Baby Steps toward International Fair Labor Standards: Evaluating the Child Labor Deterrence Act

Michael A. Tonya
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I. INTRODUCTION

Newspaper reports of child labor abuses lead with misery: in Thailand, weeping, malnourished children squint at daylight, clinging to the legs of the Bangkok policemen who are raiding the paper cup sweatshop where the youngsters work. In Mexico, twelve-year-old Vincent Guerrero, the smartest of 105 sixth-graders, wins a speech contest at his school. That evening, Vincent’s father is proud to announce that school is over for Vincent for good. Now the boy will work full time, spreading toxic toluene glue on the soles of athletic shoes, with his bare hands. Within weeks Vincent is home in bed, coughing, with burning eyes and nausea.

The reports explain that tradition, economic pressure and evil bosses are to blame. Some of the children even say they want to work. The practitioners are complacent. There are numerous laws against employing children, and reports of abuses outrage the newspaper readers, but child labor thrives. The bans are rarely enforced.

3 For example, Indian labor union spokesperson Swami Agnivesh stated that child labor legislation was passed but not implemented due to lack of “political and judicial will.” Over 55 million child laborers in India Xinhua General Overseas News Service, Feb. 15, 1991, item no. 0215170 available in LEXIS, NEXIS Library.
4 Moffett, supra note 2.
5 The International Labor Organization reports that there are 88 million working children, 67
The proponents of the Child Labor Deterrence Act (CLDA) argue that this market for child labor in other countries is not simply a sorry fact of life.\(^6\) The U.S., they say, can restrict use of child labor abroad by eliminating the U.S. market for the goods the children make.\(^7\) To manage this the CLDA would target American importers, penalizing those who attempted to bring such goods through customs.\(^8\) By implication, the proponents of the CLDA also assert that such action would be legal under international law.

In remarks introducing the CLDA, Congressman Donald Pease (D-Ohio) invoked the newspaper stories and mourned the wasted potential of each young Vincent Guerro.\(^9\) Indeed, the CLDA he proposes would require further published periodic reports to identify countries that use and abuse child labor. The disturbing news reports could then be written by the United States.

Congressman Pease, however, made only passing reference to the issues of the effectiveness of the bill and of existing U.S. international obligations. How will U.S. treaty obligations and generally accepted principles of international law restrict the U.S. if it attempts to enforce a bill with the extraterritorial effects of the Child Labor Deterrence Act? Will the CLDA, if it is legal under international law, actually affect the use of child labor abroad? Or will it only mean more sad stories?

A brief history of U.S. domestic and international child labor prohibitions will place the Child Labor Deterrence Act in context. The United States tried and failed to establish international fair labor standards within the multilateral framework of the GATT. That failure pro-

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\(^7\) Specifically, export goods manufactured or mined by children less than fifteen years old. H.R. 3786, supra note 6 at §§ 2(c), 8(a)(7). See also 137 CONG. REC. E3861 (daily ed. Nov. 15, 1991) (Congressman Donald J. Pease, introducing H.R. 3786, 102nd Cong., 1st Sess., stated that, "child labor cannot practically be eradicated overnight. Rather priority should go in the near-term to stopping the most egregious forms of exploitation of children in the workplace around the world. In our opinion, the widest possible international consensus can be mobilized around the proposition that children under fifteen should not be allowed to work in industry or mining. This approach would prevent younger children from being put to work in occupations where they would be in the greatest danger of traumatic injury or occupational disease.").

\(^8\) H.R. 3786, supra note 6 at § 6.

\(^9\) 137 CONG. REC. E3860 supra note 6, at E 3860.
voked the U.S. to unilaterally demand workers’ rights, pressing for international fair labor standards in nonreciprocal grant programs and extraterritorially applied domestic legislation. These bolder attempts at change, however, have rarely been used to reform international child labor laws. This continued lack of success has prompted the CLDA.

The CLDA will be evaluated in terms of effects on existing international agreements, American workers, American importers, and foreign children. International resistance to child labor reform persists, but the CLDA seems to have been drafted with that resistance in mind. The bill could be a valuable first step toward general agreement on international fair labor standards.

II. MINIMUM AGE: ASSERTING INTERNATIONAL FAIR LABOR STANDARDS

Congress and the President share constitutional foreign trade powers. The President negotiates foreign trade agreements, while the Congress regulates commerce with foreign nations. The U.S. trade policy that emerges from this shared power can be focused and consistent when the branches cooperate closely. Congress does, at times, simply ratify a course set by the President and his appointee, the U.S. Trade Representative (USTR). Absent that cooperation, foreign trade policy can be a tug-of-war, with the President and Congress often at odds over how to soothe interest groups, implement party platforms, and maintain international alliances.

Both branches have agreed on the need for enforceable international fair labor standards, and presidents have sought to include them in trade agreements for many years. International fair labor standards are the minimum rights of workers, distinguished from domestic standards of any one country; a “benchmark” applicable to all countries. Those international standards, as recognized by the United States, are:

1. the right of association,
2. the right to organize and bargain collectively,

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10 U.S. CONST. art. II, § 2.
11 Id. art. I, § 8.
13 VERNON & SPAR, supra note 12, at 25-27.
15 Id. at 569.
3. the prohibition of compulsory or forced 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.\footnote{16}

Since Eisenhower, American presidents have backed the General Agreement on Tariffs and Trade (GATT) as the vehicle for these fair labor standards.\footnote{17} The GATT is the multilateral agreement that has become the dominant international trade institution.\footnote{18} Fair labor standards accepted as a provision of the GATT could ensure fair competition because they could be universally applied.\footnote{19}

The executive has failed, however, to win agreement on any of the basic international fair labor standards. With the CLDA, Congress would force the executive to assert the fourth of the international standards listed above, outside the GATT framework, whether other nations liked it or not.\footnote{20}

III. HISTORY

From the start, proponents of international minimum age standards for workers have backed multilateral agreements because the best intentions of private reformers can be undercut by the realities of competition. For example, as early as 1850, in Belgium, textile manufacturers and mine managers decided among themselves to prohibit the use of child labor in their own plants.\footnote{21} Without laws to force their competitors to

\begin{itemize}
\item[19] GATT, supra note 17.
\item[20] H.R. 3786, supra note 6 at § 2(b).
\end{itemize}
observe the same prohibitions, however, the reformers could not afford to maintain their new standards. These reformers did not want their good will rendered worthless by a minority of self-interested producers who ignored the new minimum age, and hired children for the savings in wage costs.

A. The U.S. Crusade

Tension between American reform and economic interests illustrates the problem at the domestic level. After the Civil War, manufacturing meant jobs for many poor farmers and sharecroppers in the southern states, and sometimes for their children. The hopes of the old southern aristocracy were revived when manufacturing promised to rehabilitate the region and maintain white supremacy. Businessmen in these states competed with the North much as the less developed countries compete with industrial giants in the twentieth century; by exploiting cheap labor. Northern competitors complained that the South was profiting unfairly, and that southern producers should copy the North’s progressive child labor prohibitions, but the South resisted. The mill owners and the mine managers, who hired “breaker boys” ten and eleven years old to work deep in the shaft, had their principal competitive advantage in low wage costs. Trumpeting the Puritan ethic, preaching the virtues of work, southern states claimed their right to legislate such questions without outside interference. Cotton mill owners called themselves benevolent for employing children as young as eight years old; the owners were supposed saviors to families otherwise in the poorhouse.

Economic self interest might have motivated employers to resist child labor reform indefinitely had the American crusade not been fortified by community outrage. Muckraking journalists exposed the oppression of young children in the workplace. Photographs could now be used to document — and to shock. Citizens who are already convinced need only inspiration to turn that conviction into action, into cash contri-

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22 Id. at 11.
23 Id.
25 STEPHEN WOOD, CONSTITUTIONAL POLITICS IN THE PROGRESSIVE ERA 7 (1968) (the southern factory masters and financiers composing the “new oligarchy” were the same community leaders who formed the antebellum plantation aristocracy).
26 Id. at 7-8.
27 COBB, supra note 24, at 72.
29 Id.
30 Id.
31 See generally UPTON SINCLAIR, THE JUNGLE (1906).
32 See, e.g., CONSUMER’S LEAGUE OF THE CITY OF NEW YORK, CHILDREN WHO WORK IN THE TENEMENTS (1908).
butions, and into votes. Church groups and the National Child Labor Committee were incensed and willing to fight.\textsuperscript{33}

The early federal bans won by these reformers were declared unconstitutional. In Europe, international conventions to ban child labor were signed in 1919.\textsuperscript{34} In the United States, a 1918 Supreme Court decision still denied Congress the power to regulate child labor among the states, because the commerce clause was not the proper means to such an end.\textsuperscript{35} Attempts to control child labor through the power to tax were struck down as well, in 1922.\textsuperscript{36}

The crusaders countered with a constitutional amendment that would have given Congress the power to set a minimum age for employment.\textsuperscript{37} Interpreting the amendment as one which would interfere with states' and parental rights, the opposition southern textile producers and the National Association of Manufacturers successfully opposed the measure in twenty-two states.\textsuperscript{38} After more than twenty years of debate, economic interests could still successfully resist child labor reform.

It was 1938 before Congress passed minimum age requirements in the Fair Labor Standards Act, setting the U.S. minimum age for labor in industry and mining at 16, and another three years before the legislation

\textsuperscript{33} WOOD, \textit{supra} note 25, at 10.

\textsuperscript{34} Alice Cheney, \textit{A Comparison of Convention Provisions with Labor Legislation in the United States} 166 ANNALS AM. ACAD. POL. & SOC. SCI. 176, 178-183 (1933).

\textsuperscript{35} "The act in its effect does not regulate transportation among the states," wrote the court, "but aims to standardize the ages at which children may be employed in mining and manufacturing within the states. The goods shipped are of themselves harmless." \textit{Hammer v. Dagenhart}, 247 U.S. 251, 258 (1918) \textit{overruled by} United States v. Darby, 312 U.S. 100 (1941).

\textsuperscript{36} Though Justice Holmes would have upheld Congress' attempt in \textit{Hammer}, even he sided with the majority that struck down Congress' use of the taxing power to regulate the minimum working age in the Child Labor Tax Case, 259 U.S. 20 (1922) (Justice Holmes stated, "if there is any matter upon which civilized countries have agreed - far more unanimously than they have with regard to intoxicants and some other matters over which this country is now emotionally aroused - it is the evil of premature and excessive child labor." \textit{Hammer v. Dagenhart}, 247 U.S. at 280 (Holmes, J., dissenting)).

\textsuperscript{37} H.R.J. Res. 184, 68th Cong., 1st Sess. (1924). The proposed amendment read:

\textbf{SECTION 1.} The Congress shall have power to limit, regulate, and prohibit the labor of persons under 18 years of age.

\textbf{SECTION 2.} The power of the several states is unimpaired by this article except that the operation of state laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress.

\textsuperscript{38} 68 CONG. REC. 7166 (1924) (statement of Rep. Pou); \textit{id.} at 5315 (statement of Rep. McSwain), ("there will be the same regulations for the truckers of New England and the ranchers of Texas. It is therefore manifest that what will suit the people of one State and of one section must be unsuited to the people of another State and of another section.").

The National Association of Manufacturers wanted to lower the maximum compulsory education age to 14 years to accommodate "mentally inferior children" who would not profit from further education. \textit{National Child Labor Committee, \textit{supra} note 28, at 22.
was finally upheld by the courts.39

B. Early International Enforcement

The Belgian industries and U.S. reformers discussed above called for minimum age standards and other worker protections within their own countries. At the same time citizens of many nations began calling for standards on the international level.40 The early initiatives for international labor legislation surprisingly did not come from workers because labor laws generally prevented their right to organize.41 Instead, the impetus came from entrepreneurs, managers, administrators and physicians. Their motives were, first, humanitarian, second, political (on the grounds that workers rights would prevent social upheaval), and, third, economic; industrialists remained concerned that any worker protections not enforced throughout their industry would put them at a competitive disadvantage.42

The 1906 Berne Convention to prohibit the use of white phosphorus in the match industry was typical of the first international labor conventions — small triumphs after years of work, gauged to some pressing need, and not internationally enforceable.43 In 1908, after two years of discussion at Berne, the members of the Convention finally succeeded in reaching agreement on banning the use of dangerous white phosphorus, and prohibiting night work by women.44 The Berne Convention had no organizational mechanism, no penalties beyond limited peer disapproval, and, once it appeared that it would actually be signed by only a small group of committed nations, it came to be seen merely as a means to promote further legislation in separate nations.45

The Berne convention is nevertheless significant. European market

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41 Ghebali, supra note 40 at 2.

42 Id. at 3.

43 Fair Labor supra note 17, at 62.

44 An exploratory diplomatic labor conference at Berlin in March, 1890 agreed only on resolutions regarding the dangerous matches. The Congress of Labor Legislation in Brussels in 1897 led to the International Association for Labor Legislation in 1900. The United States did not sign. Ghebali, supra note 40 at 5.

45 Mahaim, supra note 21, at 11. Only one of the six nations that signed the ban on white phosphorus even used the substance. Only nine of twelve signatory states to the female night work ban actually agreed to prohibit it in any way, and the standards for regulation of such work varied widely from country to country, depending on existing domestic laws. The conventions were later endorsed by ILO conventions 4 and 7.
forces had not cured the problem of unsafe white phosphorus. Like reports of child labor abuse, white phosphorus publicity brought outrage over the suffering of afflicted workers. Fear for loved ones in similar situations tipped the scale.\textsuperscript{46} Even in the United States, though no American companies produced these matches, there was great American interest in the danger they posed.\textsuperscript{47} This international concern for the victims of an arguably cost efficient business practice mirrors the outrage that at least partially fuels American child labor campaigns today.\textsuperscript{48}

In 1912, Congress answered domestic concerns with the first U.S. trade law intended to protect the health of foreign workers. In an import tax hike that, while not expressly banning the white phosphorus matches, effectively eliminated their U.S. market, the U.S. accomplished the same goal other nations had addressed through strict prohibitions.\textsuperscript{49} The U.S. tax legislation made it easier for other manufacturing countries to sign the Berne Convention; those nations would have suffered economic disadvantage in switching to safer, more expensive materials had the U.S. market remained to tempt the unscrupulous manufacturer.\textsuperscript{50}

C. The ILO After the First World War

Popular pressure for workplace safety and other worker rights grew following World War I.\textsuperscript{51} Workers were organizing. The class collaboration that drove the war efforts fostered minimum wage laws and worker-employer committees during World War I.\textsuperscript{52} After the war, trade unions enjoyed new strength and respect. They demanded worker rights, and institutions to implement them, in the Armistice treaties.\textsuperscript{53}

In 1919, as part of the war's settlement, the International Labor Organization (ILO) was created, providing for universal application of worker standards and "tripartite" participation by workers, government,
and employers in the legislative process.\textsuperscript{54} Child labor was one of the first labor subjects to be addressed.\textsuperscript{55} A convention was signed setting a minimum age for employment in industry at fourteen years.\textsuperscript{56} Work hours, rest days and forced labor were addressed in subsequent agreements. These arguments were signed by varying numbers of countries.\textsuperscript{57} Though President Wilson himself convened the Conference in Washington, the United States did not sign the 1919 Child Labor Convention.\textsuperscript{58} Because of congressional resistance in the name of sovereignty, the United States refused to even join the ILO or its parent, the League of Nations, but presidents after Wilson did contribute to and endorse the ILO, and the United States eventually became an ILO member in 1934.\textsuperscript{59}

The ILO cannot enforce its child labor conventions.\textsuperscript{60} The ILO child labor standards are a guide, but the United States has not relied on

\textsuperscript{54} Mahaim, \textit{supra} note 21, at 13. The ILO Constitution, as part of the League of Nations in the Treaty of Versailles, was conceived by the Allied countries. It was notable for its tripartite structure, involving workers, employers, and government as partners in all negotiations. It provided for universal application of worker standards. \textit{See} Treaty of Versailles, June 28, 1919, Part XIII 225 Consol. T.S. 373.

\textsuperscript{55} \textsc{The International Labor Rights Education and Research Fund}, \textsc{Trade's Hidden Costs: Worker Rights in a Changing World Economy} 20 (1988) [hereinafter \textsc{Trade's Hidden Costs}].


\textsuperscript{57} Mahaim, \textit{supra} note 21, at 16; Cheney, \textit{supra} note 34.

\textsuperscript{58} Meyers, \textit{supra} note 46, at 137. The Secretary of Labor represented the U.S. at Brussels and Paris. Wilson's Secretary of Labor, William B. Wilson, was elected president of the conference.

The United States had shown interest but had not signed any of the early international labor conventions. The Secretary of Labor had represented the U.S. at the Brussels Conference of 1897, the first international discussion on the formulation and enforcement of labor standards, and at the Paris Conference of 1900. These discussions led to the formation of the original International Association for Labor Legislation, to which the U.S. was a consistent, if frugal, financial contributor. The U.S. Bureau of Labor Statistics budgeted a $200 annual contribution from 1903 until 1909. From 1910 until 1920 the amount was $1,000 annually.

\textsuperscript{59} Meyers, \textit{supra} note 47, at 135-45; Ghebali, \textit{supra} note 40, at 117. The U.S. was more interested in domestic application. The U.S. has signed only 7 of the now 159 ILO conventions, preferring not to restrict itself to any outside standard. \textit{See also} Linda L. Moy, \textit{The U.S. Legal Role in International Labor Organization Conventions and Recommendations}, 22 \textsc{Int'l L.} 767, 768 (1988).

\textsuperscript{60} Francis G. Wilson, \textit{The Enforcement of International Labor Standards} 166 \textsc{Annals Am. Acad. Pol. & Soc. Sci.} 95 (1933) ("Perhaps there will be a time in the distant future when governments and public opinion will demand a strong international system of control."). Child labor abuses continue within nations that have signed the ILO convention on the subject. \textsc{Anuradha Vittachi}, \textsc{Stolen Childhood: In Search of the Rights of the Child} (1989) (Many nations today, like Italy, sign \textit{and} violate ILO conventions).
the ILO to actually establish the enforceable international standard for child labor or any other worker rights.61 Indeed, the United States withdrew from the ILO in 1975, citing the decline of tripartism, the increasing politicization, and the lack of regard for procedure.62 Today the ILO still works for its traditional goals by investigating and reporting abuses of the rights of workers. These efforts are part of its International Program for the Improvement of Working Conditions and Environment (French initials PIACT).63

IV. INTERNATIONAL AGREEMENTS

Enforceable agreements are key for trading nations seeking fair labor standards today. Without enforcement they are no better off than the 19th century Belgian businessmen noted above. The international dissenter state can still ignore ILO fair labor standards and save itself the costs of protecting workers. The dissenter's neighbors and trade partners might suggest that the dissenter reform. These neighbors and trade partners might even, as we shall discuss, apply economic pressure.64 According to classical theories of international law, however, the dissenter is the equal of each of the other nations in the international community.65 Other sovereign nations cannot legally reduce the dissenter's sovereign territorial power.66 Under this "positivist" theory, only the dissenter itself, through consent, can limit its own power.67 Sometimes this consent is implied, through the dissenter's acquiescence to a customary rule.68


64 This note need not consider the use of physical force as a means of altering a sovereign nation's conduct. It is a tool of last resort, inappropriate in a discussion of child labor reform.

65 J. G. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 22-29 (6th ed. 1967).


67 STARKE, supra note 65, at 23-24. Positivist theory is premised on the Hegelian assumption that each state has a will that can be restricted only through the consent of that state. International law under this theory is the sum of rules to which each sovereign state has expressly or impliedly agreed. Id.

For example, international customs have developed on questions of conduct on the high seas, or territorial waters, and tribunals use those norms as bases for new international law decisions. Such acquiescence can hardly be found, however, when there has been no customary practice among nations. In the case of child labor, it would be difficult to establish the existence of a customary rule because child labor had been used for centuries, limited only recently, and is still openly practiced in many nations.

There do exist principles so universally accepted - the illegality of piracy in international waters, for example - that all nations are accountable to all others for a violation. These principles, however, reach this status through wide acceptance. The mere proposal of legislation such as the CLDA, designed to combat abuses in other countries, suggests that child labor standards are not yet among these generally accepted principles.

Because custom cannot help where there is no prior practice, and generally accepted principles are so limited, a sovereign nation's express consent on the matter of child labor, in treaties and other international agreements, would be highly valued. Nations can, of course, ignore their treaties, as individuals can breach their contracts, but the isolation and retaliation those nations can suffer weigh against that practice. What nations do want is something in return for their expressly relinquished sovereignty.

A. The GATT

Following World War II the original parties to the GATT agreed that they each could gain economically by relinquishing some sovereignty in favor of a multilateral international trade agreement to lower tariffs. The United States, dominant partner in victory, planned to dictate the terms.

It appeared then that fair labor standards would have a place in this new trade agreement. In 1947, the United Nations Conference on Trade

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69 Lotus, supra note 66; Fisheries (U.K. v. Nor.) 1951 I.C.J. 116. See also I.C.J. Y.B., 1951-52, at 78 (summarizing the issues and holding of the case).

70 HENRY J. STEINER & DETLER F. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 835-36 (1986) (a "universal crime" is seen as a violation of the law of nations and, therefore it is appropriate for any nation to prosecute a pirate in its own court. Other such crimes include slavery and torture.).

71 Id.

72 Lotus, supra note 66.

73 BRIERLY, supra note 68, at 55-57. See also Quincy Wright, Non-Military Intervention, in THE RELEVANCE OF INTERNATIONAL LAW 5, 13-14 (Karl W. Deutsch & Stanley Hoffmann eds. 1968); ARTHUR LARSON, WHEN NATIONS DISAGREE 193-218 (1961) (regarding the high rate of compliance with decisions of international tribunals).

74 DAM, supra note 18, at 10-14.

75 Id. at 10-16.
and Employment drafted a charter for the International Trade Organization (ITO), an agreement in which tariff reduction was only one concern. Dramatic improvements in labor standards, including minimum age requirements, were proposed. With reciprocal trade benefits at stake, strong labor measures might have been enforceable. The aggressive labor proposals, however, were watered down until the charter contained only the admonition that members should eliminate "unfair labor conditions, particularly in production for export."

The Havana Charter, amending the ITO's structure for the last time in 1948, was never ratified by the United States. The ITO's Havana Charter conference had been convened and negotiated by President Truman's representatives. They brought the agreement home and factions in the business community descended upon Congress, objecting to the ITO's provisions for active transactional roles for governments, and the right of governments to limit the direct investments of foreign firms.

The Truman administration had stated that the United States would not accept the ITO until Congress approved it, and the Administration would not seek that approval. The ITO faded as the GATT was passed in a separate conference which dealt almost exclusively with tariffs. The GATT came into existence as a tariff agreement, a way to lower escalating duties, specifically avoiding the divisive issues of working conditions and fair labor standards that crippled other attempted agreements. The right to form and join trade unions, to receive equal wages for equal work, to reasonable work hours, and to freedom from forced labor were relegated to further unenforceable articles in the United Nations Decla-

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77 Fair Labor supra note 17, at 63-64 (Latin American countries proposed a system whereby any nation would be relieved of its trade obligations to any other nation whose labor standards were inferior).

78 Clair Wilcox, A Charter for World Trade 234 (1949).

79 DAM, supra note 18, at 11.

80 Id. at 10.

81 Vernon & Spar, supra note 12, at 45.

82 DAM, supra note 18, at 14.

83 See Congress of the U.S. Congressional Budget Office, The GATT Negotiations and U.S. Trade Policy xvii (1987) [hereinafter "Congress"] (stating that nontariff barriers to trade can only be reduced when there is general agreement, as there was regarding tariffs, on fundamental principles).

84 DAM, supra note 18, at 17. The GATT came into force provisionally on Jan. 1, 1948 and its provisional basis endures under the 1947 Protocol of Provisional Application, T.I.A.S. No. 1700, 55 UNTS 308. Nations not original contracting parties have acceded to the agreement through acceptance of this or later protocols, or by succession.
ration of Human Rights.85 The rights of children could not be agreed upon, except to note that they must be educated and protected.86

Labor unions continued to lobby, however, for the ITO provisions left out of the GATT, urging the President to characterize denials of basic worker rights as unfair labor practices, and in the 1950's the United States began pressing for changes to the GATT.87 The Renegotiation and Escape clauses, which were the means by which GATT trading partners sought redress, required a nation to be seriously injured before it took GATT corrective action.88 The U.S. was unlikely to win a claim of serious injury based on violations of workers rights, and would certainly lose a claim based on use of child labor, because numerous other GATT members practiced the same violative conduct.89 The U.S. concentrated instead on making the ILO fair labor standards part of the GATT. None of the parties, however, could even agree as to what "unfair labor practices" were.90

U.S. and other original signers ignored the Havana Charter in favor of the GATT. Only the prison labor provision, article XX, section (e), dealt specifically with labor standards. DAM, supra note 18, at 10. But see GATT, supra note 17 art. XXIX (contracting parties agree to observe some chapters of Havana Charter).

87 Fair Labor, supra note 17 at 64.
88 The tariff concessions in GATT cannot be rescinded unless the countries affected are compensated. Violation by one party does not lead to punishment by the others. Rather, violation permits the wronged party to withdraw concessions. Conflicts are to be resolved through bilateral consultation. CONGRESS, supra note 83, at xi.

Note also that without ratification by the Senate, the GATT remains an executive agreement. In order to give private American citizens remedies when seriously injured by imports, domestic legislation is necessary. The escape clause of the GATT was appropriated for this purpose in 1951, but since then the "serious" injury requirement has been changed to "significant". VERNON & SPAR, supra note 12, at 61-62.

89 Injury which is not strictly monetary will be difficult to prove, particularly when parties disagree in principle as to what constitutes injury. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, June 30, 1967, Part I-Anti-Dumping Code, 19 U.S.T. 4349, 4351-52.

The dispute resolution machinery of GATT allows a GATT "contracting party" to bring action for nullification or impairment of even an implied benefit. However, if the nation accused of impairing the rights of the complaining nation refuses to make "satisfactorily adjustment of the matter," the complaining nation can only submit the matter to the combined contracting parties for consideration, and hope for possible authority to withdraw concessions under the GATT. A complaint based on violation of minimum age limits for workers would be particularly difficult to win without agreement by the other contracting parties that fair labor standards were implied in the GATT. See GATT, supra note 17, article XXIII.

Other possible GATT remedies include the imposition of antidumping and countervailing duties, but these are designed to compensate for the margin of injury between the quoted price and the normal, fair value of the product. A measure such as the CLDA, which prohibits import of certain goods, would not be a proper countervailing response. GATT, supra note 17, art. VI.

90 Fair Labor, supra note 17, at 64.
B. Resisting GATT reform

The United States that argues today for inclusion of fair labor standards in the GATT is not the same commanding force that shaped the GATT, the International Monetary Fund and the Marshall Plan following World War II.91 Recent U.S. proposals, though cautiously framed as mere "examinations" of the relation of worker rights to the GATT, have met consistent opposition.92 Without individual changes of heart among trading partners, there is no reason to think the United States could now establish fair labor standards that have been resisted from the beginning.

Some resistance is to be expected, particularly regarding child labor. Working children are an agricultural tradition throughout the world, and in less developed countries industry is a fairly recent addition to the culture.93 Working parents barely able to feed themselves are glad to see their children bring money home.94 Child labor can be a manifestation of a family's decision to improve itself economically.95 Often, at the subsistence level, the families cannot even consider allowing children to go to school; letting them stay home to play is out of the question.96 The only choice is between work at home or work away.97 Foreign producers, meanwhile, are loathe to give up what they see as their single advantage in the world market: cheap labor.98 The U.S., with its large markets and tempting grants, can press foreign political leaders to reform, but these leaders themselves may hold natural bias against outside interference, or

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93 Virachi, supra note 60.


95 Id.


97 Id.

98 Trade's Hidden Costs, supra note 55, at 7.
they may be unable to control the producers and those workers who want child labor to continue.

Those resisting international standards further criticize the United States for restrictive trade policies of its own. Labor costs have emerged as a principal factor in distinguishing costs of production in various countries. U.S. capital has followed that cheap labor to other countries, often ignoring abandoned American workers. This cannot be hidden from the rest of the international trade community. The U.S. interest, though not necessarily single-minded, has been described as such abroad, and resisted on grounds that it is mere expediency.

V. TEMPTING ILLEGALITY

The United States can respond to this multilateral resistance in three ways. It can wait. It can innovate within the terms of existing agreements. It might also act in disobedience of these multilateral agreements, as a means of changing them. As far as international fair labor standards were concerned, the executive branch preferred to lobby and wait through much of the 1980's. The Congress was more aggressive, pressing for change through nonreciprocal programs and in increasingly firm unilateral trade measures that other nations claimed were illegal under the GATT. The CLDA is heir to this trend.

A. Nonreciprocal Programs

Within the terms of existing agreements, one method for effecting change in other countries is the nonreciprocal grant. Rather than bargain for a new treaty or a renegotiation, the granting nation simply establishes terms of eligibility for an nonreciprocal benefit. Quid pro quo is actually required because foreign nations must meet the terms to receive the

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100 TRADE'S HIDDEN COSTS, supra note 55, at 10.

101 The European Community is considering lodging a complaint with GATT over the recent U.S. 10% tax surcharge on the portion of retail car prices above $30,000, calling the tax discriminatory. Auto makers such as Mercedes, BMW, and Porsche are affected. A Discriminatory Tax?, WALL ST. J., Jan. 18, 1991, at A6.


103 Id. at 284.

104 2 HARVEY KAYE ET AL., INTERNATIONAL TRADE PRACTICE § 38.01 (1987).
grant, but the nations know this when entering into the agreement. By
definition, the grants may be made on any basis Congress chooses. Other
multilateral and bilateral obligations need not be disturbed. The United
States uses the nonreciprocal grants to encourage compliance with inter-
national fair labor standards. The U.S. could specifically require enforced
child labor prohibitions in any country that sought this special treatment,
but it has not.

Through the Caribbean Basin Economic Recovery Act (CBERA),
twenty-seven nations in that region are eligible to apply for trade benefits
with the United States. Once a CBERA applicant country meets cer-
tain mandatory criteria, that country is evaluated at the President’s dis-
cretion as to the “degree to which workers in the country are afforded
reasonable work place conditions and have the right to organize and bar-
gain collectively.” The president may terminate benefits if basic rights
in the agreement are violated. No specific injury need be shown.

Minimum age is not specifically mentioned in the CBERA. “Rea-
sonable work place conditions” could be construed to mean the prohibi-
tion of child labor, but given the executive’s failure to act to stop ongoing
abuses in beneficiary countries, the CBERA is not likely to be used in
that manner. Nevertheless, within the bounds of the CBERA man-
date, the executive has successfully engineered workers rights improve-
ments.

105 Id. at § 39.01.
106 Caribbean Basin Economic Recovery Act, 19 U.S.C. § 2702. Section 2702(b) lists the na-
tions for which U.S. trade and investment preferences are available:

- Anguilla
- Antigua and Barbuda
- The Bahamas
- Barbados
- Belize
- Costa Rica
- Dominica
- Dominican Republic
- El Salvador
- British Virgin Islands
- Grenada
- Guatemala
- Guyana
- Haiti
- Honduras
- Jamaica
- Nicaragua
- Panama
- Saint Lucia
- Saint Vincent
- The Grenadines
- Suriname
- Trinidad and Tobago
- Cayman Islands
- Montserrat
- Netherlands Antilles
- Saint Christopher-Nevis
- Turks and Caicos Islands

107 Id.; Steve Charnovitz, Caribbean Basin Initiative: Setting Labor Standards, 107 MONTHLY
LAB. REV. 54 (1984). Like the CLDA, the CBI has empowered the U.S. Secretary of Labor to
monitor compliance.

108 Under the Caribbean Basin Economic Recovery Act, a beneficiary nation’s failure to grant
worker rights would be grounds for the Executive to refuse eligibility. 19 U.S.C. § 2702(b)(7) (Supp.
II 1990). 19 U.S.C. § 2702(a)(2) would presumably allow the Executive to terminate a beneficiary
nation’s eligibility for the same failure, if Congress and that nation were properly notified.


110 Costa Rica, a CBERA country, allows children of 12 to work, and children of even younger
years are a major labor factor in the thriving “informal” economy. Haiti also permits labor by
twelve-year-olds. The widespread Haitian “Restavek” practice of urban households adopting poor
rural youth to work long hours as servants continues unchecked. DEPARTMENT OF STATE, supra
note 94.
ments in nations that did not initially meet the eligibility requirements.¹¹¹ Though no beneficiaries have specifically been cut off on the basis of labor rights abuses, several have pledged to observe fair labor standards previously unmet in their countries.¹¹²

The Generalized System of Preferences (GSP), mentioned above is based on the GATT.¹¹³ the preferences are nonreciprocal and therefore


¹¹² Fair Labor, supra note 17, at 66 (Haiti was most notable in its shift from repression to permission of labor unions).


Burma, Liberia, Nicaragua, and Romania are sanctioned and are therefore ineligible. Namibia, Chile, Paraguay and the Central African Republic have been recently reinstated. 8 INT’L TRADE REP. 181 (1991).

Independent countries designated to qualify for GSP benefits are:

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<th>Angola</th>
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<th>Morocco</th>
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<td>Antigua &amp; Barbuda</td>
<td>Gambia</td>
<td>Mozambique</td>
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<td>Argentina</td>
<td>Ghana</td>
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<td>Bahamas</td>
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<td>Bangladesh</td>
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<td>Barbados</td>
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<td>Belize</td>
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<td>Bolivia</td>
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<td>Brazil</td>
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<td>Burundi</td>
<td>Ivory Coast</td>
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<td>Cameroon</td>
<td>Jamaica</td>
<td>Saint Lucia</td>
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<td>Cape Verde</td>
<td>Jordan</td>
<td>Saint Vincent &amp; the Grenadines</td>
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<td>Central African Republic</td>
<td>Kenya</td>
<td>Sao Tome &amp; Principe</td>
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<td>Chad</td>
<td>Kiribati</td>
<td>Senegal</td>
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<td>Colombia</td>
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<td>Seychelles</td>
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<td>El Salvador</td>
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<td>Equatorial Guinea</td>
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are not binding. Tariffs on exports from less developed countries are lowered in order to stimulate those exports and direct the country’s resources to manufacturing, away from strict agriculture and raw materials production. The program was designed to speed the growth and modernization of the less developed members of GATT. Specific labor standards were added to the GSP by Congress in 1984 as a further test of beneficiary eligibility. A violation of listed “internationally recognized worker rights” renders an otherwise preferred nation ineligible. These worker rights include a minimum age requirement.

The worker rights provisions of the GSP are not strict, however, nor are they strictly enforced. Beneficiaries may meet the standards by merely “taking steps” to implement these worker rights.

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<td>Western Samoa</td>
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<td>Thailand</td>
<td>Uganda</td>
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<td>Togo</td>
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<td>Trinidad Tobago</td>
<td>Vanuatu</td>
<td>Zaire</td>
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<td>Tunisia</td>
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<td>Turkey</td>
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<td>Zimbabwe</td>
</tr>
</tbody>
</table>

Territories and non-independent Countries include:

- Anguilla
- British Indian Ocean Territory
- Cayman Islands
- Christmas Island (Australia)
- Cocos (Keeling) Islands
- Cook Islands
- Falkland Islands
- (Islas Malvinas)
- French Polynesia

Here are the countries included in the list:

- Saint Christopher-Nevis
- Saint Helena
- Tokelau
- Trust Territory of the Pacific Island
- Turks and Caicos Islands
- Virgin Islands, British
- Wallis & Futuna
- Western Sahara


115. *Id.* at 303 (stating that the GSP will lead to economic advancements for the developing countries). Those granting preference to less developed countries formally agreed those grants would not be binding.

The fair labor practice requirements of the GSP were justified insofar as those practices serve to guarantee healthy economic development. If, for example, labor is free to organize, then they will bargain a wage that spreads the returns of increased export throughout the economy instead of giving those returns to a moneyed few. Likewise, prohibition of child labor will mean healthier development and, where schools are available, time for education, which in turn means a more marketable labor pool. TRADE’S HIDDEN COSTS, *supra* note 55, at 25.


119. 19 U.S.C. § 2462(b)(7). The GSP employs its own, broad fair labor standards without reference to ILO standards. These standards are essentially the same in both documents. The president’s discretion, in asserting a violation of these standards, is broad. If U.S. economic interests dictate, he can limit revocation of benefits to a single industry. *Florsheim Shoe Co., Div. of Interco v. United States*, 744 F.2d 787, 794-95 (Fed. Cir. 1984).
More importantly, executive discretion severely limits the effectiveness of the GSP in practice. The USTR, in a procedure not required in the legislation, insists on third party petitions to force investigations, and those petitions have languished for years without action.

For example, on March 29, 1990 the International Labor Rights Education and Research Fund filed suit against President Bush and United States Trade Representative Carla Hills to force action on numerous petitions. The AFL-CIO, a plaintiff in the action, complained of deep disappointment "that this [GSP] lever has been so rarely utilized by the USTR." A telling assessment of the GSP worker rights provisions was delivered by Federal District Court Judge Gerhard Gesell. He dismissed this civil suit against President Bush because of "an apparent total lack of standards" in the legislation. The judge said there was only "a vague requirement of review from time to time," and that there was "no statutory direction which provides any basis for this court to act."

The GSP, therefore, prints a long list of nations which the United States could encourage to meet international fair labor standards, but gives no guarantee that these professed concerns of Congress will be met.

Though not a grant of trade preferences, the Overseas Private Investment Corporation (OPIC) program, which insures U.S. private investment abroad against political risk, can benefit a foreign nation by making it safe for U.S. private investors. Fair labor standards in the host country were added as an eligibility requirement to OPIC in

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120 Dozens of petitions for worker rights violations have been filed, but out of 140 countries receiving benefits, only Romania and Nicaragua have been removed as beneficiaries. Paraguay and Chile have been suspended. GSP Subcommittee, Office of the U.S. Trade Representative, General Review of the Generalized System of Preferences, 10 INT'L LAB. WORKER RTS. 6 (1987).

121 Holly Burkhaller, USTR Boycotts International Labor Rights, LEGAL TIMES, Apr. 9, 1990 at 25 (Americas Watch's comprehensive petition on labor rights violations in El Salvador has been passed over three years running).


123 7 INT'L TRADE REP. 1464, 1504 (1990) (the AFL-CIO wanted action on complaints against El Salvador, Bangladesh, and Syria. The USTR has never initiated a GSP workers' rights investigation).


124 Bush, 752 F. Supp. at 497.

125 Id.

The amendment was made because fair treatment of workers, and the right to associate and organize, were called good indicators of stability in a trade partner. In OPIC, however, as in the GSP, the country in which investment is to be insured must only be “taking steps” to meet a minimum standard of fair labor practice. These standards are again subject to the same executive discretion that guides implementation of the GSP program. The OPIC legislative history gives more specific guidance as to what “taking steps” means, but discretion remains.

The abolition of child labor might be demanded of over 150 small, mostly undeveloped nations through U.S. nonreciprocal programs. Child labor continues unabated in many of these countries. Further, none of the countries removed from eligibility for the GSP and OPIC programs has suffered that fate specifically because of child labor abuses.

B. Unilateral Measures

The United States has long regulated imports. When a customs officer inspects or even turns away imported firearms or chemicals, for health or safety reasons, he acts under authority of a government that is within its international rights. Each sovereign nation may protect its territory and citizens. Under the GATT, when the United States can show a trade partner has violated tariff agreements, it may act to right

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128 HOUSE COMM. ON FOREIGN AFFAIRS, REPORT TO ACCOMPANY H.R. 3166, H.R. REP. NO. 285, 99th Cong., 1st Sess. (1988), reprinted in 1985 U.S. C.C.A.N 2572, 2577-2578. But cf., James M. Zimmerman, The Overseas Private Investment Corporation and Worker Rights: The Loss of Role Models for Employment Standards in the Foreign Workplace, 14 HASTINGS INT’L & COMP. L. REV. 603 (1991) (arguing that the U.S. should not “summarily condemn” foreign nations for failing to take steps to implement internationally recognized worker rights. Rather than simply deny OPIC insurance protection to Americans who would invest in such countries, Mr. Zimmerman argues that Congress should amend the OPIC worker rights provisions to allow each investor to certify that the project in which he invests will meet those internationally recognized standards. The certified project could serve as a model for other industry in that nation. Like the exception clause of the CLDA, this process would permit foreign businesses that meet international standards to benefit through access to the U.S.).
129 22 U.S.C. § 2191a(a)(I) (1988). OPIC adheres to ILO standards. Romania, Nicaragua, Chile and Paraguay were removed from OPIC eligibility after their removal from the GSP program.
131 DEPARTMENT OF STATE, supra note 94.
133 STARKE, supra note 65, at 51. See, e.g., 19 U.S.C. § 1862 (regulating imports for national security reasons).
the balance. The GATT also permits the United States to levy temporary anti-dumping duties when a foreign nation sells subsidized domestic surplus below international market price, undercutting U.S. firms. The contracting parties to the GATT have agreed that such practices are actionable. The CLDA is different because its basis for regulation is not safety and not the GATT. The use of child labor is not a violation of a generally recognized principle in international law, nor of any binding treaty.

The CLDA would therefore further limit the choices of any sovereign nation that chose to trade with the United States, shrinking their labor pool, giving them nothing but the trading status quo in return. Because GATT members have agreed to accept goods from all members equally, such a prohibition on the import of goods, grounded on a standard the GATT has not acknowledged, violates the agreement.

The CLDA is not, however, the first attempt at this sort of unilateral action. The President and the USTR are already empowered under domestic law to address unfair trade practices not covered by international principles or agreements. The Omnibus Trade and Competitiveness Act of 1988 (OTCA), through its notorious section 301, directs the USTR to retaliate when "unreasonable" trade practices of a foreign nation affect the United States. The 1988 amendments to the OTCA specify that a denial of worker rights is an unreasonable trade practice. Any success of the broad OTCA in affecting foreign economies would bode well for the more specific CLDA, but these amendments have been of limited use in establishing internationally accepted fair labor standards.

C. Section 301 of the OTCA

The Trade Act of 1974 included a section 301, designed as a tool for enforcing trade agreements and ending unfair foreign trade practices. The President was authorized to "respond to any act, policy, or practice of a foreign country or instrumentality that (i) is inconsistent with the

135 GATT, supra note 17, arts. XIX, XXVIII.
136 Id. art. VI.
138 Supra notes 69-73 and accompanying text.
139 GATT, supra note 17, art. I, sec. 1.
141 Id. (the export targeting and anticompetitive behavior were also labeled "unreasonable.").
provisions of, or otherwise denies benefits to the United States under, any trade agreement, or (ii) is unjustifiable, unreasonable, or discriminatory and burdens or restricts United States commerce." The executive branch was slow to take action under the earliest versions of section 301. Section 301 was therefore amended in 1984, to give the President and the USTR even greater authority, and to clarify terms such as "unjustifiable" and "unreasonable."

With the growth of the U.S. trade deficit in 1985, pressure mounted for even stronger action against competitors seen as profiting unfairly in their trade with the United States. Congress began amending the Trade Act to restrict executive discretion and to further define unfair practices. The amendments included workers’ rights provisions and a requirement of a minimum age for employment. Although worker rights were only actionable where a "persistent pattern" of abuses had been shown, and could be evaluated in light of a nation’s particular economic development, the USTR opposed these amendments, fearing counter-retaliation by trade partners. Congress approved them anyway, in the 1988 OTCA. Congress specified that section 301 was supposed to be harsh because it was intended as a negotiating tool.

At a glance, the 1988 section 301 appears harsh indeed. First, the USTR is given great independence to pursue nations engaged in unfair trade practices and to choose the appropriate retaliation. Second, action on unfair trade practices is mandatory when in violation of an existing agreement. These changes, however, only appear to transform section 301. The USTR remains the President’s appointee, and is there-

144 Section 301 was seen as ineffective because the administration continued to take trade problems through the GATT procedure. Many of those cases were never resolved. Warren Maruyama, Section 301 and the Appearance of Unilateralism, 11 Mich. J. Int’l L. 394, 395-396 (1990).
146 Maruyama, supra note 144, at 397.
149 Comprehensive Trade Legislation: Hearings on H.R. 3 Before the House Committee on Ways and Means and Its Subcommittee on Trade, 100th Cong., 1st Sess. 152 (1987) (USTR Clayton Yeutter testified that, concerning enforcement of section 301, he was “not sure we can get much tougher than we have been over the last 18 or 24 months.”).
153 Id.
fore still not entirely independent.\textsuperscript{154} Also, section 301 action is not as mandatory as it might seem.

When section 301 action is mandatory, a waiver of U.S. action can still be arranged when a GATT panel determines that no existing agreement between the parties has been violated.\textsuperscript{155} This waiver provision effectively funnels any mandatory section 301 cases through the GATT dispute resolution procedures.\textsuperscript{156} Section 301 action by the U.S. will cease, pending the decision of a GATT panel, and the USTR can abide by the GATT panel’s decision rather than assert a U.S. domestic statute against the foreign trading partner. "Successful" section 301 actions have been those in which the USTR has abandoned her section 301 investigation because the threat of closing the U.S. market to the “violating” country brought that country to the GATT negotiating table, and the violation alleged would have been a violation of the GATT agreement.\textsuperscript{157}

Section 301 does, therefore, encourage bilateral negotiations over issues of sufficient concern to the President and the USTR. Action under the CLDA could lead to the same kind of bargaining. This would follow the long standing GATT practice of avoiding disputes. As early as 1957, with Congress threatening serious restrictions on cotton textile exports, President Eisenhower’s representatives encouraged GATT partner Japan to “voluntarily” restrict cotton textile exports.\textsuperscript{158} U.S. agreements over the years regarding steel, autos, semiconductors, trade preferences for Caribbean nations, as well as free trade agreements with Israel, Canada,


\textsuperscript{156} Phillips, \textit{supra} note 147, at 531-532.

This waiver power is in addition to the general discretion of the USTR to deny a petition, or to determine that the petition falls within a mandatory category. It has been suggested that for an executive branch not eager to take action against a trading partner, the Section 301 retaliation provisions are “mandatory but not compulsory…assuming that is a hair you can split.” \textit{Id.} at 534, \textit{citing} 133 CONG. REC. S4661 (daily ed. Apr. 25, 1987) (statement of Sen. Packwood). \textit{But see} 4 INT’L TRADE REP. 1564-65 (Japan, Mexico, and the EC criticize section 301 as counter to GATT, Japanese economic counselor Yoshigi Nogami calling the section “back door protectionism”).

\textsuperscript{157} 7 INT’L TRADE REP. 205 (1990) (USTR terminates unfair trade investigation concerning EC oilseeds subsidies when EC agrees to GATT finding of violation of GATT rules); \textit{Id.} at 1794 (USTR terminates section 301 investigation after GATT panel ruling prompts Thailand to open it’s cigarette market).

For an example of USTR procedure see Office of the U.S. Trade Representative, \textit{Initiation of Section 302 Investigation and Request for Public Comment: European Community Third Country Meat Directive}, 56 Fed. Reg. 1663 (1991) (where a discriminatory trade practice complaint by U.S. pork producers prompted the USTR to consult first with the EC under GATT article XXIII, to abandon that avenue when the EC took steps to eliminate discrimination, then to continue bilateral talks when the EC chose to renounce its promised improvements).

\textsuperscript{158} VERNIN \& SPAR, \textit{supra} note 12, at 167 (arguing that the U.S. is stepping away from role as “keeper of international law,” and starting to view the trade world as other nations do: one agreement at a time).
CASE W. RES. J. INT'L L. Vol. 24:631

and Mexico, all employed bilateral negotiations.\textsuperscript{159} In practice, section 301 action begins when investigations are requested, then "priority" countries are identified by the USTR and investigations are opened.\textsuperscript{160} Negotiations between the two nations follow. With this bilateral operation, section 301 matches the tradition of GATT negotiations.\textsuperscript{161} The section 301 investigation can bring trade partners to the negotiating table.

Some commentators have argued that aggressive use of such legislation, under present circumstances, might be the United States' only hope for changing the GATT.\textsuperscript{162} According to this theory, Congress is merely trying to modernize and broaden an old, functionally limited international trade agreement.\textsuperscript{163}

Section 301 has done little, however, to end child labor abuses. Section 301's mandatory provisions do not force action on child labor or on any other international labor abuse. Like other unfair practices not actionable under the GATT, an abuse of child labor is a less than attractive

\textsuperscript{159} Id.; Gerald F. Seib, Bush Makes Progress on Trade Issues in Mexico, Gains Support for Gulf Policy, WALL ST. J., Nov. 28, 1990, at A28.

Because free trade was considered the ultimate goal of the GATT, provisions in article XXIV allow an exception from the most favored nation principle when nations form regional customs unions or free trade areas. DAM, supra note 18, at 274-283.

\textsuperscript{160} See e.g., 7 Int'l Trade Rep. 284 (Feb. 28, 1990) (submissions from the Automotive Parts & Accessories Association, the Semiconductor Industry Association, Southwire Corp., Allied-Signal Corp., the Rice Millers' Association and eight other parties requested the USTR target Japan for unfair trade practices.).


\textsuperscript{162} Professor Robert Hudec has defined "justified disobedience" as follows:
1. The objective must be to secure legal change consistent with general objectives of the agreement being disobeyed.
2. Reform must first be attempted through good faith negotiation under the terms of the agreement.
3. The disobedience must be accompanied by an offer to continue to negotiate and must cease upon achieving the objective.
4. The extent of disobedience must be limited to what is necessary to achieve the reforms.
5. The disobedient party must accept the existing law as fully as possible, even while disobeying. Under GATT this would mean the party must accept the panel proceeding and the decision even the retaliation that may result.


\textsuperscript{163} Mandel, supra note 162; Cf. 136 CONG. REC. S. 5486 (daily ed. May 1, 1990) (statement of Senator Lautenberg introducing the Environmental Protection and Trade Equity Act, which would link eligibility for trade preferences to environmental protection by the beneficiary country. The USTR opposes the bill as undercutting the cooperative development of international environmental standards.).
cause for a USTR dedicated to working within the GATT framework.\textsuperscript{164} If the use of children in mining and manufacturing jobs was a priority concern of the U.S. executive, section 301 could have been used to force action. If that had been the case, however, it is unlikely that the proponents of the CLDA would have offered this bill three times in three years.\textsuperscript{165}

VI. THE CHILD LABOR DETERRENCE ACT

When Congressman Pease first proposed the Child Labor Deterrence Act in 1989, he said, "access to the American marketplace is powerful leverage and should be used positively to encourage foreign producers and importers to treat defenseless children with dignity."\textsuperscript{166} Senator Donald Riegle (R-Mich.), introducing the 1990 Senate version of the bill, described the victims of child labor as: first, helpless working children, like those in Morocco making rugs in Morocco 6 days a week for 15 cents an hour; and second, American workers, unable to compete with the slave wages paid in abusing countries.\textsuperscript{167} The two sponsors agreed that the only way to stop the exploitation was to dry up the markets for these goods.\textsuperscript{168}

The CLDA is different from other unilateral means used to insure fair labor standards abroad. If it is signed into law, it would impose stricter limits on executive discretion.\textsuperscript{169}

Under the CLDA the Secretary of Labor would be responsible for compiling an annual report, "using all available information regarding the commercial exploitation of children," identifying the countries that condone the use of children under the age of 15 as labor in manufacturing or mining, and listing those that "effectively discourage" that use.\textsuperscript{170} The language is broad here but does not give the Secretary great discretion in deciding which nations make which list. The Secretary's sources are ordained in the bill to include international human rights groups, labor organizations, religious groups, and children's advocacy organiz-

\textsuperscript{164} See An Interview with U.S. Trade Representative Carla Hills 7 INT'L TRADE REP. 84 (1990) (indicating that GATT does not now deal with several problems of the lesser developed world); Ian Charles Ballon, The Implications of Making the Denial of Internationally Recognized Worker Rights Actionable Under Section 301 of the Trade Act of 1974, 28 VA. J. INT'L L. 73, 100-101 (1987).

\textsuperscript{165} CLDA, supra note 6.


\textsuperscript{167} 136 CONG. REC. S7035 (daily ed. May 24, 1990). Senator Reigle has also pointed out that, according to ILO statistics, use of child labor had grown 57% in the years 1979 through 1986. \textit{Id.}

\textsuperscript{168} Id. at S7036.

\textsuperscript{169} H.R. 3786, supra note 6, § 5(a)(unless certain exceptions are met, "the Secretary may not permit the entry of any manufactured article that is a product of that country [violating the minimum age requirement]).

\textsuperscript{170} \textit{Id.} § 4(f).
To further ensure a reliable report, private citizens could petition to have countries identified as condoning child labor. The Secretary would be required to respond to each petition, citing the facts and reasons supporting her decision. This approach is true to the CLDA's stated policy of establishing a new international rule. A reliable, quotable source of information regarding child labor abuses could be cited by foreign citizens opposed to the practice in their own countries. International pressure could be brought to bear on offending governments, industries, and perhaps even on particular producers.

Once a nation is identified as not effectively prohibiting child labor, "during the effective identification period for a foreign country the Secretary may not permit the entry of any manufactured article that is a product of that country." This identification would be revocable, but only when the Secretary, in a written opinion, reports to Congress that the "foreign country concerned has adopted, and is effectively enforcing, laws prohibiting the production of products with child labor within the country."

The tainted goods would not be taxed. They would be prohibited, and the importer fined, or even jailed. The bill provides for exceptional cases by allowing the importer to "satisfy the Secretary that the importer of the article has taken steps to ensure, to the extent practicable, that the article is not a product of child labor."

The Secretary of Labor's discretion would exist, then, in promulgating a petition process and in deciding whether an importer met the exception language. If a nation was identified as condoning child labor, and an American importer nevertheless wanted to deal with one of that country's exporters, under the language of the CLDA the contract between the importer and his foreign supplier would be required as evidence in the Secretary's decision to make an exception. That contract

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171 Id. § 4.
172 Id. § 4(b)(1).
173 Id. § 4(b)(2)(B).
174 Id. § 3.
175 Id. § 5(a)(1) (the "effective identification period" is defined as beginning on the date on which the country is identified in the Federal Register as condoning child labor, and ending when revocation of that identification is published in same).
176 Id. § 4(d)(2)(A).
177 Id. §§ 6(b) and (c) (the CLDA provides for civil fines of up to $25,000. Criminal penalties for intentional violation include fines of from $10,000 to $35,000 or imprisonment for one year, or both).
178 Id. § 5(b)(1).
179 Id. § 7.
180 Id. § 5(b)(2)("The documentation required by the Secretary. . .shall include written evidence that the agreement setting forth the terms and conditions of the acquisition or provision of the imported article includes the condition that the article not be a product of child labor.").
would at a minimum have to include the condition that the article purchased not be a product of child labor.\textsuperscript{181} The potential for collusion between importer and exporter is high when each has such an incentive to include a written contract provision forbidding the use of child labor, so the regulations governing the exception petition process must be strict. When an American importer petitions for exception, that means his foreign trading partner produces goods in a country identified as allowing the use of child labor. The foreign exporter must truly be the exception to the rule that he claims to be, or the exception petition process will annihilate the CLDA.\textsuperscript{182}

VII. Effects, Real and Imagined of the Child Labor Deterrance Act

The CLDA's prohibition on entry of certain goods conflicts with existing U.S. international commitments under the GATT. According to its sponsors, that conflict is justified because the CLDA will aid two groups: foreign children and American workers.\textsuperscript{183} The bill also conflicts with private interests inside and outside the United States. Despite the conflicts it provokes, the CLDA may function as a first step in establishing a new international principle of minimum working age. We will consider each of these effects.

A. Existing Agreements: Clashing with the GATT

In his remarks introducing the 1989 CLDA in the House, Congressman Pease argued that the United States could change the GATT.\textsuperscript{184} By using access to the American marketplace as leverage, the Congressman suggested, the United States could "encourage" foreign producers to abide by a minimum age for employment.\textsuperscript{185} As discussed above, this threat of lost markets has been effective in bringing otherwise reluctant trade partners to the negotiating table.\textsuperscript{186} Section 301 and worker rights provisions in nonreciprocal programs, however, have not been invoked in the name of child labor standards.\textsuperscript{187}

The worst case scenario might have the United States halting the import of goods from a country that enjoys most favored nation status under the GATT, and never considering that nation's willingness to bargain. The foreign nation affected could be unwilling to adopt a new stan-

\textsuperscript{181} Id.
\textsuperscript{182} See infra notes 198-201 and accompanying text.
\textsuperscript{183} Pease, supra note 7. See 136 CONG. REC. supra note 167.
\textsuperscript{184} 135 CONG. REC. supra note 166, at H2161.
\textsuperscript{185} Id. at H2162.
\textsuperscript{186} Supra notes 157-161 and accompanying text.
\textsuperscript{187} Supra notes 164-165 and accompanying text.
standard that flies in the face of its traditions and its economic self-interest. If such a nation does not rely on trade with the United States, or need its political or military influence to an extent sufficient to balance these traditional and economic interests, the United States might lose that nation as a trading partner.

Equally as problematic, the United States could be called to a GATT dispute resolution panel. As discussed above, the United States will have difficulty justifying its prohibition before such a panel. Serious injury stemming exclusively from the use of child labor will be hard to prove in a forum that has consistently refused to even address the matter. The United States will, therefore, be forced to argue that the use of child labor creates an unfair trade barrier. The CLDA, however, exists because the United States has made that argument unsuccessfully for the last forty years.

The CLDA assumes a better case. The CLDA, attempting to capitalize on the success of section 301 actions also relies on the seductiveness of the U.S. market and bilateral negotiations. Section 301 actions do, however, leave room for negotiation and rarely are able to force action. The CLDA, on its face, demands capitulation, but there is no reason why, once a customs agent stops goods at the border, it should make any difference that the agent's orders came from the President through the USTR or from Congress through the CLDA. It might be argued that actions under section 301 can cautiously target nations that the U.S. knows it can beat at the negotiating table, because those nations need access to the American market, or because the U.S. can afford to risk the loss of the trade. The CLDA, however, should not be so easily distinguished.

First, the CLDA targets an abuse that, though widespread, is particularly offensive to large numbers of people throughout the world, and outlawed by many governments. Second, child labor reform threatens less and demands less of foreign governments and industries than other fair labor standards. Political organizations can grow from trade unions if rights of association and collective bargaining are granted. Rights to minimum wages, maximum hours, and other benefits can be expensive. But in a surplus labor economy the price of labor will likely rise little when adults take the place of children, so the prohibition of child labor

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188 Dam, supra note 18, at 353-368.
189 See supra notes 133-139 and accompanying text.
190 See supra notes 84-90 and accompanying text.
191 Charnovitz, supra note 14.
192 See supra notes 157-161 and accompanying text.
193 Trade's Hidden Costs, supra note 55.
may cost less than other reforms.\textsuperscript{194} Third, the rationale behind the only fair labor standard that is part of the GATT — the prohibition on the sale of goods made with forced labor — is very like that of minimum age requirements; workers unable to refuse the work must not be allowed to enrich the employers who would pay them pennies and reap the competitive advantage.\textsuperscript{195} Finally, nations pressed one at a time by the United States implementation of the CLDA will not be able to thwart reform through GATT procedures as is possible under section 301. Their refusal to talk will not preserve the status quo; it will close their access to U.S. markets.

It does not seem that the American citizens concerned about the abuse of child labor abroad have any less right to representation by U.S. trade negotiators than do U.S. farmers,\textsuperscript{196} or U.S. service industries.\textsuperscript{197} This is particularly so if Congress has voted to elevate those concerns, and to allow those citizens to petition the Secretary of Labor to identify child labor offenders. Given the good reasons for a foreign nation to capitulate to U.S. child labor reform demands, the task of the USTR might not be that difficult.

\textbf{B. Private Parties}

Provisions of the CLDA would allow a resistant foreign government to be bypassed when the U.S. importer and the foreign supplier seek to maintain a profitable relationship.\textsuperscript{198} Under this exception clause, the U.S. importer may try to satisfy the Secretary that, though goods from this particular foreign country are presumed to be made with child labor, the goods purchased by this importer actually are not.\textsuperscript{199} The Secretary's promulgated rules must, however, require some real showing of compli-
ance by the foreign importer, in order to give the CLDA teeth. The burden must be on the importer to rebut the presumption that goods exported from a country identified as failing to effectively enforce child labor standards were produced by children.

To aid the American importer, the language of the bill as proposed specifies sources of verification for the Secretary to use in classifying countries, and stresses that, whenever possible, those same independent sources should be used to identify industries within a particular foreign country on the basis of their "commercial exploitation of children." Import trade can involve more than just a foreign manufacturer and a U.S. buyer; brokers, agents and distributors may stand between the U.S. importer and the producers of the goods. An American importer could conceivably never have corresponded with her producer. Accordingly, the Secretary's regulations should go further and require records of all available information regarding the child labor practices of particular manufacturers and mine operations. These records can be useful as part of the Secretary's annual report and as the basis for consumer boycotts. They will be invaluable as evidence to support a U.S. importer's claim that she deserves to be granted an exception under CLDA section 5(b).

Compliance with strict documentation requirements of exception clause regulations could be expensive, and might strain working relations with agents and exporters used to being left to conduct their own business. Where foreign exporters have alternate markets they may forego dealing with American importers. Where the foreign exporter, however, wants to continue trade with the U.S., and if he does not employ children, it will be in his interest to provide reliable documentary, photographic, video, or testimonial evidence to his American trading partner confirming the character of his work force. At the foreign exporter's suggestion, the nearest representative of one of the reporting organizations to which the Secretary turns for child labor information could visit the foreign plant and certify the absence of child labor.

C. American Workers

Congressional Democrats had an issue in the ballooning trade deficit of the 1980's; one on which they felt President Reagan was vulnerable. Increasing exports from less developed countries shocked Europeans and Americans, who had dominated post-war trade unchallenged. The U.S. share of the world market in automobiles, semi-conductors, and ag-

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200 Id. § 4(f).
202 Phillips, supra note 147 at 502.
203 VERNON & SPAR, supra note 12, at 48-49.
riculture shrank dramatically. Calls for a level playing field increased. Foreign nations were criticized for practicing “social dumping;” selling goods that were in effect subsidized by the low wage costs possible only when workers’ rights are denied. In reality, U.S. exports had held steady in the late seventies and early eighties. It was a rush of imports in the early eighties that tipped the trade balance, imports not the result of unfair trade practices but, according to the United States Government Accounting Office, “overwhelmingly due to the rise of the value of the U.S. dollar,” and the fiscal deficit. Nevertheless, proposed across-the-board tariff hikes appealed to a protectionist sentiment. Labor unions pressed for inclusion of worker rights provisions in international agreements.

The CLDA, insofar as it is based on the theory that children from other countries are taking the jobs of Americans, appeals to the same popular sentiment that flowered in the eighties. Although there is evidence that juvenile labor is cheaper, the prohibition of child labor, nevertheless, may have little effect on the surplus labor economy that many poorer nations endure. This is because wages are already depressed, so the difference between a child’s and an adult’s wage is slight, as is any consequent savings to the employer. In rare full employment economies, or where adults can otherwise refuse the lower wage, adults will leave other sectors, such as agriculture, to take the manufacturing jobs that children are no longer allowed to perform. Minimum age standards, then, can raise the adult wage to the extent that it takes more than one child to do the adult’s work in the sector the adult

204 Id.
205 Bello & Homer, supra note 151, at 31-37.
206 Charnovitz, supra note 14, at 565.
207 Vernon & Spar, supra note 12, at 47.
209 Congressman Richard A. Gephardt (D-Mo.) proposed an amendment to section 301 that would mathematically identify nations that both (1) enjoyed excessive trade surpluses with the United States and (2) engaged in unjustifiable, unreasonable or discriminatory trade practices that hurt the United States significantly. If bilateral negotiations could not remedy these situations, the amendment required trade restrictions to an extent determined by the trade deficit that year. The amendment was not passed. H.R. 4800, Section 119, 99th Cong., 2d Sess., 132 Cong. Rec. H3025 (daily ed. May 21, 1986).
211 See, e.g., Issa Shivji, Law and Conditions of Child Labor in Colonial Tanganyika 1920-1940, 13 Int'l J. Soc. L. 221, 222-23 (1985); Moffett, supra note 2.
212 Hansson, supra note 194.
213 Id.
has abandoned.214

If elimination of child labor does raise the adult wage, will the increment be sufficient to level the field on which the United States and this nation compete? There are other influences at work.215 Market forces affect the business trying to stay afloat in an international market. For example, a nation like Taiwan, with great numbers of young women eager to work for low wages in textile mills, once had cost advantages over the United States without resorting to child labor.216 Already a significant footwear producer, Taiwan’s footwear exports to the United States doubled from 1980 to 1989.217 Taiwan’s U.S. sales of baby carriages, toys, and games increased fourfold.218 With successful development has come increases in wages and entitlements.219 Now pressure to lower costs persists.220 Pressure to improve skill and technology grows even in labor intensive manufacturing such as textiles, where the international market changes and quality must be controlled.221 The country therefore looks to entirely new industries, such as electronics, imitating foreign products and scrapping for technology of its own, again with adult labor.222

Taiwan, in this manner, has become less of a cheap labor threat to the United States, but it is competitive in a new way, and the change had nothing to do with children.223 The cheapest labor honors have been passed to another country.

For example, Portugal once resisted modernization because its competitive advantage lay in cheap labor, including the use of young children in manufacturing.224 Twin pressures of workers wanting a better living standard and new manufacturing competitors with automated facilities

214 Id.
215 See Cooper, supra note 208, at 4-5.
218 U.S. FOREIGN TRADE HIGHLIGHTS (1990), supra note 217.
219 Id.
220 Id. at 2.
221 Id.
222 See generally ILT Taiwan, supra note 216, at 2.
223 Cf. South Korea, where the country’s, “regimented work force is beginning to lift its collective head from the conveyor belt and live a little . . . .” According to the Labor Minister, the Korean work week has fallen from 51.1 to 46.3 hours in three years. Service sector employment has grown 6.1% and Deputy Prime Minister Choi Kak Kyu says that government policy is directed at, “developing high technology in core industries and producing technically trained workers to produce high-value products.” South Koreans Start to Work Less, Buy More, L.A. TIMES, Sept. 9, 1991, at D3.
224 Patrick Blum, Portugal Fears Textiles Will Fall Victim to GATT Deal, FIN. TIMES, Nov. 16, 1990, at 7.
weakened Portugal's once secure advantage to the point that even child labor does not offer savings sufficient to allow it to compete. Thus, it is not as simple as claiming children are taking American jobs. Still poorer nations may undercut any nation, encouraging it to compete efficiently in more sophisticated goods, goods such as electronics, goods children cannot produce.

Only to the extent, then, that a foreign nation has a full employment economy, sees adult manufacturing wages rise due to a minimum working age requirement, and remains in the same market and mode of production once wage costs change, can a bill like the CLDA cause the prices of imports to the United States to rise, making American producers more competitive and thus preserving jobs for American workers.

To this limited extent, the CLDA might also prevent the flight of American capital to foreign markets that offer cheap labor. Recent U.S. policy, however, has not supported permanent protection of workers whose jobs disappear because production facilities move to foreign countries. Labor unions have opposed the U.S. policy, but the U.S. response to industrial flight has focused on worker adjustment and retraining rather than rigid constraints on capital, preferring to let market forces dictate investment. It is doubtful that the slight economic effect of the CLDA could protect workers when declared U.S. policy is to the contrary.
D. Foreign Children

The CLDA procedure calls for the Secretary of Labor to use a number of authorities when deciding if a country condones child labor, whether by law or in practice.\(^{231}\) The Secretary would therefore be free to disregard ineffective child labor laws. She could make her determination based on what the country does, not on what it says. If this is the case, however, a great many nations will fail to pass the test.

Even the United States, by some reckoning, might fail to show that it has taken sufficient steps to eliminate child labor. Minimum working age is mandated in the Fair Labor Standards Act and in some state statutes, but recent investigations by the General Accounting Office show the laws are much abused and their enforcement underfunded.\(^{232}\) The Fair Labor Standards Act doesn't apply to small businesses and some states have less restrictive standards. With children of the post-war baby boom now adults, there are fewer 15 to 18 year olds available for service and fast food jobs, so employers are tempted to hire 12, 13, and 14 year old children. It can be argued that this is not mining or manufacturing, but abuses occur in those industries as well, and, regardless of the industry, the point is that in the United States, just as in foreign countries, legislation alone has not cured abuses of child labor.\(^{233}\)

Italy, similarly, has laws prohibiting child labor, but inspectors “see their job as little more than a pointless game.”\(^{234}\) Even if Italian violators are discovered among the maze of small, scattered work places, they find it easy to move and restart business under a different name. Further, as noted above, family needs demand child labor.\(^{235}\) The impoverished parents of these children are eager to see their child employed.\(^{236}\)

The Secretary's determination should reflect reality in each country, but to keep from choking off imported goods altogether it will have to depend on some practical analysis similar to the “taking steps to improve” tests used in the CBI and OPIC programs. Completely hollow foreign legislation, devoid of enforcement procedures or funding, should

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\(^{231}\) H.R. 3786 supra note 6, at § 4(f) (the Secretary is to use all available information from the ILO, children’s advocacy organizations, trade unions, religious and human rights organizations).


\(^{234}\) VITTACHI, supra note 60.

\(^{235}\) DEPARTMENT OF STATE, supra note 94; Tafadzwa Matimba, Children: Abuse Has Many Faces, INT’L PRESS SERVICE, Sept. 25, 1990 (Zimbabwe parents expect children to work); MARINA VALCARENGHI, CHILD LABOUR IN ITALY 14 (1981) (poor families, rural and urban, force offspring to work).

\(^{236}\) VALCARENGHI, supra note 235.
not be considered a real ban on child labor. On the other hand, proponents should realize that the test specified in the bill, requiring that a nation be “effectively enforcing” a child labor law, will not be a useful reform tool if it sets an impossible standard. The United States certainly cannot hold foreign trading partners to higher standards than it sets for itself.

Agriculture, street business, and domestic service employ most of the working children in the world. Domestic servants apprentice in Haiti at the age of six. In one Argentine province eighty-eight percent of children ten to thirteen years old work on cotton plantations. The CLDA, and the trend toward automation, may encourage lesser use of child labor in manufacturing, but it will not end the children’s labor in agriculture and services, where the youngsters risk injury from dangerous machinery and exposure. As the ILO reports, poverty is the overriding cause of child labor. Parents are forced to send the child to work, or have the child help them in their work. In many rural areas no educational facilities exist to even pose an alternative. Even when educational facilities do exist, most parents in this situation will choose to have the child work. Only the strictest domestic legislation in each foreign country could overcome these pressing needs and lack of alternative activities. The CLDA does target the most dangerous industries, but it cannot eliminate child labor.

VIII. CONCLUSION

If the Secretary does accurately list foreign countries on the basis of their actual control of child labor and if each American importer is required to verify the written contract with his foreign supplier, the CLDA might succeed in changing foreign practices through private and national contacts. The U.S. market does work as an incentive. Nonreciprocal programs and negotiations based on section 301 violations have shown this to be the case. The Secretary of Labor’s published reports could also aid consumer and human rights groups campaigning against child labor. Each nation’s domestic legislation to ban child labor, however, will only change practice to the extent it is enforced.

If stringent guidelines are not followed, the CLDA’s strength will be strictly symbolic. This is not to suggest that symbolism, or the CLDA,

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238 DEPARTMENT OF STATE supra note 94.
239 Id.
240 Id.
241 Kucherov, supra note 96, at 44-45.
242 Uniyal, supra note 5.
243 Kucherov, supra note 96, at 45.
244 SUMANTA BANERJEE, CHILD LABOR IN THAILAND 22 (1980).
are worthless. Symbolism may be the realistic goal of the CLDA. It cannot right the trade imbalance. It may affect wage levels only in some economies. Foreign children will continue to work long hours on farms and as domestic servants even if it becomes law. A nation that does not need U.S. markets is likely to challenge the CLDA’s prohibitions under the GATT.

The CLDA does assert a new international principle. It calls for a minimum age standard to be added to the GATT. It urges a world wide ban on the products of child labor through the United Nations. The bill does not demand the full range of international fair labor standards included in section 301, or hinted at in the GSP program. Foreign nations are not asked to set a minimum wage, or to permit the formation of labor unions, with the threatening political power such organizations can gather. Foreign nations are asked merely to cease the use of young children in certain industries.

A minimum age requirement for work in factories will not be as great a sacrifice as other fair labor standards. Sophisticated techniques and automation already limit the use of children in large scale manufacturing. Stories of abused children in their own countries may also make trading partners and government officials abroad more accommodating. If they are not asked to give up too much, and their compassion softens indifference, then they may acquiesce to U.S. assertions of a new international principle in order to maintain profitable relations. Instead of pressing all recognized fair labor standards in a frozen multilateral forum, the CLDA picks one that threatens the least and presses it gently, one nation, one employer at a time.

Michael A. Tonya*

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245 CLDA, supra note 6, at 3786, § 3.
* J.D. Candidate, Case Western Reserve School of Law (1992).