not gain market access in the United States, Pakistan might assert at the WTO dispute settlement body³⁷ that the TDA violates a number of GATT provisions.³⁸ This Comment contends that the United States could successfully invoke GATT

U.S.C.) (designed to encourage trade with developing nations and to condition some trade on the improvement of child labor indicators in those nations).

30. *See id.* §§ 111-116, 201-203, 211-213 (granting trade preferences to African and Caribbean nations).

31. *See id.* § 411(a) (amending 19 U.S.C. § 1307 and defining “forced labor and/or indentured labor” to include “forced or indentured child labor”).

32. Tariff Act of 1930, ch. 497, § 307, 46 Stat. 590, 689-90 (codified as amended at 19 U.S.C. § 1307 (2000)) (authorizing Treasury Secretary to deny entry of goods “produced or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor”).

33. *Id.*; *see also* Trade and Development Act § 411(a) (clarifying that child labor now falls under the purview of Section 307).

34. Exec. Order No. 13,126, 64 Fed. Reg. 32,383 (June 12, 1999), *reprinted in* 41 U.S.C. § 35 (1994 & Supp. V 1999).

35. Bureau of International Labor Affairs: Notice of Final List of Products Requiring Federal Contractor Certification as to Forced or Indentured Child Labor Under Executive Order Number 13,126, 66 Fed. Reg. 5353, 5356 (Jan. 18, 2001).

36. *See id.* at 5353 (commenting that “the definition of ‘forced or indentured child labor’ . . . is derived from, and generally consistent with, the Tariff Act of 1930.”); *see also* U.S. CUSTOMS SERV., U.S. DEP’T OF THE TREASURY, FORCED CHILD LABOR ADVISORY 6-7 (2000) (noting that “employment to discharge a debt” and “employment of very young children” are “red flag” indicators of forced or indentured child labor). The Advisory also identifies Department of Labor reports on child labor and Department of State documents on human rights as sources of information that the Customs Service will consider when certifying products made by child labor. *Id.* app. B.

37. *See* WTO Agreement, *supra* note 2, arts. 4-6, Annex 2 [hereinafter DSU] (outlining procedures for WTO Members attempting to resolve complaints). DSU Article 4 requires that Members first attempt to come to a mutual settlement of their dispute through good faith consultations. *Id.* art. 4. DSU Article 5 allows Members to voluntarily submit their dispute to conciliation and mediation by the WTO. *Id.* art. 5. DSU Article 6 permits the complaining Member to request the establishment of a WTO Panel, composed of individuals from a list of experienced practitioners, to settle the dispute. *Id.* art. 6. DSU Article 17 establishes a permanent WTO Appellate Body to hear appeals from Panel decisions. *Id.* art. 17.

38. *See infra* notes 77-80 and accompanying text (suggesting that Pakistan might assert violations of GATT Articles I, XI, and XIII).

Article XX(b) to justify a Section 307 import restraint³⁹ imposed for the purpose of counteracting and preventing child labor violations.⁴⁰ The international community recognizes collectively that many forms of child labor pose a serious health risk.⁴¹ This recognition vindicates the United States' use of unilateral and extraterritorial measures applied in a non-discriminatory fashion.⁴² Lastly, it is preferable to justify the TDA under Article XX(b) rather than Article XX(a) (which protects "public morals") simply because the WTO Appellate Body ("WTOAB")⁴³ has yet to interpret Article XX(a).⁴⁴

Part I of this Comment explains the evolution of the trade and labor debate within the GATT/WTO system. Part II outlines how the WTO and GATT dispute settlement bodies have interpreted Article XX exceptions, both before and after incorporating the interpretive standards of the Vienna Convention on the Law of Treaties ("VCLT" or "Vienna Convention").⁴⁵ Part III contends that the policy objective and design of the TDA fall under the Article XX(b) public health exception. To do so, the import prohibition employed by the TDA must be "necessary" to achieving its policy objective, which is the elimination of forced child labor. Part IV considers whether the Act,

39. See 19 U.S.C. § 1307 (2000) (prohibiting the importation of products made with convict labor, forced or indentured labor, and authorizing the Secretary of the Treasury to prescribe regulations for the enforcement of the provision).

40. *Infra* notes 376-78.

41. See *supra* note 13 and accompanying text (providing the ILO 182 and UN Child Convention definitions of child labor); see also International Labour Organization, Ratifications of ILO Convention 182 [hereinafter ILO 182 Ratifications] (listing 117 signatories to ILO 182), available at <http://webfusion.ilo.org/public/db/standards/normes/appl/index.cfm> (last updated Apr. 7, 2002); United Nations, Ratifications of Convention on the Rights of the Child [hereinafter UN Child Convention Ratifications] (listing 191 signatories to UN Child Convention), available at <http://www.unhchr.ch/html/menu3/b/k2crc.htm> (last updated Feb. 8, 2002).

42. See *infra* notes 376-78 (concluding that fairly applying the TDA sufficiently addresses international child labor concerns).

43. See discussion *supra* note 37 (describing the dispute settlement procedure in the WTO, particularly the establishment of a permanent Appellate Body).

44. See Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT'L L. 689, 744 (1998) [hereinafter Charnovitz, *Moral Exception*] (stating that the "public morals" exception of Article XX(a) must be assembled because no dispute settlement body has interpreted it). Charnovitz argues that Article XX(a), which permits measures "necessary to protect public morals," would justify an import prohibition on child labor products because child labor is widely-condemned internationally as a moral abomination. *Id.*; GATT, *supra* note 6, art. XX(a). This Comment generally dovetails with Professor Charnovitz's conclusion but capitalizes on the persuasiveness of recent WTOAB decisions interpreting Article XX(b) and the more explicit recognition of child labor as a health issue (rather than a moral issue) in international treaties and organizations. See *supra* notes 148-60, 199-206 and accompanying text (describing the international consensus on the health risks of child labor and the effects of the WTOAB decision in Asbestos).

45. May 23, 1969, 1155 U.N.T.S. 331, T.S. No. 58 (entered into force Jan. 27, 1980), reprinted in 8 I.L.M. 679 [hereinafter Vienna Convention].

if applied as proposed by the United States Customs Service, meets the requirements of the chapeau of Article XX. Using the import ban on Pakistani bricks as a hypothetical example of how and when the TDA could be implemented, this Comment concludes that the TDA would survive scrutiny by a WTO Panel⁴⁶ if applied evenhandedly and applied based on an internationally accepted definition of child labor.

I. THE TRADE AND LABOR DEBATE WITHIN THE GATT/WTO SYSTEM

After World War II, the world faced the task of rehabilitating its major economic powers and establishing political order.⁴⁷ The theory of comparative advantage⁴⁸ instructed policymakers that reducing trade barriers would promote economic stability.⁴⁹ If every country dedicated resources to its most efficient industries, the products of those industries could be traded for goods from like-minded countries and both trading partners could achieve net economic gains.⁵⁰ Under the comparative advantage theory, these gains would accomplish both economic and political goals, specifically, reducing poverty and promoting peace.⁵¹

To perform this task, the major trading powers negotiated the creation of the International Trade Organization ("ITO").⁵² The purpose of the ITO resembled that of the WTO: to create an institution to maintain and enforce the GATT trading system.⁵³ The

46. See discussion *supra* note 37 (describing the dispute settlement procedure in the WTO, particularly the establishment of Panels).

47. See JACKSON et al., *supra* note 6, at 1-6 (summarizing the rise of the GATT system and the vehement international reaction to the U.S. Tariff Act of 1930).

48. See CHARLES P. KINDLEBERGER, INTERNATIONAL ECONOMICS, 17-21, 27, 33 (5th ed. 1973), reprinted in JACKSON et al., *supra* note 6, at 8-12 (providing a thorough discussion of the economic theory of comparative advantage).

49. See JACKSON et al., *supra* note 6, at 5 (describing consensus among national leaders that promoting trade would be mutually advantageous).

50. See CHARLES P. KINDLEBERGER, INTERNATIONAL ECONOMICS 17-21, 27, 33 (5th ed. 1973), reprinted in JACKSON et al., *supra* note 6, at 8-12 (explaining comparative advantage theory).

51. See Robert E. Hudec, *GATT Legal Restraints on the Use of Trade Measures Against Foreign Environmental Practices*, in 2 FAIR TRADE AND HARMONIZATION 108 (Jagdish Bhagwati & Robert E. Hudec eds., 1996) (contending that the GATT provided both for the economic growth of post-WWII nations and the establishment of an improved system of international relations).

52. See BHALA & KENNEDY, *supra* note 2, § 1(a) (summarizing the comprehensive politico-economic plan that created the Bretton Woods triad of institutions). The triad would have included the World Bank, International Monetary Fund, and International Trade Organization, but the ITO never came into being. *Id.*; see also *infra* note 56 and accompanying text (explaining why the ITO faltered).

53. See JACKSON et al., *supra* note 6, at 302 (comparing the objectives of the ITO and WTO). Professor Jackson notes that, while the ITO would have included a considerable range and volume of rules regarding international economic behavior,

Havana Charter of 1948, the founding document and blueprint for both the ITO and the GATT, provided that “[m]embers recognize . . . that all countries have a common interest in the achievement and maintenance of fair labour standards related to productivity, and thus in the improvement of wages and working conditions.”⁵⁴ This wording never made its way into the GATT, however, because its drafters limited the GATT to “traditional commercial aspects of the trade in goods.”⁵⁵ Because the ITO never came into existence,⁵⁶ the GATT did not retain the ITO fair labor standards provisions.⁵⁷ Instead, the GATT inherited only one explicit labor-related exception from the Havana Charter: Article XX(e) permits measures relating to prison labor.⁵⁸

Since 1953, the United States and like-minded nations have intermittently pushed for the inclusion of a social clause in the GATT⁵⁹ that would include more explicit workers’ rights protections that could be enforced through trade sanctions.⁶⁰ At the Marrakesh

the WTO is a so-called “mini-charter” meant to evolve and change. *Id.*

54. U.S. DEP’T OF STATE, PUB. NO. 3117, HAVANA CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION 113, ch. II, art. 7 (1948); *see also* Virginia A. Leary, *Workers’ Rights and International Trade: The Social Clause (GATT, ILO, NAFTA, U.S. Laws)*, in 2 FAIR TRADE AND HARMONIZATION, *supra* note 51, at 198 (explaining that the ill-fated ITO contained fair labor standards provisions that committed Members to the elimination of “unfair labour conditions”).

55. *See* Leary, *supra* note 54, at 198 (implying that drafters of Havana Charter intended the GATT to govern commercial transactions and the ITO to govern trade-related labor issues).

56. *See* BHALA & KENNEDY, *supra* note 2, § 1(a) (submitting that the United Nations received no acceptance of the Havana Charter from any nation because the U.S. Senate made it clear that it would not agree to the ITO’s creation).

57. *See* Adelle Blackett, *Whither Social Clause? Human Rights, Trade Theory and Treaty Interpretation*, 31 COLUM. HUM. RTS. L. REV. 1, 7 (1999) (observing that the demise of the ITO removed any explicit linkage between trade and labor rights).

58. *See* GATT, *supra* note 6, art. XX(e) (representing the only explicit reference in the GATT to “labour”).

59. *See* Leary, *supra* note 54, at 199 (noting efforts made by the United States and some European countries to include labor provisions in the GATT) (citing Steve Charnovitz, *The Influence of International Labour Standards on the World Trading Regime*, 126 INT’L LABOUR REV. 565, 574-75 (1985)). *See generally* *Administration Will Continue to Press for Creation of Labor Group at WTO*, 14 INT’L TRADE REP. (BNA), No. 1, at 14-15 (Jan. 1, 1997) (referring to the United States’ attempts to build on European commitments to labor rights and introduce a labor clause at the WTO); *Clinton Administration Committed to Labor/Environment Link in WTO*, 15 INT’L TRADE REP. (BNA), No. 31, at 1351 (Aug. 5, 1998) (reiterating the Clinton Administration’s desire to bring labor issues to the WTO forum, but noting significant barriers to multilateral consensus).

60. *See* U.S. COMMISSION ON FOREIGN ECONOMIC POLICY, STAFF PAPERS 437-38 (1954), *quoted in* Janell M. Diller & David A. Levy, Note, *Child Labor, Trade and Investment: Toward the Harmonization of International Law*, 91 AM. J. INT’L L. 663, 685-86 (1997) (recounting a U.S. proposal to add a social clause that would make the “maintenance of labor conditions below those which the productivity of the industry and the economy at large would justify” a nullification and impairment of another nation’s benefits under GATT Article XXIII, thus triggering a potential dispute

Ministerial Conference in 1994,⁶¹ negotiators hotly disputed the linkage of trade and labor standards.⁶² The Chairman of the Trade Negotiations Committee eventually concluded that no consensus existed among participants on the issue.⁶³ In his concluding remarks, the Chairman merely reiterated that “ministers . . . stressed the importance they attach to their requests for an examination of the relationship between the trading system and internationally recognized labour standards.”⁶⁴ After the Marrakesh Ministerial Conference, the GATT contracting parties agreed to form a permanent organization (the WTO) with the GATT as its central legal text.⁶⁵

At the 1996 Ministerial Conference in Singapore, Members acknowledged the significant role of trade in promoting core labor standards.⁶⁶ Although deciding against forming a working party on trade and labor,⁶⁷ the Members agreed to encourage collaboration

settlement on the labor rights issue). *See generally* Blackett, *supra* note 57, at 79-80 (suggesting that the social clause be grafted onto the WTO by allowing labor rights violations to be enforced through the WTO dispute settlement procedure).

61. *See discussion supra* note 2 (explaining the Marrakesh Ministerial Conference); *see also* WTO Agreement, *supra* note 2, art. IV (requiring that a Ministerial Conference composed of all WTO Members be held at least every two years to make decisions on pertinent matters and to put forth the WTO work program).

62. *See generally* Leary, *supra* note 54, at 198-99 (spelling out the course of the trade and labor debate at Marrakesh, during which developing countries argued against an explicit link between labor standards and trade); Statements by J.P. Delamuraz (Switzerland), Michael Kantor (United States), Theodore Pangalos (Presidency of the Council of the European Communities), Sir Leon Brittan (Commission of European Communities), Vice President Al Gore (United States), *Marrakesh Ministerial Conference*, MTN.TNC/MIN(4)/ST/74, 4, 107 (Apr. 12-14, 1994), *cited in* Leary, *supra* note 54, at 199 n.47 (arguing forcefully for explicit recognition of labor standards in Marrakesh Final Act).

63. *See infra* note 64 and accompanying text (citing concluding remarks of Marrakesh Conference’s Trade Negotiations Chairman).

64. Concluding Remarks of H.E. Sergio Abreu Bonilla, Chairman of the Trade Negotiations Committee, *Multilateral Trade Negotiations of the Uruguay Round at Marrakesh*, MTN.TNC/MIN(94)/6 (Apr. 15, 1994), *quoted in* Leary, *supra* note 54, at 199.

65. *See* WTO Agreement, *supra* note 2, art. I (establishing the World Trade Organization); *id.* Annex 1A (formally incorporating GATT 1947 into GATT 1994).

66. *See* Singapore Ministerial Declaration, WTO Doc. WT/MIN(96)/DEC (Dec. 13, 1996), *reprinted in* 36 I.L.M. 220, 221 (1997) [hereinafter Singapore Declaration], *available at* <http://docsonline.wto.org> (last visited Feb. 14, 2002)

We renew our commitment to the observance of internationally recognized core labour standards. The International Labor Organization is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them . . . [and] [w]e reject the use of labour 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.

Id.

67. *Compare id.* (omitting any language regarding the establishment of a formal

between the WTO and the ILO.⁶⁸ Most importantly, the Members did not exclude the possibility that the WTOAB might enforce labor standards.⁶⁹ Instead, the Singapore Declaration concluded that the ILO should merely “set and deal with,” but not necessarily enforce, labor standards.⁷⁰

Since Singapore, the United States and other Members have sought to expand the labor rights agenda.⁷¹ At the Doha Ministerial

body to pursue a relationship with the ILO), *with* Singapore Ministerial Conference, Statement by Sir Leon Brittan Q.C., Vice-President of the European Commission, Statement at Singapore Ministerial Conference, Commission of the European Communities, WTO Doc. WT/MIN(96)/ST/2 (Dec. 13, 1996) (expressing EU position that the Singapore Declaration should form the basis for future discussion of labor standards in the WTO), *available at* <http://docsonline.wto.org> (last visited Feb. 14, 2002), *and* Singapore Ministerial Conference, Statement by the Honourable Charlene Barshefsky, Acting United States Trade Representative, United States, WTO Doc. WT/MIN(96)/ST/5 (Dec. 13, 1996) (expressing the U.S. position that the WTO should establish a work program to deal with labor issues), *available at* <http://docsonline.wto.org> (last visited Feb. 14, 2002).

68. *See* Singapore Declaration, *supra* note 66 (describing the importance of collaboration with the ILO); *see also* Drusilla K. Brown, *A Transactions Cost Politics Analysis of International Child Labor Standards*, in SOCIAL DIMENSIONS OF U.S. TRADE POLICY 245, 263 (Alan K. Deardorff & Robert M. Stern eds., 2000) (concluding that the separation of labor standards monitoring between the WTO and the ILO stems from a lack of agreement among the principals over enforcement and standards).

69. *See* Singapore Declaration, *supra* note 66 (failing to provide explicitly that the ILO should enforce labor standards).

70. *Id.*

71. *See* Preparations for the 1999 Seattle Ministerial Conference, Communication from the United States, *WTO's Forward Work Programme: Proposed Establishment of a Working Group on Trade and Labour*, WTO Doc. WT/GC/W/382 (Oct. 30, 1999) (proposing that the WTO establish a Working Group on Trade and Labor that would examine, among other topics, “the extent of forced or exploitative child labour in industries engaged in international trade”), *available at* <http://docsonline.wto.org> (last visited Feb. 14, 2002); Geneva Ministerial Conference, United States, Statement by the Honourable Charlene Barshefsky, Acting United States Trade Representative, WTO Doc. WT/MIN(98)/ST/57 (May 18, 1998) [hereinafter Geneva Barshefsky Statement] (advocating continued collaboration between the ILO and WTO, but hinting that the ILO must prove itself as a leader in advocating the rights of workers), *available at* <http://docsonline.wto.org> (last visited Feb. 14, 2002); *see also* Seattle Ministerial Conference, Commission of the European Community, Statement Circulated by Pascal Lamy, Commissioner for Trade, WTO Doc. WT/MIN(99)/ST/3 (Nov. 30, 1999) (suggesting creation of a carefully designed joint ILO/WTO forum on trade and labor that would advance the Singapore Declaration and prevent the possibility of protectionist sanctions), *available at* <http://docsonline.wto.org> (last visited Feb. 14, 2002); Preparations for the 1999 Seattle Ministerial Conference, Communication from the European Communities, *Proposal for a Joint ILO/WTO Standing Working Forum on Trade, Globalization and Labour Issues*, WTO Doc. WT/GC/W/383 (Oct. 30, 1999) (proposing an ILO/WTO Standing Working Forum to promote labor rights without use of trade sanctions and commending ILO progress in “banning the worst forms of child labour”), *available at* <http://docsonline.wto.org> (last visited Feb. 14, 2002); *Outcome of Summit of the Americas and Prospects for Free Trade in the Hemisphere: Hearing Before the Subcomm. on Trade, House Comm. on Ways and Means*, 107th Cong. 34-35 (2001) (statement of Robert B. Zoellick, U.S. Trade Rep.) (outlining Bush Administration commitment to incentive-based programs and to strengthening specialized institutions such as the ILO to promote labor standards), *available at* <http://www.ustr.gov/speech->

Conference in 2001, the Ministers again failed to define the WTO/ILO working relationship more clearly.⁷² Thus far, developing nations have argued effectively that core labor rights provisions actually disguise protectionist policies and erode the competitive advantage developing nations enjoy in labor costs.⁷³ In response, developed countries argue that, if structured to avoid protectionism, fundamental labor rights can and should be included in the WTO.⁷⁴ Members have yet to agree on the integration of labor standards into the WTO, but a dispute settlement challenge of a labor-related trade law, like the TDA, could be an impetus for formal agreement.⁷⁵

test/zoellick/index.shtml (last visited Feb. 14, 2002); Robert B. Zoellick, The United States, Europe and the World Trading System, Address Before The Kangaroo Group, Strasbourg, France (May 15, 2001) (stressing that labor standards cannot be protectionist and that trading partners must be sensitive to issues of sovereignty), *available at* <http://www.ustr.gov/speech-test/zoellick/index.shtml> (last visited Feb. 14, 2002); Robert B. Zoellick, Press Conference at WTO Mini-Ministerial Meeting, Mexico City, Mexico (Sept. 1, 2001) (contrasting Clinton Administration position on labor standards with Bush Administration position that favors improving labor standards by opening markets and encouraging growth), *available at* <http://www.ustr.gov/speech-test/zoellick/index.shtml> (last visited Feb. 14, 2002). *But see* Doha Ministerial Conference, United States, Statement by H.E. Robert B. Zoellick, United States Trade Representative, WTO Doc. WT/MIN(01)/ST/3 (Nov. 10, 2001) (omitting any reference to inclusion of labor rights in the WTO agenda), *available at* <http://docsonline.wto.org> (last visited Feb. 14, 2002).

72. *See* Doha Ministerial Declaration, WTO Doc. WT/MIN(01)/DEC/1 (Nov. 14, 2001) (reaffirming the declaration of the Ministers at the Singapore Ministerial Conference concerning core labor standards and noting the progress made by the ILO “on the social dimension of globalization”), *available at* <http://docsonline.wto.org> (last visited Feb. 14, 2002).

73. *See* Leary, *supra* note 54, at 199 (noting the continuously strenuous protest of developing nations to the addition of a social clause); *see also* Doha Ministerial Conference, Communication from Cuba, Declaration of the Group of 77 and China on the Fourth WTO Ministerial Conference at Doha, Qatar, WTO Doc. WT/L/424 (Oct. 22, 2001) (opposing any linkage between trade and labor standards and exhibiting skepticism that concepts such as “global coherence” set forth by intergovernmental organizations like the ILO will be used as vehicles for protectionism), *available at* <http://docsonline.wto.org> (last visited Feb. 14, 2002); Doha Ministerial Conference, Pakistan, Statement by H.E. Abdul Razak Dawood, Minister for Commerce, Industries and Production, WTO Doc. WT/MIN(01)/ST/6 (Nov. 10, 2001) (protesting that the underlying motive for the reference to labor standards in the Doha Declaration is protectionism), *available at* <http://docsonline.wto.org> (last visited Feb. 14, 2002).

74. *See* Doha Ministerial Conference, Canada, Statement by the Honourable Pierre S. Pettigrew, Minister for International Trade, WTO Doc. WT/MIN(01)/ST/13 (Nov. 10, 2001) (expressing disappointment that Members could not agree on a plan at Doha to ensure that the WTO works with the ILO to advance labor standards), *available at* <http://docsonline.wto.org> (last visited Feb. 14, 2002); Doha Ministerial Conference, Sweden, Statement by H.E. Leif Pagrotsky, Minister for Trade, WTO Doc. WT/MIN(01)/ST/119 (Nov. 10, 2001) (decrying WTO Members who have made commitments to market access in the WTO and core labor rights in the ILO but are unwilling to make concrete WTO support for the ILO), *available at* <http://docsonline.wto.org> (last visited Feb. 14, 2002).

75. *See infra* note 399 and accompanying text (explaining how a dispute settlement decision incorporating labor rights into the WTO does not necessarily “diminish the rights” of WTO Members). A successful WTO defense of the TDA

II. THE INTERPRETIVE HISTORY OF GATT ARTICLE XX FROM 1947 TO THE PRESENT

Disputes over labor standards can be presented to a WTO Panel if one Member allegedly restricted trade on the basis of a labor rights principle.⁷⁶ When claiming injury, a complaining Member must specify the GATT-related benefit being “nullified and impaired” by the responding Member.⁷⁷ Under WTO jurisprudence, an import ban (like the one authorized by the TDA) generally triggers a violation of the most-favored-nation (“MFN”) clause,⁷⁸ the elimination of the quantitative restrictions clause,⁷⁹ and the non-discriminatory administration of the quantitative restrictions clause.⁸⁰ The responding Member may choose to not defend the measure as GATT consistent but instead to justify it under Article XX—the Exceptions Clause.⁸¹ The Exceptions Clause allows Members to deviate from the GATT when protecting legitimate social or political objectives.⁸² In such a situation, the responding Member has the burden of proving compliance with Article XX.⁸³

under Article XX(b) might induce WTO Members to more explicitly link trade and labor. So far, the WTO has only decided to collaborate with the ILO. No working party, committee, or GATT/WTO treaty provision formally integrates or provides an enforcement mechanism for labor rights. *See supra* notes 66-72 and accompanying text (outlining the limited union between the ILO and WTO following the 1996 Singapore Declaration).

76. *See infra* notes 77-80 and accompanying text (describing different violations of the GATT that an import ban would trigger).

77. *See* GATT, *supra* note 6, art. XXIII (requiring that complaining parties suffer from actual or potential injury).

78. *See id.* art. I (requiring that parties grant any trade preference on any product to all GATT contracting parties). For example, the United States might ban imports of hand-made bricks from Pakistan while accepting imported bricks from other WTO Members. Pakistan would claim a violation of Article I because the United States is granting a trade preference (the opportunity to import bricks) to all Members except Pakistan. *See id.* (prohibiting this type of inequity among WTO Members).

79. *See id.* art. XI (requiring that parties only place duties, taxes, or charges on imports and generally refrain from implementing prohibitions, quotas, or other quantitative restrictions). For example, Pakistan would claim a violation of Article XI because the United States has implemented an import prohibition on hand-made bricks rather than any kind of tariff or charge.

80. *See id.* art. XIII (requiring quantitative restrictions, when allowable, to be applied in a non-discriminatory manner). If the United States could justify a prohibition, Pakistan might still claim an Article XIII violation because the United States does not apply the prohibition to other brick-importing Members.

81. *See id.* art. XX (permitting Members to violate their commitments under the GATT in limited instances).

82. *See* Salman Bal, *International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT*, 10 MINN. J. GLOBAL TRADE 62, 69 (2001) (discussing how the Exceptions Clause may permit governments to apply otherwise illegal measures).

83. *See* WTO Appellate Body Report on United States—Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R at 22 (Apr. 12, 1996) [hereinafter *Reformulated Gasoline*] (noting that the party who invokes the

Prior to the WTO Agreement, GATT Panels⁸⁴ relied heavily on the GATT drafting history when deciding Article XX claims.⁸⁵ This reliance is not surprising. GATT Panel decisions formerly required consensus adoption by each GATT party, including the responding party.⁸⁶ Panels may have depended on drafting history in the hopes that the responding party would find such logic more persuasive and thus vote to adopt the Panel report.⁸⁷

The Uruguay Round Agreements precipitated a fundamental change in the dispute settlement process.⁸⁸ According to Dispute Settlement Understanding (“DSU”) Article 3(2), WTO adjudicatory bodies should rely on the “customary rules of interpretation of

exception also bears the burden of establishing that its use does not constitute an abuse of the exception), available at <http://docsonline.wto.org> (last visited Feb. 14, 2002); see also Note by the Secretariat, Revision, World Trade Organization, Committee on Trade and Environment, *GATT/WTO Dispute Settlement Practice Relating to Article XX, Paragraphs (b), (d) and (g) of GATT*, WT/CTE/W/53/Rev.1, paras. 8-9 (Oct. 26, 1998) [hereinafter *DSB Practice*] (elaborating on burden of proof requirements in Article XX cases), available at <http://docsonline.wto.org> (last visited Feb. 14, 2002).

84. See GATT, *supra* note 6, art. XXIII (providing generally for resolution of disputes but omitting any language regarding appropriate procedures).

85. See GATT Dispute Panel Report on United States—Restrictions on Imports of Tuna, Sept. 3, 1991, GATT B.I.S.D. (39th Supp.), para. 5.25 (1991) [hereinafter Tuna-Dolphin I] (noting that the text does not clearly answer the question at issue and that the drafting history, purpose of the provision, and consequences for the General Agreement as a whole must be analyzed); see also Thai Cigarettes, *supra* note 3, paras. 73-74 (noting that prior GATT panels have confirmed that contracting parties intended to allow valid human health policies at the expense of trade liberalization). But see GATT Panel Report on United States—Restrictions on Imports of Tuna, June 16, 1994, GATT B.I.S.D. (39th Supp.), para. 5.20 (1994) [hereinafter Tuna-Dolphin II] (proposing that the GATT Panel use international treaties as supplementary interpretive tools under the Vienna Convention). The Tuna-Dolphin II GATT Panel dismissed an interpretation regarding the location of the targeted plants or animals that had been suggested in a number of international environmental treaties. See *id.* para. 5.19 (finding that bilateral and plurilateral environmental agreements are “not relevant” to Vienna Convention analysis regarding any “subsequent agreement between the parties regarding the interpretation of” GATT Article XX). The Panel could identify no direct references to these treaties in the GATT drafting history. See *id.* para. 5.20 (concluding that environmental agreements signed after consummation of GATT are “of little assistance” as preparatory work to Vienna Convention analysis under GATT Article XX).

86. See GATT, *supra* note 6, art. XXIII (establishing positive consensus voting in the GATT regarding adoption of Panel decisions). The WTO Agreement changed the process for adopting dispute settlement reports by implementing Appellate Body and Panel reports unless the Members decide unanimously against adoption. See DSU, *supra* note 37, art. 17(14) (giving Members thirty days to oppose report).

87. See Christoph T. Feddersen, *Focusing on Substantive Law in International Relations: The Public Morals of GATT's Article XX(a) and "Conventional" Rules of Interpretation*, 7 MINN. J. GLOBAL TRADE 75, 87-88 (1998) (suggesting that GATT Panel reports relied on assumption that drafting history signified a “nearly authoritative and widely accepted interpretative guide”).

88. See generally DSU, *supra* note 37, arts. 3, 17 (adding appellate review, adoption by negative consensus, and international law perspective on interpretation).

international law.”⁸⁹ In practice, the WTOAB interprets this article to mean that interpretive conflicts should be resolved by applying the Vienna Convention.⁹⁰ Under VCLT Article 31, the text’s “ordinary meaning” determines its proper reading.⁹¹ The context, object, and purpose of the particular treaty provision, in addition to the treaty as a whole, should guide the interpretive process.⁹² Under VCLT Article 31(3)(b), subsequent interpretations of a specific treaty provision also contribute to the examination of its context.⁹³ In other words, previous interpretations should influence the future interpretation of the same provision.⁹⁴ Lastly, preparatory work (and drafting history) only supplement ordinary meaning analysis.⁹⁵

The implication of the new DSU procedures confounded WTO Panels convened shortly after the Uruguay Round.⁹⁶ Subsequent WTO Panels have moved away from a contract-based approach to

89. *Id.* art. 3(2).

90. *See* Reformulated Gasoline, *supra* note 83, at 17 (deciding that the Vienna Convention represents the “customary rules of interpretation of international law” mandated by DSU Article 3 because it has been relied upon by all Members); Vienna Convention, *supra* note 45.

91. *See* Vienna Convention, *supra* note 45, art. 31(1) (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty.”).

92. *See id.* (noting that the terms of the treaty should be considered “in their context and in the light of [the treaty’s] object and purpose”); *see also* Blackett, *supra* note 57, at 68 (contending that recent Appellate Body decisions broaden Article XX analysis by giving a “more permissive understanding to the role of the particular provisions within the text of the entire treaty”).

93. *See* Vienna Convention, *supra* note 45, art. 31(3)(b) (“3. There shall be taken into account, together with the context: . . . (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”).

94. *See* WTO Appellate Body Report on Japan—Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at 14 (Nov. 1, 1996) [hereinafter Japan Alcoholic Beverages] (noting that the adopted panel reports “are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute.”), *available at* <http://docsonline.wto.org> (last visited Feb. 14, 2002).

95. *See* Vienna Convention, *supra* note 45, art. 32 (“Recourse may be had to supplementary means of interpretation, including preparatory work of the treaty . . . to confirm the meaning . . . or to determine the meaning when the interpretation . . . (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”).

96. *See* Reformulated Gasoline, *supra* note 83, at 11 (observing that the Panel failed to adequately take into account the actual words used in Article XX but instead relied too heavily on drafting history); *see also* WTO Appellate Body Report on United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Oct. 12, 1998), para. 115, *available at* <http://docsonline.wto.org> (last visited Feb. 14, 2002) [hereinafter AB Shrimp-Turtle I] (commenting that the Panel did not expressly examine the ordinary meaning or context of Article XX and disregarded the essential sequence of steps for analyzing Article XX). For a discussion of the WTO dispute settlement procedure as a whole, *see* discussion *supra* note 37.

interpretation and towards a treaty-based approach.⁹⁷ As a result, drafting history plays a subordinate and complementary, rather than a predominant, role.⁹⁸ WTO Panels employ a dynamic construction of the GATT based on ordinary meaning and context rather than using a static textual construction based on drafting history.⁹⁹ It is natural that “ordinary meaning” leads to a dynamic interpretation.¹⁰⁰ Ordinary meaning analysis simply implies that adjudicators use the understanding of individual words and phrases that has evolved over time.¹⁰¹

This shift towards a dynamic understanding of the GATT text has altered the interpretation of Article XX in particular.¹⁰² For instance, in the WTOAB decision in *U.S.—Import Prohibition of Certain Shrimp and Shrimp Products* (“Shrimp-Turtle I”), the WTOAB disagreed vehemently with the obsolete Panel procedure for evaluating the Exceptions Clause.¹⁰³ The WTO Panel decided that

97. See *AB Shrimp-Turtle I*, *supra* note 96, para. 130 (drawing support for its evolutionary definition of “exhaustible natural resources” from other “modern international conventions and declarations”); see also Blackett, *supra* note 57, at 70 (noting that the contractarian response to negotiating history differs fundamentally from the appropriate use of negotiating history under the Vienna Convention).

98. See *AB Shrimp-Turtle I*, *supra* note 96, para. 157 (using drafting history to confirm its previous interpretation but not to guide its present interpretation); see also Blackett, *supra* note 57, at 70-71 (illustrating how the first Shrimp-Turtle Appellate Body looked to negotiating history but did so to confirm a prior interpretation rather than to develop one).

99. See Feddersen, *supra* note 87, at 87-88 (explaining that the switch from a positive consensus arrangement in the GATT to a negative consensus in the WTO diminishes the prospective role of drafting history); see also *AB Shrimp-Turtle I*, *supra* note 96, para. 129 (defining “exhaustible natural resources” in light of the contemporary and internationally-recognized definition). See generally *infra* notes 141-42 and accompanying text.

100. See *AB Shrimp-Turtle I*, *supra* note 96, para. 129 (submitting that the “sustainable development” language of the WTO Preamble, incorporated through Vienna Convention contextual analysis, requires that the generic term “natural resources” of Article XX(g) is “by definition, evolutionary”); see also Feddersen, *supra* note 87, at 108 (espousing the view that the WTO interpretive guidelines “necessitate more flexibility and dynamic interpretation” than the GATT and that two enumerated provisions of Article XX could conceivably overlap). See generally BLACK’S LAW DICTIONARY 1097 (6th ed. 1990) (defining “ordinary” as “common” or “customary”).

101. See *AB Shrimp-Turtle I*, *supra* note 96, para. 129 (holding that meanings of specific Article XX exceptions should evolve as international law and policy develops); see also Robert Howse, *The World Trade Organization and the Protection of Workers’ Rights*, 3 J. SMALL & EMERGING BUS. L. 131, 142 (1999) (asserting that the notion of accounting for international law norms in treaty interpretation already exists within WTO dispute settlement).

102. Compare *AB Shrimp-Turtle I*, *supra* note 96, para. 186 (justifying, under Article XX(g), an unilateral and extraterritorial environmental measure aimed at protecting sea turtles), with *Tuna-Dolphin I*, *supra* note 85, para. 5.27 (disallowing, under Article XX(g), an unilateral and extraterritorial environmental measures aimed at protecting dolphins).

103. See *AB Shrimp-Turtle I*, *supra* note 96, paras. 117-19 (rejecting the Panel

the measure violated the object and purpose of the WTO Agreement as a whole, rather than the object and purpose of Article XX specifically.¹⁰⁴ The Panel's analysis is antiquated and illogically equates current Members' expectations regarding the purpose of Article XX with those of the original GATT drafters.¹⁰⁵

In contrast, the WTOAB in Shrimp-Turtle I projected a more evolutionary purpose onto the Exceptions Clause,¹⁰⁶ and Members gained the right to enact GATT-inconsistent laws for legitimate public policy purposes.¹⁰⁷ The WTOAB reasoned that maintaining the multilateral system is a "fundamental and pervasive premise underlying the WTO Agreement" but "not a right or an obligation."¹⁰⁸ The WTOAB proceeded to reaffirm the Article XX test used in U.S.—Standards for Reformulated and Conventional Gasoline ("Reformulated Gasoline").¹⁰⁹

Under the Reformulated Gasoline test, trade-distorting policies must conform to a two-step analysis under Article XX.¹¹⁰ First, the measure's design and objective must fall properly under one of the enumerated Article XX exceptions, denoted (a) to (j).¹¹¹ If a measure is justifiable under the provisions, the second step is to test its application.¹¹² As applied, the measure must not be discriminatory

decision to first investigate the measure's compliance with the Article XX chapeau and concluding that the appropriate test should be the one enunciated in Reformulated Gasoline); *see also* Reformulated Gasoline, *supra* note 83, para. 22 (submitting that a measure must first be provisionally justified under a specific Article XX exception and then analyzed under the chapeau of Article XX).

104. *See* AB Shrimp-Turtle I, *supra* note 96, para. 116 ("[The] Panel did not look into the object and purpose of the chapeau of Article XX. Rather, the Panel looked into the object and purpose of the whole of the GATT 1994 and the WTO Agreement, which object and purpose it described in an overly broad manner.").

105. *See id.* para. 121 (denouncing the Panel interpretation because it effectively eradicated the potential use of unilateral measures). Regarding the chapeau of Article XX, the Appellate Body appropriately focused not on the design of the measure (i.e. unilateral, cooperative) but instead on its application. *See id.* para. 115 (chastising the lower Panel for "disregarding" the readily apparent purpose of Article XX chapeau: examining the manner in which the measure is applied).

106. *Id.*

107. *Id.* (noting that paragraphs (a) through (j) of Article XX are recognized exceptions to substantive GATT obligations, and that these exceptions reflect domestic policies that are viewed "as important and legitimate in character").

108. *Id.* para. 116.

109. *Id.* para. 118.

110. *See* Reformulated Gasoline, *supra* note 83, at 14 (evaluating the measure at issue under Article XX(g) before analyzing the measure according to the provisions of the Article XX chapeau).

111. *See id.* at 12 (requiring that the design of the measure at issue be "primarily aimed at" conservation of natural resources).

112. *See id.* at 15-16 (requiring that the application of the measure not constitute arbitrary or unjustifiable discrimination, or a disguised restriction on international trade).

under the Article XX chapeau.¹¹³ According to the WTOAB in Shrimp-Turtle I, this analysis reflects “not inadvertence or random choice, but rather the fundamental structure and logic of Article XX.”¹¹⁴

Applying the first step to an Article XX(b) exception, the challenged policy must comport with the ordinary meaning¹¹⁵ of a necessary measure enacted to protect human health.¹¹⁶ To do so, the regulation must seek to guard against a valid health risk,¹¹⁷ and also, the regulation must be a necessary departure from the GATT.¹¹⁸ The definition of human health risks according to the ordinary meaning of exception XX(b) is broadening as the WTOAB incorporates the internationally-accepted, and similarly broadening, definitions of human health risks.¹¹⁹

In comparison, the definition of a “necessary” but trade-restrictive policy has undergone a less explicit change.¹²⁰ The necessity test has always focused on the necessity of the measure’s design, not its policy objective.¹²¹ A measure does not satisfy the “necessary” clause if the Member could employ a reasonable alternative measure more consistent (or less inconsistent) with the GATT to achieve its objective.¹²²

113. *Id.*

114. AB Shrimp-Turtle I, *supra* note 96, para. 119.

115. *See supra* text accompanying notes 97-99 (explaining the definition of ordinary meaning).

116. *See* EU Asbestos, *supra* note 4, para. 115 (noting that adoption of health-protective measures under Article XX(b) is allowable despite being in conflict with other GATT provisions).

117. *See id.* para. 157 (establishing that a banned product must pose a sufficient human health risk to fall under Article XX(b)).

118. *See* GATT, *supra* note 6, art. XX(b) (stating that the measure must be “necessary to protect human . . . life or health”).

119. *See* EU Asbestos, *supra* note 4, para. 162 (suggesting that opinions of international bodies with expertise in defining such risks should be accorded great weight). This approach concedes implicitly that the definition of health risks according to the GATT drafters may be immaterial to contemporary society. *See id.* (acknowledging that international bodies have agreed on the carcinogenic and harmful nature of asbestos since 1977, three decades after the signing of the GATT in 1947).

120. *See id.* paras. 170-72 (clarifying but still relying on the definition of “necessary measure” developed in the Thailand Cigarettes case, before adoption of the DSU).

121. *See* Thailand Cigarettes, *supra* note 3, paras. 73-75 (citing prior GATT practice that a “necessary” measure is one that is, by design, inconsistent with GATT but to the least extent reasonably possible). *See generally* DSB Practice, *supra* note 83, paras. 40-41 (determining that every GATT Panel performing an Article XX “necessary” analysis has referred to the trade measure requiring justification, not the policy objective chosen).

122. *See* Thailand Cigarettes, *supra* note 3, para. 75 (justifying Thailand’s objective of protecting the public from health risks associated with cigarettes but objecting to the ban on foreign cigarettes without a restriction on domestic trade).

According to the 1994 GATT Panel in U.S.—Restrictions on Imports of Tuna (“Tuna-Dolphin II”), unilateral sanctions applied extraterritorially are not “necessary.”¹²³ However, the Tuna-Dolphin Panels appear outdated in light of subsequent practice.¹²⁴ In 2001, the WTOAB in European Communities—Measures Affecting Asbestos and Asbestos—Containing Products (“Asbestos”), critically revised the previous “necessity” test by balancing the necessity of the measure against the significance of the public health objective.¹²⁵

Applying the second step, the challenged measure must comport with the chapeau of Article XX.¹²⁶ To do so, the measure must not be applied in a way that arbitrarily or unjustifiably discriminates or constitutes disguised protectionism.¹²⁷ When looking for “disguised” restrictions, GATT Panels focused on the publicity of the measure.¹²⁸ Current WTO Panels find a violation when measures violate the chapeau’s purpose and object of “avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX.”¹²⁹ WTO Panels locate an equilibrium line between a Member’s right to invoke Article XX and another Member’s substantive rights under

123. See Tuna-Dolphin II, *supra* note 85, para. 5.26 (indicating that the GATT drafters intended Article XX(b) to apply to the use of sanitary measures within the jurisdiction of the importing country).

124. See discussion *infra* Parts III.B.1, III.B.2 (discussing the current use of a balancing approach to evaluate restrictions, which allows for unilateral sanctions, and focusing on modern practice, which authorizes the limited use of unilateral extraterritorial measures).

125. See *infra* notes 199-204 and accompanying text (detailing how the adoption of the balancing approach allowed for the French ban on asbestos).

126. See *supra* note 103 and accompanying text (mentioning the proper method for evaluating a measure under the chapeau of Article XX).

127. See GATT, *supra* note 6, art. XX (reciting that so long as 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 the GATT should prevent adoption of measures to protect public health); see also AB Shrimp-Turtle I, *supra* note 96, para. 120 (stating that Article XX chapeau standards for discrimination or protectionism may differ depending on the policy objective being protected).

128. See GATT Dispute Panel Report on United States-Prohibition of Imports of Tuna and Tuna Products from Canada, Feb. 22, 1982, GATT B.I.S.D. (29th Supp.), para. 4.8 (1982) (deciding that the United States action should not be considered a disguised restriction on trade because it had been taken as a trade measure and announced publicly); see also GATT Dispute Panel Report on United States—Import of Certain Automotive Spring Assemblies, May 26, 1983, GATT B.I.S.D. (30th Supp.), para. 56 (1983) (finding no disguised restriction because the United States published the exclusion order at issue in the Federal Register and enforced it openly). See generally *DSB Practice*, *supra* note 83, para. 21 & nn.26-27 (characterizing interpretations of the GATT Panels in the Tuna Products and Spring Assemblies cases as “very literal”).

129. Reformulated Gasoline, *supra* note 83, at 25. See generally *DSB Practice*, *supra* note 83, para. 22 (emphasizing that the Appellate Body did not define the concepts of “arbitrary discrimination” or “justifiable discrimination” but looked solely at the Article XX chapeau’s general object and purpose).

the GATT.¹³⁰

After the Shrimp-Turtle and Asbestos decisions, WTO dispute settlement bodies will likely allow import prohibitions that seek to protect internationally recognized policy objectives.¹³¹ Thus, in accordance with the Shrimp-Turtle decision, the key to compliance is meeting the requirements of the Article XX chapeau.¹³² In the case of unilateral and coercive sanctions, the application of the disputed measure must be non-discriminatory, transparent, and effective.¹³³ But, in any Article XX(b) case, the Member claiming the exception must first prove that the design of its law meets its health-related aim.¹³⁴

III. STEP ONE: THE TRADE AND DEVELOPMENT ACT'S COMPLIANCE WITH ARTICLE XX(b)

To comply with the Article XX(b) exception, child labor must be a valid public health concern, and the TDA must be the least trade-restrictive measure to remedy that concern.¹³⁵ The Vienna Convention and subsequent WTO dispute settlement practices form an evolving interpretive framework¹³⁶ that will likely confer provisional justification on the TDA.¹³⁷

130. See AB Shrimp-Turtle I, *supra* note 96, para. 164 (holding that the use of an economic embargo by the responding Member to coerce the complaining Member into adopting the same domestic policy will be unjustifiable discrimination when the responding Member fails to consider different conditions that exist in the complaining Member's territory).

131. See AB Shrimp-Turtle I, *supra* note 96, para. 186 (approving use of a trade-restrictive measure that serves an environmental objective and is applied in a non-discriminatory manner); EU Asbestos, *supra* note 4, para. 172 (approving use of a trade-restrictive measure that serves a human health objective and is applied in a non-discriminatory manner).

132. See *infra* note 213 and accompanying text (hypothesizing that the WTOAB now recognizes that the Article XX chapeau alone adequately protects complaining Members from unilateral and coercive sanctions).

133. See WTO Appellate Body Report on United States-Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia, WT/DS58/AB/RW, para. 153 (Oct. 22, 2001) [hereinafter AB Shrimp-Turtle II] (affirming a unilateral and coercive sanction after the United States amended the measure to provide for transparency and due process), available at <http://docsonline.wto.org> (last visited Apr. 11, 2002).

134. See discussion *infra* Part III (explaining that for the TDA to fall under the Article XX(b) exception, child labor must be a legitimate health concern and the restriction contained in the TDA must be essential to achieving the stated objective).

135. See *supra* notes 118-22 and accompanying text (defining the term "necessary" in the context of trade restrictions).

136. See *supra* note 131 and accompanying text (providing examples of acceptable trade restrictions and concluding that a trend in allowing import prohibitions is likely).

137. See *infra* notes 291-93 and accompanying text (discussing the TDA in the context of Article XX(b) and resolving that, given its proper objective and manifestation, the Act should be acceptable under the GATT framework).

A. *Preventing Child Labor is a Valid “Human Health” Objective*

Under current WTO interpretation, child labor is certainly a widely known health risk. The international community has formally acknowledged the health problems of working children.¹³⁸ In addition, a WTO Panel may now be more willing to recognize, implicitly or explicitly, the purpose of “raising standards of living” under the Vienna Convention’s contextual analysis.¹³⁹ The definitions of “measures to protect human health” and “exhaustible natural resources” are much broader than the narrow understanding the GATT contracting parties held in 1947.¹⁴⁰

1. *Definition of public health objectives is evolving*

The WTOAB in Shrimp-Turtle I confirmed that ordinary meaning analysis is a dynamic approach to defining the legitimate policy exceptions of Article XX.¹⁴¹ In that case, the WTOAB stated that “[t]he words of Article XX(g) ‘exhaustible natural resources,’ were actually crafted more than fifty years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations.”¹⁴²

The WTOAB affirmed this evolutionary definition in Asbestos. The lower WTO Panel consulted a variety of authorities on the legitimacy of the alleged health risk.¹⁴³ The Panel considered expert evidence, scientific documentation, international treaties, and the rulings of intergovernmental organizations.¹⁴⁴ Because the sources collectively condemned any use of asbestos, the WTOAB permitted France to implement its “chosen level of health protection”—a complete ban on importation.¹⁴⁵ The WTOAB did not base its decision on the expectations of the original GATT contracting parties.¹⁴⁶ From this decision, it seems that a WTO Panel will more

138. See discussion *infra* Part III.A.2 (demonstrating international consensus concerning the existence of health risks related to child labor).

139. See discussion *infra* Part III.A.3 (suggesting that the WTO Preamble clause concerning “raising standards of living” implies that social objectives should provide context when interpreting the WTO agreements).

140. See discussion *infra* Part III.A.1 (defining public health objectives).

141. See *supra* notes 99-107 and accompanying text (explaining the ordinary meaning analysis).

142. AB Shrimp-Turtle I, *supra* note 96, para. 129.

143. EU Asbestos, *supra* note 4, paras. 159-62.

144. See *id.* para. 162 (noting variety and near unanimity of scientific sources employed by the Panel and that the Panel stayed “well within the bounds of its discretion”).

145. See *id.* para. 174 (doubting the efficacy of a “controlled usage” alternative to a ban on asbestos and legitimating the French decision to totally halt the spread of asbestos-related health risks).

146. See *supra* note 105 and accompanying text (recounting the Shrimp-Turtle I

closely examine the contemporary public health concerns of the WTO community when resolving disputes.¹⁴⁷

2. *The international community agrees on the health risks of child labor*

A variety of international authorities specializing in health and labor issues characterize child labor as a serious public health problem. The WHO places children in the group of workers "particularly vulnerable to occupational hazards."¹⁴⁸ The risk to children is heightened because they operate in the informal sector where workers are less easily protected by public health programs and more often "subjected to highly unsafe conditions."¹⁴⁹ A WHO study found that injury is the leading cause of death among children at work and that "one in every five or ten children sustains an accident each year."¹⁵⁰ Children do not identify occupational risks as well as adults; thus, they are much more susceptible to workplace accidents.¹⁵¹ Another international organization, the United Nations Children's Fund ("UNICEF"), estimated that in 1991, eighty million children between the ages of ten and fourteen years undertook work harmful to their development.¹⁵² More readily than adults, working children suffer injuries from exposure to chemicals, heavy lifting, psychological abuse, and disease.¹⁵³

As noted above, the ILO has concluded that even non-hazardous child labor damages a child's health and development severely.¹⁵⁴ Children who work in the agricultural or service sectors rather than

Panel's improperly restrictive interpretation of Article XX(g)).

147. See *supra* note 131 and accompanying text (citing the WTOAB's approval of policy objectives as defined by international organizations in both Shrimp-Turtle cases).

148. Fourth Network Meeting of the WHO Collaborating Centres in Occupational Health, Espoo, Finland, Summary Report, WHO Protection of the Human Environment: Occupational and Environmental Health Series, at 31 (June 9, 1999).

149. *Id.*; see also Valentina Forastieri, *Challenges in Combatting Child Labour From an Occupational Health Perspective*, 7 ILO/FINNIDA Asian-Pacific Regional Programme on Occupational Safety and Health 2 (2000) (citing ILO survey of twenty-six nations that found that working children are mainly in rural and informal sectors), at http://www.occuphealth.fi/e/info/asian/ap200/challenges_02.htm (last visited Feb. 14, 2002).

150. See VALENTINA FORASTIERI, CHILDREN AT WORK: HEALTH AND SAFETY RISKS 19 (International Labour Office, 1997) (describing the dangers inherent in child labor).

151. *Id.*

152. Christiaan Grootaert & Harry Anthony Patrinos, *The Policy Analysis of Child Labor*, in THE POLICY ANALYSIS OF CHILD LABOR: A COMPARATIVE STUDY 1 (Christiaan Grootaert & Harry Anthony Patrinos eds., 1999).

153. A. BEQUELE & W.E. MYERS, FIRST THINGS FIRST IN CHILD LABOUR: ELIMINATING WORK DETRIMENTAL TO CHILDREN, 6 (International Labour Office, 1995).

154. See *supra* notes 17-19 and accompanying text (summarizing ILO studies and findings).

attending school consistently grow up to be shorter in stature,¹⁵⁵ lighter in weight,¹⁵⁶ and inferior in overall health.¹⁵⁷ The conditions under which some child labor is carried out—intense heat or cold, long hours, dust and fumes—damage the child’s health even when the work is not intrinsically dangerous.¹⁵⁸ Considering that an estimated 250 million children between the ages of five and fourteen years work regularly, half of them on a full-time basis, the health problems are truly widespread.¹⁵⁹ For all of these reasons, in 1983, the ILO Director-General included “work that places too heavy a burden on the child” and “work that endangers his safety, health or welfare” in the definition of “child labor.”¹⁶⁰

3. *The WTO Preamble’s goal of “raising standards of living” should be integrated*

In evaluating the ordinary meaning of protecting human health, a reasonable WTO Panel might determine that the WTO Preamble legitimizes limited social objectives, such as eradicating child labor.¹⁶¹ The Preamble mandates that trade “be conducted with a view to raising standards of living.”¹⁶² In *Shrimp-Turtle I*, the WTOAB approved the environmental policy objective at issue partly by referencing the “sustainable development” language of the WTO Preamble.¹⁶³ This perambular language indicates both the intent of GATT and WTO negotiators and adds “colour, texture and shading”

155. Report VI(1) Child Labour: Targeting the Intolerable, International Labour Conference, 86th Sess., Agenda Item 6, at 8 (1998) (citing CHILDREN AT WORK: SPECIAL HEALTH RISKS, WHO, Technical Report Series No. 756 (1987)).

156. *Id.*

157. See *id.* (stating that “the health of children working in hotels, restaurants, construction and elsewhere was found to be considerably inferior to that of a control group of children attending school.”) (citing U. Naidu & S. Parasuman, *Health Situation of Working Children in Greater Bombay*, Unit for Child and Youth Research, Tata Institute of Social Sciences (1985)).

158. See ACTION AGAINST CHILD LABOUR 13 (Nielien Haspels & Michele Jankanish eds., 2000) (reviewing developmental implications on children of non-hazardous labor); see also Jennifer Bol, *Using International Law to Fight Child Labor: A Case Study of Guatemala and the Inter-American System*, 13 AM. U. INT’L L. REV. 1135, 1146 (1998) (citing evidence that the development and education of children suffer when they try to combine work with school because work is often fatiguing or inordinately time-consuming).

159. See Ashagrie, *Working Children Statistics*, *supra* note 13, at 2 (discussing the range of statistics demonstrating the pervasiveness of child labor).

160. Bol, *supra* note 158, at 1141-42 (1998).

161. See Geneva Barshefsky Statement, *supra* note 71 (suggesting that the WTO’s overarching goal of “raising standards of living” refers to the promotion of labor standards).

162. WTO Agreement, *supra* note 2, pmbl.

163. See *AB Shrimp-Turtle I*, *supra* note 96, paras. 152-53 (recognizing that the perambular language on “sustainable development” should be read in conjunction with a specific Article XX provision).

to the interpretation of Article XX.¹⁶⁴ Because health factors into any standard of living assessment, improving health by eradicating child labor would raise living standards.¹⁶⁵

However, in *Shrimp-Turtle I*, the WTOAB pointed to additional evidence that Members had explicitly agreed to protect the environment. The WTOAB noted that the Members established a Committee on Trade and Environment (“CTE”).¹⁶⁶ It might also have been relevant that the Members decided, in the Agreement on Technical Barriers to Trade (“TBT”), to permit technical measures that protect the environment.¹⁶⁷ Directly analogous evidence of formal agreement by Members on labor issues is lacking.¹⁶⁸ Nonetheless, the Singapore Declaration did explicitly define the WTO position on the trade-labor relationship for the first time.¹⁶⁹ Thus, Members recognized that trade affects labor rights and that a policy decision would therefore be necessary.¹⁷⁰ By formalizing decisions on the environment (CTE and TBT) and labor (Singapore Declaration), in both instances the WTO arguably found that a trade-

164. *Id.* para. 153.

165. See, e.g., *The Analysis of Household Surveys: A Microeconomic Approach to Development Policy*, Living Standards Measurement Study of the World Bank (reporting that World Bank studies of living standards include measurements of data such as nutrition, expenditure patterns, educational attainment, earnings, and health) (citing ANGUS DEATON, *THE ANALYSIS OF HOUSEHOLD SURVEYS: A MICROECONOMIC APPROACH TO DEVELOPMENT POLICY* (World Bank, 1997)), available at <http://www.worldbank.org/lsms/tools/deaton/intro.htm> (last visited Apr. 15, 2002); *Brief History of the Living Standards Measurement Study*, Living Standards Measurement Study of the World Bank (describing how living standards surveys eventually added objectives of measuring health indicators) (citing M. GROSH & P. GLEWWE, *A GUIDE TO LIVING STANDARDS SURVEYS AND THEIR DATA SETS* (World Bank, Working Paper No. 120, 1995)), available at <http://www.worldbank.org/lsms/guide/history.html> (last updated Mar. 1, 1996); see also *Pakistan Integrated Household Survey 1991*, World Bank, Poverty and Resources Division (Dec. 1995), at 1-2 (listing “Health” as a major section in the household living standards questionnaire conducted in Pakistan), available at <http://www.worldbank.org/lsms/country/pk91/pk91.pdf> (last visited Apr. 15, 2002).

166. See *AB Shrimp-Turtle I*, *supra* note 96, para. 154 (determining that the CTE signifies an indication of intent among Members to recognize environmental objectives in the WTO).

167. See WTO Agreement, *supra* note 2, art. 5.4 (allowing Members to promulgate technical regulations designed for “protection of . . . the environment”).

168. See *supra* notes 57-58 and accompanying text (noting that only Article XX(e) contains a reference to “prison labour”).

169. See *supra* notes 66-67 and accompanying text (noting broad language of the Singapore Declaration that the WTO should “support” the ILO but that the ILO should “set and deal with” labor standards).

170. See *supra* notes 66-70 and accompanying text (describing language and purpose of Singapore Declaration); see also GEORGE TSOOGAS, *LABOR REGULATION IN A GLOBAL ECONOMY* 45 (M.E. Sharpe, Inc. ed., 2001) (asserting that the Singapore Declaration does not close the door to a trade-labor link, but rather shows some acceptance of labor standards by developing country WTO Members, even if the Declaration is not very explicit).

related objective sufficiently touches and concerns the purpose of the WTO as set forth in the Preamble.¹⁷¹

Two possible conclusions can be drawn from the use of the Preamble in *Shrimp-Turtle I*. A limited conclusion is that only those clauses added to or removed from the GATT Preamble to form the WTO Preamble—such as “sustainable development”—demonstrate consensus among Members.¹⁷² A broader conclusion is that a contextual analysis should incorporate the entire WTO Preamble, including former GATT Preamble clauses, such as “standards of living.”¹⁷³ The latter reasoning follows the modern and dynamic interpretative approach more closely.¹⁷⁴ If ordinary meaning analysis incorporates the Preamble, a WTO Panel must account for the goal of “raising standards of living” when defining a measure protecting “human life,” such as the TSA.¹⁷⁵

In summary, the recognition of the health risk inherent in child labor is not confined to researchers and policymakers in Geneva.¹⁷⁶ The community of nations accepts the hazardous character of child labor, as evidenced by widespread ratification of the two major relevant treaties: ILO Convention 182 (“ILO 182”)¹⁷⁷ and the United Nations (“UN”) Convention on the Rights of the Child (“UN Convention”).¹⁷⁸ The ordinary meaning of a measure to protect human health must include the TDA, a law to prevent child labor and its associated health concerns.¹⁷⁹

171. Cf. Hudec, *supra* note 51, at 143 (implying that the WTOAB could incorporate the “raising the standards of living” language in the same way as the “sustainable development” language).

172. Cf. *AB Shrimp-Turtle I*, *supra* note 96, paras. 152-53 (implying, possibly, that only the deleted words “full use of the resources of the world” and added words “optimal use of the world’s resources in accordance with sustainable development” of the WTO Preamble reflect the intent of WTO negotiators).

173. See *supra* notes 161-71 and accompanying text (demonstrating that the WTOAB has incorporated the “sustainable development” language of the WTO Preamble when interpreting Article XX and arguing that the “raising standards of living” language should be similarly incorporated).

174. See *supra* notes 102-08 and accompanying text (outlining the interpretive shift towards a more contemporary reading of the WTO text).

175. *Supra* note 173.

176. See *supra* notes 12, 41 and accompanying text (demonstrating additional consensus among scholars, public, and numerous governments that have ratified major international child labor treaties).

177. See *supra* notes 13, 41 (citing language and signatories of ILO 182).

178. See *supra* notes 13, 41 (citing language and signatories of UN Convention).

179. See 146 CONG. REC. S3,864-65 (2000) (statement of Sen. Harkin) (declaring that the TDA provision regarding child labor is an attempt to build on commitments of the ILO 182 signatories). Senator Harkin added that his amendment to the bill, elaborating the child labor product ban, passed the Senate by a resounding vote. See *id.* at 3864 (citing the 96-0 Senate vote).

*B. The Trade and Development Act is Necessary
to Accomplish its Policy Objective*

The import prohibition permitted by the TDA is necessary to achieve the eradication of child labor. After legitimating a measure's policy goal, WTO Panels evaluate whether deviating from the GATT/WTO framework is indeed necessary to achieve the goal.¹⁸⁰ In essence, the Panel examines whether policymakers ignored equally effective alternatives that would have been more consistent with the GATT, and thus less restrictive on trade.¹⁸¹ This prong of the provisional justification test generates considerable controversy.¹⁸²

The Tuna-Dolphin disputes, which were never adopted,¹⁸³ remain the only instances in which GATT Panels have evaluated unilateral sanctions applied by one party to protect the health of living organisms within another party's territory, pursuant to Article XX(b).¹⁸⁴ In both Tuna-Dolphin cases, the GATT Panels found that the United States Marine Mammal Protection Act ("MMPA") deviated unnecessarily from the GATT.¹⁸⁵ The MMPA prohibited U.S. imports of foreign tuna caught without using dolphin-safe techniques.¹⁸⁶ The ban applied to countries where the unsafe tuna originated and to "intermediary" countries that traded in unsafe tuna.¹⁸⁷

180. See EU Asbestos, *supra* note 4, paras. 170-72 (adding that several factors, including the importance of health objectives and the effectiveness of the measure, must be taken into account when performing the necessity test).

181. See *id.* paras. 173-75 (evaluating the efficacy of the suggested alternative to a complete ban on asbestos—"controlled usage").

182. See, e.g., Bal, *supra* note 82, at 100-01 (challenging the decision of GATT Panels to give priority to the least trade restrictive measures over measures that more effectively accomplish their policy objectives as turning "the clause on its head"); Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25 J. WORLD TRADE 37, 49 (1991) [hereinafter Charnovitz, *Environmental Exceptions*] (criticizing attempts by GATT Panels to define the "least degree of inconsistency" with the GATT and to weigh policy options); Ilona Cheyne, *Environmental Unilateralism and the WTO/GATT System*, 24 GA. J. INT'L & COMP. L. 433, 460-61 (1995) (disagreeing with the GATT Panel decision that indirect trade measures are never necessary regardless of the efficacy of less trade-restrictive measures or the importance of the objective).

183. See Feddersen, *supra* note 87, at 117 (noting that GATT contracting parties adopted neither Tuna-Dolphin Panel report).

184. See *DSB Practice*, *supra* note 83, para. 46 (listing the two Tuna-Dolphin cases as the only GATT Panel reports to address extraterritoriality under Article XX(b)).

185. See Tuna-Dolphin I, *supra* note 85, para. 5.29 (disallowing American direct import prohibition of Mexican tuna products); Tuna-Dolphin II, *supra* note 85, para. 5.39 (considering the United States embargo of dolphin-unsafe tuna from third party nations to be unnecessary for the protection of animal life or health).

186. See Tuna-Dolphin I, *supra* note 85, para. 2.5 (prohibiting the import of "any fish or fish product harvested through the incidental taking of marine mammals").

187. See Tuna-Dolphin II, *supra* note 85, paras. 5.2-5.5 (detailing import prohibition of tuna from third party countries that exported tuna caught by

According to the Tuna-Dolphin Panels, a measure intended to protect animal life or health could be permissible under Article XX(b).¹⁸⁸ However, the measure could not be accomplished by unilateral action or by means reaching beyond United States territory and into the jurisdiction of another.¹⁸⁹ The GATT Panels relied on the drafting history of Article XX(b)¹⁹⁰ and the failure of the United States to negotiate an international cooperative agreement.¹⁹¹ Most importantly, the Panels questioned the viability of the GATT system in a world of unregulated trade embargoes.¹⁹² As explained in Part III(B)(1), these floodgate arguments do not apply if a measure, like the TDA, is applied in a non-discriminatory fashion.¹⁹³

Applying the final Tuna-Dolphin II ruling, the United States would need to justify its ban on products made by child labor in light of the options “reasonably available.”¹⁹⁴ The TDA authorizes the application of unilateral sanctions to effect a policy change in another Member’s jurisdiction.¹⁹⁵ Because of its design, the TDA would not be a valid Article XX(b) exception under the outdated Tuna-Dolphin “necessary” standard.¹⁹⁶

unlicensed fishermen).

188. See Tuna-Dolphin I, *supra* note 85, para. 5.24 (prohibiting the U.S. embargo because all reasonably available options had not been exhausted); Tuna-Dolphin II, *supra* note 85, at para. 5.38 (remarking that policies to coerce other countries into changing laws within their jurisdictions pursuant to Article XX(b) would seriously impair the objectives of the General Agreement).

189. See Tuna-Dolphin II, *supra* note 85, para. 5.38 (asserting that the use of coercive measures must be limited to affecting a policy within the jurisdiction enforcing the measure).

190. See Tuna-Dolphin I, *supra* note 85, para. 5.26 (concluding that removal from Article XX(b) of the phrase “if corresponding safeguards under similar conditions exist in the importing country,” which was used in the ITO Charter’s New York Draft, evidenced an intent to exclude use of sanitary measures applied outside one party’s jurisdiction); Tuna-Dolphin II, *supra* note 85, paras. 5.31, 5.42 (noting that the drafting history’s silence on the extraterritorial application issue and concluding that “recognized methods of interpretation” lent no support to the United States’ viewpoint).

191. See Tuna-Dolphin I, *supra* note 85, para. 5.28 (finding that the United States had not negotiated satisfactorily with the complaining parties).

192. See Tuna-Dolphin I, *supra* note 85, para. 5.27 (postulating that the multilateral trading framework would provide legal security only for parties with identical internal regulations); Tuna-Dolphin II, *supra* note 85, para. 5.38 (resting its decision on the potential injury to basic objectives and principles of the GATT).

193. See discussion *infra* Part III.B.1 (explaining how the Shrimp-Turtle decisions negated arguments that extraterritorial trade measures would destroy the multilateral trading system).

194. See Tuna-Dolphin II, *supra* note 85, para. 5.35 (accepting the Thailand-Cigarettes Panel approach to determining the necessity of a chosen measure).

195. See Trade and Development Act, Pub. L. No. 106-200, § 411, 114 Stat. 251 (2000) (allowing the Customs Service to ban imports made by forced or indentured child labor).

196. See Tuna-Dolphin I, *supra* note 85, para. 5.28 (failing to approve a U.S. measure as necessary for protection of animal life or health because the United

However, there are a number of reasons why the Tuna-Dolphin categorical rule excluding extraterritorial measures should be abandoned. Subsequent WTO practice has relaxed the restriction on coercive extraterritorial measures under Article XX¹⁹⁷ and, applying a balancing approach, permitted the use of unilateral sanctions when guarding human life.¹⁹⁸

1. *Subsequent practice permitting unilateral sanctions under a balancing approach*

Ten years after the first Tuna-Dolphin GATT panel decision, the WTOAB again addressed the “necessity” of a unilateral measure in Asbestos.¹⁹⁹ The WTOAB ratified the reasonable alternative approach from Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes, but added a balancing process.²⁰⁰ The “vitality” of the policy objective and the extent to which an alternative measure “contributes to the realization of the end” factors into this balancing process.²⁰¹ The WTOAB valued the French measure banning asbestos as “important in the highest degree”²⁰² and stated that such a measure to protect human life would be “more easily justified.”²⁰³ As a result, France could employ a prohibition on asbestos rather than an unproven method such as controlled usage.²⁰⁴

In contrast, the Tuna-Dolphin GATT Panels evaluated Article XX(b)’s application to protecting *animal* life and did not relate the

States did not effectively negotiate an international agreement); Tuna-Dolphin II, *supra* note 85, para. 5.39 (failing to approve a U.S. measure as necessary for the protection of animal life or health because the measure forced other countries to change their policies).

197. See discussion *infra* Part III.B.2 (establishing that the WTOAB has approved of coercive extraterritorial measures).

198. See discussion *infra* Part III.B.1 (establishing that the WTOAB has approved of unilateral measures under Article XX(b)).

199. See EU Asbestos, *supra* note 4, para. 170 (realizing that necessity test is applicable and applying test to French import ban on asbestos).

200. See *id.* paras. 171-72 (suggesting that the WTO Panel should evaluate whether less restrictive trade measure will adequately achieve same end as import prohibition); see also Thai Cigarettes, *supra* note 3, para. 75 (requiring that Article XX(b) measures be no more trade-restrictive than necessary).

201. EU Asbestos, *supra* note 4, para. 172; see also WTO Appellate Body Report, Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS169/AB/R, paras. 163, 166 (Jan. 10, 2001), available at <http://docsonline.wto.org> (last visited Feb. 14, 2002) [hereinafter Korea Beef] (utilizing a balancing approach to determine whether a more GATT consistent alternative is reasonably available).

202. EU Asbestos, *supra* note 4, para. 172.

203. *Id.*

204. See *id.* para. 174 (allowing the French ban on asbestos because of scientific doubts regarding efficacy of “controlled usage”).

measure's necessity to the "vitality" of its objective.²⁰⁵ Given the Asbestos outcome, modern WTO Panels using a balancing approach would presumably give more legitimacy to a unilateral measure aimed at eradicating child labor, a threat to *human* health, than a measure aimed at eradicating a threat to *animal* health.²⁰⁶ Correspondingly, the responding WTO Member would be given more latitude to choose a more efficient measure rather than blindly implementing the least trade-restrictive alternative.²⁰⁷

It is worth noting that the WTOAB, in Asbestos, ruled only on the legality of a purely domestic prohibition.²⁰⁸ France did not attempt to coerce other nations into adopting a similar domestic ban on asbestos.²⁰⁹ Nonetheless, one should not infer from the distinction between purely domestic measures and coercive measures that a future WTO Panel would not permit a coercive measure such as the TDA.²¹⁰ The disputing Members in Asbestos simply did not present the issue of extraterritorial health measures under Article XX(b).²¹¹ Thus, the WTOAB in Asbestos neither disapproved nor approved of them.²¹² Furthermore, the Shrimp-Turtle I decision may imply that the Article XX chapeau alone, and not the requirements of Article XX(g) specifically, protects complaining Members from unfairly coercive measures.²¹³ Thus, the same conclusion could be reached for Article XX(b)—that the chapeau alone provides sufficient

205. Compare Tuna-Dolphin I, *supra* note 85, para. 5.28 (disapproving of a measure enacted to protect animal life or health: dolphins), and Tuna-Dolphin II, *supra* note 85, para. 5.39 (same), with EU Asbestos, *supra* note 4, para. 172 (advocating a balancing test between the vitality of a human health objective and the GATT consistency of the measure's design).

206. See Julie H. Paltowitz, A "Greening" of the World Trade Organization? A Case Comment on the Asbestos Report, 26 BROOK. J. INT'L L. 1789, 1826 (2001) (suggesting that the Asbestos case balancing approach has introduced an element of deference to health needs of WTO Members).

207. See *id.* (portraying the "sufficiently effective" standard used by WTOAB in Asbestos as a more pragmatic and realistic interpretation of the "least restrictive alternative" standard that considers relative difficulty of Members in implementing various health measures).

208. See EU Asbestos, *supra* note 4, para. 175 (upholding decree that all asbestos-related products could not enter France).

209. See *id.* (permitting a law that would forbid use of asbestos in the importing country but would not condition entry of foreign asbestos on similar prohibition in exporting country).

210. See *supra* notes 208-09 and accompanying text (discussing French asbestos law).

211. See EU Asbestos, *supra* note 4, para. 175 (ruling on import prohibition that accompanied domestic prohibition).

212. See *id.* (approving only import ban unrelated to laws of exporting Member).

213. See AB Shrimp-Turtle I, *supra* note 96, para. 156 (stating that preventing abuse and misuse of specific Article XX exceptions is purpose of Article XX chapeau); see also discussion *supra* Part III.B.2.

protection.²¹⁴

Under an assumption that the chapeau alone should evaluate coercive measures, it may no longer be necessary for a WTO Panel to intensely scrutinize all of the policy options reasonably available to the United States other than the TDA.²¹⁵ This kind of policy balancing draws the WTO Panel outside its range of expertise.²¹⁶ In the alternative, if the WTO Panel did look into the U.S. policy decision to eradicate child labor, the Panel would likely find that no measure other than the TDA would meet the “sufficiently effective” standard under the Asbestos test.²¹⁷ The United States has already created programs that combat child labor and are more consistent with the GATT.²¹⁸ A wide range of policy analysts and economists agree that among GATT-consistent measures, none shows the promise of total efficacy.²¹⁹ These programs generally fall into four groups: (1) measures granting and revoking trade preferences; (2) measures promoting investment in nations with acceptable child labor records; (3) “social labeling” measures; and (4) multilateral negotiations.²²⁰

In the trade preferences group, the Trade Act of 1974 permits the President to designate developing countries as participants in the Generalized System of Preferences (“GSP”)²²¹ program only if they

214. See *infra* notes 284-88 and accompanying text (asserting that the WTOAB considers the jurisdictional element of Article XX exceptions in its chapeau analysis only).

215. See *supra* notes 208-14 and accompanying text (suggesting that analysis of reasonable and less trade-restrictive alternatives may be obsolete); see also Charnovitz, *Environmental Exceptions*, *supra* note 182, at 49 (questioning logic of WTO Panel weighing GATT consistency of action because both the Panel and GATT actions in question prove inconsistent with different GATT clauses including Article XI and XIII).

216. See *supra* note 182 and accompanying text (citing scholarly criticism of WTO dispute settlement bodies that analyze and question policy choices).

217. See *infra* note 261 and accompanying text (concluding that the severity of the child labor problem justifies unusually drastic measures, such as unilateral embargoes).

218. See Lisa G. Baltazar, *Government Sanctions and Private Initiatives: Striking A New Balance For U.S. Enforcement of Internationally-Recognized Workers' Rights*, 29 COLUM. HUM. RTS. L. REV. 687, 689-93 (1998) (examining a range of U.S. policies attempting to enforce internationally-recognized labor rights, including multilateral mechanisms, conditioned trade assistance programs, and private initiatives).

219. See *id.* at 721-22 (criticizing current U.S. efforts as “disappointing and subject to blatant inconsistencies”); Lance Compa, *Going Multilateral: The Evolution of U.S. Hemispheric Labor Rights Policy Under GSP and NAFTA*, 10 CONN. J. INT'L L. 337, 344-50 (1995) (examining GSP “wins” and “losses” when acting to counter labor violations).

220. See James P. Kelleher, *The Child Labor Deterrence Act: American Unilateralism and the GATT*, 3 MINN. J. GLOBAL TRADE 161, 163-70 (1994) (discussing the four main categories of policies dealing with international labor rights).

221. GSP Renewal Act, Trade and Tariff Act of 1984, Pub. L. No. 98-573, §§ 501-508, 98 Stat. 2948, 3018-24 (codified as amended at 19 U.S.C. §§ 2701-706).

demonstrate a commitment to eliminating the worst forms of child labor.²²² The Caribbean Basin Economic Recovery Act (“CBERA”)²²³ similarly qualifies the access of Caribbean nations to preferential trade status.²²⁴ Like the TDA, the Omnibus Trade and Competitiveness Act of 1988 permits the U.S. Trade Representative to investigate workers’ rights abuses and revoke a nation’s most-favored nation trade status.²²⁵

The GSP and CBERA programs conform more closely to the GATT than an import prohibition because developing countries receive a duty-free tariff rate under those programs.²²⁶ There is little consensus, however, on the efficacy of revoking trade preferences.²²⁷ By definition, a rescission of GSP sets the affected country’s tariff level at the bound GATT rate, the level afforded to all non-GSP Members of the WTO.²²⁸ Because the bound GATT rate is already so low on many products, developing nations that lose GSP status may be hardly affected.²²⁹ GSP revocation sometimes improves child labor

222. See *id.* § 503(b)(6) (directing the President to refuse GSP status to countries “not taking steps to afford internationally recognized worker rights”).

223. 19 U.S.C. § 2703 (2001).

224. See *id.* § 2703(b)(5)(B)(iv) (requiring beneficiary country to implement “its commitments to eliminate the worst forms of child labor”).

225. Trade Act of 1974, Pub. L. No. 93-618, § 121(a)(4), 88 Stat. 1986, amended by Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1101(b)(14), 102 Stat. 1107, 1125 (codified at 19 U.S.C. § 2901(b)(14) (1989) [hereinafter OTCA]. The OTCA may have the same effects as an import prohibition of child labor products but the OTCA is no more consistent with the GATT than the TDA. See GATT, *supra* note 6, arts. I, XI (requiring that Members grant any trade preferences to all other WTO Members and refrain from prohibiting the imports of any Member). The denial of MFN status and the imposition of quantitative restrictions distort trade equally. Compare Trade and Development Act, Pub. L. No. 106-200, § 411, 114 Stat. 251 (2000) (enacting labor rights-related import prohibition), with OTCA, *supra* note 225, § 1101(b)(14) (suspending application of WTO-negotiated bound tariff rates to countries that violate workers’ rights); see also *supra* note 215 and accompanying text.

226. See GSP Renewal Act § 503(b)(8) (denying GSP duty-free tariff status to countries that fail to protect workers’ rights and setting tariff levels at GATT Article II bound rates); 19 U.S.C. § 2703(b)(5)(B)(iv) (mimicking GSP Renewal Act provisions with respect to Caribbean nations). As a Member of the WTO, the United States is obligated to guarantee a negotiated tariff level on all imports and to all WTO Members. See GATT, *supra* note 6, arts. I, II (binding Members to individual schedule of tariff commitments and granting most-favored nation status to all WTO Members).

227. See *supra* notes 230-31 and accompanying text (citing scholarly lack of consensus). See generally HENRY J. FRUNDT, TRADE CONDITIONS AND LABOR RIGHTS: U.S. INITIATIVES, DOMINICAN AND CENTRAL AMERICA RESPONSES 100 (Univ. Press of Florida 1998) (separating effects of GSP revocation programs in Latin America into efforts that facilitated passage of labor legislation and efforts that had little clear effect on labor rights in actual practice).

228. See *supra* note 226 and accompanying text (discussing effect of rescinding GSP status of WTO Member).

229. See *infra* note 231 and accompanying text (noting the inconsistent effectiveness and frequent failures of the GSP program).

conditions,²³⁰ but success is not guaranteed.²³¹ In contrast, an import ban like the TDA prohibits market access to child labor products,²³² rather than simply providing for more expensive access,²³³ and would certainly be more influential.²³⁴ Thus, rescission of trade preferences would be less “sufficiently effective” than the TDA.²³⁵

In the investment protection group, the United States promotes labor law enforcement through initiatives that do not violate GATT provisions.²³⁶ The investment insurance activities of the Overseas Private Investment Corporation (“OPIC”)²³⁷ are limited to countries “taking steps to adopt and implement laws that extend internationally recognized worker rights.”²³⁸ Also, the U.S. Director of the Multilateral Investment Guarantee Agency (“MIGA”)²³⁹ must oppose by law any investment measure proposed by the World Bank if the

230. See Compa, *supra* note 219, at 347-49 (surmising that revocation of GSP status contributed to democratic movements in Chile, Paraguay, and Guatemala and facilitated rise of unions and reform of labor code in Dominican Republic); Benjamin N. Davis, Note and Comment, *The Effects of Workers Rights Protections in United States Trade Laws: A Case Study of El Salvador*, 10 AM. U. INT'L L. REV. 1167, 1213-14 (1995) (concluding that GSP revocation program had positive effect on workers' rights in El Salvador albeit relatively minor effect).

231. See Theresa A. Amato, *Labor Rights Conditionality: United States Trade Legislation and the Int'l Trade Order*, 65 N.Y.U. L. REV. 79, 99-100 (1990) (listing several instances where labor rights violations in certain countries were well-known but USTR took no action under GSP program); Bol, *supra* note 158, at 708-14 (complaining that enforcement of labor rights standards with GSP program is subjective, improperly discretionary, arbitrary, and unfair); Kelleher, *supra* note 220, at 165-66 (showing how supposed contingency of GSP status on improvements in beneficiary country's labor standards is eroded by a variety of procedures conferring discretion upon executive officials); Davis, *supra* note 230, at 1175 (contending that many commentators consider GSP revocation process to be “highly politicized”); Garg, *supra* note 12, at 500-01 (blaming “vague and discretionary” GSP procedures on fact that United States has ignored blatant labor rights violations in developing countries and readily granted exceptions to compliance with GSP labor rights provisions).

232. See Trade and Development Act, Pub. L. No. 106-200, § 411, 114 Stat. 251 (2000) (prohibiting importation of child labor products).

233. See GSP Renewal Act, Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 503(b)(8), 98 Stat. 2948, 3018-24 (codified as amended at 19 U.S.C. §§ 2701-2706) (permitting importation of child labor products but not at duty-free rate).

234. See AB Shrimp-Turtle I, *supra* note 96, para. 171 (remarking that import prohibition is ordinarily “the heaviest weapon in a Member's armoury of trade measures”).

235. See Hudec, *supra* note 51, at 144 (resolving that trade sanctions or threat of sanctions are quite successful in producing change in governmental or private behavior).

236. See discussion *infra* notes 238-40 and accompanying text (describing U.S. measures that conditionally protect foreign investment but do not generally affect the rights of WTO Members); see also GATT, *supra* note 6, art. II (setting tariff rates and allowing only departures downwards).

237. 22 U.S.C. §§ 2191-2200 (1985).

238. See *id.* § 2191a(a)(1) (conditioning country's access to OPIC investment insurance on determination regarding labor record).

239. The Multilateral Investment Guarantee Agency (MIGA) Act, 22 U.S.C. § 290k-2 (1989).

beneficiary developing nation does not adequately enforce labor standards.²⁴⁰ Investment-related measures alone, however, have yet to achieve the avowed goal of the international community—eliminating the worst forms of child labor.²⁴¹ A trade measure like the TDA would complement investment-related efforts.²⁴² OPIC and MIGA alone are not “sufficiently effective” if they require an additional program (e.g., the TDA) to accomplish their objectives.²⁴³

In the “social labeling” group, the U.S. Government and private actors often pursue programs that affix “child-labor free” labels on compliant products.²⁴⁴ Two congressmen proposed the Child Labor Free Consumer Information Act of 1999 to place such labels on imported products.²⁴⁵ Labeling uses market mechanisms to alter consumptive demand for the products of child labor.²⁴⁶ A number of ILO studies question the feasibility and effectiveness of such programs.²⁴⁷ Other commentators cite problems of consumer awareness and enforcement.²⁴⁸ Lastly, it is not clear whether labeling

240. See *id.* § 290k-3(1)(A) (authorizing United States to participate in World Bank program but not to support beneficiary countries with deplorable labor rights records).

241. See discussion *infra* Part III.A.2 (illustrating the continued prevalence of child labor).

242. See *supra* notes 234-235 and accompanying text.

243. See Janelle M. Diller & David A. Levy, Note and Comment, *Child Labor, Trade and Investment: Toward the Harmonization of International Law*, 91 AM. J. INT'L L. 663, 693, 696 (1997) (evaluating full range of U.S. investment measures related to child labor eradication and concluding that it is too early to determine whether such measures will truly discourage extreme forms of child labor).

244. See Garg, *supra* note 12, at 504 (examining positive and negative aspects of programs that label products as “child-labor free” and rely on market mechanisms to discourage trade).

245. See Child Labor Free Consumer Information Act of 1999, S. 1549, 106th Cong. § 101(a)(1) (encouraging use of an “easily identifiable symbol or term indicating that the article or section of wearing apparel or sporting good was not made with child labor”).

246. See *supra* note 244 and accompanying text (discussing the effects of labeling on consumer behavior).

247. See Alakh N. Sharma, et al., *The Impact of Social Labelling on Child Labour in India's Carpet Industry*, ILO/IPEC Working Paper, 78 (2000) (deducing that labeling programs in India have “played a limited role in addressing the problem of child labour” primarily due to divergent standards and poor monitoring), at <http://www.ilo.org/public/english/standards/ipecc/publ/policy/papers/india/india.pdf> (last visited Apr. 12, 2002); Centro de Estudos em Administracao do Terceiro Setor, Dundacao Instituto de Administracao, Universidade de Sao Paulo, *Social Labelling Against Child Labour: Brazilian Experiences*, ILO/IPEC Working Paper, 95-96 (2000) (stressing problem of ineffectual monitoring of social labeling programs in Brazil and suggesting that labeling alone cannot accomplish significant reduction in child labor), at <http://www.ilo.org/public/english/standards/ipecc/publ/policy/papers/brazil/report.pdf> (last visited Apr. 12, 2002).

248. See Garg, *supra* note 12, at 504-05 (arguing that low public awareness of social labeling and widespread mislabeling of products may render social labeling program ineffective).

requirements conform more closely to the GATT.²⁴⁹

In the international negotiations group, the United States has actively sought out intergovernmental and multilateral means to enforce child labor laws.²⁵⁰ In the ILO, the United States has ratified the major child labor conventions²⁵¹ and makes the largest annual contributions to both the ILO General Budget²⁵² and the budget of the International Program to Eliminate Child Labor (“IPEC”).²⁵³ IPEC provides assistance to nations that concede their inadequacy at enforcing child labor laws.²⁵⁴ The results of these cooperative programs remain inconclusive.²⁵⁵ Furthermore, it is widely acknowledged that the ILO enforcement mechanism of “moral suasion” continues to be ineffective.²⁵⁶

Until ILO standards are enforced multilaterally, no alternative to the TDA seems “sufficiently effective” to deny that an import ban on child labor products is “necessary” under Article XX(b).²⁵⁷ Each

249. See WTO Press Release, Trade and Environment Bulletin, WT/PRESS/TE/036 (July 6, 2001) (noting that some Members agree that labeling may be causing market access problems for developing countries, particularly with respect to non-product-related production and processing methods), available at <http://docsonline.wto.org> (last visited Apr. 12, 2002).

250. See *supra* notes 59-71 and accompanying text (recounting how the United States has historically pursued a WTO social clause and supported international child labor treaties and initiatives).

251. See ILO 182 Ratifications, *supra* note 41 (indicating that United States ratified treaty on Dec. 2, 1999).

252. *Programme and Budget Proposals and Other Financial Questions*, Int'l Labour Conf., ILO, 89th Sess., Agenda Item 2, app. VI (2001), at <http://www.ilo.org/public/english/standards/relm/ilc/ilc89/pdf/pr-11.pdf> [hereinafter ILO Budget 2002] (last visited Apr. 12, 2002).

253. *Programme and Budget: Proposals for 2000-01, Infocus Programme on Child Labour: IPEC* (Nov. 1999) [hereinafter *IPEC Budget 2002*], at <http://www.ilo.org/public/english/standards/ipecc/publ/pb99/table6.htm> (last visited Apr. 12, 2002).

254. See *Report I(B) of the Director-General: Stopping Forced Labour, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, Int'l Labour Conf., 89th Sess., at 40 (2001) (illustrating joint European Union/ILO technical cooperation agreement providing for projects to raise awareness of bonded labor, increase capacity of children to withdraw from such work, and rehabilitate child laborers).

255. See *id.* at 40-41 (exhibiting concern that bonded labor has not decreased in magnitude or intensity and has shifted to new industries).

256. See Drusilla K. Brown, *A Transactions Cost Politics Analysis of International Child Labor Standards*, in ALAN V. DEARDORFF & ROBERT M. STERN, *SOCIAL DIMENSIONS OF U.S. TRADE POLICY* 259 (Alan Deardorff & Robert M. Stern eds., 2000) (describing ILO as having “a very small range of tasks and virtually no power of enforcement”); Baltazar, *supra* note 218, at 689-90 (recognizing ILO’s “lack of power to punish labor rights violations” or “enforce compliance” because of its limitation to moral force and embarrassing publicity); Howse, *supra* note 101, at 167 (proposing that ILO authorize trade sanctions but acknowledging that such an approach “would certainly be diametrically opposed to the ILO tradition, which emphasizes diplomacy and consensualism”).

257. See Howse, *supra* note 101, at 161-62 (observing that neither financial inducements nor labeling programs appear superior to trade measures and

policy option has its proponents, but none presents a clear and decisive tool to combat child labor.²⁵⁸ Also, in the Asbestos report, the WTOAB showed its willingness to give more deference to domestic trade policy decision-makers.²⁵⁹ Because preventing child labor is a “vital” public health objective, the means of realizing this end will receive much less scrutiny.²⁶⁰ Thus, a WTO Panel performing a balancing test would allow the imposition of sanctions under the TDA.²⁶¹

2. *Subsequent practice authorizing limited use of unilateral extraterritorial measures*

The recent WTOAB decisions in Shrimp-Turtle suggest that an import prohibition aimed at coercing other nations to enforce their own child labor laws may now be justifiable.²⁶² Before adoption of the DSU and ordinary meaning analysis, the GATT Panels in the Tuna-Dolphin cases ruled that unilateral measures could not be considered “necessary” under Article XX(b).²⁶³ The GATT Panelists reasoned that these measures would unfairly coerce other nations into adopting equivalent domestic policies.²⁶⁴ According to the Tuna-Dolphin GATT Panels, this domination would cause the multilateral trading system to collapse.²⁶⁵

In Shrimp-Turtle I, the earlier WTO Panel decision followed this “slippery slope” rationale and reached the same result as the GATT

concluding that use of unilateral sanctions may be the most useful tool to combat labor violations); Hudec, *supra* note 51, at 128 (“Once negotiation has been tried and failed, trade restrictions will be necessary every time.”).

258. *See supra* notes 230-31, 257 and accompanying text (discussing possible enforcement mechanisms).

259. *See supra* notes 199-206 and accompanying text (discussing effects of Asbestos decision).

260. *Id.*

261. *Cf.* Charnovitz, *Moral Exception*, *supra* note 44, at 740-41 (hypothesizing that an import ban of child labor products justified under “public morals” exception of Article XX(a), and not the “public health” exception of a Article XX(b), would survive the scrutiny of WTO Panel simply because of the gravity of child labor and relevant international commitments). *See generally supra* note 44 and accompanying text (explaining why this Comment supports Charnovitz’s thesis but, alternatively, justifies the TDA under Article XX(b)).

262. *See supra* note 131 and accompanying text (discussing recent approvals of trade-restrictive measures aimed at protecting human health and the environment).

263. Tuna-Dolphin II, *supra* note 85, para. 5.39.

264. *See id.* para. 5.38 (arguing that an interpretation of Article XX(b) which would allow a nation to impose sanctions for the purposes of effecting change in policies that come within the jurisdiction of other countries would hinder the objectives of GATT).

265. *See id.* (noting that GATT objectives would be “seriously impaired” by a unilateral measure).

Tuna-Dolphin Panels.²⁶⁶ The WTOAB in Shrimp-Turtle I, however, strongly criticized the WTO Panel's policy arguments.²⁶⁷ In that case, the United States attempted to utilize Article XX(g) to justify an import prohibition on shrimp caught without an American-issued license.²⁶⁸ The license mandated the use of technology designed to avoid the inadvertent capture of endangered sea turtles.²⁶⁹ The WTOAB broadly approved of unilateral sanctions under Article XX(g) but circumscribed their use depending on the nature of the pursued objective.²⁷⁰

Yet, it is noteworthy that no WTO dispute settlement body construing Article XX(b) has explicitly approved of coercive embargoes, such as the TDA.²⁷¹ In fact, both Tuna-Dolphin GATT Panels in 1991 and 1994 ruled that Article XX(b) did not allow such embargoes.²⁷² Several factors suggest that the Tuna-Dolphin decisions on extraterritorial measures are not fatal to the TDA under the WTO system. The dynamic interpretive approach now emerging greatly diverges from the approach prevalent in the Tuna-Dolphin disputes.²⁷³ The Tuna-Dolphin Panels' reliance on drafting history would severely weaken the decision in the eyes of a modern WTO panelist.²⁷⁴ Most importantly, the GATT contracting parties never adopted the Tuna-Dolphin reports, conferring a secondary status on their precedential value.²⁷⁵

266. See AB Shrimp-Turtle I, *supra* note 96, para. 7.61 (invalidating an extraterritorial measures because it threatened the object and purpose of the multilateral trading system).

267. See *supra* note 96 and accompanying text (citing WTOAB decisions where the Panel failed to follow the essential sequence of steps for analyzing Article XX).

268. See AB Shrimp-Turtle I, *supra* note 96, para. 3 (prohibiting the import of shrimp from countries who have not proven that they pose no threat to endangered turtles, either due to habitat or through modified fishing practices).

269. See *id.* paras. 4-5 (requiring foreign trawlers to adopt sea turtle protective devices that are "comparable in effectiveness" to those in United States.).

270. See *id.* para. 186 (disapproving only of the application of Section 609 because it constituted "arbitrary and unjustifiable discrimination," but not its objective or design).

271. See *id.* para. 133 (explicitly "not passing upon the question of whether there is an implied jurisdictional limitation in Article XX(g) . . . [or] the nature or extent of that limitation"). But see AB Shrimp-Turtle II, *supra* note 133, para. 153 (approving implementation of Shrimp-Turtle I and allowing Members to unilaterally condition market access on "comparably effective" environmental standards).

272. See *supra* note 185 and accompanying text (explaining the Tuna-Dolphin decisions).

273. See *supra* notes 97-108 and accompanying text (discussing the contemporary WTOAB interpretive approach).

274. See *supra* note 98 and accompanying text (explaining the WTO's de-emphasis of GATT drafting history).

275. See *supra* notes 94, 187 and accompanying text (differentiating between adopted and unadopted GATT panel reports, like the unadopted Tuna-Dolphin reports, and conferring somewhat greater precedential weight upon adopted

The Tuna-Dolphin GATT Panels found an extraterritorial measure inappropriate under Article XX(b), but appropriate under other Article XX exceptions, specifically Article XX(e).²⁷⁶ It is undisputed that Article XX(e) permits an import ban on products due to their production method—the labor of prisoners.²⁷⁷ Operating under a Vienna Convention contextual analysis, the Tuna-Dolphin Panels might have reached the exact opposite conclusion evaluating Article XX(b).²⁷⁸ The recognized legitimacy of an Article XX(e) ban demonstrates that Article XX itself permits extraterritorial measures.²⁷⁹ Under that rationale, Article XX(b) could justify a similar ban on imports using production methods harmful to a working child's health.²⁸⁰

Also, the adopted WTO Shrimp-Turtle I report allayed all of the policy fears expressed by the Tuna-Dolphin GATT Panels regarding

reports).

276. See Tuna-Dolphin II, *supra* note 85, para. 5.32 (observing that measures could be taken under different clauses of GATT that affect things or actions located outside the territorial jurisdiction of the contracting party).

277. See Cheyne, *supra* note 182, at 461-62 (arguing that import restrictions of prison labor products enacted pursuant to Article XX(e) are potentially protective and coercive, but nonetheless accepted by GATT).

278. See Howse, *supra* note 101, at 143 (asserting that inclusion of Article XX(e) regarding “the products of prison labour” in GATT infers that GATT contemplated use of unilateral sanctions in pursuit social objectives under Article XX).

279. See *supra* note 277 and accompanying text (establishing that Article XX(e) permits a unilateral import prohibition of prison labor-made goods).

280. See Charnovitz, *Moral Exception*, *supra* note 44, at 744 (expressing view that Article XX(a) could justify outwardly-directed measures undertaken for “moral” reasons, because moral and economic issues will be increasingly difficult to separate in an interdependent global economy). The debate among scholars continues to rage over whether Members can discriminate between products based on their production method, rather than solely by their physical and other commercial characteristics (the so-called “product-process” distinction). See generally Brandon L. Bowen, *The World Trade Organization and its Interpretation of the Article XX Exceptions to the General Agreement on Tariffs and Trade, in Light of Recent Developments*, 29 GA. J. INT'L & COMP. L. 181, 188-89 (2000) (arguing that the product-process distinction explicitly violates wording of GATT because Article XX provides several exceptions that countries may undertake without violating the GATT); Frank J. Garcia, *The Global Market and Human Rights: Trading Away the Human Rights Principle*, 25 BROOK. J. INT'L L. 51 n.158 (1999) (concluding that product-process distinction would effectively doom efforts to address human rights violations arising out of production processes). Many commentators agree that the Shrimp-Turtle decision in particular severely weakens the product-process distinction. See John A. Barrett, *The Global Environment and Free Trade: A Vexing Problem and a Taxing Solution*, 76 IND. L.J. 829, 870 (2001) (arguing that Shrimp-Turtle permits discrimination between products based on differences in production method, at least within Article XX(g)); John H. Jackson, *The Limits of International Trade: Workers' Protection, the Environment and Other Human Rights*, 94 AM. SOC'Y INT'L L. PROC. 222, 224 (2000) (suggesting that “the product-process distinction will probably not survive and perhaps should not survive”). Also refer to Robert E. Hudec, *The Product-Process Doctrine in GATT/WTO Jurisprudence*, in NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: ESSAYS IN HONOUR OF JOHN H. JACKSON 187 (Marco Bronckers & Reinhard Quick eds., 2000), for a good discussion of the ongoing debate.

the resilience of the multilateral trading system.²⁸¹ Although examining Article XX(g) and not Article XX(b), the WTOAB in Shrimp-Turtle I found that a stringent Article XX chapeau analysis would protect Members from coercive measures.²⁸² The Panels in Shrimp-Turtle I, and in both Tuna-Dolphin disputes, worried that the contested measures would abuse the rights of the complaining parties.²⁸³ By comparison, the WTOAB in Shrimp-Turtle I suggested that “conditioning access to a Member’s domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may . . . be a common aspect of measures falling [under] . . . exceptions (a) to (j) of Article XX.”²⁸⁴

The Tuna-Dolphin GATT Panels blurred the line between a non-discrimination analysis under the Article XX chapeau and a necessity analysis under Article XX(b).²⁸⁵ The WTOAB in Shrimp-Turtle I performed these analyses separately.²⁸⁶ This separation may indicate that WTO Panels will review the jurisdictional element of import prohibitions under the Article XX chapeau prong, not specific Article XX exceptions. In addition, the WTOAB in Asbestos showed some willingness to allow unilateral sanctions under Article XX(b), even though the French ban had no similarly coercive purpose.²⁸⁷ Considering Shrimp-Turtle I, a logical WTO Panel might extend the ruling in Asbestos to include import bans enacted to deter child labor as long as the measure conforms to the Article XX chapeau.²⁸⁸

Applying the current “necessity” test, the TDA would probably survive the scrutiny of a WTO Panel. Child labor is a “vital” health

281. See AB Shrimp-Turtle I, *supra* note 96, para. 156 (focusing on the object and purpose of Article XX).

282. See *id.* (implying that a stringent Article XX chapeau analysis protects complaining Members from coercive extraterritorial measures by preventing abuse of another Member’s “right to invoke an exception” and thus avoids “devalu[ing] the treaty rights of the other Members”).

283. See *supra* notes 192, 266 and accompanying text (explaining that any countries without equal regulatory regimes would be unprotected).

284. AB Shrimp-Turtle I, *supra* note 96, para. 121.

285. See Tuna-Dolphin I, *supra* note 85, para. 5.27 (relying on perceived threat to multilateral trading system rather than looking at measure’s application); Tuna-Dolphin II, *supra* note 85, para. 5.38 (claiming potential injury to basic objectives of GATT and disregarding measure’s application).

286. See AB Shrimp-Turtle I, *supra* note 96, paras. 125-45, 146-86 (granting provisional justification to Section 609 under Article XX(g), but finding that the United States discriminatorily applied the measure).

287. See *supra* notes 208-12 and accompanying text (noting the non-coercive nature of the French measure but contending that future WTO panels might even permit coercive measures).

288. See *supra* note 280 and accompanying text (concluding that a measure deterring child labor might pass the Article XX(b) prong).

risk and, under a balancing approach, domestic policymakers should be given wide deference to combat it.²⁸⁹ No reasonably available alternatives to unilateral sanctions appear to be “sufficiently effective.”²⁹⁰ Allowing unilateral sanctions based on impermissible production methods, such as child labor, will not destroy the multilateral trading system.²⁹¹ The drafting history of Article XX(b) plays a supplementary role and does not exclude the use of unilateral and extraterritorial sanctions.²⁹² Furthermore, the WTO Preamble objective of raising standards of living permits the pursuit of properly delimited social objectives.²⁹³ Thus, the design of the TDA should achieve provisional justification as a valid Article XX(b) exception.

IV. STEP TWO: THE TRADE AND DEVELOPMENT ACT COMPLIES WITH THE CHAPEAU OF ARTICLE XX

When properly applied and enforced, the TDA would adequately comply with the Article XX chapeau. To do so, measures must not discriminate arbitrarily or unjustifiably or act as disguised restrictions on trade.²⁹⁴ WTO Panels locate an “equilibrium line” between a Member’s right to invoke an Article XX exception and another Member’s substantive GATT rights.²⁹⁵

The two WTO Shrimp-Turtle decisions form the framework for compliance with the Article XX chapeau.²⁹⁶ Responding to a claim by Malaysia, the WTOAB in Shrimp-Turtle I explicitly applied the chapeau test to a U.S. extraterritorial and coercive trade measure, Section 609.²⁹⁷ The chapeau contemplates three potential violations:

289. See discussion *supra* Part III.A (noting that researchers, policymakers, and the international community acknowledge existence of health risk and suggesting integration of the WTO preamble’s goal of “raising standards of living”).

290. See *supra* notes 257, 261 and accompanying text (suggesting that the inefficiency of financial inducements and labeling programs may render unilateral sanctions the most effective tool available).

291. See *supra* notes 280-81 and accompanying text (asserting that unilateral sanctions may survive Article XX(b) scrutiny and that the multilateral trading system is resilient enough to withstand them).

292. See *supra* note 274 and accompanying text (contending that larger role of GATT drafting history would conflict with views of modern WTO Panelists).

293. See discussion *supra* Part III.A.3 (suggesting that “raising standards of living” should be incorporated into interpretation of Article XX).

294. See *supra* note 127 and accompanying text (listing three ways in which a measure may not be applied).

295. See AB Shrimp-Turtle I, *supra* note 96, para. 159 (preventing competing Member rights from canceling each other out or distorting and nullifying the delicate balance of rights and obligations).

296. See *id.* para. 156 (proscribing a balancing of Members’ rights and obligations); see also AB Shrimp-Turtle II, *supra* note 133, para. 153 (clarifying first Shrimp-Turtle standards and emphasizing efforts at international negotiation and due process in application of trade-restrictive measures).

297. AB Shrimp-Turtle I, *supra* note 96, para. 160 (interpreting chapeau standards

unjustifiable discrimination, arbitrary discrimination, and disguised restriction on trade.²⁹⁸ The WTOAB examined the measure's application, not its design, and found that the United States did not satisfy the Article XX chapeau.²⁹⁹

Following the Shrimp-Turtle I decision, the United States reformed its application of Section 609.³⁰⁰ In response, Malaysia filed another WTO claim against the United States, arguing that the United States had not effectively implemented the Shrimp-Turtle I recommendations and ruling.³⁰¹ Evaluating the implementation, both the WTO Panel and WTOAB concurred that the Section 609 revised application overcame and remedied its previous flaws.³⁰²

In both instances, the WTOAB's analysis focused on three features of the application of Section 609 by the United States: the degree of flexibility in standard-setting, the extent of cooperative negotiations, and the level of procedural protection given to applicants.³⁰³ Applying the Shrimp-Turtle decisions to TDA, the TDA and Section 307 will be found to comply with the Article XX chapeau because the United States allows for flexibility in compliance standards, constructively engaged Pakistan in negotiations, and ensures basic procedural fairness.³⁰⁴ To further improve its likelihood of passing the chapeau test, the United States should allow Pakistan some time to comply with the TDA while continuing to finance Pakistani enforcement efforts.

A. Standards Used by the Customs Service are Sufficiently Flexible

The TDA avoids the inflexibility problems that plagued the U.S. law in Shrimp-Turtle.³⁰⁵ In that case, the original 1996 Guidelines

as both procedural and substantive requirements for proper use and application of an Article XX exception).

298. *Id.* para. 150.

299. *See id.* para. 186 (legitimizing import prohibition serving environmental purpose and implying that United States could employ Section 609 if applied properly); *see also supra* note 105 and accompanying text (distinguishing between analysis of a measure's design and its application).

300. *See* AB Shrimp-Turtle II, *supra* note 133, paras. 4-8 (setting out provisions of the U.S. Revised Guidelines, which allow nations to avoid import prohibitions if they are properly certified by the United States).

301. *Id.* para. 1.

302. *See id.* para. 153 (approving Revised Guidelines as long as good faith efforts to reach a multilateral agreement continue and other conditions remain satisfied).

303. *See id.* paras. 134, 148 (rejecting Malaysian contentions that the United States must conclude a multilateral agreement and permit even more flexibility in its Revised Guidelines); AB Shrimp-Turtle I, *supra* note 96, paras. 173, 178, 182 (objecting to U.S. application of Section 609 based on problems with phase-in period, flexible approach to certification, and due process).

304. *See* discussion *infra* Part IV.A-C.

305. *See supra* note 303 and accompanying text (discussing the WTOAB's analysis

and State Department administrators conditioned the granting of import licenses on an applicant's adoption of turtle-safe fishing methods "essentially the same" as U.S. methods.³⁰⁶ The WTOAB in Shrimp-Turtle I found unjustifiable discrimination because the United States provided little flexibility to applicant nations.³⁰⁷ The design of Section 609 did not discriminate on its face,³⁰⁸ but the 1996 Guidelines left no room for gauging the varying conditions in other countries.³⁰⁹

After Shrimp-Turtle I, the United States issued a set of revised Section 609 guidelines on certification.³¹⁰ These guidelines allowed harvesting nations to show a regulatory program "comparable in effectiveness."³¹¹ According to Malaysia, the Revised Section 609 guidelines still failed to account for regional fishing methods.³¹² The WTOAB in the new Shrimp-Turtle case distinguished between conditioning market access on adoption of "essentially the same" policies rather than programs "comparable in effectiveness."³¹³ The latter standard gave applicants "sufficient latitude" to choose an equally efficacious measure that accounts for specific country conditions.³¹⁴ The WTOAB found that the "comparably effective" standard did not discriminate unjustifiably.³¹⁵

Examining the TDA's flexibility, a WTO Panel would scrutinize the standards used by the U.S. Customs Service ("Customs") to decide which child labor imports to prohibit.³¹⁶ Customs bases its findings of

in Shrimp-Turtle regarding the United States' application of Section 609).

306. See AB Shrimp-Turtle I, *supra* note 96, paras. 162-63 (focusing on State Department administrators who, in practice, did not perform rigorous investigations of fishing methods and local conditions of applicant countries and rarely granted licenses).

307. See *id.* para. 165 (mandating that Members consider "appropriateness of the regulatory program for the conditions prevailing in those exporting countries").

308. See *id.* para. 162 (remarking that 1996 Guidelines required administrators to account for "measures the harvesting nation undertakes to protect sea turtles," but that administrators frequently only looked at whether applicant countries used the exact same technology as United States).

309. See *supra* note 307 and accompanying text (remarking that the United States took no account of conditions in countries applying for Section 609 licenses).

310. See *supra* note 300 and accompanying text (detailing U.S. Revised Guidelines).

311. See AB Shrimp-Turtle II, *supra* note 133, para. 144 (authorizing importing Member to condition market access on passage of comparably effective regulatory schemes by exporting Members and finding that exporting Members receive "sufficient latitude").

312. See *id.* para. 145 (characterizing oversight by United States as "unjustifiable or arbitrary discrimination").

313. *Id.* para. 144.

314. *Id.*

315. See *id.* para. 148 (confirming that the Revised Guidelines gave Malaysia the opportunity to conform as a result of the increased degree of flexibility).

316. See U.S. CUSTOMS SERV., U.S. DEP'T OF THE TREASURY, FORCED CHILD LABOR

forced or indentured child labor on a range of indicators—serious “red flags” and less conclusive “yellow flags.”³¹⁷ Some “red flags” include employment to discharge a debt, employer penalties that increase indebtedness, and the presence of very young children.³¹⁸ These indicators strongly resemble those used by the ILO and by Pakistan’s own Bonded Labour System (Abolition) Act of 1992 (“BLSAA”).³¹⁹

The persistence of child labor indicators in Pakistan stems from inadequate enforcement.³²⁰ By utilizing the TDA, the United States would not require that Pakistan adopt “essentially the same” child labor laws or enforcement regimes as the United States.³²¹ Rather, Customs prohibits entry of child labor products based on objective measurements and not on the design of the applicant nation’s child labor program.³²² In fact, Pakistan’s BLSAA could become an acceptable solution if comparable in effectiveness to U.S. programs.³²³

ADVISORY 5-8 (2000) [hereinafter CUSTOMS CHILD LABOR MANUAL] (ordering Customs officials to seek documentary evidence regarding “red flag” indicators or less serious “yellow flag” indicators of forced child labor being used in production of U.S. imports).

317. See *id.* at 6-8 (explaining that “red flags” show strong indication of basis for Customs enforcement action while “yellow flags” signal need to investigate further).

318. *Id.* at 6-7.

319. See Bonded Labour System (Abolition) Act of 1992 (defining “bonded labourer” as a “labourer who incurs, or has or is presumed to have incurred, a bonded debt. . .”) [hereinafter BLSAA], reprinted in All Pakistan Federation of Labour, *Bonded Brick Kiln Workers—1989 Supreme Court Judgment and After*, at <http://www.icftu.org> (last visited Feb. 14, 2002). This law frees Pakistani brick kiln workers from (i) the staggering burden of advances, and (ii) deductions made from their wages every week on account of these advances. *Id.*

320. See U.S. Dep’t of State, Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices: Pakistan* (2001) (confirming that handmade bricks are likely produced with forced or indentured child labor and that provincial governments responsible for enforcing BLSAA have failed), available at <http://www.state.gov/g/drl/rls/hrrpt/2000/sa/index.cfm> (last visited Feb. 14, 2002); see also International Confederation of Free Trade Unions, *Report for the WTO General Council Review of Trade Policies of Pakistan* (2002) [hereinafter *ICFTU Pakistan Report*] (citing a national policy and action plan produced by Pakistani Government but remarking that enforcement remains minimal), available at <http://www.icftu.org/list.asp?Language=EN&Order=Date&Type=WTOReports&Subject=ILS> (last visited Feb. 14, 2002).

321. See CUSTOMS CHILD LABOR MANUAL, *supra* note 316, at 6-7 (failing to mention adequacy of enforcement mechanisms, but simply referring to observable indicators).

322. See *id.* (discussing objective measures which include slave labor conditions, evidence of physical or sexual abuse of child workers at the workplace, and employment of very young children).

323. See *supra* note 321 and accompanying text (noting that Customs merely requires that countries do not exhibit indicators of child labor, not that they adopt specific policies); see also *AB Shrimp-Turtle II*, *supra* note 133, para. 147 (stating that Revised Guidelines permit State Department to certify nations that use fishing methods that do “not pose a threat of the incidental taking of sea turtles”). By comparison, if Pakistani child labor enforcement methods do not pose a threat to

Pakistan has already set up “vigilance committees” to implement the BLSAA’s strict penalties.³²⁴ But, thus far, the BLSAA remains largely unimplemented and the vigilance committees are plagued by corruption and a lack of political will.³²⁵ Therefore, the Pakistani programs have been largely ineffective.³²⁶ Because Customs requires only an initiative comparable in effectiveness, the TDA lacks the faults of Section 609 in the Shrimp-Turtle case.³²⁷

Also, Customs policy provides additional flexibility. The TDA is not a licensing program; rather, it determines forced child labor violations on a case-by-case basis.³²⁸ In Shrimp-Turtle I, Malaysia argued convincingly that Section 609 improperly prohibited turtle-safe shrimp solely because trawlers caught them in the waters of unlicensed countries.³²⁹ With the TDA, only Pakistani brick-makers employing children will be denied market access rather than all Pakistani brick-makers, some who may have legitimate labor practices.³³⁰ Because Customs uses “comparable effectiveness” criteria and reviews cases individually, the TDA is not unjustifiably discriminatory.³³¹

*B. The United States Has Made a Good Faith Effort
to Negotiate with Pakistan*

The United States can legitimately state that it engaged its trading partners in negotiations on child labor because it has signed two major multilateral treaties on the subject.³³² In contrast, the United

the health and welfare of children, the Customs Service regulations would permit the import of the products of such labor. *See id.* (according due weight to national programs of shrimp importers).

324. BLSAA, *supra* note 319, foreword, para 2.

325. *See id.* (remarking that many vigilance committees have still yet to form, while others have yet to find a single instance of bonded child labor despite prevalent anecdotal evidence).

326. *See id.* (summarizing that rules and laws of land have been disregarded because of prevalent corruption and bad governance); *ICFTU Pakistan Report*, *supra* note 320 (estimating that Pakistani courts have turned away over 2000 cases brought by bonded laborers).

327. *See* CUSTOMS CHILD LABOR MANUAL, *supra* note 316, at 6-7 (not prescribing mandatory program for enforcing child labor laws).

328. *See id.* at 6 (warning importers that particular “red flags” indicate high risk that their products will be prohibited from entering the United States).

329. *See supra* notes 308-10 and accompanying text (summarizing decision in original Shrimp-Turtle I decision).

330. *See supra* note 328 and accompanying text (noting that labor practices that are “red flagged” will prevent the improperly-produced goods from being imported into the United States).

331. *See supra* notes 327, 328 and accompanying text (highlighting why Section 609 failed and why the TDA will receive WTOAB approval).

332. *See* ILO 182 Ratifications, *supra* note 41 (ratified by United States on Feb. 12, 1999 and by Pakistan on Nov. 10, 2001); UN Child Convention Ratifications, *supra*

States in Shrimp-Turtle I consummated an Inter-American Convention with only one group of importers.³³³ The Convention stipulated the comparable fishing methods that complied with Section 609.³³⁴ After completing this agreement, the United States began enforcing the shrimp ban worldwide and transferring technology to its new partners.³³⁵ The United States did not seek an agreement with the complaining Members, however, and provided them much less time to phase in the necessary technology.³³⁶ The WTOAB ruled that Members should seriously engage all relevant parties in bilateral or multilateral negotiations before enforcing an import ban.³³⁷ Members should also make other efforts to facilitate compliance, such as technology transfer.³³⁸

After Shrimp-Turtle I, the State Department held a number of conferences to fashion an agreement among Asian nations on turtle-safe fishing methods.³³⁹ Malaysia claimed that the United States must produce an agreement, not merely engage in negotiations.³⁴⁰ The WTO Panel and WTOAB in the second Shrimp-Turtle decision disagreed and found that a Member should be “judged on its active participation and its financial support to the negotiations.”³⁴¹ The U.S. efforts at negotiations complied with this determination.³⁴²

When looking at the TDA and the adequacy of U.S. negotiations, a WTO Panel would assess the participation of the U.S. and Pakistan in

note 41 (ratified by United States on Feb. 16, 1995 and by Pakistan on Nov. 12, 1990).

333. See AB Shrimp-Turtle I, *supra* note 96, para. 169 (providing that each party take “appropriate and necessary measures” for protection of sea turtles, thus marking out a formal equilibrium line between environmental and trade objectives).

334. See *id.* para. 170-71 (demonstrating that the United States could have negotiated a similarly consensual and multilateral agreement to establish sea turtle conservation procedures).

335. See *id.* para. 175 (chastising the United States for providing different levels of effort in transferring turtle-safe technology to specific countries).

336. See *id.* para. 173 (giving Caribbean and Western Atlantic nations three years to comply with compulsory turtle-excluder device requirement while giving all other countries exporting shrimp, including India, Malaysia, Pakistan and Thailand, only four months).

337. See *id.* para. 172 (noting that the unilateral element of Section 609’s application “heightens [its] disruptive and discriminatory” nature).

338. See *id.* para. 175 (explaining that less transfer of technology prejudices Members’ attempts at certification).

339. See AB Shrimp-Turtle II, *supra* note 133, para. 131 (noting that the United States proposed a regional sea turtle convention to South-East Asian nations, led a symposium in Malaysia, attended a conference in Australia, and conducted an initial round of negotiations on an Asian regional agreement).

340. See *id.* para. 116 (illustrating the Malaysian position that serious, good faith efforts at negotiations are insufficient).

341. *Id.* para. 132.

342. *Id.* para. 134.

the ILO.³⁴³ The ILO's International Program on the Elimination of Child Labor ("IPEC") conducted an intensive project to eradicate Pakistani child labor between 1995 and 1997.³⁴⁴ The U.S. Department of Labor provided critical funding for the project.³⁴⁵ Additionally, the United States remains the largest donor to the ILO general budget, and to the IPEC budget in particular.³⁴⁶ Despite U.S. and international support, Pakistan continually fails to enforce its child labor laws.³⁴⁷

The United States and Pakistan agreed to design, implement, and enforce measures to eliminate the worst forms of child labor by signing ILO 182 and the UN Convention.³⁴⁸ The existence of these labor agreements is in direct contrast with Shrimp-Turtle I, where the United States failed to negotiate or reach a joint determination with Malaysia regarding turtle-safe fishing methods.³⁴⁹ In this example, Pakistan and the United States have jointly determined that child bondage and compulsory child labor are not permissible.³⁵⁰

Nonetheless, the application of the TDA to Pakistan may still discriminate unjustifiably. The United States must notify Pakistan of its intention to strictly enforce the TDA while continuing to support IPEC programs in Pakistan.³⁵¹ In Shrimp-Turtle I, the United States

343. See *id.* para. 122 (concluding that the United States must "provide all countries similar opportunities to negotiate an international agreement," stopping short of producing an agreement).

344. See CEACR: Individual Observation concerning Convention No. 29, Forced Labour, 1930 Pakistan (ratification: 1957), International Labour Conference, 88th Sess. (2000) (expressing dissatisfaction with Pakistani government because it provided no information on progress and results of IPEC program or ILO project to eliminate exploitative and hazardous child labor practices), available at <http://www.ilo.org/ilc> (last visited Feb. 14, 2002).

345. See U.S. Dep't of Labor, Bureau of Int'l Labor Affairs, International Child Labor Projects (donating over \$112.1 million to IPEC between 1995 and 2001, with steady increase), available at <http://www.dol.gov/dol/ilab/public/programs/iclp/projects.htm> (last visited Apr. 13, 2002).

346. See *supra* notes 252-53 and accompanying text (demonstrating that the United States is the largest donor to both the ILO and the IPEC).

347. See *supra* notes 320, 325-26 and accompanying text (noting the ineffectiveness of Pakistan's implementation of its child labor laws).

348. See ILO 182, *supra* note 13, art. 3(a), 3(d) (committing signatories to prohibit and eliminate child slave labor, child debt bondage, and work harmful to the health and safety of children); UN Child Convention, *supra* note 13, art. 32(1) (requiring parties to the Convention to protect children from work that is likely to harm a child's health or physical, mental, spiritual, moral or social development); see also *supra* note 332 and accompanying text (indicating the date of ratification to both multilateral treaties by the United States and Pakistan).

349. See *supra* notes 334-39 and accompanying text (discussing the United States' failure to engage in negotiations with the complaining Members in Shrimp-Turtle I).

350. See ILO 182, *supra* note 13, art. 3(a) (prohibiting child debt bondage by parties to the agreement).

351. See AB Shrimp-Turtle II, *supra* note 133, para. 132 (praising the United States' efforts to provide financial support).

did not grant Malaysia a phase-in period or technical support before banning its imports.³⁵² With the TDA, the United States must provide Pakistan a fair warning and a fair opportunity to comply with the law. If this is done, a WTO Panel will likely find that the United States satisfies the negotiations requirement of the Article XX chapeau.³⁵³

C. Customs Service Determinations are Transparent and Afford Due Process

The TDA would also likely meet the final requirement under the chapeau—the provision of basic procedural protections.³⁵⁴ The United States in Shrimp-Turtle I rejected licenses without providing Malaysia a forum to be heard, notification of review, a detailed explanation, or an opportunity to appeal.³⁵⁵ In contrast, the nations certified by the United States received these protections.³⁵⁶ The WTOAB found that, because the American procedures lacked transparency and due process, the application of Section 609 could be characterized as arbitrary discrimination.³⁵⁷

In complying with Shrimp-Turtle I, the U.S. Section 609 Revised Guidelines more explicitly instructed the Department of State to consider the different conditions existing in the applicant country.³⁵⁸ Also, the United States agreed to provide notice of steps needed for certification and the opportunity to submit additional information.³⁵⁹ The WTOAB eventually approved of the due process revisions by the United States.³⁶⁰

352. See *supra* notes 334-45 and accompanying text (addressing the major errors by the United States in Shrimp-Turtle I).

353. See *supra* note 307 and accompanying text (identifying the three features laid out by the WTOAB in its analysis of section 609 in Shrimp-Turtle, the second being the extent of cooperative negotiations).

354. See, e.g., AB Shrimp-Turtle II, *supra* note 133, para. 147 (commenting on the United States' revised approach to Section 609 certification that gives applicant nations specific and timely notification and opportunity to submit additional information for consideration).

355. See AB Shrimp-Turtle I, *supra* note 96, para. 180 (describing the procedure as lacking a transparent, predictable certification process that is followed by competent United States government officials).

356. See *id.* para. 181 (asserting that Members who apply but fail to get certified are denied basic fairness and due process, and are discriminated against while successful applicant Members are treated more fairly).

357. See *id.* paras. 182-84 (finding that the lack of transparency and the failure to provide adequate due process makes the application of Section 609 both unjustifiably and arbitrarily discriminatory).

358. See AB Shrimp-Turtle II, *supra* note 133, para. 147 (including provisions in the Revised Guidelines for reception of evidence regarding comparably effective turtle-safe fishing methods as well as any other measures the applicant country takes to protect sea turtles, including protection of nesting beaches and other programs).

359. See *id.* (indicating that an applicant country that "does not appear to qualify" will receive feedback addressing its shortcomings and will be provided with suggestive steps to help the country become certified).

360. See *id.* para. 153 (holding that the Revised Guidelines are in compliance and

When applying the TDA, the Commissioner of Customs may initiate a Section 307 investigation when an officer reasonably believes that a class of merchandise should be prohibited.³⁶¹ After considering comments from foreign officials,³⁶² Customs provides adequate notice of its decision and an opportunity for review.³⁶³ The lack of such procedures proved fatal to Section 609 in Shrimp-Turtle.³⁶⁴ Because Customs affords ample due process, the TDA will be justifiable under the Article XX chapeau.³⁶⁵

Comparing the application of the TDA with Section 609 in Shrimp-Turtle, the Customs Service's method of enforcing the TDA, on its face, lacks the deficiencies that beset Section 609.³⁶⁶ Customs uses a flexible standard by basing its "red flag" indicators on international norms and allowing comparably effective approaches to eliminating child labor.³⁶⁷ The United States has consummated a child labor treaty with Pakistan while funding efforts to improve Pakistani enforcement.³⁶⁸ Lastly, Customs regulations provide fair procedures for WTO Members.³⁶⁹

Of course, the United States has yet to take any action under the TDA against Pakistan.³⁷⁰ It is, therefore, impossible to firmly conclude that the United States would satisfy the chapeau in all situations. The Customs Service might ignore its own regulations or, in some way, divest them of their facial conformity.³⁷¹ For instance,

justified under Article XX).

361. See Findings of Commissioner of Customs, 19 C.F.R. § 12.42(e) (2001) (granting the Commissioner authority to determine whether there is enough information that reasonably, but not conclusively, indicates that merchandise violates Section 307).

362. See *id.* § 12.42(d) (instructing Commissioner to consider "any representations offered by foreign interests, importers, domestic producers, or other interested persons").

363. See *id.* § 12.42(f), (g) (directing the Commissioner to publish his or her finding in a weekly issue of the Customs Bulletin and the Federal Register, and providing importers an opportunity to present rebuttal evidence).

364. See *supra* notes 359-62 and accompanying text (outlining Customs procedures for identifying and prohibiting child labor products).

365. See AB Shrimp-Turtle I, *supra* note 96, para. 182 (requiring fundamental due process, including notice, adequate explanation, and an opportunity to be heard).

366. See *supra* notes 303-04 and accompanying text (highlighting the WTOAB's reasoning for invalidating Section 609 in Shrimp-Turtle).

367. See *supra* notes 316-18 and accompanying text (discussing the the Customs standard).

368. See *supra* note 348 and accompanying text (addressing the negotiations between Pakistan and the United States).

369. See *supra* notes 355-48 and accompanying text (discussing the presence of adequate due process).

370. See Customs Detention Orders, *supra* note 28 (failing to mention Pakistan as a target of TDA action).

371. See AB Shrimp-Turtle I, *supra* note 96, para. 161 (striking down Section 609 because State Department administrators did not adhere to their own enumerated

Customs could interpret its “red flag” indicators in an extreme or prejudicial fashion.³⁷² In the alternative, the Customs Service may overzealously target a certain nation for unrelated political reasons.³⁷³ Assuming good faith by Customs, the application of the TDA to Pakistan, as a theoretical example, will likely adhere to the chapeau of Article XX.³⁷⁴ By giving additional financing and a reasonable phase-in period,³⁷⁵ the United States can apply the TDA with assurance that a WTO Panel would ratify its decision.

CONCLUSION AND RECOMMENDATIONS

Few nations would disagree that the labor undertaken by Seema and other children in Pakistan must cease immediately.³⁷⁶ The fact is, however, that Pakistan and other Members lack the political will to enforce their own child labor laws.³⁷⁷ This offers little relief to Seema and her peers. The U.S. Trade and Development Act of 2000 likely represents an efficient option to encourage enforcement.³⁷⁸ By necessity, however, the United States must depart from its WTO commitments to Pakistan or any other Member.³⁷⁹ This departure is contemplated by GATT Article XX(b), which allows for derogation from commitments when nations are acting to protect human life or health.³⁸⁰

guidelines).

372. See generally Kelleher, *supra* note 220, at 165-66 (showing that informal GSP status hearing procedures can be broadly interpreted and, as a result, can confer inordinate discretion upon executive officials).

373. See Davis, *supra* note 230, at 1175 (asserting that GSP revocation process can be “highly politicized”).

374. See discussion *supra* Part IV.A-C (noting that the application of the TDA to Pakistan will likely comply with the Article XX chapeau because the Customs Service standards are flexible, the United States has made a good faith effort to negotiate with Pakistan, and Customs Service determinations are fair and afford due process).

375. *Supra* notes 335-39 and accompanying text.

376. See *supra* notes 20-26 and accompanying text (describing the harsh labor practices in Pakistan through the story of nine-year old Seema).

377. See *ICFTU Pakistan Report*, *supra* note 320 (remarking that enforcement of child labor laws in Pakistan remains ineffective due to an insufficient number of inspectors, minimal training, and vast corruption).

378. See *supra* notes 292-96 and accompanying text (noting that the TDA will probably be upheld by the WTO because child labor is a “vital” health risk, there do not seem to be any reasonable alternatives to sanctions that would be “sufficiently effective,” and allowing such sanctions will not destroy the “multilateral trading system”).

379. See *supra* notes 78-80 and accompanying text (asserting that the import ban proposed by the TDA could trigger a violation of GATT articles I, XI, and XII).

380. See *supra* notes 81-82 and accompanying text (outlining the object and purpose of Article XX).

Interpreting Article XX(b), the WTOAB first looks to the disputed measure's health-related objective and then to its design.³⁸¹ The measure must be necessary to effect its policy objective.³⁸² To combat child labor, a majority of the countries in the international community adopted the standards established by the ILO and the United Nations.³⁸³ Such consensus gives domestic policymakers more leeway in deciding how to remedy the health menace of child labor.³⁸⁴ A unilateral import prohibition should be among the available policymaking tools.³⁸⁵

To deter developed countries from coercing compliance, the Article XX chapeau tests the application of measures for discrimination and protectionism.³⁸⁶ Before enforcing a trade restrictive measure, a Member must attempt to negotiate an agreement and properly ensure due process in enforcement.³⁸⁷ In the U.S.-Pakistan hypothetical, both nations have committed by treaty to eliminate the worst forms of child labor.³⁸⁸ The TDA would provide all Members with compliance guidelines, notice of potential enforcement, and opportunity to comment.³⁸⁹

Nonetheless, application of the TDA conforms to the Article XX chapeau only in certain factual settings. A hypothetical TDA enforcement against Pakistan is but one example.³⁹⁰ Other WTO Members have yet to ratify the ILO conventions on child labor.³⁹¹

381. See generally discussion *supra* Part III.

382. See discussion *supra* Part III.B (arguing that the import prohibition allowed by the TDA is necessary to accomplish the end of eradicating child labor).

383. See *supra* note 41 and accompanying text (remarking that 113 countries ratified ILO 182 and 192 countries ratified the UN Child Convention).

384. See *supra* note 206 (arguing that the Asbestos balancing approach gives more deference to policymakers regarding measures that protect human health).

385. See Howse, *supra* note 101, at 161-62 (maintaining that the use of unilateral sanctions is a useful policy tool). But see Iftikhar Ahmed, *Getting Rid of Child Labour*, ILO/IPEC Working Paper, 32, at <http://www.ilo.org/public/english/standards/ipecc/simpoc/index.htm> (2000) (condemning use of sanctions to coerce action on child labor as "hasty, ad hoc, often negative") (last visited Feb. 14, 2002).

386. See *supra* note 282 and accompanying text (concluding that the Article XX chapeau protects Members against discriminatorily applied measures, particularly coercive and extraterritorial measures).

387. See *supra* notes 343, 357 and accompanying text (discussing the good faith negotiations requirement first articulated in the Shrimp-Turtle case).

388. See *supra* note 332 and accompanying text (providing the dates that both the United States and Pakistan signed the ILO and UN Child Convention).

389. See *supra* notes 362-64 and accompanying text (detailing Customs procedures for enforcing the TDA).

390. See discussion *supra* Part IV.A-C (noting that the TDA complies with the Article XX chapeau when adequately "applied and enforced").

391. See ILO 182 Ratifications, *supra* note 41 (list of ILO 182 non-signatories); World Trade Organization, List of Members and Observers (noting that 41 of ILO 182 non-signatories are also WTO Members), available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last updated Jan. 1, 2002).

With those Members, the United States must negotiate separately before enforcing the TDA.³⁹² Also, some Members may exhibit far fewer indicators of abusive child labor.³⁹³ In these situations, the United States could not justify a TDA action as readily.

The design of the TDA should pass an Article XX(b) challenge. In contrast, the application of the TDA will probably comply with the Article XX chapeau only if Customs stringently abides by its own regulations. To improve the likelihood of compliance, the United States should take certain additional steps. First and most importantly, the United States must allow an appropriate phase-in period while financially assisting other nations' enforcement initiatives.³⁹⁴ Also, the U.S. Trade Representative might consider an oversight program to ensure the equitable administration of the TDA.³⁹⁵

Regardless of the preparations undertaken by the United States, some WTO Members may claim that the TDA is disguised protectionism. To address this, the United States should consider repealing the "consumptive demand" exception of Section 307.³⁹⁶ This clause allows the import of prohibited goods when similar goods are insufficiently produced in the U.S. domestic market to meet consumer demand.³⁹⁷ Eliminating the "consumptive demand" exception would negate any possible claim that the purpose of Section 307 is really to protect American consumers and industries

392. See AB Shrimp-Turtle II, *supra* note 133, para. 122 (mandating that Members attempt to negotiate agreement on equilibrium line between policy objective and WTO rights of other Members in absence of existing agreement).

393. See *supra* notes 325-26, 344 and accompanying text (using Pakistani bonded child labor indicators as extreme example of abusive child labor practices).

394. See discussion *supra* Part IV.B.

395. See Garg, *supra* note 12, at 500-01 (lamenting poor oversight of GSP procedures that some contend have disregarded blatant labor rights violations in developing countries).

396. See Socially Responsible Consumers' Choice and Anti-Child Labor Act, S. 1353, 107th Cong. § 2(a) (2001) (striking language in the second sentence of Section 307 of the Tariff Act of 1930 (19 U.S.C. § 1307) stating, "but in no case shall such provisions be applicable to goods . . . not mined, produced, or manufactured in such quantities in the United States as to meet the consumptive demands of the United States"); see also WTO Panel Report on United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia, WT/DS58/RW, para. 5.142 (June 15, 2001) [hereinafter Shrimp-Turtle Panel II] (determining whether design of measure provided disguised protection beyond level associated with imposition of ban), available at <http://docsonline.wto.org> (last visited Feb. 14, 2002).

397. See Tariff Act of 1930, 19 U.S.C. § 1307 (2000); *China Diesel Imp., Inc. v. United States*, 870 F. Supp. 347, 350 (Ct. Int'l Trade 1994) (rejecting the United States' contention that "mere production capability" may defeat the consumptive demand exception, and holding instead that a product must be available in the domestic industry).

instead of the world's working children.³⁹⁸

If the United States embraces these recommendations, a WTO Panel would uphold the TDA prohibition of child labor imports as an Article XX exception. Such a Panel ruling may finally compel WTO Members to address child labor more seriously and explicitly than they did at the Singapore Ministerial Conference.³⁹⁹ Once the WTO as a whole concretizes a plan for enforcing trade-related labor rights, the multilateral trading community may finally offer child workers of the world the opportunity to develop into healthy and productive adults.

398. See Shrimp-Turtle Panel II, *supra* note 396, para. 5.143 (finding no "disguised restriction on international trade" because the United States proved that no part of Section 609 gave American fishermen any commercial gain over foreign fishermen).

399. *But see* DSU, *supra* note 37, art. 3(2) ("Recommendations and rulings of the Dispute Settlement Body cannot add or diminish the rights and obligations provided in the covered agreements."). By approving Section 609 in Shrimp-Turtle, the Appellate Body implicitly countered the argument that allowing coercive and/or extraterritorial sanctions for an environmental purpose "diminish[es] the rights" of Members. AB Shrimp-Turtle I, *supra* note 96, para. 186. Applying an evolutionary definition of "human health," a WTO Panel should reach the same conclusion regarding coercive and extraterritorial sanctions for a human health purpose. *See id.* para. 129 (applying an evolutionary definition of "exhaustible natural resources").