

1994

The Child Labor Deterrence Act: American Unilateralism and the GATT

James P. Kelleher

Follow this and additional works at: <https://scholarship.law.umn.edu/mjil>



Part of the [Law Commons](#)

Recommended Citation

Kelleher, James P., "The Child Labor Deterrence Act: American Unilateralism and the GATT" (1994). *Minnesota Journal of International Law*. 119.

<https://scholarship.law.umn.edu/mjil/119>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Journal of International Law collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

The Child Labor Deterrence Act: American Unilateralism and the GATT

James P. Kelleher

Child laborers are the most exploitable of all workers. They are easily intimidated, often have few legal rights, and work for very low wages.¹ A recent Washington Post article described Praiwan, a thirteen year old Bangkok boy who makes leather bags from eight in the morning until eleven at night.² He has only one hour off for lunch and another hour for dinner, and just one day off every two weeks. He earns \$24 a month. In India, a non-governmental organization filed a writ petition to the Supreme Court on behalf of thirty-two children between the ages of six and fourteen.³ The children had been kidnapped to work in the carpet industry. The petition stated that the children had been treated brutally for even minor mistakes: hung upside down from trees, beaten with bamboo sticks, and branded with red hot iron rods.⁴ In 1991, the International Labour Organization (ILO) estimated that half of the 50,000 children working as bonded labor in Pakistan's carpet-weaving industry would never reach the age of twelve — victims of disease and malnutrition.⁵

Unfortunately, the exploitation of child workers is not an isolated problem. According to Michel Hansenne, the ILO Director General, the total number of working children is certainly in

1. See WILLIAM J. KNIGHT, U.S. DEP'T OF LABOR, BUREAU OF INT'L LABOR AFFAIRS, *THE WORLD'S EXPLOITED CHILDREN: GROWING UP SADLY* (1980). See also Patricia Hyndman, *The Exploitation of Child Workers in South and South East Asia*, 58 *NORD. J. INT'L L.* 94 (1989).

2. Lynne Kamm, *How Our Greed Keeps Kids Trapped in Foreign Sweatshops*, *WASH. POST*, Mar. 28, 1993, at C5.

3. See Hyndman, *supra* note 1, at 97 n.24 (citing K. Satyarthi, *Child Workers in the Carpet Industry of the Mirzapauric Bhadohi Belt: An Activist's Viewpoint*, n.16 (1988)) (paper prepared for a Lahore seminar).

4. *Id.*

5. Cited by Senator Harkin in his speech introducing the Child Labor Deterrence Act of 1993. 139 *CONG. REC.* S3179 (daily ed. Mar. 18, 1993) (statement of Sen. Harkin).

the hundreds of millions.⁶ Hansenne noted that although the conditions under which children work have worsened in recent years and the number of child workers has increased in many countries, few countries have developed comprehensive plans to deal with the problem.⁷ A bill now before the U.S. Senate, the Child Labor Deterrence Act,⁸ attempts to address the problem of international child labor by prohibiting the import of articles produced by child workers into the United States.⁹ The Bill is an extension of recent unilateral attempts by the United States to regulate economic activities overseas through the threat of trade restrictions.¹⁰

This Note analyzes the Child Labor Deterrence Act in light of U.S. obligations under the General Agreement on Tariffs and Trade (GATT),¹¹ and in reference to policy considerations regarding child labor programs. Part I outlines existing American legislation which purports to restrict international child labor and discusses the trend towards stronger unilateral measures. Part II describes the proposed Child Labor Deterrence Act. Part III examines relevant American obligations under GATT and concludes that the Child Labor Deterrence Act would violate those obligations by unilaterally dictating the labor standards that other nations must follow. Part IV explores the rationale behind the GATT policy of limiting a nation's jurisdictional reach to purely domestic concerns, and examines the Child Labor Deterrence Act in light of that policy. Finally, the Note concludes that, although unilateral action may be warranted in some instances, multilateral agreements which build on local in-

6. U.S. DEPT OF LABOR, BUREAU OF INT'L LABOR AFFAIRS, INTERNATIONAL CHILD LABOR PROBLEMS, 93-6 FOREIGN LABOR TRENDS 3 (1993) (press release from the ILO Washington Office on July 21, 1992).

7. *Id.* ILAB selected child labor for inclusion in its 1992 report "because child labor has been a dramatically worsening global problem." *Id.* at 2. The monograph provides information on 170 countries and lists some specific estimates for the number of children working in several developing countries: 4.8 million in Nepal, 3 million in Bangladesh, 12 million in Nigeria, 7 million in Brazil, and 800,000 in Columbia. *Id.* The 1991 State Department human rights report on child labor showed 56 significant changes from the 1990 report. *Id.* Thirty-five of these changes were negative. *Id.*

8. S. 613, 103d Cong., 1st Sess. (1993).

9. See *infra* notes 50-71 and accompanying text.

10. See generally AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM (Jagdish Bhagwati & Hugh T. Patrick eds., 1990).

11. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. pts 5, 6, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT]. GATT is a U.S. executive agreement treated as a treaty obligation. See JOHN H. JACKSON, WORLD TRADE AND THE LAW OF THE GATT 37 (1969).

formation and effectively balance the various needs of child workers are the preferable means of dealing with the exploitation of child labor.

I. EXISTING AMERICAN LEGISLATION

International child labor and U.S. trade policy are linked in five pieces of existing federal legislation: the Generalized System of Preferences (GSP),¹² the Caribbean Basin Economic Recovery Act (CBERA),¹³ the Overseas Private Investment Corporation (OPIC),¹⁴ the Multilateral Investment Guarantee Agency (MIGA),¹⁵ and Section 301 of the Trade Act of 1974¹⁶ as amended by the Omnibus Trade and Competitiveness Act (OTCA).¹⁷ These can be broken down into two categories. The first is composed of GSP, CBERA, OPIC, and MIGA which provide special trade benefits to developing countries. In contrast, section 301 authorizes the President to enforce U.S. trade rights through retaliation against states that have violated those rights.¹⁸

The GSP and CBERA allow the President to grant duty-free treatment to certain articles imported from beneficiary developing countries.¹⁹ OPIC provides political risk insurance and pro-

12. The Generalized System of Preferences is part of the Trade Act of 1974, Pub. L. No. 93-618, tit. V., §§ 501-505, 88 Stat. 2066 (1975) (codified as amended in 19 U.S.C. §§ 2461-65 (1988)) [hereinafter GSP].

13. Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67, tit. II, subtit. A, §§ 201-18, 97 Stat. 384 (1983) (codified as amended in 19 U.S.C. §§ 2701-06 (1988)) [hereinafter CBERA].

14. Foreign Assistance Act of 1961, Pub. L. No. 87-195, pt. I, ch. 2, tit. IV., § 231, as added Dec. 30, 1969, Pub. L. No. 91-175, pt. I, § 105, 83 Stat. 809 (codified as amended at 22 U.S.C. § 2191 (1988)) [hereinafter OPIC].

15. MIGA Enabling Statute, Pub. L. No. 100-202, § 101(e) [tit. I], 101 Stat. 1329-131, 1329-134 (1987) (codified as amended in 22 U.S.C. § 290k (1988)).

16. Trade Act of 1974, Pub. L. No. 93-618, tit. III, ch. 1, § 301, 88 Stat. 1978, 2041 (codified as amended in 19 U.S.C. 2411 (1988)). Section 301 of the Trade Act of 1974 addresses foreign restrictions on U.S. trade. The Act has been amended repeatedly, most notably in 1984 and 1988. See generally AGGRESSIVE UNILATERALISM, *supra* note 10.

17. The Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, tit. I, subtit. C, pt. 1, § 1301(a), 102 Stat. 1164 (codified at 19 U.S.C. § 2411 (1988)) [hereinafter OTCA]. See generally Theresa A. Amato, Note, *Labor Rights Conditionality: United States Trade Legislation and the International Trade Order*, 65 N.Y.U. L. REV. 79 (1990). The Act calls for domestic policy reforms providing for new investments and incentive structures and sends a strong message to trading partners that "the United States will not watch idly as myriad unfair trade practices erode the United States' position in the global economy." *Id.* at 84.

18. 19 U.S.C. § 2411 (1988).

19. 19 U.S.C. § 2461 (1988), 19 U.S.C. § 2701 (1988), respectively.

ject finance to assist private investment by U.S. businesses.²⁰ MIGA is a World Bank institution — in which the United States participates — that promotes capital flows to developing countries by offering guarantees against non-commercial risks.²¹ The GSP, CBERA, and OPIC condition the benefits of U.S. participation upon a beneficiary country's respect for certain "internationally recognized worker rights," including a minimum age for the employment of children.²² The implementing legislation for MIGA made U.S. participation conditional upon MIGA's U.S. director taking steps to obtain the adoption of certain policies.²³ One such step was to propose and actively seek to ensure that MIGA would not guarantee investments "in any country which has not taken or is not taking steps to afford internationally recognized worker rights to workers in that country."²⁴

Although there was originally some variation among the labor rights provisions of the acts, by 1990 the standards and provisions concerning worker rights (including child labor) in CBERA, OPIC, and MIGA were identical to those of the GSP.²⁵ Of the four, the GSP legislation has had the greatest impact and has stirred up the most political controversy.²⁶

Under the GSP, the President may provide duty-free treatment for any eligible article from any beneficiary developing

20. 22 U.S.C. § 2191 (1988).

21. FAYE LYLE, U.S. DEPT OF LABOR, BUREAU OF LABOR AFFAIRS, WORKER RIGHTS IN U.S. POLICY 11 (1991).

22. The specific provisions are: GSP, 19 U.S.C. § 2462(b)(7) (1988); CBERA, 19 U.S.C. § 2702(b)(7) (Supp. II 1990); and OPIC, 22 U.S.C. § 2191a(a) (1988). Under each of the above provisions, the term "internationally recognized worker rights" includes: (1) the right of association; (2) the right to organize and bargain collectively; (3) a prohibition on the use of any form of forced or compulsory labor; (4) a minimum age for the employment of children; and (5) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. 19 U.S.C. § 2462(a)(4) (1988). Note that the statutes do not specify under (4) what the minimum age for employment should be, only that there should be one.

23. LYLE, *supra* note 21, at 11.

24. 22 U.S.C. § 290k-2 (1988). For the U.S. definition of "internationally recognized worker rights," see *supra* note 22.

25. See *supra* note 22. In the original CBERA passed in 1983, the worker rights provisions were discretionary. LYLE, *supra* note 21, at 8. The Customs and Trade Act of 1990 made worker rights criteria a mandatory element of the designation process, as they had become for the GSP in 1984. P.L. 101-382, tit. II, subtit. B, pt. 1, § 213, 104 Stat. 656 (codified as amended at 19 U.S.C. § 2702(b)(7) (Supp. II, 1990)). The relevant OPIC provisions became synonymous with those in the GSP in 1985. Overseas Private Investment Corporation Amendments Act of 1985, P.L. 99-204, § 5, 99 Stat. 1670 (codified as amended at 22 U.S.C. § 2191a(a) (1988)).

26. See LYLE, *supra* note 21, at 14.

country.²⁷ The Act, nonetheless, places a number of restrictions on the President's power to designate a developing nation as a GSP beneficiary.²⁸ One of these restrictions provides that the President shall not designate any country a beneficiary country if the country has not taken or is not taking steps to afford internationally recognized worker rights to workers in that country.²⁹ Under the GSP, "internationally recognized worker rights" include five types of legal protection, one of which is a minimum age for the employment of children.³⁰ To enforce these provisions, the GSP Subcommittee of the Office of the United States Trade Representative (USTR) conducts investigations concerning the practice of individual countries.³¹ The USTR initiates investigations in response to petitions from interested parties in the United States which allege worker rights violations in one of the beneficiary countries.³²

Although on the surface GSP status is contingent, at least to some degree, on the prohibition of child labor, in practice, a developing country's child labor policies are rarely definitive. Several factors come into play in determining GSP status. First, the GSP subcommittee of the USTR can use its discretion in determining whether or not to accept a petition calling for a review of the GSP status of a developing country.³³ The petition can be rejected and no review conducted at all.³⁴ Second, a minimum age for employment is only one of the criteria listed under worker rights. The subcommittee must make an overall judgment of the status of internationally recognized worker rights.³⁵ If child labor is not given priority over the other four worker rights criteria, child labor violations may not prove decisive.

27. 19 U.S.C. § 2461.

28. 19 U.S.C. § 2462(b).

29. *Id.* § 2462(b)(7).

30. *See supra* note 22.

31. 15 C.F.R. § 2007 (1993).

32. 15 C.F.R. § 2007.0. The regulation defines an interested party as a party who has a "significant economic interest" in the subject of the request for review, or any party representing a "significant economic interest that would be materially affected by the action requested." *Id.* § 2007.0(d).

33. The subcommittee can determine whether the petition "warrants further review." 15 C.F.R. § 2007.2(a)(1). *See generally* PETER DORMAN, U.S. DEP'T OF LABOR, BUREAU OF INT'L LABOR AFFAIRS, WORKER RIGHTS AND U.S. TRADE POLICY (1989).

34. The subcommittee may decide not to review a GSP beneficiary country even when worker rights violations in that country are well documented. Such reviews are potentially high profile activities and may impose significant foreign policy costs. DORMAN, *supra* note 33, at 5.

35. *Id.* at 7.

Third, "a minimum age for the employment of children" is a rather vague requirement. The legislation does not specify any particular age.³⁶ Fourth, the GSP requires only that beneficiary countries be "taking steps" to afford these internationally recognized worker rights.³⁷ This is a rather nebulous criterion and certainly open to broad interpretation.³⁸ Finally, the designation is ultimately left to executive discretion. The subcommittee makes its recommendation to the President, but the President makes the final decision whether to remove GSP preference from a country.³⁹

The Omnibus Trade and Competitiveness Act (OTCA)⁴⁰ amended Section 301 of the Trade Act of 1974.⁴¹ Section 301 requires the USTR, under the direction of the President, to in-

36. See *supra* note 22.

37. 19 U.S.C. § 2462(b)(7).

38. In order to avoid imposing sanctions, an administration could deem cosmetic and insignificant policy changes as evidence that the mandated steps are being taken. Harlan Mandel, Note, *In Pursuit of the Missing Link: International Worker Rights and International Trade?*, 27 COLUM. J. TRANSNAT'L L. 443, 471 (1989). Some of the USTR's GSP worker rights determinations have been criticized because of this issue. See, for example, the USTR's 1987 decision not to revoke South Korea's GSP status. *Id.* at 471 n.151.

39. 19 U.S.C. § 2462.

Paragraph . . . (7) [the worker rights provision] shall not prevent the designation of any country as a beneficiary developing country under this section if the President determines that such designation will be in the national economic interest of the United States and reports such determination to the Congress with his reasons therefor.

Id. 15 C.F.R. § 2007.8(b)(2)(v) also provides that the President shall consider "the level of economic development of such country, including the per capita GNP, the living standards of its inhabitants and any other economic factor the President deems appropriate" in making his determination. The House Conference Report stipulates,

It is recognized that acceptable minimum standards may vary from country to country. However, the Committee does expect the President . . . to require that any developing country specifically demonstrate respect for the internationally recognized rights of its workers.

Ways and Means Committee, *House Report to Accompany H.R. 6063*, H.R. REP. No. 1090, 98th Cong., 2d Sess. (1985), reprinted in 1984 U.S.C.C.A.N. (99 Stat.) 5112. U.S. Courts have held that the President's decision to grant or withhold GSP benefits is not subject to judicial review. *Florsheim Shoe v. United States*, 744 F.2d 787 (Fed. Cir. 1984).

40. See *supra* note 17.

41. See generally AGGRESSIVE UNILATERALISM, *supra* note 10. Section 301 allows the United States to use the threat of trade retaliation against other countries to eliminate trade practices that the United States has unilaterally decided are unacceptable. As such, Section 301 seeks one-way unrequited concessions from other trading partners. *Id.* One commentator stated, "The new Section 301 of the Omnibus Trade and Competitiveness Act of 1988 is probably the most criticized piece of U.S. foreign trade legislation since the Hawley-Smoot Tariff Act of 1930." Robert E. Hudec, *Thinking about the New Section*

investigate complaints about unfair trade practices of other nations, and authorizes it to take a broad range of retaliatory actions against measures found to constitute unfair trade practices.⁴² The Act expressly requires the USTR to prosecute certain unfair practices while leaving the prosecution of other practices to the agency's discretion.⁴³ One of these discretionary provisions allows the USTR to include the denial of worker rights as an unfair trade practice.⁴⁴ OTCA defines worker rights in the same language as the GSP provisions.⁴⁵ The inclusion of worker rights as an unfair trade practice is based on the premise that by violating worker rights which are honored by U.S. producers, foreign states gain an unfair competitive advantage.⁴⁶ The OTCA marked the first time that the United States had conditioned reciprocal trade benefits on the implementation of internationally recognized worker rights.⁴⁷ The worker rights

301: *Beyond Good and Evil*, in *AGGRESSIVE UNILATERALISM*, *supra* note 10, at 113.

42. 19 U.S.C. § 2411(c) (1988).

43. 19 U.S.C. §§ 2411(a), 2411(b) (1988), respectively.

44. 19 U.S.C. §§ 2411(b)(1), (d)(3)(B)(iii) (1988). Some observers caution that conditioning trade on worker rights may come back to haunt the United States. The United States does not have the same level of welfare legislation that some European countries consider to be basic worker rights (e.g., paid maternity leave or universal health care). These countries could arguably employ worker rights as a convenient tool to protect themselves against U.S. exports. See LYLE, *supra* note 21, at 19.

45. 19 U.S.C. § 2462(a)(4). See *supra* note 22.

46. According to this theory, exploitation through low wages, hazardous working conditions, and long hours allows producers to keep costs "artificially" low and thus undercut the prices of U.S. firms. The phenomenon is also referred to as "social dumping" since the exported products owe their competitiveness to low labor standards. See Steve Charnovitz, *The Influence of International Labour Standards on the World Trading Regime*, 126 INT'L LAB. REV. 565, 567 (1987). Developing countries have rejected this theory, holding that it is simply a disguise for protectionism. J.M. Servias, *The Social Clause in Trade Agreements: Wishful Thinking or an Instrument of Social Progress*, 128 INT'L LAB. REV. 423, 425 (1989). The ILO Director-General commented on the phenomenon referring to the economic theory of comparative advantage:

Just as the industrialized countries are now at a comparative advantage by virtue of their abundant capital and technological mastery, so does an abundant labour supply confer a comparative advantage on the developing countries. Technology and capital are cheaper in the North than in the South: yet it is not considered unfair to develop activities based on this comparative advantage. Nor, therefore, would it make sense to reproach the South for having lower labour costs than the North because therein lies its present advantage.

Id. at 428 (citing F. Blanchard, *International trade and employment: The role of the ILO*, seminar on the North-South dialogue, Autumn 1980).

47. See Amato, *supra* note 17, at 84, for a complete discussion of the significance of the worker rights provisions of OTCA.

conditions required by OPIC, CBERA, and GSP are placed only upon eligibility for special benefits; normal trade relations between the United States and the beneficiary country under these programs are unaffected by the labor rights provisions.⁴⁸ The OTCA, however, conditions normal trade relations on respect for worker rights.⁴⁹

II. THE HARKIN BILL

The Child Labor Deterrence Act of 1993⁵⁰ emerges out of this backdrop of conditioning trade upon worker rights. The proposed act, also known as the "Harkin Bill" ("Bill"), is sponsored by Senator Tom Harkin (D-Iowa). The Bill currently has fourteen co-sponsors⁵¹ and is pending in the Senate Finance Committee. If enacted, the Harkin Bill would significantly ex-

48. Nonetheless, the denial of such benefits may well be a violation of GATT's Most-Favoured Nation (MFN) obligations under Article I:1. *See* GATT art. I:1. Under GATT's MFN provision, any trade benefit that one GATT member extends to another member must be unconditionally extended to all other members. *Id.* The placing of worker rights conditions on GSP benefits does not appear to be authorized by the Enabling Clause which allows the granting of GSP privileges. *Differential and More Favorable Treatment, Reciprocity, and Fuller Participation of Developing Countries*, BISD 26th Supp. at 203 (1980).

49. Under the amended version of Section 301, taking retaliatory measures against a trading partner for failing to support worker rights is a completely discretionary measure. *See supra* text accompanying note 44. Since the provision has yet to be used by the executive, it is not yet GATT inconsistent. "[L]egislation merely giving those executive authorities the power to act inconsistently with the General Agreement is not, in itself, inconsistent with the General Agreement." GATT Dispute Settlement Panel, *United States — Restrictions on Imports of Tuna*, GATT Doc. DS21/1 (Sept. 3, 1991), *reprinted in* 30 I.L.M. 1594, 1619 (Nov. 1991) [hereinafter *Tuna/Dolphin*].

50. S. 613, 103d Cong., 1st Sess. (1993). A companion bill has been proposed in the House by Representative George Brown Jr. (D-California). H.R. 1397, 103d Cong., 1st Sess. (1993). The House bill is significantly different from the Senate bill in that it does not apply to articles produced by a foreign industry unless such industry "does not comply with the applicable national laws prohibiting child labor in the workplace." H.R. 1397 § 4(a)(1). *See infra* note 53. The bill was introduced on March 18, 1993 and referred to the House Ways and Means Committee. In the Senate, Senator Howard Metzenbaum (D-OH) introduced a bill, Child Labor Amendments of 1993 (S. 86), which would beef up domestic child labor laws by setting criminal sanctions for willful violators of child labor laws and limit the weekly hours minors could work. On the same day, Representative Tom Lantos (D-CA) introduced The Young American Worker's Bill of Rights (H.R. 1106) which would establish criminal sanctions for willful violations of child labor laws and, for the first time, limit the number of hours that sixteen or seventeen year old youths can work while in school.

51. The co-sponsors are Senators Campbell (D-CO), Conrad (D-ND), Daschle (D-SD), DeConcini (D-AZ), Dorgan (D-ND), Feingold (D-WI), Grassly (R-IA), Inouye (D-HI), Kennedy (D-MA), Levin (D-MI), Metzenbaum (D-OH), Riegle (D-MI), Rockefeller (D-WV), and Wofford (D-PA).

tend the linkage between international child labor and U.S. trade policy. The Bill attempts to curtail the employment of children in the production of goods for export by prohibiting the entry of such goods into the United States and encouraging other nations to join in a ban on trade in such products.⁵²

The Harkin Bill would prohibit the importation of any manufactured article that is the product of a foreign industry that the Secretary of Labor has identified as using child labor.⁵³

52. S. 613 § 2(b). Senator Harkin made the following remarks introducing the Bill:

Mr. President, that's what this bill is about — children whose dreams and childhood are being sold for a pittance — to factory owners and in markets around the globe. It's about protecting children around the globe and their future. It's about eliminating a major form of child abuse in our world. It's about breaking the cycle of poverty by getting these kids back out of factories and into schools. It's about raising the standard of living in the Third World so we can compete on the quality of goods instead of the misery and suffering of those who make them. It's about assisting Third World governments to enforce their laws by ending the role of the United States in providing a market for goods made by children and encouraging other nations to do the same. Mr. President, unless the economic exploitation of children is eliminated, the potential and creative capacity of future generations will forever be lost on the factory floor.

139 CONG. REC. S3179 (daily ed. Mar. 18, 1993). Connected with this concern for the welfare of child workers is a notion that child labor provides an "unfair advantage" to those foreign industries that use it. *See supra* note 46 and accompanying text. By exploiting children, manufacturers are able to keep prices artificially low, and thus undercut American (and other countries) firms. A provision of the Child Labor Deterrence Act states, "Adult workers in the United States and other developed countries should not have their jobs imperiled by imports produced by child labor in developing countries." S. 613, 103d Cong., 1st Sess. § 2(a)(9) (1993). Although the Bill specifically mentions child labor in developing countries, illegal child labor continues to be a problem in the developed world. Child labor may be concentrated in developing countries, but it is certainly not confined to them. *See generally* U.S. DEP'T OF LABOR, BUREAU OF INT'L LABOR AFFAIRS, *supra* note 6. The report noted that Greece, Italy, Poland, Portugal, Spain, and Turkey had child labor "problems." *Id.* at 20. The United States also has lingering problems with the employment of children as evidenced by recent legislation. *See supra* note 50.

53. S. 613 § 5(a)(1). It should be noted that the House version of the Bill adds that the industry's use of child labor must also be in violation of "applicable national laws." H.R. 1397 § 4(a)(1). This is in sharp contrast to the Senate bill which applies regardless of the national laws of the exporting country. The provision is a puzzling addition to the Bill since it would make the remainder of the Bill, which defines child labor and fixes a minimum age of fifteen for employment, basically irrelevant. The House version of the Child Labor Deterrence Act could also have the somewhat perverse effect of punishing countries that enact child labor legislation while leaving those with no such legislation untouched. The provision appears to be an attempt to refrain from violating the sovereignty of the exporting state, but it in effect takes the punch out of the Senate version. The House version of the Bill is interesting, however, in that it

Under the Act, a child is defined as "an individual who has not attained the age of 15."⁵⁴ A manufactured article includes any good that is fabricated, assembled, or processed, including any mineral resources that are entered in a crude state.⁵⁵ To be considered a product of child labor, the article must be "manufactured" in whole or in part by one or more children under any one of the following conditions: (1) in exchange for remuneration (regardless of to whom paid), subsistence, goods or services; (2) under circumstances tantamount to involuntary servitude; or (3) under conditions posing serious health problems.⁵⁶ Significantly, the Bill does not cover children working in agriculture or children working for their own families.⁵⁷

The Bill would require the Secretary of Labor to identify foreign countries that use child labor in the manufacture of products for export and have, on a continuing basis, exported such products to the United States.⁵⁸ As part of the identification process, the Secretary must undertake periodic reviews which include information made available by the ILO and human rights organizations.⁵⁹ The Bill also authorizes any person to file a petition with the Secretary requesting that a particular foreign industry be identified as using child labor in the export of goods.⁶⁰ The Secretary has ninety days to conduct an investigation and determine whether or not any further action is war-

closely reflects the approach taken in the North American Free Trade Agreement Side Accords on Labor. *See infra* note 146.

54. S. 613 § 8(2).

55. S. 613 § 8(7). "Any mineral resource that at entry has been subjected to only washing, crushing, grinding, powdering, levigation, sifting, screening, or concentration by flotation, magnetic separation, or other mechanical or physical processes shall be treated as having been processed for the purposes of this Act." *Id.*

56. S. 613 § 8(1).

57. Children who work for their families may be covered by the Bill if they are paid or if they work under conditions posing serious health risks. While it is possible to consider a child working for her family without pay as working for remuneration (i.e., subsistence) such a classification seems unlikely. The exclusion of family work and agriculture is extremely significant since the majority of children working in many developing countries are working in either (or both) of these two sectors. *See infra* notes 127-28 and accompanying text. Also, the definition of "family" itself may present some difficulties due to differing cultural concepts of the term.

58. S. 613 § 4(a).

59. *Id.* Such organizations are not allowed to file under the GSP provisions.

60. S. 613 § 4(b)(1). This person need not be an interested party as defined under the GSP. *See supra* note 32.

ranted.⁶¹ The Secretary must explain the facts and reasons underlying the decision, regardless of the decision made.⁶² Prior to identification, the Secretary is also required to consult with the USTR, the Secretary of State, the Secretary of Commerce, and the Secretary of the Treasury and to consider written comments from the public.⁶³

Once a foreign industry has been identified as using child labor, the Secretary of the Treasury (via the U.S. Customs Service) may not permit the entry of any manufactured article that is a product of that foreign industry.⁶⁴ The Bill allows the Secretary of Labor to revoke this prohibition if available information indicates that such action is "appropriate."⁶⁵ Nonetheless, before removing an industry from the prohibited list, the Secretary must publish notice that a revocation is being considered and invite written comment from the public.⁶⁶ The Secretary must also inform Congress of any revocation, stating the facts and reasons why the Secretary considers revocation appropriate.⁶⁷

Finally, the Bill sets forth civil and criminal penalties for importing articles in violation of the act. Civil penalties may be up to \$25,000.⁶⁸ Criminal penalties for intentional violations may include fines between \$10,000 and \$35,000 or imprisonment for one year, or both.⁶⁹

The Harkin Bill represents an important extension upon existing legislation linking trade and child labor. First, the Bill furthers the principle established in the OTCA conditioning reciprocal trade upon certain worker rights. Second, the Bill separates child labor from general worker rights as an independent source of trade restriction. Third, the Bill adds some greater

61. S. 613 § 4(b)(2)(A).

62. S. 613 § 4(b)(2)(B).

63. S. 613 § 4(c).

64. S. 613 § 5(a)(1). While previous U.S. legislation involving goods produced by child labor overseas has focused on national level decisions, *see supra* notes 27-32 and accompanying text, the Harkin Bill provides for individual industry distinctions. The Bill also provides that articles of an "identified" industry may still be allowed to enter the United States if they were en route to the United States before the first day of the effective identification period or if there exists adequate certification that the article is not the product of child labor. S. 613 § 5(a)(2).

65. S. 613 § 4(d).

66. *Id.* § 4(d)(3).

67. *Id.* § 4(d)(2).

68. *Id.* § 6(b).

69. *Id.* § 6(c).

precision to the definition of child labor.⁷⁰ Fourth, the Bill prohibits the importation of specific articles rather than the general goods of a specific nation. Finally, the Bill forces the administration to reach a prompt decision and to explain its action. By "opening up" the decision, the Child Labor Deterrence Act may increase the political pressure on the administration to take action.⁷¹

III. THE HARKIN BILL AND AMERICAN OBLIGATIONS UNDER GATT

The Harkin Bill constitutes a fairly dramatic step in U.S. trade policy. If the Bill were enacted, the United States would, for the first time, include the labor used to produce a good as a factor in determining its policies regarding the importation of that good. Thus, questions arise concerning the legality of such a significant policy change under existing international economic law.

The primary international agreement governing trade regulations is the General Agreement on Tariffs and Trade (GATT).⁷² As a general policy, GATT prohibits the use of embargoes or quotas. GATT Article XI provides that "No prohibitions or restrictions . . . whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party . . ." ⁷³ Since the Harkin Bill would place an embargo or a "zero quota" on goods produced by child labor, there is a clear risk that the Bill may prove contrary to GATT if enacted in its present form.⁷⁴

70. Some general principles concerning the definition of "a minimum age for the employment of children" have been established by the Department of Labor. See LYLE, *supra* note 21, at 26-29. Nonetheless, unlike the definition of child labor in the Harkin Bill, these principles are not binding legal definitions. *Id.* at 20 n.13.

71. By forcing the administration to make a determination solely on the issue of child labor, the Bill limits the leeway the various factors taken into account in GSP determination allow. See *supra* notes 33-39 and accompanying text.

72. See *supra* note 11.

73. GATT art. XI.

74. The provisions of CBERA, GSP, OPIC, and MIGA which condition the grant of preferential status for imports upon upholding certain worker rights may themselves be in violation of GATT Article I:1. See *supra* note 48. OTCA may also prove to be a violation, but this completely depends on how the President uses its provisions. See *supra* note 49 and accompanying text.

There are two arguments available to the United States to defend the Harkin Bill against claims of a GATT violation. First, Article XI applies only to restrictions imposed at the border. The United States could attempt to classify the prohibition of goods produced by child labor as part of an "internal" market regulation which forbids the manufacture or sale of products of child labor regardless of their source. Internal regulations are governed by GATT Article III rather than Article XI.⁷⁵ Article III permits internal regulations which treat foreign products "no less favorably" than like domestic products.⁷⁶ Second, the United States could claim that even if the regulation is a prohibited border restriction, the measure is permitted under GATT Article XX as one of the enumerated "general exceptions."⁷⁷

These characterizations of the Harkin Bill are similar to those put forth by the United States in defending its restrictions on the import of Mexican tuna. In *United States — Restrictions on Imports of Tuna ("Tuna/Dolphin")*, a GATT panel limited the extent of GATT Articles III and XX to the protection of purely domestic interests.⁷⁸ The Panel determined that the United

75. GATT Ad art. III provides that,

[a]ny internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in [Article III:1] which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in [Article III:1], and is accordingly subject to the provisions of Article III.

GATT art. III. Thus the fact that a regulation is enforced at the border does not prevent it from being an "internal regulation" within the context of the GATT.

76. GATT art. III:4. Article III:4 states:

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

Id.

77. All GATT obligations are subject to Article XX general exceptions. GATT art. XX. Article XX enumerates a series of broad clauses excepting certain governmental regulations aimed at protecting national welfare from the normal restrictions which GATT places upon national autonomy. Thus, Article XX is only invoked when a measure constitutes a violation of normal GATT rules. If the Harkin Bill were permitted under Article III as an internal regulation, no violation would have occurred and thus Article XX would not be invoked. See JACKSON, *supra* note 11, ch. 12.

78. *Tuna/Dolphin*, *supra* note 49. The Marine Mammal Protection Act (MMPA), Pub. L. No. 95-522, 86 Stat. 1027, 1030 (codified as amended at 16 U.S.C. § 1371(a)(2)(E) (Supp. II 1990)), prohibits the importation of tuna into the United States if the exporting country uses harvesting technology that

States could not use trade restrictions in an attempt to control Mexican methods of tuna fishing which resulted in a significant number of dolphin deaths.⁷⁹ The *Tuna/Dolphin* decision thus serves as a good indicator of how the Harkin Bill would fare under GATT jurisprudence.

In support of the GATT-legality of the Harkin Bill, the United States could first argue that it is not constructing an import policy, but rather enforcing a domestic rule on the sale of goods. Under this approach, American regulations simply prohibit articles produced by child labor from the U.S. market. Both foreign and domestic industries would be treated the same. Senator Harkin intimated such a characterization in his remarks introducing the Bill before the Senate. The Senator stated, "[t]his legislation is not about imposing our standards on the developing world. It's about preventing those manufacturers in the developing world who exploit child labor from imposing their standards on the United States."⁸⁰ Senator Harkin attempted to characterize the Bill as upholding an "internal regulation" of the United States itself. Internal regulations fall under GATT Article III, which allows a government to adopt any internal regulation it chooses, so long as the regulation provides foreign goods no less favorable treatment than like domestic products.⁸¹ Since all goods produced by child labor are theoretically prohibited, the Bill treats foreign and domestic goods equally.

causes an incidental taking of marine mammals or sea turtles in excess of U.S. standards. Under the Act, the National Marine Fisheries Service (the Service) of the Department of Commerce is responsible for administering this requirement. The Service determined that the dolphin deaths caused by Mexican tuna fisherman in the Eastern Tropical Pacific Ocean did not violate the requirements of the MMPA. The Earth Island Institute, a California non-profit organization, filed suit, and on April 11, 1991, the U.S. Court of Appeals for the Ninth Circuit held that the Service's interpretation conflicted with the statutory language and congressional purpose of the MMPA. *Earth Island Institute v. Mosbacher*, 929 F.2d 1449, 1453 (9th Cir. 1991). The court then ordered the Secretary of Commerce to prohibit the import of Mexican tuna. Mexico made a request for a panel under GATT Article XXIII to hear the dispute. The panel concluded that the U.S. policy violated American obligations under the General Agreement. See generally Joel P. Trachtman, *International Decision: GATT Dispute Settlement Panel*, 86 AM. J. INT'L L. 142 (1992). See also Matthew H. Hurlock, Note, *The GATT, U.S. Law and the Environment: A Proposal to Amend the GATT in Light of the Tuna/Dolphin Decision*, 92 COLUM. L. REV. 2098 (1992).

79. *Tuna/Dolphin*, *supra* note 49.

80. 139 CONG. REC. S3179 (daily ed. Mar. 18, 1993).

81. GATT Article III:4. See *supra* note 76.

In light of the decision of the GATT panel in *Tuna/Dolphin*, this argument would not prevail. The GATT panel in that case concluded that Article III extends only to those measures that regulate some inherent quality of the product itself.⁸² In *Tuna/Dolphin*, the tuna itself was the same regardless of whether its harvesting resulted in the death of dolphins. The American legislation did not concern the actual product which had entered the United States, but rather a production process outside U.S. jurisdiction.⁸³ The harvesting methods had no impact whatsoever on the quality of the tuna and thus no direct impact on the United States. Similarly, the Harkin Bill is not intended to affect any inherent quality of the particular good, but rather the manner in which that good is produced.

If the Harkin Bill does not qualify as an internal regulation, it would be governed by GATT Article XI and would clearly constitute a violation.⁸⁴ Nonetheless, the United States could still argue that the legislation falls under Article XX(b) and is thus exempt from the provisions of Article XI. Article XX (General Exceptions) is the source of most of the exceptions to the basic free trade policy of the GATT.⁸⁵ Article XX(b) states, "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . . (b) necessary to protect human, animal or plant life or health."⁸⁶ The United States could argue that restrictions on the import of goods produced by child labor are necessary to protect the health of the children involved.⁸⁷ For example, in carpet factories,

82. *Tuna/Dolphin*, *supra* note 49, at 1618.

83. *Id.*

84. *See supra* notes 73-75 and accompanying text.

85. *See supra* note 77.

86. GATT art. XX(b). Article XX limits the extent of the exceptions by making them "[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." *Id.*

87. *See* KNIGHT, *supra* note 1.

Studies available at the International Children's Center show that many of the jobs done by children hurt their physical development, result in deformities, and a range of illnesses such as skin troubles, bronchitis, and tuberculosis. Growing bodies suffer from the effects of fatigue and overexertion, and from poor hygienic conditions such as excessive heat, bad weather, and prolonged contact with dust. . . . Heavy loads and awkward body positions arrest the growth of bones in children. Deformation of the spinal column, pelvis, or thorax can also result from bending under heavy burdens or remaining in an unnatural position for a long time. There are also serious mental repercussions. . . . Skipping all the problems, motivations, and interests of

working children squat on planks for many hours each day; they later suffer from bone deformities in their legs.⁸⁸ Other children working in these same factories perform highly detailed tasks for long hours, resulting in permanent damage to their eyesight.⁸⁹

In *Tuna/Dolphin*, the United States argued that the restrictions on Mexican tuna were justified under Article XX(b).⁹⁰ These restrictions were constructed so as to limit the killing of dolphins during the harvesting of tuna. Accordingly, the restrictions were clearly intended to protect animal life.⁹¹ Although there is no express limitation in Article XX itself on the location of the harm sought to be avoided, the GATT panel determined that the history of Article XX(b) clearly indicated that the exception was intended to apply only where the primary target of the protection lies within the jurisdiction of the importing country.⁹² Since the dolphins in question were not under U.S. jurisdiction, the United States had no "right" to protect them. Similarly, just as the dolphins which the United States sought to protect through its legislation lie outside U.S. jurisdiction, the child laborers affected by the Harkin Bill work outside of the United States.⁹³

normal childhood has a permanent limiting effect on their later adult lives.

Id. at 11-12.

88. See Hyndman, *supra* note 1, at 95.

89. *Id.*

90. *Tuna/Dolphin*, *supra* note 49, at 1606. The U.S. also argued that the MMPA was allowed under GATT Article XX(g) for measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." *Id.* at 1607.

91. *Id.* at 1598. Certain types of tuna in the Eastern Tropical Pacific Ocean often swim along with dolphins. Fisherman thus locate tuna by setting on the dolphins which, being mammals, must come to the surface. Mexican fishing boats in the region were using "purse-seine" nets to harvest tuna. This technique involves sending a motorboat out from the main vessel with one end of the net to encircle a school of fish before connecting that end of the net back to the main boat. The main vessel then draws in the net to gather its entire contents. Fisherman thus knowingly trap dolphin in their nets when using this technique. *Id.* See Kerry L. Holland, Note, *Exploitation on Porpoise: The Use of Purse Seine Nets by Commercial Tuna Fisherman in the Eastern Tropical Pacific Ocean*, 17 SYRACUSE J. INT'L L. & COM. 267 (1991).

92. *Tuna/Dolphin*, *supra* note 49, at 1620. For a contrary view of the relevant history, see Trachtman, *supra* note 78, at 143 n.2.

93. The jurisdictional infringements of the proposed child labor bill are significantly more severe than those of the tuna case. In the tuna case, the dolphins in question were in the high seas and thus not in either American or

The *Tuna/Dolphin* panel further noted that to meet Article XX(b)'s requirement that the action be "necessary," the party invoking the exception must show that it had pursued all alternative options reasonably available to it which are consistent with the General Agreement.⁹⁴ The United States has not vigorously approached child labor through either its control of domestic corporations or its international aid policies.⁹⁵ The United States would also have difficulty in establishing that it had exhausted or even moderately pursued U.N. and I.L.O. channels or engaged in bilateral negotiations to the fullest extent possible.⁹⁶

The GATT panel's decision in *Tuna/Dolphin* follows the principle that each country should have the right to determine its own internal regulations. The result under Article III is that

Mexican jurisdiction. The child laborers covered by the Harkin Bill are clearly under both the territorial and nationality jurisdiction of the exporting country.

94. *Tuna/Dolphin*, *supra* note 49, at 1620. See also GATT Dispute Resolution Panel, *Thailand — Restrictions on Importation of and Internal Taxes on Cigarettes*, BISD 37th Supp. 200 (1990) (GATT panel report adopted on Nov. 7, 1990). The panel in this case determined that there were various measures consistent with GATT which were reasonably available to Thailand to control the quantity and quality of cigarettes smoked which could achieve the same policy goals that the Thai Government pursues by restricting the importation of cigarettes in violation of Article XI:1. Thus the import restrictions could not be considered "necessary". *Id.* ¶ 81.

95. By exercising jurisdiction over its own nationals, the United States could prevent American companies from using child labor overseas. See generally James M. Zimmerman, *International Dimension of U.S. Fair Employment Laws: Protection or Interference?*, 131 INT'L LAB. REV. 217 (1992). Prior to 1957, several courts gave the Fair Labor Standards Act of 1938 (FLSA), ch. 676, 52 Stat. 1060 (codified as amended in 29 U.S.C. §§ 201-19 (1988)), full extraterritorial effect. The FLSA requires employers to follow minimum standards for child labor as well as other pay and hours restrictions. In 1957, Congress passed an amendment excluding from FLSA coverage "any employee whose services during the work-week are performed in a workplace within a foreign country." *Id.* at 221 (citing 29 U.S.C. § 213(f)). The United States could also pursue activities attacking the root causes of child labor by supporting efforts toward universal education and economic development in developing countries. See *infra* note 161 and accompanying text.

96. As of January 1, 1990, the United States had ratified only six of the ILO's 169 conventions. Of the six, four of the conventions dealt with workers at sea, and only two were ratified since 1946. In contrast, the United Kingdom had ratified 67 conventions, Japan 36 and India 30, to cite a few examples. Bureau of Public Information, *Chart of Ratification of International Labour Conventions* (1990). Interestingly, on September 25, 1991, the United States ratified ILO Convention No. 105, Abolition of Forced Labour Convention (1957). Telephone interview with ILO Washington Office (Jan. 12, 1994). That convention corresponds to the third "international worker right" which is defined by the GSP as "the right to avoid forced or compulsory labor." See *supra* note 22. For a discussion of American efforts to include worker rights provisions within the GATT see *infra* notes 153-157 and accompanying text.

the importing country may only regulate activities which have a direct effect on its own citizens or territory. Under Article XX, the enumerated exceptions are similarly restricted to the protection of purely domestic interests. If the panel adopted the position supported by the United States, each GATT member could unilaterally determine the policies from which other members could not deviate without jeopardizing their rights under GATT.⁹⁷

Necessarily connected to this jurisdictional principle is a process component. By limiting a nation's jurisdiction to the protection of purely domestic interests, the panel in effect declared the unilateral declaration of standards to be inappropriate. The panel also implicitly indicated that multilateral decisions among the members themselves is the appropriate way of dealing with international concerns over the domestic policies of another nation.⁹⁸ The GATT requires multilateral determinations of the conditions of trade; no one nation can arrogate to itself creation and supervision of global production.⁹⁹

The GATT panel's decision in *Tuna/Dolphin* makes it apparent that the Harkin Bill would conflict with U.S. obligations under GATT. Although GATT panel decisions are not binding precedent,¹⁰⁰ the principles laid out in the panel decision seem

97. See *Tuna/Dolphin*, *supra* note 49, at 1621.

98. Multilateralism refers to the idea that the trade agreement should be equally formed by all the trading nations that it applies to. The GATT panel in the tuna decision wrote,

These considerations led the Panel to the view that the adoption of its report would affect neither the rights of individual contracting parties to pursue their internal environmental policies and to co-operate with one another in harmonizing such policies, nor the right of the CONTRACTING PARTIES acting jointly to address international environmental problems which can only be resolved through measures in conflict with the present rules of the General Agreement.

Id. at 1623.

99. See Jagdish Bhagwati, *Aggressive Unilateralism: An Overview*, in *AGGRESSIVE UNILATERALISM*, *supra* note 10, at 1, 36.

The world trading regime should not be built on the assumption that any one player, no matter how dominant, can impose its own rules, unilaterally claiming social legitimacy for them. Institutions cannot be built on notions of benign dictatorship: a lesson the functioning democracy in the United States itself, with all of its slowness and "inefficiencies" that practitioners of real-politik complain of, amply teaches all of us.

Id.

100. While, like other international law decisions, GATT panel reports do not have strict "stare decisis" effect, prior precedents do have weight in various international decisions and fora. JOHN H. JACKSON & WILLIAM J. DAVEY, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 332 (2nd ed. 1986).

an accurate interpretation of GATT, and it is unlikely that a future panel would reach a significantly different result unless GATT itself is amended in this regard.¹⁰¹

Although passage of the Harkin Bill would bring the United States into violation of its GATT obligations, there is nothing in domestic law which would prohibit the United States from enacting the Bill.¹⁰² It would not mark the first time that Congress has passed a GATT-inconsistent measure.¹⁰³ Proponents with a strong moral objection to child labor may argue that the critical conditions facing working children override the technical requirements of GATT. As Representative Brown stated when he introduced the House version of the Bill, "We cannot accept the bizarre reasoning and skewed priorities whereby international rules and U.S. import laws now protect endangered animals and plants, but remain silent on imports made by children shamelessly exploited in the workplace."¹⁰⁴ Thus, even if the

101. The panel's decision was not formally adopted by the CONTRACTING PARTIES. Under pressure from the United States, and given the on-going NAFTA negotiations, Mexico chose not to pursue its claim. Thus, the CONTRACTING PARTIES never actually voted on the ruling in the tuna case. Trachtman, *supra* note 78, at 142 n.2. The lack of a formal ruling appears to be largely a technicality. In the course of panel deliberations, Australia, Canada, the EEC, Indonesia, Japan, Korea, Norway, the Philippines, Senegal, Thailand, and Venezuela submitted statements in support of the Mexican position. *Tuna/Dolphin*, *supra* note 49, at 1610-16. The United States stood alone.

102. U.S. obligations under GATT were created by an executive agreement. *See supra* note 11. Since federal laws have equal, if not superior, status to executive agreements, the later in time rule applies. An inconsistent federal law enacted after the GATT provision takes precedence. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 (1987). Note that executive agreements, as federal law, prevail over inconsistent state law by reason of the Supremacy Clause. *United States v. Belmont*, 301 U.S. 324, 331-32 (1937). A state trying to enact a bill like the Child Labor Deterrence Act would thus be prohibited from doing so by the prior executive agreement.

103. The United States has a history, particularly in recent years, of non-compliance with GATT rulings. *See generally* Robert E. Hudec et al., *A Statistical Profile of GATT Dispute Settlement Cases: 1948-1989*, 2 MINN. J. GLOBAL TRADE 1 (1993).

104. 139 CONG. REC. E 702, 703 (daily ed. Mar. 18, 1993). The Representative is referring to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, Convention done Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249, reprinted in 12 I.L.M. 1085 (1973) [hereinafter CITES]. The Convention entered into force for the United States on July 1, 1975. The Convention prohibits trade in endangered species. A column in *The Plain Dealer* commented, "When you consider the indignation that's been mobilized over testing mascara on rabbits, turning minks into coats, polluting trout streams and chopping down owl habitats, it'd be pretty depressing if we turned out not to mind working little kids 15 hours a day for slave wages." Patricia McLaughlin, *Child-Labor Abuse Gains Notice*, PLAIN DEALER, May 13, 1993, at 5D.

GATT prohibits the United States from defending children, such critics may contend that the United States has a moral obligation to take such measures.

Several factors may also enable the United States to "get away" with the measure. First, developing countries may be hesitant to challenge the measure. Countries that openly espouse the use of child labor may risk consumer boycotts of their goods. Countries may also be embarrassed to admit that they depend upon child labor. Second, even if a GATT action is pursued, the United States could simply block the action.¹⁰⁵ Finally, even if developing countries could obtain a favorable ruling, their ultimate sanctions may have little retaliatory effect on an economy as large as that of the United States.

If the United States can disregard the decision of a GATT panel, it should not be so quick to ignore the reasoning behind GATT policy. The GATT panel in *Tuna/Dolphin* established two principles: (1) decisions concerning production processes which do not affect the good's impact on the importing country should be left to the discretion of the producing nation; and (2) any trade restrictions governing such decisions must be enacted through multilateral agreements. Together, these two principles state that ultimate decisions concerning domestic regulations are best left to the national governing authority. Such an approach is more likely to lead to good policy decisions than the unilateral American approach. Decisions are best reached by a process which incorporates local information and local decision-makers in the policy-making process. Good policy requires looking at the specifics of the situation.¹⁰⁶

IV. THE HARKIN BILL AS CHILD LABOR POLICY

An analysis of the Harkin Bill illustrates the danger of unilateral action. Such action may not only be ineffective, but may actually harm those it is intended to help.¹⁰⁷ If the American concern truly lies in improving the situation of children in developing countries, the United States should seek negotiated multi-

105. Under the rules of GATT, a panel decision is not technically final until it has been ratified by the CONTRACTING PARTIES (i.e., members of GATT). Since GATT traditionally resolves disputes on a consensus basis, any party, including the party who received the adverse ruling, can block adoption of a panel decision. See *Dispute Settlement Procedures*, BISD 14th Supp. 139, ¶ X (1969). Interestingly, member states have only seldomly refused to concede to an adverse ruling. See generally Hudec, *supra* note 103.

106. See *infra* notes 137-38 and accompanying text.

107. See *infra* notes 127-29 and accompanying text.

lateral actions against the exploitation of child labor whenever possible.¹⁰⁸

The Harkin Bill makes three implicit assumptions. First, the Bill cites "under fifteen" as a universal definition of a child.¹⁰⁹ Second, the Bill assumes that prohibiting children from working in industries exporting to the U.S. market will keep children out of the workforce. Third, the Bill presumes that keeping children out of the labor force will increase their well-being. The truth of these suppositions varies significantly across countries and across industries; a systematic analysis of all three assumptions is necessary before determining the actual effects of the Bill on working children.

First, the Harkin Bill defines a child as any person under the age of fifteen.¹¹⁰ By adopting a rigid age-based definition of a child, the Harkin Bill assumes that there is a universal standard governing the appropriate age for a child to begin work. This single standard approach neither takes into account cross-cultural differences in family structure nor does it look at a child's role as a participating member of society in general.¹¹¹ The belief that children should not be looked at as a form of economically productive labor is a fairly recent development in industrialized societies and is not shared in much of the developing world.¹¹² Moreover, different societies have different thresholds for defining childhood.¹¹³ Thus, even if there was a

108. Unilateral action may be warranted under certain extreme circumstances. See *infra* notes 148-52 and accompanying text.

109. S. 613 § 8(2).

110. *Id.*

111. See MYRON L. BARSH, *The Draft Convention on the Rights of the Child: A Case of Eurocentricism in Standard-setting*, 50 *NORD. J. INT'L L.* 24 (1989). In this article, the author points out the eurocentricism in the U.N. human rights system in general.

112. See MYRON WEINER, *THE CHILD AND THE STATE IN INDIA* 109-10 (1991). The notion that children should be removed from the labor force and placed into schools is a very modern one. Only recently were children transformed from valuable economic assets to economically useless but emotionally priceless objects. *Id.* at 110 (referring to PHILIPPE ARIES, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF THE FAMILY LIFE* (1962), and VIVIANA ZELIZER, *PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN* (1985)).

113. In some societies, age may not be a sufficient basis for defining "childhood." The fulfillment of certain social rites and traditional obligations may well be important requirements in defining "adult" and "child" status. In still others, the integration of childhood into socio-economic life may begin so early, and the transition from childhood to adulthood may be so smooth and gradual, that it may be virtually impossible to identify clearly the different life phases. We must therefore recognize that we are dealing with a concept which could mean different things depending on the context.

common understanding among nations that children should not work, different societies may have cultural differences concerning the ages that demarcate childhood.¹¹⁴ As of 1988, eighteen countries had a minimum age of twelve for admission to the formal workforce;¹¹⁵ nine countries had a minimum age of thirteen; and forty-six had a minimum age of fourteen.¹¹⁶

To justify the "under fifteen" definition of a child, the Bill quotes a section of ILO Convention No. 138 Concerning Minimum Age for Admission to Employment which states: "The minimum age specified in pursuance of paragraph 1 of this article shall not be less than the age of compulsory schooling and, in any case, shall not be less than 15 years."¹¹⁷ This apparent attempt to cite a universal standard is, however, a bit misleading. The actual ILO Convention is not nearly as rigid as the Bill implies. Convention No. 138 aims for a progressive rise in minimum age for admission to employment rather than the strict enforcement of a pre-determined age. The Convention itself is a fairly flexible instrument. It provides that a country whose economy and educational facilities are insufficiently developed may: (1) specify a minimum age of fourteen years;¹¹⁸ (2) limit the sectoral scope of application;¹¹⁹ and (3) reduce to twelve the minimum age of entry into employment in light work.¹²⁰ A 1988 ILO publication stated that, "[T]he Convention, although comprehensive, provides flexible standards and guidelines for which countries at different stages of socio-economic development can

ALEC FYFE, INTERNATIONAL LABOUR OFFICE, GENEVA, CHILD LABOUR: A GUIDE TO PROJECT DESIGN 6 (1993).

114. Some cultures may have no definable concept of childhood at all. *Id.*

115. For a list of specific countries, see INT'L LABOUR OFFICE, 7 CONDITIONS OF WORK DIGEST 10 (1988).

116. *Id.*

117. S. 613 § 2(a)(2) (citing ILO Convention (No. 138) Concerning Minimum Age for Admission to Employment, June 6, 1973, art. 2, ¶ 3, 1015 U.N.T.S. 297, 300) [hereinafter ILO Convention No. 138]. ILO Convention No. 138 is a consolidation and revision of ten earlier ILO Conventions establishing a minimum age for employment in different sectors of economic activity. Other ILO conventions concerning child labor cover night work, medical examinations, and unhealthy and dangerous work. See H.T. Dao, *ILO Standards for the Protection of Children*, 58 *NORD J. INT'L L.* 54 (1989).

118. ILO Convention No. 138, *supra* note 117, art. 2(4).

119. *Id.* art. 5(1), (3). A developing country may limit the scope of application of the Convention, provided that a minimum number of sectors are covered. *Id.* Certain sectors are also required including: mining and quarrying; manufacturing; construction; electricity, gas and water; sanitary services; transport, storage and communication; and plantation and other agricultural undertakings mainly producing for commercial purposes. *Id.*

120. *Id.* art. 7(4).

aim and which they can progressively raise as living standards improve."¹²¹

Despite this flexible approach, as of 1992 only thirty-nine nations had ratified the Convention, far short of an international quorum.¹²² The United States itself has not ratified the Convention.¹²³ Although American labor regulations most likely exceed the requirements of the Convention, the United States has resisted subjecting itself to international conventions in general.¹²⁴ The American belief seems to be that we know what is best for our own people. There seems to be something doubly wrong in refusing to accept international standards as binding upon oneself while pressing standards established unilaterally upon others.¹²⁵

Second, the Harkin Bill presumes that by eliminating the ability of children to work in the export market, it will effectively shift their time toward some beneficial activity like education or leisure.¹²⁶ The Bill fails to recognize that work for the export market is not the only work available. If surrounding conditions "force" a child to work, and he or she is unable to work in the export industry, the child will most likely simply work elsewhere. In addition to export industries, children also work in the home, in agriculture, and in industries producing for

121. INT'L LABOUR OFFICE, *supra* note 115, at 7. The Convention also requires a higher age (eighteen) for admission to employment in areas "likely to jeopardise the health, safety or morals of young persons." ILO Convention No. 138, *supra* note 117, art. 3(1).

122. For a list of countries, see FYFE, *supra* note 113, at 55.

123. While it may seem a bit strange for a nation to cite an international agreement it has not ratified, such a position is not unusual. The Third U.N. Convention on the Law of the Sea, U.N. Doc. A/CONF.b2/122 (Oct. 7, 1982) reprinted at 21 I.L.M. 1261 (1982), has yet to come into force, yet some of its provisions are nonetheless cited as evidence of customary international law. See Marian Nash, *U.S. Practice: Contemporary Practice of the United States Relating to International Law: Fisheries*, 86 AM. J. INT'L L. 792 (1992). The International Court of Justice has also referred to the UNCLOS III as representing "general international law" regarding the Exclusive Economic Zone. See *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Can. v. U.S.), 1984 I.C.J. 246 (Oct. 92) ¶ 94.

124. See *supra* note 96.

125. For further discussion on this point, see *infra* notes 158-60 and accompanying text.

126. The insights of the new household economics are helpful in this regard. See generally GARY S. BECKER, *A TREATISE ON THE FAMILY* (1981). The model applies microeconomic analysis to the household, emphasizing that families are producers as well as consumers. The model tells us that families determine the particular use of their members' time by weighing the various options available to them. Roughly speaking, a child's time can be spent in three ways; work, leisure, or investment (education or physical development).

the domestic market; none of these areas are affected by the Harkin Bill.¹²⁷ These jobs generally provide lower pay and may often be more hazardous than comparable export-related jobs.¹²⁸ A BBC field report from Bangladesh provided a similar analysis:

Only those industries that export to the U.S. are affected by the Harkin Bill. As far as Bangladesh is concerned, that's just the garment industry. But the estimated 50,000 children who've been working in garment factories are part of a much greater total of over six million child laborers nationwide. . . . Unfortunately, the bill doesn't concern itself with those children working in dangerous environments such as glass-blowing factories or as prostitutes, so former child garment workers could be queuing up to join them.¹²⁹

Third, the Bill assumes that removing children from the work force will improve their well-being. This assumption is made without considering the alternatives available to the children.¹³⁰ Although work can certainly be prejudicial to a child's

127. See *supra* note 57 and accompanying text. The majority of children who work do so in agriculture. KNIGHT, *supra* note 1, at 13. Another commentator notes:

Most experts agree that the majority of working children, and much of the worst exploitation, is in rural areas, especially among agricultural laborers. Yet, much more visible urban street workers, who may be relatively better off and fewer in number, have been receiving considerably more attention from both national and international agencies. Likewise, ignoring children who work as household domestics - perhaps the largest children's occupational group in some countries - discriminates against girls, who predominate in this occupation.

PROTECTING WORKING CHILDREN 6 (William Myers ed., 1991).

128. A Department of Labor monograph commented:

Ironically, children would be better off if they were working in the formal sector. But they are legally prohibited from doing so, and in the formal sector the prohibition is in fact applied effectively. So children are thrown back into the informal sector, where working conditions are poor, and where, it goes without saying, there are no welfare facilities, no work rules, low pay, and no future.

KNIGHT, *supra* note 1, at 9.

129. *Child Labor Bill May Have Unintended Effects*, National Public Radio, July 14, 1993, available in LEXIS, Nexis library, Current file. According to figures published by the Swiss-funded Underprivileged Children's Education Program, there are nearly 3 million children under the age of 14 working for a living in urban areas of Bangladesh. Many of these children collect garbage. Sabir Mustafa, *Factories Lay Off Underage Workers*, UPI, May 9, 1993, available in LEXIS, Nexis Library, Current File.

130. See CLARK NARDINELLI, *CHILD LABOR AND THE INDUSTRIAL REVOLUTION* 7 (1990). Nardinelli notes:

The economic approach is to consider alternatives. The economist rarely deals in absolutes; thus the question is not whether something is good or bad but whether it is better or worse than the alternatives. . . . Clearly, under some conditions child labor improves the conditions of children and under other conditions it does not.

Id.

emotional, physical, and intellectual development,¹³¹ the absence of work can also condemn a child to a variety of social, moral, and health risks.¹³² This is particularly true in areas where poverty is entrenched, where the child would be unable to attend school due to a lack of adequate school facilities, or where attending school is simply too expensive.¹³³ If a child can not attend school and is prohibited from work, what avenue is open to them for personal development? Income from work may also be necessary to sustain a child's nutritional and health status.

Depending on the particular work conditions, work can also benefit a child.¹³⁴ Work can develop a child's social and technical skills and increase a child's confidence and self-esteem. Work can also aid children in entering the adult world. By working and contributing to the family income, children can improve their own health and nutrition status as well as that of their other family members.

As detailed above, the Harkin Bill is thus premised on three highly questionable presumptions. A further flaw of the Bill is that it attempts to tackle a complicated problem with a simple regulatory approach. Child labor is an immense and complex problem in which economic, legal, political, cultural, and other factors are all intertwined. One of the major limitations of the Bill is that it does nothing to change the factors which lead a child to work in the first place. The ILO cites several conditions which contribute to child labor: poverty, lack of access to school-

131. See *supra* note 87.

132. See INT'L LABOUR OFFICE, *supra* note 115, at 14.

133. In many developing countries, children within compulsory school age can not attend school because there is no school available. Even where schooling facilities are within reach, the urge of poverty may be more pressing than the immediate advantages of schooling, especially when further education prospects are dim in the long term and any ensuing benefits likely to be low.

Dao, *supra* note 117, at 64. The percentage of children who enroll in secondary school (sixth or seventh grade) is very low in many developing nations. WORLD BANK, WORLD DEVELOPMENT REPORT 1993, 294-95 (1993). Examples of national enrollment rates in secondary school include: Bangladesh, 17%; Brazil, 39%; India, 44%; Indonesia, 45%; Nepal, 30%; Nigeria, 20%; Pakistan, 22%; and Thailand, 32%. *Id.*

134. See Philip Alston, *Implementing Children's Rights: The Case of Child Labour*, 58 NORD. J. INT'L L. 35 (1989).

Since not all of the world's working children are exploited, and since certain forms of work may be highly beneficial to the children concerned, it is necessary not only to ascertain the incidence of child labour in the world but also to draw the line between exploitative and non-exploitative practices. (footnotes omitted)

Id. at 36. See also FYFE, *supra* note 113.

ing, migration to urban areas, rapid population growth, and insufficient employment opportunities for adults.¹³⁵ Neither the Child Labor Deterrence Act nor any accompanying congressional policy address any of these other interrelated issues.¹³⁶

The point here is not that child labor is a good thing. In an ideal situation, all children would have the ability to go to school and to play. But the Child Labor Deterrence Act is not about creating that ability. It is about limiting choices, and it fails to take account of the factors affecting those choices. This is precisely the concern behind the GATT policy prohibiting nations from imposing their standards upon other countries. Ascertaining the precise nature of the problem in a given area is a prerequisite to effective action.¹³⁷ A national government making its own policy is in a better position to consider and balance its own needs and the needs of its citizens than a foreign government enforcing its own views unilaterally.¹³⁸ Good policy requires looking at the specifics of the situation.

Due to the vast sociological, economic, and cultural differences that exist among countries, standards governing the minimum age of employment will not be universal. Modern standards in the North were created in response to the needs of that society. Such standards may be well adapted to meet those

135. See INT'L LABOUR OFFICE, *supra* note 115, at 3-4. According to the new household economics, how a child's time is allocated depends on income, relative shadow prices, and the preference of parents. See NARDINELLI, *supra* note 130, at 40. See also BECKER, *supra* note 126.

136. As the ILO Director-General has noted:

Thus the elimination of child labour and the progressive raising of the minimum age for admission to employment must be regarded as objectives to be attained gradually and as an integral part of a process of development designed to overcome the scourges of unemployment and destitution. Formal measures alone will not work; if applied in isolation from over-all measures to improve the economic and social context, and especially in the absence of alternatives to work, they may even be harmful.

Alston, *supra* note 134, at 39 (citing ILO Director-General's Report 38 (1983)).

137. One commentator has noted,

High-minded, abstract platitudes so common to this area of concern are of little help in penetrating thorny moral, technical, political, economic and cultural thickets to effectively reach real children. Effective protection of working children requires that compassionate vision and firm resolve be matched to a realistic appreciation of the situations, opportunities and constraints within which practical action can be taken.

PROTECTING WORKING CHILDREN, *supra* note 127, at x. See also Alston, *supra* note 134, at 38-40.

138. See generally Hurlock, *supra* note 78.

needs, yet still be ill-adapted to the conditions existing in many other nations.¹³⁹

Nonetheless, child labor policies should not be completely left to each country's unfettered discretion. The world does have an interest in human rights and in some minimum protection for children.¹⁴⁰ There are certain absolutes arising from the inherent dignity of human beings which all nations should adhere to regardless of their level of development. Some of the conditions under which children labor in the world today should not be tolerated in any country.¹⁴¹ There is no social, economic, or cultural justification for children to work as bonded labor in near slave-like conditions, or for six or seven year olds to be

139. This goes to the heart of the assertion that the use of child labor constitutes an unfair trade practice which gives foreign firms an unjustified competitive advantage. The idea that child labor is an unfair trade practice is contingent on the fact that employers are actually exploiting their child workers. As the previous discussion illustrates, different economic conditions may exist which make different standards among countries equally valid. A viable restriction on child labor can not be determined in isolation from other social and economic issues.

140. Since the creation of the United Nations in 1948, several UN covenants have been enacted which prohibit the exploitation of child workers as part of a general human rights standard. The two most widely accepted have been the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 1956 (Article 1), April 30, 1957, 18 U.S.T. 3201, T.I.A.S. No. 6418, 266 U.N.T.S. 3, which has been ratified by 102 nations, and the International Covenant on Economic, Social and Cultural Rights of 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess. Supp. No. 16, at 49, U.N. Doc. A/6316 (1967), which has been ratified by ninety-two countries. Other significant instruments include the Declaration on the Rights of the Child of 1959, G.A. Res. 1386, U.N. GAOR, 14th Sess. Supp. No. 16 at 19, U.N. Doc. A/4354 (1959), and the Convention on the Rights of the Child, G.A. Res. 25 (XLIV), U.N. GAOR, 44th Sess., 61st Plen. mtg., annex, U.N. Doc. A/RES/44/25 (1989), which opened for signature on Jan. 26, 1990.

141. In 1978, The U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities appointed Mr. Abdelwahad Bouhdiba as Special Rapporteur to study the question of child labor. He offered the following conclusions:

In at least three cases the exploitation of child labour is no less than a flagrant crime which violates the United Nations Charter, the principles of the Charter and the Universal Declaration of Human Rights, and the most elementary principles of morality and all positive laws. Energetic repressive action is called for in these cases, namely: (a) Sale and similar practices (serfdom, bond-service, fake adoption, abandonment); (b) Child prostitution, trafficking in pornography involving the sexuality of children, and the international traffic in girls and boys for immoral purposes; (c) Under-age maid servants in a position of servitude.

Yo Kubota, *The Protection of Children's Rights and the United Nations*, 58 *NORD. J. INT'L L.* 16 (1989).

working under hazardous factory conditions for ten to twelve hours a day for virtually no pay.¹⁴²

The inability of a national government to prevent widespread child labor under such exploitative conditions may be a result of "political failure" within that country.¹⁴³ Employers are powerful, child laborers are not. Protecting the rights of child laborers may not be given a high priority. There may be an inadequate allocation of resources to enforce existing protective laws. Finally, class distinctions may result in a ruling elite which is largely indifferent to the conditions of poor or minority children.¹⁴⁴ Given the existence of these failures, there is a need for international protection of working children.

V. OPTIONS FOR INTERVENTION ON BEHALF OF CHILDREN

The GATT panel in *Tuna/Dolphin* established the principle that countries can only regulate the internal conditions of production of another country through international agreements.¹⁴⁵ Accordingly, if the United States wants to enact protective measures for child laborers, it must do so through multilateral (or at least bilateral) negotiations.¹⁴⁶ In light of the benefits of

142. See U.S. DEP'T OF LABOR, BUREAU OF INT'L LABOR AFFAIRS, *supra* note 6.

In Uttar Pradesh, India, child labor recruiters entice parents to pledge their children against earning "advances." Recruited children must work as unpaid "trainees" for 6 months to 1 year, after which they may earn four to eight cents a day. There are no holidays. For most children, this lasts 5 to 6 years, the period for which they were bonded.

Id. at 3. See also U.S. DEP'T OF LABOR, BUREAU OF INT'L LABOR AFFAIRS, PAKISTAN, 91-06 FOREIGN LABOR TRENDS (1991).

Bonded labor is widespread in Pakistan, as throughout the subcontinent, in brick-making, carpet weaving, fish cleaning and packing, shoe-making, auto-repair, agriculture, mining, and quarrying industries. Bonded laborers and their families are trapped by pay advances (peshgi) which they are unable to work off. An employer can keep an illiterate indentured worker in financial bondage almost indefinitely, with the debt often being passed down to his children.

Id. at 9.

143. See Hyndman, *supra* note 1, at 102-03.

144. See WEINER, *supra* note 112. In this book, Weiner raises the argument that traditional notions of social rank and hierarchy may result in beliefs that certain people are appropriate for working, not thinking. *Id.* In order to perpetuate such a system, the state must keep children in manual labor jobs and out of schools.

145. See *supra* text accompanying notes 78-83.

146. See *supra* notes 98-99. The side agreement on labor of the recently approved North American Free Trade Agreement (NAFTA) is an example of a negotiated "labor rights" agreement. See *North American Free Trade Agree-*

local input, a negotiated agreement has significant advantages.¹⁴⁷ Negotiated agreements ensure that a variety of perspectives are heard and that information from local sources is used in constructing policy. Unilateral measures are often undertaken with little consideration given to the particular circumstances of the countries affected. Thus, although multilateral agreements may not be as quick or as easy to enforce as unilateral agreements, they constitute a more appropriate and effective means of improving the situations of child workers.

Nonetheless, despite the sound policy reasons behind GATT's prohibition of unilateral action, there are times when moral imperatives may make such action justifiable or perhaps even require it.¹⁴⁸ Negotiations can continuously drag on while actions without any shadow of legitimacy continue to take place.¹⁴⁹ There is no serious ideology which professes that working under exploitative circumstances is good either for the child

ment Side Accords on Labor Cooperation, Import Surges, BNA DAILY REPORTS FOR EXECUTIVES, at M177 (1993). The Agreement does not establish common minimum standards but rather explicitly recognizes the right of each party to establish its own labor standards. *Id.* art. 2. The Agreement allows a party to protest if another party has persistently failed to enforce its own occupational safety and health, child labor, or minimum wage technical labor standards. *Id.* art. 27. An Arbitral Panel may be established to hear the dispute if prior consultations prove ineffective. *Id.* art. 29. The goal of such an approach would seem to be to provide some transparency to the current status of worker rights in each country. The Agreement also establishes a Ministerial Council, *id.* art. 8, which serves several functions, including promoting cooperative activities between the parties regarding child labor. *Id.* art. 11(b).

147. See *supra* notes 137-39 and accompanying text. See also Hurlock, *supra* note 78, at 2142-44.

148. See generally Hudec, *supra* note 41. Professor Hudec develops the concept of "justified disobedience." *Id.* A nation practices justified disobedience when the damage to the legal system caused by inaction in the face of deadlock will exceed the damage caused by some disobedient act trying to force a correction. *Id.*

149. GATT itself provides an excellent example of this problem.

While it is possible to remedy inadequacies by negotiation, the reform process is often maddeningly slow, and sometimes stalls completely, due to the need for agreement of the nearly one hundred national governments who are GATT's law-making body. Governments tend to support law reform in principle, but when confronted with specific legal reforms that will call upon them to change domestic laws and practices, they encounter strong political pressures to follow the safer course of keeping the status quo. This political caution is not peculiar to GATT; indeed, GATT has probably been more successful in overcoming it than many other international organizations that deal in politically sensitive matters. But it is still strong enough in GATT that law reform is seriously hobbled by it.

Id. at 126.

or the society in which he or she lives.¹⁵⁰ The severe exploitation of child workers is so unacceptable that it should not be left aside indefinitely when there is little hope that either domestic conditions will improve, or that a multilateral agreement can be reached.

In such extraordinary situations, unilateral action may be warranted even though such action is in clear contradiction to GATT.¹⁵¹ As the Harkin Bill so clearly demonstrates, unilateral action is a dangerous area ripe for abuse. In order to protect against such abuse, five conditions should be fulfilled before a country resorts to such unilateral measures.¹⁵² First, good faith attempts at negotiations must have failed. Second, the enacting nation should take all reasonable GATT-consistent measures before resorting to unilateral trade restrictions. Third, the measures enacted should not be self-serving. Fourth, the restriction should not enforce standards which are not widely accepted by other nations. And finally, the ultimate goal should remain a multilateral agreement. The Harkin Bill is analyzed below under these five steps.

First, good faith attempts at negotiations should have failed. The United States has been a consistent proponent of attempts to attach worker rights amendments to GATT.¹⁵³ In

150. See Alston, *supra* note 134, at 35.

151. The GATT panel in *Tuna / Dolphin* established a rule against unilateral actions. See *supra* text accompanying notes 97-99. While the author agrees with the general rule, as with most rules, absolute adherence will result in unjust outcomes on occasion. See Hudec, *supra* note 41.

152. The steps recommended in this Note are a variation of the guidelines suggested by Robert E. Hudec. *Id.* at 137. Professor Hudec cites five substantive guidelines that should be followed when taking GATT-inconsistent measures under Section 301:

- 1) The objective of the disobedient act must be to secure recognition of a legal change that is consistent with the general objectives of the GATT.
- 2) Disobedience undertaken in support of a claim must be preceded by a good faith effort to achieve the desired legal change by negotiation.
- 3) Disobedience must be accompanied by an offer to continue to negotiate in good faith, with a pledge to terminate the disobedient action upon satisfactory completion of such negotiations.
- 4) The extent of the disobedience must be limited to that which is necessary to achieve a negotiated legal reform of the kind needed to solve the problem.
- 5) Governments must accept the power of the legal process to judge their disobedient behavior, and must accept the consequences imposed by law.

Id. at 137-38. See also Raymond F. Mikesell, *GATT Trade Rules and the Environment*, 11 CONTEMP. POL'Y ISSUES 14 (1993).

153. The earliest American proposal for a labor rights provision in GATT was made in 1953. Charnovitz, *supra* note 46, at 574. In 1987, the House of

1986, the United States proposed including worker rights in the Uruguay Round of GATT negotiations.¹⁵⁴ The initiative failed, however, and the subject of worker rights was not included in the Ministerial Declaration that launched the Uruguay Round.¹⁵⁵ The United States more recently suggested that a GATT Working Party be established to examine worker rights issues.¹⁵⁶ The proposal was also met with substantial opposition.¹⁵⁷

Yet despite its leading role on worker rights in GATT, the United States has resisted active participation in human rights fora such as the ILO. Supporters of a worker rights provision in GATT itself cite GATT's greater enforcement capacity and its preferable political climate.¹⁵⁸ Nonetheless, there are other international agreements unconnected with GATT which use trade measures as enforcement provisions.¹⁵⁹ GATT is in many ways a suspect forum for "humanitarian" claims. GATT is premised upon the economic self-interest of its members. It is a trade forum. The preference for GATT over other fora implies that the United States views international worker rights as primarily a domestic economic concern rather than a moral or humanitarian issue.¹⁶⁰

Second, a country should not take GATT-illegal action unless it has already taken alternative measures.¹⁶¹ If the Child

Representatives passed a provision listing American objectives for the Uruguay round. One of the objectives was, "to adopt, as a principle of GATT, that the denial of worker rights should not be a means for a country or its industries to gain competitive advantage in international trade." *Id.* at 575 (citing H.R. 3, 100th Cong., 1st Sess., § 111(b)(10) (May 8, 1987)).

154. *Id.* at 565.

155. *Id.*

156. *See* Amato, *supra* note 17, at 92-94.

157. *Id.*

158. *Id.* at 92.

159. For example, CITES, *supra* note 104, seeks to protect endangered species by strictly limiting trade in specimens of these species. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 28 I.L.M. 649 (1989), prohibits trade in hazardous wastes unless adequate disposal is ensured.

160. Such a characterization is supported by other U.S. legislation in the area. Section 301 lists the denial of worker rights as an "unfair trade practice." *See supra* text accompanying note 44. The Harkin Bill itself states as one of its purposes, "Adult workers in the United States. . . should not have their jobs imperiled by imports produced by child labor. . . ." S. 613 § 2(a)(9). *See also infra* note 164.

161. The GATT panel advocated this position in *Tuna/Dolphin*. *See supra* note 94 and accompanying text. *See also* GATT Dispute Resolution Panel, *Thailand — Restrictions on Importation of and Internal Taxes on Cigarettes*, *supra* note 94.

Labor Deterrence Act truly signals that Americans are ready to take some responsibility for the conditions of children in the developing world, then the country should demonstrate this commitment by taking affirmative steps in that direction. There are numerous non-trade related policies which the United States could adopt which would both decrease the incidence of child labor overseas and improve the conditions of the children themselves. Possibilities include increasing foreign aid to build and equip schools and training facilities or helping develop employment opportunities for adults in developing countries in order to alleviate the poverty underlying much of the need for child labor.¹⁶² The United States should earn its right to claim the moral imperative.

Third, the measures enacted should not be clearly self-serving. It is interesting to note that the Harkin Bill professes to help working children in a manner which costs the United States nothing. In fact, the Bill appears partially aimed at improving the U.S. economic situation. The direct effect of the Bill would be to deny employment to children working overseas in export industries and thus presumably boost domestic employment in those industries.¹⁶³ Not surprisingly, the Bill has been criticized as protectionist.¹⁶⁴

Fourth, such restrictions should not enforce standards which are not widely shared by other nations — including nations in similar circumstances to the target nation or nations.

162. A consumer boycott could also eliminate the purchase of goods produced by child labor. The recent German boycott of Indian carpets as a result of consumer disdain for that industry's use of child labor has decreased sales to the extent that the industry is currently negotiating a labelling agreement which certifies that the carpet was not produced by child labor. See John Rette, *UN Joins Assault on Child Sweatshops*, GUARDIAN, May 7, 1993, at 12; *The Bonded Labour Issue*, CARPET & FLOORCOVERINGS REV., Feb. 5, 1993, at 21. Since such boycotts are simply a reflection of "consumer tastes" and not a specific governmental policy, they are thus not a violation of GATT. Nonetheless, such boycotts contain similar policy risks as unilateral governmental prohibitions; the boycott may not be based on a true understanding of the local situation. See *supra* notes 137-39.

163. See *supra* note 46. The lay-off of child workers overseas will not necessarily lead to a boost in domestic employment. An official of the Bangladesh Garment Exporters Association stated, "It won't cost us any extra money to employ older staff as we always pay according to the job performed rather than according to age." Sabir Mustafa, UPI (B.C. Cycle), Jan. 17, 1993, available in LEXIS, Nexis library, Current File.

164. Human Rights activists in Dhaka, Bangladesh, criticized the legislation saying it was designed to protect U.S. jobs and not to help the working children of Bangladesh. *Activists Blast U.S. Bill on Child Labor*, UPI (B.C. Cycle), Aug. 8, 1993, available in LEXIS, World Library, Allwld File.

Setting an age of fifteen as the minimum age of employment represents a northern, industrialized view of childhood.¹⁶⁵ The United States should turn to international agreements, resolutions, or to customary international law to locate applicable standards. Unilateral actions which violate GATT should be based upon clearly defined and broadly accepted norms. For example, customary international law prohibits slavery in all its forms.¹⁶⁶

Finally, the ultimate goal of any unilateral action should remain a multilateral agreement. Thus, any nation undertaking unilateral measures should continue to seek an international agreement. The policy justifications of a multilateral agreement remain strong. Negotiated agreements ensure that a variety of perspectives are heard and that the competing needs of the people are effectively balanced. The creation of such an international agreement would do much more to help the world's working children than passage of the Harkin Bill.

VI. CONCLUSION

Exploitative child labor remains a large problem in many parts of the world. By prohibiting the import of manufactured goods produced by children under the age of fifteen, the Child Labor Deterrence Act attempts to tackle the problem of international child labor. According to the principles established by the GATT panel in *Tuna/Dolphin*, GATT prohibits a nation from enacting regulations which do not protect its own territory or citizens, but instead seek to regulate economic activities within another nation. Since the Harkin Bill attempts to unilaterally establish a universal minimum age for admission to employment, the Bill would bring the United States into violation of GATT.

By prohibiting the unilateral control of one nation over other states' production processes, GATT supports not only notions of national sovereignty, but the realization that local input is necessary for effective regulation. Child labor is an immense and complex problem in which socio-economic, legal, political, cultural, and other factors are all intertwined. The unilateral actions of a single nation are unlikely to be successful in attack-

165. See *supra* notes 111-14 and accompanying text.

166. One of the U.N. organs that works extensively with the rights of child workers is the Working Group on Contemporary Forms of Slavery. The committee examines questions surrounding such practices as the sale of children, child prostitution, and detained children. See Kubota, *supra* note 141, at 10.

ing the problem. The United States should instead seek international agreements protecting working children from the most severe instances of exploitation. Such agreements would best be pursued outside the GATT, through the ILO, other U.N. organs, or an international convention.