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Protecting the Innocent or Protecting Special Interests - Child Labor, Globalization, and the WTO

Keywords

Child Labor, Globalization, Labor, Juveniles, Comparative Law, Parents and Children

**PROTECTING THE INNOCENT OR
PROTECTING SPECIAL INTERESTS?
CHILD LABOR, GLOBALIZATION, AND THE WTO**

*Dexter Samida**

INTRODUCTION

For those in wealthy countries, the idea of children toiling in factories or fields seems like a relic from a bygone age. However, for too many children in the world this is still a sad reality. Many children work in hazardous conditions. There were an estimated 211 million children working worldwide in 2000.¹ Of these 211 million children, approximately 8.4 million were involved in child trafficking, forced and bonded labor, armed conflict, prostitution and pornography, and other illicit activities—the worst of the worst forms of labor.²

Poverty, income variability, debt, lack of access to credit, and lack of educational opportunities are cited as causal factors.³ This article focuses on the oft-suggested link between trade and child labor.

This article considers two strategies that the international community might consider in order to reduce the prevalence of child labor. Part I considers whether countries can combat the scourge of child labor by becoming less open to foreign trade and globalization. Specifically, this part of the article looks for empirical

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1. INT'L PROGRAMME ON THE ELIMINATION OF CHILD LABOUR, ILO, EVERY CHILD COUNTS: NEW GLOBAL ESTIMATES ON CHILD LABOUR 20 (2002), available at <http://www.ilo.org/public/english/standards/ipecc/simpoc/others/globalest.pdf> [hereinafter IPEC]. This estimate uses a more expansive definition of child labor (ages 5 to 14) than that considered below. See *infra* the text accompanying note 24 for an explanation of the numbers used in this article.

2. IPEC, *supra* note 1, at 25.

3. See ROBERT T. JENSEN, ILO, DEVELOPMENT OF INDICATORS ON CHILD LABOR 8-15 (2000) available at <http://www.ilo.org/public/english/standards/ipecc/simpoc/guides/jensen.pdf> (noting that because there is evidence that credit restraints are associated with higher levels of child labor, providing credit to poor households could somewhat alleviate this problem); See generally KATHLEEN BEEGLE ET AL., CHILD LABOR, CROP SHOCKS, AND CREDIT CONSTRAINTS (Nat'l Bureau of Econ. Research, Working Paper No. 10088, 2003), available at <http://www.nber.org/papers/w10088> (considering the relationship between a mother's education and her children's level of educational attainment); See, e.g., ALESSANDRO CIGNO ET AL., CHILD LABOR, NUTRITION AND EDUCATION IN RURAL INDIA: AN ECONOMIC ANALYSIS OF PARENTAL CHOICE AND POLICY OPTIONS 34-35 (2001).

evidence supporting or negating the link between globalization and child labor. Part II considers the potential effectiveness of a unilateral U.S. trade ban and whether such a ban would be legal under World Trade Organization law.

I. GLOBALIZATION AND CHILD LABOR

The fact is that the [World Trade Organization]'s policies are creating conditions for the accentuation of poverty and the decline in the condition of workers everywhere. Child labor is one manifestation or effect of the demands being placed on the majority of the world's population under a neoliberal economic regime.⁴

If globalization is responsible for vast increases in the prevalence of child labor then more restrictive trade policies should enable developing countries to combat the growth of child labor. This argument relies on the assumption that globalization is in fact causing more child labor. Many commentators are convinced there is a link.

For example, Madeleine Grey Bullard, in her award-winning journal article,⁵ argues that “[g]lobalization could offer children an escape from lives of toil and drudgery, but instead, it draws more children into servitude.”⁶ In nearly identical words, Bullard's source for that assertion claims the same thing.⁷ Interestingly, neither article has figures demonstrating that an increase in child labor has in fact occurred, irrespective of the cause.⁸

Other commentators claim that there is evidence that “increasing numbers of children migrate from their natal homes as opportunities for work expand in nearby towns or distant cities.”⁹ For example, in early American society, families moved to areas where child labor was in demand, even if this tended to reduce wages earned by the adult wage earner.¹⁰ It is in this way that some perceive the export

4. Saadia Toor, *Child Labor in Pakistan: Coming of Age in the New World Order*, 575 ANNALS AM. ACAD. POL. & SOC. SCI. 194, 203–04 (2001). Claims that capitalism is the cause of child labor are not new. For example, see Edwin Markham, *The Hoe-Man in the Making*, COSMOPOLITAN (Sept. 1906) reprinted in MUCKRAKING! THE JOURNALISM THAT CHANGED AMERICA 4, 6 (Judith Serrin & William Serrin eds., New Press 2002) (“The factory, we are told, must make a certain profit, or the owners (absentee proprietors generally, living in larded luxury) will complain. . . . It pays, my masters, to grind little children into dividends!”).

5. Madeleine Grey Bullard, *Child Labor Prohibitions Are Universal, Binding, and Obligatory Law: The Evolving State of Customary International Law Concerning The Unempowered Child Laborer*, 24 HOUS. J. INTL L. 139, 139 (2001). The article received the American Civil Liberties Union, Ben G. Levy, Essays in Freedom Award.

6. *Id.* at 156.

7. See Robert Senser, *How the Global Economy Promotes Child Labor*, available at <http://www.senser.com/clali.htm> (last visited Apr. 19, 2005) (stating that “[t]he global economy should offer little children an escape from lives of forced labor. Instead, it is drawing more and more of them into various types of servitude.”).

8. See generally tbl. 1 *infra* page 6.

9. Rachel Baker & Rachel Hinton, *Approaches to Children's Work and Rights in Nepal*, 575 ANNALS AM. ACAD. POL. & SOC. SCI. 176, 178 (2001).

10. Donald O. Parsons & Claudia Goldin, *Parental Altruism and Self-Interest: Child Labor Among Late Nineteenth-Century American Families*, ECON. INQUIRY, Oct. 1989, at 637, 655–57 (estimating that around 90% of the income generated by working children in a family was dissipated

sector to be the most direct link between child labor and globalization.¹¹ This is a possible connection, and it is one of the critiques of the North American Free Trade Agreement.¹² Furthermore, some argue that opening up the export sector increases the opportunities for unskilled labor which could in turn draw children into the workforce.¹³

However, this argument glosses over the fact that the child who relocates in order to find work in the export sector may have previously worked at a less desirable job. Export jobs are not the only source of employment for child laborers—only the most visible.¹⁴ In reality only a small percentage of child laborers work in the export sector.¹⁵ Given this, even a large increase in the size of the export sector will have only limited effects on the number of child laborers.¹⁶

through lower adult male wages); See Kaushik Basu & Zafiris Tzannatos, *The Global Child Labor Problem: What Do We Know and What Can We Do?*, 17 WORLD BANK ECON. REV. 147, 150–51 (2003) (arguing that there are multiple equilibriums including a “bad” equilibrium where high levels of child labor push down adult wages. Under this scenario a ban on child labor would be welfare enhancing).

11. Toor, *supra* note 4, at 217 (“When we talk about globalization creating the conditions (through the disembeddedness of the economic from the social) for the increasing exploitation of child labor in countries of the South, it does not mean only in the export sector, although the export sector is perhaps the most direct link.”).

12. See, e.g., Joshua Briones, *Student Scholarship: Paying the Price For NAFTA: NAFTA’s Effect on Women and Children Laborers in Mexico*, 9 UCLA WOMEN’S L.J. 301, 307 (1999); Joan M. Smith, *North American Free Trade and the Exploitation of Working Children*, 4 TEMP. POL. & CIV. RTS. L. REV. 57, 63 (1994) (“[T]here is serious cause for concern that the industrial growth projected under NAFTA will produce greater exploitation of children.”).

13. See, e.g., ERIC V. EDMONDS & NINA PAVCNIK, INTERNATIONAL TRADE AND CHILD LABOR: CROSS-COUNTRY EVIDENCE 18-19 (Nat’l Bureau of Econ. Research, Working Paper No. 10317, 2004), available at <http://www.nber.org/papers/w10317>. The authors consider this argument in their paper and conclude that “the evidence [of their empirical research]. . . does not find any significant support for that claim.” *Id.* at 19.

14. See, e.g., Robert J. Liubicic, *Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights Through Private Initiatives*, 30 LAW & POL’Y. INT’L BUS. 111,140 (describing non-export industries as “invisible” industries).

15. See U.S. DEP’T. OF LABOR, *BY THE SWEAT AND TOIL OF CHILDREN: THE USE OF CHILD LABOR IN AMERICAN IMPORTS 2* (1994), available at <http://www.dol.gov/ILAB/media/reports/iclp/sweat/sweat.pdf> (estimating that export markets may account for as little as 5% of total employment of child laborers).

16. Even if the number of child laborers did increase due to an expansion of the export sector this might not be all bad. Increased employment demand might (for children and their parents) increase wages, improve working conditions, or both.

Moreover, globalization and foreign trade tend to increase incomes.¹⁷ To the extent that trade increases family incomes it may lessen families' reliance on child labor and may move children from the workplace into the classroom.

a. Recent Trends

Linda Golodner, President of the National Consumers League, asserts that "[t]he problem of child labor has grown along with the expansion of the global marketplace."¹⁸ An article by Timothy A. Glut seems to provide evidence for this assertion. He claims that the number of child laborers has increased by 112 million in only eight years.¹⁹ He states:

In late 1994, the International Labo[u]r Organization (ILO) estimated that there were 200 million child laborers in the world's work force.... These statistics contrast sharply with earlier studies. In 1986, the ILO estimated that there were only eighty-eight million child workers. *This dangerous increase in the amount of child labor* illustrates the ineffectiveness of current measures to curtail child labor.²⁰

Glut, however, neglects to cite any actual ILO studies. Instead the author cites newspaper articles in the Detroit Free Press, L.A. Times, and the Washington Post.²¹ His inattention to the actual numbers hides the great improvements that have been made and creates the impression that something drastic needs to be done.

Data from the International Labour Office, compiled in Table 1, tells a much different story.²² In 1960, twenty five percent of world's children worked.²³ That

17. See, e.g., Axel Dreher, *Does Globalization Affect Growth?*, at 14 (2003), available at <http://econwpa.wustl.edu/eps/dev/papers/0210/0210004.pdf> (last visited Apr. 19, 2005) (concluding that economic integration leads to faster rates of growth); See DAVID DOLLAR & AART KRAAY, TRADE, GROWTH, AND POVERTY 2 (World Bank, Working Paper No. 2615, 2001), available at <http://www.worldbank.org/research/growth/pdfiles/Trade5.pdf> (stating that developing countries that have "globalized" have grown faster even as wealthier nations growth rates have slowed). Trade between nations also tends to reduce income gaps between those nations. DAN BEN-DAVID & AYAL KIMHI, TRADE AND THE RATE OF INCOME CONVERGENCE 16 (Nat'l. Bureau of Econ. Res., Working Paper No. 7642, 2000), available at <http://papers.nber.org/papers/w7642.pdf>. Finally, some writers claim that globalization induces better governance. FEDERICO BONAGLIA ET AL., HOW GLOBALISATION IMPROVES GOVERNANCE 28 (OECD Development Centre, Working Paper No.181, 2001) available at <http://www.oecd.org/dataoecd/41/48/2675871.pdf>.

18. Linda F. Golodner, Address at the National Consumers League (Jan. 21, 1998), available at http://nclnet.org/advocacy/workersrights/speech_child_labor_01211998.htm.

19. Timothy A. Glut, *Changing the Approach to Ending Child Labor: An International Solution to an International Problem*, 28 VAND. J. TRANSNAT'L L. 1203, 1206-07 (1995). See also *id.*, at 1207 n.19 (postulating that, in percentage terms, there has been an "over 100% increase in child labor." Glut also argues that the increase "cannot simply be attributed to a greater number of children in the world.").

20. *Id.* at 1206-07 (emphasis added).

21. *Id.* at 1207; See also *id.*, at 1207 n.15, 1207 n.18.

22. See WORLD BANK, WORLD DEVELOPMENT INDICATORS (2002), available at <http://laborsta.ilo.org/> [hereinafter World Bank Data] This study looks at the amount of economically active children. For the purposes of this study, the term "child" is restricted to children aged 10-14. The next age group, 15-19, contains some people generally not considered children. Data for younger children is not available by country. Researchers generally believe that the term "child labor" should

same year, 39 percent of children in Sub-Saharan Africa worked, as did 38 percent of children in East Asia and the Pacific.²⁴ By 2000, the percentages of children working in the world and Asia had dropped to 11 percent and 8 percent, respectively, while the percentage of children working in Sub-Saharan Africa had dropped to 29 percent.²⁵ None of these areas has seen an increase in the prevalence of child labor.²⁶

Table 1. Prevalence of Child Labor by Region²⁷

Region	1960	1970	1980	1990	1995	2000
East Asia & Pacific	37.82%	32.83%	26.23%	14.27%	11.18%	8.06%
Europe & Central Asia	4.71%	3.55%	3.34%	2.80%	1.97%	1.11%
Latin America & Caribbean	16.59%	14.64%	12.70%	11.27%	9.87%	8.23%
Middle East & North Africa	21.61%	18.58%	14.03%	7.80%	6.06%	4.38%
South Asia	31.76%	27.29%	23.35%	19.39%	17.32%	15.03%
Sub-Saharan Africa	39.06%	36.66%	34.71%	32.21%	30.33%	28.99%
World	24.85%	22.20%	19.86%	14.61%	13.08%	11.33%

Table 2 looks at the prevalence (expressed in percentage terms) of child labor and the total numbers of child laborers in: the world; more developed regions; less developed regions; and the ten countries that in 2000 had the highest prevalence of child labor. It illustrates how child labor has declined overall since 1960. Even in countries that have increased *numbers* of child laborers the *ratio* of child workers to non-workers has fallen, in some places dramatically.

not encompass all work children do (such as light chores). See IPEC, *supra* note 1, at 32–33. However, separate data is not available.

23. See World Bank Data, *supra* note 22; see *supra* Part I., at tbl. 1.

24. See World Bank Data, *supra* note 22; see *supra* Part I., at tbl. 1.

25. See World Bank Data, *supra* note 22; see *supra* Part I., at tbl. 1.

26. See World Bank Data, *supra* note 22; see *supra* Part I., at tbl. 1. This statement can be made even stronger. Only five of the 171 countries measured have seen any increase in the prevalence of child labor during the time period evaluated. In 1960 the Dominican Republic had 25.7% of the children aged 10-14 working. In 1970 the rate went up to 31.6% and subsequently down to 24.8% in 1980. In Kenya the rate went from 44.96% in 1970 to 45.06% in 1980. In 1990 the rate dropped to 43.4%. Nicaragua saw a 0.82 percentage point increase between 1960 and 1970, followed by a subsequent decline. Similarly, the United Arab Emirates and the United States had temporary increases of 0.45 and 0.10 percentage points respectively in the same time period, also followed by declines.

27. See World Bank Data, *supra* note 22.

Table 2. Selected Regions and Child Labor²⁸

	Rates		Thousands	
	1960	2000	1960	2000
World	24.7%	11.2%	76420	67444
More developed regions	3.0%	0.0%	2434	17
Less developed regions	32.4%	13.0%	73985	67427
Bhutan	69.1%	51.1%	65	136
Burkina Faso	79.4%	43.5%	426	686
Ethiopia	50.8%	41.1%	1386	3277
Kenya	46.3%	39.2%	435	1699
Mali	63.7%	51.1%	329	726
Nepal	70.7%	42.1%	797	1154
Niger	49.9%	43.6%	182	609
Rwanda	44.2%	41.4%	152	413
Uganda	51.9%	43.8%	438	1343

Furthermore, as illustrated in Table 3, the countries that had the biggest expansion in their export sectors also had the biggest reductions in the prevalence of child labor.²⁹

Table 3. Exports and Child Labor

Change in Exports (1995–2000)	-21.3%	2.7%	22.1%	61.4%
Change in Child Labor (1995–2000)	-18.2%	-25.0%	-22.8%	-31.2%

Some commentators rightly suggest that child labor is difficult to define, find, and measure.³⁰ Nevertheless, these commentators are content in claiming that child labor is a serious and increasing problem.³¹ The ILO itself cautions that it is difficult to make comparisons over different years.³² While one should be cautious in using this data in empirical models, it would be wrong to exempt the claims of anti-globalization writers from empirical scrutiny simply because the data is difficult to collect.

28. Table 2 was compiled from World Bank Data, *supra* note 22.

29. Table 3 was compiled from World Bank Data, *supra* note 22. It only includes countries that had some positive level of child labor in 1995. The data was broken into quartiles and then analyzed. The percentage change in child labor was calculated by the deducting the prevalence of child labor in 1995 from the 2000 value and then dividing by the 1995 level. Growth of the export sector was calculated in a similar fashion.

30. Joan M. Smith, *supra* note 12, at 63.

31. *Id.*

32. IPEC, *supra* note 1, at 18–19.

b. Previous Empirical Studies

Trade liberalization has had a positive effect on the prevalence of child labor in Vietnam. One examination of the country indicated that trade liberalization in the rice market moved one million children out of child labor by increasing family incomes.³³ The declines were greatest for secondary school-aged girls, who were consequently more likely to attend school.³⁴

As for a cross-section of countries, a recent study found no evidence that greater openness to trade led to higher levels of child labor.³⁵ The authors concluded that while greater openness is correlated with a lower prevalence of child labor, this effect was statistically insignificant once the study was controlled for income differences across countries.³⁶ They also concluded that there was no evidence that increased trade leads to product demand changes which in turn leads to increases in child labor.³⁷ They found no evidence that child labor is related to the heterogeneity of skill endowments, capital scarcity, or the signing of anti-child labor agreements.³⁸ Additionally, they concluded that child labor is not driven by increases in exports of products made by unskilled labor.³⁹

Other authors agree with this evaluation. One critique concludes that high levels of child labor might be attributable to an absence of globalization, rather than to too much of it.⁴⁰ The article uses the Sachs-Warner index of openness, along with a number of control variables.⁴¹

A cross-sectional study of countries by Robert Shelburne came to similar conclusions.⁴² Shelburne's article used imports and exports as a percent of GNP as a measure of openness, along with a number of control variables.⁴³ He found that countries that are small, poor, and less open to international trade have a greater prevalence of child labor.⁴⁴

33. See ERIC EDMONDS & NINA PAVCNİK, DOES GLOBALIZATION INCREASE CHILD LABOR? EVIDENCE FROM VIETNAM 31 (Nat'l Bureau of Econ. Research, Working Paper No. 8760, 2000), available at <http://papers.nber.org/papers/w8760.pdf>.

34. *Id.* at 28-29.

35. See EDMONDS & PAVCNİK, *supra* note 13.

36. *Id.* at 22-23.

37. *Id.* at 23.

38. *Id.*

39. *Id.* at 18-19, tbl 5.

40. ALESSANDRO CIGNO ET AL., *Does Globalization Increase Child Labor?*, 30 WORLD DEVELOPMENT 1579, 1587 (2002); Stanley Fischer, *Globalisation and Its Challenges*, 93 AM. ECON. REV. 1, 33 (2003), available at <http://www.iie.com/fischer/pdf/fischer011903.pdf> (echoing this sentiment and concluding, "the pro-market pro-globalization approach is the worst economic policy, except for all the others that have been tried.")

41. ALESSANDRO CIGNO ET AL., *supra* note 40, at 1585-86.

42. Robert C. Shelburne, *An Explanation of the International Variation in the Prevalence of Child Labour*, 24 WORLD ECON. 359, 374-75 (2001).

43. *Id.* at 372.

44. *Id.*

c. New Regressions

This Article builds upon the work of Shelburne. His model of child labor is represented by the following equation:

$$CHILAB = \alpha(PCI)^{\beta_1} (OPEN)^{\beta_2} (GNP)^{\beta_3} \varepsilon$$

CHILAB is the percentage of children *not* in the workforce; PCI is per capita income; OPEN is imports and exports as a percentage of GNP; and GNP is gross national product.⁴⁵ An exponential function was utilized for this Article because that was the functional form chosen by Shelburne.⁴⁶

Some believe poverty increases child labor.⁴⁷ If true, child labor should decrease as per capita income (PCI) increases.⁴⁸ Shelburne uses OPEN to test the influence of openness on the amount of child labor.⁴⁹ Shelburne hypothesizes that in a closed economy the introduction of child labor will, on net, benefit the non-child-labor factors of production (although with varying distributional effects).⁵⁰ In an open economy the benefits of child labor accrue to the children (or their parents), which suggests that open economies will tend to have less child labor.⁵¹ Shelburne uses GNP as a measure of economic size.⁵² Shelburne argues that for

45. *Id.* at 372-73. Shelburne used 1996 values for each variable. Shelburne also used a dummy variable for countries with a history of communist rule. Since the dummy variable had little influence on the results it is dropped here.

46. *Id.* at 376. Shelburne utilized a Box-Cox procedure to pick the functional form which would minimize the residual sum of errors. Representative linear equations were estimated for this article (but not reported). The results were similar to the regressions reported in this article.

47. See Sudharshan Canagarajah & Helena Skyt Nielsen, *Child Labor In Africa: A Comparative Study*, 575 ANNALS AM. ACAD. POL. & SOC. SCI. 71 (2001).

48. Shelburne, *supra* note 42, at 369.

49. *Id.* at 370.

50. *Id.* at 365 (suggesting that in a three factor world capital and skilled laborers will benefit from the introduction of child labor, unskilled laborers without children will be harmed, and unskilled laborers with children would most likely benefit).

51. *Id.* at 364. Shelburne concludes "[t]hus in a closed economy the non-child-labour factors gain from child labour, while they do not in an open economy. Therefore, *ceteris paribus*, one would expect on a cross-section that where an economy is open to international trade, there is less likely to be child labour." *Id.* at 366. To illustrate, assume Country X is a closed economy where production equals consumption. When child labor is introduced the non-child-labor factors of production can still produce the same combinations of labor-intensive and non-labor-intensive goods. However, the price of the labor-intensive goods falls allowing them to expand their utility. They can produce at one point and trade with the child-labor factor of production until they maximize utility. Although the net effect of the allowance of child labor is positive for the non-child-labor factors as a whole, distributional effects may make some groups worse off such as wage earners in the labor-intensive market. Next, assume Country Y is an open economy that cannot influence the world price. When Country Y allows child labor prices do not change. All non-child-labor factors of production receive the same benefits. Child-labor is paid its marginal productivity, and thus gains. If the decision to allow child labor is set by consensus (through norm creation or legislation) Country X (the closed economy) is more likely to allow child labor as more factors of production benefit from its introduction.

52. *Id.* at 371.

large, open economies the introduction of child labor changes the terms of trade, making the non-child-labor factors of production worse off.⁵³ Smaller countries cannot affect the terms of trade and therefore the non-child-labor factors are not made worse off on the whole when child labor is introduced (although there are distributional effects—some factors are made worse off and some better off).⁵⁴ This suggests smaller countries would be more likely to utilize child labor.⁵⁵

Shelburne's article suggests that smaller, poorer, and less open countries have a greater prevalence of child labor.⁵⁶ This result, while interesting, does not fully address the present issue. His article suggests that at a given point in time, lower levels of child labor are correlated with higher levels of trade.⁵⁷ However, his results do not indicate whether an increase in the level of global trade over time leads to an increase in the level of child labor.

It is also not clear that the selected measure for openness (imports and exports as a ratio of GNP) is the best available measure. As previously mentioned, the link between globalization and child labor is supposedly between the export sector and child labor.⁵⁸ A better measure might therefore focus on exports.

In the following section the Shelburne-model of child labor is extended by estimating the model for a larger number of time periods. This article will then consider an alternative measure of trade openness and present some models of dynamic change.

d. Discussion of Results

The first empirical model tested is based on the Shelburne-model of child labor discussed above.⁵⁹ However, slightly different variables were used. Gross National Income per person is used in place of the per capita income variable.⁶⁰

53. *Id.* at 376.

54. *Id.* at 375. The factors that compete with child labor are made worse off, while the other factors are better off.

55. *Id.* at 369. To illustrate, assume Country X is a large open economy. Before the introduction of child labor, manufacturers produce a certain level of goods and trade with the world to a point that maximizes their utility. Since Country X is able to affect the prices of labor-intensive goods, it is assumed that the products it trades in the world market are labor-intensive goods. When child labor is introduced, the non-child-labor factors of production can still produce the same combinations of labor-intensive and non-labor-intensive goods. However, the country's terms of trade have deteriorated. After the introduction of child labor, Country X receives less skill-intensive goods for each unit of labor-intensive goods it trades. This implies that the non-child-labor factors are unable to consume as much as previously and are made worse off. The net effect for each factor depends on the distributional consequences of the change. Country Y, a small open economy, does not affect the world price and therefore the non-child-labor factors of production are not made worse off. Country Y is, therefore, more likely to allow child labor.

56. *Id.*

57. *Id.* at 362.

58. See *supra* text accompanying note 11.

59. The analysis that follows builds on previous models, but I have added, expanded, or altered those models.

60. See *National Accounts: Output and Expenditure*, at <http://www.worldbank.org/data/working/def7.html>. Gross National Income is what the World Bank now calls what was formerly Gross National Product (GNP).

The openness variable uses gross domestic product (GDP) instead of GNP as its denominator.⁶¹ These changes are minor.

More importantly, instead of using only a single year, regressions were run for 1960, 1970, 1980, 1990, 1995, and 2000. The results are presented in Table 5 of the Appendix.⁶² The results replicate what was found previously: child labor is more prevalent in poorer, smaller, and less open countries. Two measures of openness were used. The first measure was similar to the measure used by Shelburne—imports and exports as a percent of GDP.⁶³ The second measure was exports as a percent of GDP.

Since the dependant variable is the percentage of children *not* in the workforce,⁶⁴ positive coefficients mean that when the variable increases, more children are not working, and therefore the prevalence of child labor is lower.⁶⁵ For each time period the OPEN variable is of the correct (positive) sign and is highly statistically significant, indicating greater openness is associated with less child labor.⁶⁶

The second model looks at the relationship between changes in the prevalence of child labor and changes in the other variables.⁶⁷ If, as the opponents of globalization believe, increased levels of trade increase child labor, the coefficients for the OPEN variable should be negative.⁶⁸ If increased openness is unrelated to child labor the coefficient will be zero. If increased openness was related to decreases in the prevalence of child labor the coefficient will be positive.

The estimated changes represent the differences in each particular time period, up to the year 2000. For example, the 1960 estimates look at changes in each of the variables from 1960 to 2000. The results of this model are presented in Table 6 of the Appendix.

Openness is essentially no different statistically than zero for each of the estimates.⁶⁹ This suggests changes in the level of openness are unrelated to the prevalence of child labor. Per capita income, however, is strongly statistically significant (and the correct sign) for most of the time periods.⁷⁰ In other words, increasing income leads to less child labor.

61. See World Development Indicators, *supra* note 22.

62. The Appendix begins on page 433.

63. See Shelburne, *supra* note 42.

64. This measure was used in order to allow the use of natural logarithms. It is not possible to take the natural log of 0 (representing the percent of children in the workforce). However, it is possible to take the natural log of 100 (representing the percent of children *not* in the workforce).

65. See *infra* app., at tbl. 5.

66. See *infra* app., at tbl. 5.

67. Since using changes creates negative variables a linear model was estimated. Data points where the initial level of child labor was zero were eliminated.

68. The interpretation of coefficients is again slightly counterintuitive because the model looks at the change in children not working. A negative coefficient means that if the variable increases there are fewer children *not* working, in other words, more child labor.

69. See *infra* app., at tbl. 6. One estimate approaches statistical significance at a low level.

70. See *infra* app., at tbl. 7.

One final model was used. This model looked at changes over separate ten-year periods (1960 to 1970, 1970 to 1980, 1980 to 1990, and 1990 to 2000).⁷¹ The data was also pooled and considered as a whole.⁷²

The results are slightly different than before. As gross national income expands, child labor decreases.⁷³ Gross national income per capita is not statistically significant in either the ten-year interval estimate or the pooled data estimate.⁷⁴ The coefficients for openness were almost statistically (and the correct sign) significant at a low level.⁷⁵

These results suggest that increased globalization has not led to an increase in the prevalence of child labor. Refusing to embrace further globalization will not free developing nations from the existence of child labor. If trade increases income, trade may indirectly lower the prevalence of child labor.⁷⁶

The next section focuses on the whether a unilateral trade ban would benefit child laborers. It considers whether, even given the above analysis, a unilateral trade ban targeted at goods produced with child labor is a good idea and whether it would be legal under WTO law.

II. UNILATERAL TRADE BAN

a. Discussion

Some advocate for the United States' enactment of a unilateral trade ban on goods produced using child labor.⁷⁷ However, as previously noted, only a small percentage of child laborers are employed in the export sector—perhaps as low as 5 percent.⁷⁸ A trade ban would do little to protect child laborers if they found work elsewhere. Presumably, for at least some children, the export sector is the best option in terms of wages, working conditions, or both.⁷⁹ Even if a large portion of child labor was involved in the export sector, a trade ban would simply mean child labor would move elsewhere as the existence of an export sector itself does not spawn child labor.⁸⁰

Moving child laborers out of the export sector would tend to increase the labor supply in other sectors, which could depress wages, lead to worse working

71. See *infra* app., at tbl. 7.

72. Instead of using differences this model used ratios (New Value/Old Value). This allowed the use of the original mathematical form of the model.

73. See *infra* app., at tbl. 7.

74. See *infra* app., at tbl. 7.

75. The first definition of openness (imports and exports) was statistically significant at 16.4%. The second definition (exports only) was significant at 15.48%.

76. See Dreher, *supra* note 17 and accompanying text.

77. See, e.g., Benjamin James Stevenson, *Pursuing an End to Foreign Child Labor Through U.S. Trade Law: WTO Challenges and Doctrinal Solutions*, 7 UCLA J. INT'L L. & FOREIGN AFF. 129, 166 (2002); Matthew T. Mitro, *Outlawing the Trade in Child Labor Products: Why the GATT Article XX Health Exception Authorizes Unilateral Sanctions*, 51 AM. U. L. REV. 1223, 1271 (2002).

78. U.S. DEP'T OF LABOR, *supra* note 15, at 2.

79. *Id.*

80. See *infra* app., at tbl. 5.

conditions, or both.⁸¹ Wages from foreign-owned entities⁸² tend to be higher than domestic companies, and inasmuch as the export sector is proportionately made up of a greater number of foreign firms than domestic firms,⁸³ moving labor from this sector to others could tend to reduce wages for those laborers even if the movement did not depress wages in other sectors.

If, as is likely in at least some cases, necessity pushes children into working, a unilateral trade ban could have the perverse effect of increasing the number of hours children work. This would occur for children that moved to industries paying lower wages.⁸⁴

These are not just idle concerns. The threat of the enactment of a law banning imports of products produced with child labor led to the firing of fifty-five thousand Bangladeshi children.⁸⁵ A follow-up of a subset of these children found that none had enrolled in school, half had found jobs paying less money (such as prostitution, brick-laying, and selling flowers), and the other half were still looking for work.⁸⁶ Nutrition and health care were better for those children who kept their jobs. Former workers circulated a petition to return to the factories at least part-time.⁸⁷

One commentator speculates that early British laws banning child labor may have increased (at least temporarily) its prevalence:

The effect of the laws was to impose a cost on firms that were found to be employing children. It is arguable that the added cost, by making children less attractive to hire, tended to lower their wages. But because children worked

81. This is not a shocking or controversial result. It is a proposition commonly taught in introductory labor economics classes. See Notes for Chapter 2, available at <http://www.oswego.edu/~economic/eco350/chap2.htm>. (last visited Apr. 20, 2005). In other words, an increase in labor supply results in a lower equilibrium wage, but a higher equilibrium level of employment. Presumably non-child workers will tend to shift into the export sector if wages adjust. The magnitude of the wage decline depends on how many of workers are able to shift.

82. See ROBERT E. LIPSEY & FREDERIK SJOHOLM, FOREIGN FIRMS AND INDONESIAN MANUFACTURING WAGES: AN ANALYSIS WITH PANEL DATA (Nat'l Bureau of Econ. Research, Working Paper No. 9417, 2002), available at <http://www.nber.org/papers/w9417> (finding that when a foreign-firm takes over a domestic-firm in Indonesia wages rise); ROBERT E. LIPSEY, HOME AND HOST COUNTRY EFFECTS OF FDI (Nat'l Bureau of Econ. Research, Working Paper No. 9293, 2002), available at <http://www.nber.org/papers/w9293> (summarizing the evidence regarding foreign-firms paying higher wages); ZADIA FELICIANO & ROBERT E. LIPSEY, FOREIGN OWNERSHIP AND WAGES IN THE UNITED STATES, 1987-1992 (Nat'l Bureau of Econ. Research, Working Paper No. 6923, 1999), available at <http://www.nber.org/papers/w6923> (discussing Venezuela, Mexico, and the United States).

83. See FELICIANO & LIPSEY, *supra* note 82, at 3.

84. See Sonia Bhalotra, *Is Child Work Necessary?*, available at <http://fmwww.bc.edu/RePEc/es2000/0500.pdf> (last visited Apr. 19, 2005) (finding evidence that Pakistani children work due to conditions of necessity and suggesting trade bans could actually increase the number of hours children work).

85. Ben White, *In the Best Interests of the Child?*, at <http://www.cwa.tnet.co.th/vol12-4/interest.htm> (last visited Apr. 19, 2005).

86. *Id.*

87. See White, *supra* note 85; See also CAROL BELLAMY, UNITED NATIONS CHILDREN'S FUND, THE STATE OF THE WORLD'S CHILDREN 23 (1997), available at <http://www.unicef.org/sowc97/download/sow1of2.pdf>.

primarily to reach a minimal acceptable level of income for their households, a lower hourly wage induced them to work longer hours. Hence, paradoxically, the laws may have contributed to a worsening of child labor. The same risk is there with modern laws, such as India's Child Labor Act of 1986, that impose fines on firms that hire children.⁸⁸

This debate is reminiscent of the one over minimum wage laws—the imposition of which often has unintended consequences. In Indonesia, for example, labor legislation, such as minimum wage laws, have had a statistically significant negative effect on employment in the formal sector of the economy.⁸⁹ Those suffering the greatest harm were women, the young, and the less educated.⁹⁰ Mandating higher wages or better working conditions is also likely to have significant negative effects for industries under pressure to locate in low-cost jurisdictions.⁹¹ This would be true even if working conditions were enforced by a worldwide policy, as employers would move to locations where the wage and working conditions were justified by levels of productivity.⁹² Chasing away potential employers can only make things worse, as that would tend to also restrict the opportunities available to the parents of the child laborers.

It is, therefore, not surprising that one of the most prominent child rights groups—the United Nations Children's Fund—has labeled as a myth the idea that boycotts and trade bans are the only way to lessen child labor.⁹³ In fact, a UNICEF report seriously questions the efficacy of trade bans and their likely long-term consequences.⁹⁴

In this light, it is hard to see how a trade ban would protect child laborers. A ban would more likely help domestic special interests. Allowing trade bans based on labor standards unfortunately “opens the door to possible abusive use of trade barriers for protectionist reasons.”⁹⁵ It is not surprising that some of the biggest

88. Kaushik Basu, *The Economics of Child Labor*, 289 SCI. AM. 84 (2003).

89. See generally ASEP SURYAHADI ET AL., *Minimum Wage Policy and Its Impact on Employment in the Urban Formal Sector*, 39 BULL. OF INDONESIAN ECON. STUD. 29 (2003).

90. *Id.*

91. See DRUSILLA K. BROWN ET AL., THE EFFECTS OF MULTINATIONAL PRODUCTION ON WAGES AND WORKING CONDITIONS IN DEVELOPING COUNTRIES 10-11 (Nat'l Bureau of Econ. Research, Working Paper No. 9669, 2003).

92. See *id.* at 11. An unfortunate example is South Africa where the unemployment rate is 40 percent. Labor standards, enacted at the behest of labor unions, have meant many jobs have been exported to other developing countries. See Sharon LaFraniere, *Low Labor Standard Leads South Africans to Export Jobs*, N.Y. TIMES, Mar. 13, 2004, at A3.

93. BELLAMY, *supra* note 87, at 21, 23–24.

94. *Id.* at 23–24.

95. Virginia A. Leary, *Workers' Rights and International Trade: The Social Clause (GATT, ILO, NAFTA, U.S. Laws)*, in 2 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? 177, 204 (Jagdish Bhagwati & Robert E. Hudec eds., 1996); Alan O. Sykes, *Regulatory Protectionism and the Law of International Trade*, 66 U. CHI. L. REV. 1, 3 (1999) (arguing that a unilateral trade ban on child labor could be seen as a type of “regulatory protectionism.” That is, a regulation that imposes costs on foreign-producers “in a manner that is unnecessary to the attainment of some genuine, nonprotectionist regulatory objective.”). Child labor bans come within this definition as trade bans affect costs of protection but are unlikely to reduce child labor.

advocates of trade bans are unions, who couch their demands for special treatment in more palatable terms.⁹⁶

Some have argued that in the past the United States has too readily imposed unilateral trade sanctions and that these sanctions have been ineffective.⁹⁷ Worse than being ineffective, unilateral trade bans targeting some of the world's poorest countries could have quite pernicious effects on the living standards of the most vulnerable in those countries.

b. Big Enough Stick?

A U.S. unilateral trade ban might prove ineffectual for another reason—the United States is often not a large trading partner with poorer nations. If the United States stops trading with a particular country or industry within that country, the goods could be sold to other trading partners. For the fifteen countries with the greatest levels of child labor, trade with the United States collectively accounts for approximately 9.8 percent of their trade.⁹⁸

96. See, e.g., Jenny Bates, *International Trade and Labor Standards*, PROGRESSIVE POL'Y INST., Apr. 1, 2000, available at http://www.ppionline.org/ppi_ci.cfm?contentid=1152&knlgAreaID=108&subsecid=206.

97. Claude Barfield & Mark Groombridge, *U.S. Unilateral Sanctions are Overused and Undereffective*, 8 AM. ENTERPRISE 76 (1997) (noting that “42 percent of the world’s population live in sanctioned countries” and that “sanctions are rarely effective”).

98. See World Bank Data, *supra* note 22; see *infra* Part II, at tbl. 4. The 9.8 percent figure is an unweighted average of the U.S. trade figures. A weighted average might yield a different result. This list only includes countries that had bilateral trade data. This data is available at <http://data.econ.ucdavis.edu/international/wixd/index.html>.

Table 4. Child Labor and Trade Flows⁹⁹

Country	Child Labor (% of children)	Exports (% of GDP)	Imports (% of GDP)	US Trade (% of total trade)
Mali	51.1%	25.0%	40.4%	1.0%
Bhutan	51.1%	29.6%	59.9%	2.4%
Burundi	48.5%	9.0%	23.6%	7.8%
Uganda	43.8%	10.1%	25.7%	8.5%
Niger	43.6%	15.5%	23.1%	15.9%
Burkina Faso	43.5%	10.7%	29.6%	0.6%
Nepal	42.1%	23.7%	32.0%	33.4%
Rwanda	41.4%	8.3%	24.1%	21.7%
Ethiopia	41.1%	15.4%	30.7%	11.1%
Kenya	39.2%	26.5%	35.6%	2.6%
Comoros	38.4%	15.7%	86.1%	18.4%
Tanzania	37.6%	25.6%	31.9%	3.9%
Guinea-Bissau	36.9%	14.7%	23.2%	1.4%
Chad	36.7%	31.8%	58.2%	1.3%
Madagascar	36.6%	16.6%	32.0%	17.0%

Table 4 shows that the countries with the highest levels of child labor tend not to trade in significant amounts with the United States. Further, the trade sector in many of these countries is small. This suggests that disruptions to trade flows would have limited impacts on the economy. A unilateral trade ban targeting these countries might have little effect if other countries continue to trade with them.

Even if a significant number of countries join together in a multilateral trade ban, there is no guarantee this would result in net benefits. If a country that utilizes child labor is unable to find new trading partners a broader trade ban could have significant effects. Unfortunately, as illustrated above, it is very possible that these significant effects would be deleterious.¹⁰⁰ Countries wishing to erect a trade ban are in a precarious situation—in many cases the ban will not affect enough trade to make much of a difference, and if the ban does make a difference there is little to suggest the difference would be positive.

The next section focuses on the applicable WTO law. Despite spirited efforts at trying to demonstrate that such a unilateral trade ban would be WTO legal, as discussed below, these attempted justifications fail.

99. See World Bank Data *supra* note 22. Child labor, export, and import data is from 2000. The prevalence of child labor represents the percent of those aged 10 to 14 that work. The US trade data is from 1990. US trade is calculated by dividing the dollar amount of US trade by the particular country's total export trade flows.

100. See *supra* notes 29-43, 59-76.

c. *WTO/GATT Law*

"With GATT, Asian and other slave-wage countries can send products to the United States without any taxes. They will be able to use child labor, as it is not prohibited by GATT."¹⁰¹

"The idea, however, that the WTO as it is, and with the name it carries, can or will influence the destiny of most or even many child laborers, is completely fanciful."¹⁰²

The General Agreement on Tariffs and Trade (GATT) was created with the goal of lowering tariffs through a multilateral approach.¹⁰³ The present day World Trade Organization (WTO) is the successor to the GATT.¹⁰⁴ The WTO Charter contains the 1994 revised GATT, as well as a number of other agreements.¹⁰⁵

GATT Article XI contains a general prohibition of quantitative restrictions including quotas.¹⁰⁶ A unilateral trade ban on goods produced using child labor would contravene this article. It would not be permitted under WTO law unless it fit within one of the exceptions contained in the agreement.¹⁰⁷

GATT Article XX provides a list of general exceptions, of which XX(b) is the most applicable.¹⁰⁸ Exception XX(b) allows a departure from GATT rules if the measure is "necessary to protect human, animal or plant life or health."¹⁰⁹

101. Philip M. Nichols, *Trade Without Values*, 90 NW. U. L. REV. 658, 680 n.133 (1996) (quoting William Pipher, *NAFTA, GATT Will Ruin U.S. Economy*, INDIANAPOLIS NEWS, Nov. 7, 1994, at A13 (letter to the editor)).

102. Sara Ann Dillon, *A Deep Structure Connection: Child Labor and the World Trade Organization*, 9 ILSA J. INT'L & COMP. L. 443, 443 (2003).

103. JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT ON THE NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMIC RELATIONS 211 (4th ed. 2002).

104. *Id.* at 218–19.

105. *Id.* at 219–20.

106. General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, art. XI reprinted in JOHN H. JACKSON ET AL., 2002 DOCUMENTS SUPPLEMENT TO LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASE, MATERIALS AND TEXT 28-29 (West 4th ed. 2002) [hereinafter GATT 1994]. Article I could be implicated if the ban was targeted at particular countries, but not others. GATT 1994 art. I, at 17–18.

107. See Andrew T. Guzman, *Trade, Labor, Legitimacy*, 91 CAL. L. REV. 885, 890 (2003) (discussing how labor issues might be incorporated into WTO law).

108. GATT 1994 art. XX, *supra* note 106, at 45–46. Some have argued that the XX(a) and XX(e) exceptions could also apply in the context of unilateral child labor bans. See, e.g., Janelle M. Diller and David A. Levy, *Child Labor, Trade and Investment: Toward the Harmonization of International Law*, 91 AM. J. INT'L L. 663, 681–85 (1997) (noting that XX(a) applies to measures necessary to protect public morals.). For the purposes of this Article, this argument is ignored given the improbability of its success in front of a WTO panel. See Diego J. Linan Nogueras and Luis M. Hinojosa Martinez, *Human Rights Conditionality in the External Trade of the European Union: Legal and Legitimacy Problems*, 7 COLUM. J. EUR. L. 307328 (2001) (concluding "it is practically impossible to think that Article XX(a) would permit a Member State to apply its concept of public morals extraterritorially"); but see Guzman, *supra* note 107, at 890–91 (discussing a potential XX(a) argument.). XX(e) applies to measures "related to products of prison labor." For simplicity, this Article excludes from consideration "forced" child labor, which is at least arguably similar to prison labor. According to ILO figures less than 4% of child laborers are "forced or bonded laborers." See IPEC, *supra* note 1, at 25. This suggests

In trying to fit a unilateral trade ban within this provision, commentators start by arguing that child labor is hazardous to the health of the child laborers.¹¹⁰ In the abstract, this is not seriously in question.¹¹¹ The problem is that it is highly unlikely that the elimination of child labor through labor bans actually promotes human health. The decision whether to enter the labor force is likely made based partially (if not totally in some cases) on necessity.¹¹² This necessity means laborers frozen out of the export market are likely to move to other industries—industries which may pay less, have worse working conditions, or both. The irony is that a ban on child labor might actually increase the number of hours children work.¹¹³

Without being able to link the ban with human health, the commentators stumble. One author argues:

Child labor is a 'vital' health risk and, under a balancing approach, domestic policymakers should be given wide deference to combat it. No reasonably available alternatives to unilateral sanctions appear to be 'sufficiently effective.' . . . The drafting history of Article XX(b) plays a supplementary role and does not exclude the use of unilateral and extraterritorial sanctions. Furthermore, the WTO Preamble objective of raising standards of living permits the pursuit of properly delimited social objectives.¹¹⁴

Ignoring the legality of sanctions for extraterritorial conduct,¹¹⁵ this argument relies on an unproven assertion: unilateral sanctions are effective in protecting the

significant difficulty in targeting industries that rely on this form of child labor making such bans difficult to administer.

109. GATT 1994 art. XX(b), *supra* note 106, at 45. Timothy A. Glut has suggested that unilateral trade bans might not be considered necessary given the availability of other measures to combat child labor such as labeling. See Glut, *supra* note 19, at 1233–34. He notes that the word “necessary” in Article XX(b) is problematic because GATT Dispute Panels have interpreted the term to mean “the least-GATT-inconsistent alternative that a country could reasonably be expected to employ” in order to achieve its overriding public policy goals. *Id.* Glut further argues that because inconsistencies with GATT must be unavoidable, “it is likely that a GATT Panel would find that alternatives such as a product labeling requirement foreclose the availability of other trade sanctions.” *Id.* at 1234. This Article does not consider that argument.

110. Glut, *supra* note 19, at 1233; Benjamin James Stevenson, *supra* note 77, at 162; Matthew Mitro, *supra* note 77, at 1243.

111. See ANACLAUDIA GASTAL FASSA, HEALTH BENEFITS OF ELIMINATING CHILD LABOUR 46 (ILO Working Paper, 2003), available at http://www.ilo.org/public/english/standards/ipcc/publ/download/pol_healthcostben_2003_en.pdf.

112. Bhalotra, *supra* note 84, at 24 (finding support for the contention that Pakistani children enter the work force mainly due to conditions of necessity).

113. See *supra* text accompanying notes 84–8888.

114. Mitro, *supra* note 77, at 1260–61 (citations omitted).

115. See United States—Import Prohibition of Certain Shrimp and Shrimp Products, Oct. 12, 1998, WT/DS58/AB/R, for a discussion of when sanctions for extraterritorial conduct might be allowed in a case litigated under Article XX(g). The Appellate Body noted:

Of course, it is not claimed that all populations of these species migrate to, or traverse, at one time or another, waters subject to United States jurisdiction. *Neither the appellant nor any of the appellees claims any rights of exclusive ownership* over the sea turtles, at least not while they are swimming freely in their natural habitat — the oceans. We do not pass upon the question of whether there is an

health of child laborers by reducing the prevalence of child labor. As discussed above,¹¹⁶ such an assertion is unlikely to prove true in practice, therefore, any claims that the measure protects child laborers must fail.¹¹⁷

Further, the ban may also have to comply with the standards enunciated in the Agreement on Technical Barriers to Trade.¹¹⁸ A ban on child labor might be considered a technical regulation as it would “lay[] down product characteristics or their related processes and production methods... with which compliance is mandatory.”¹¹⁹ Technical regulations should be created without “creating unnecessary obstacles to international trade” and “shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create.”¹²⁰

Proponents of such bans will again have a difficult time proving a ban on child labor is necessary to prevent harm to human health, as discussed above. One writer has also noted that the technical barriers agreement gives additional time to developing nations to comply with proposed barriers.¹²¹ In particular, the agreement states that “[m]embers shall, in the preparation and application of

implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. *We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g).*” (emphasis added).

United States—Import Prohibitions of Certain Shrimp and Shrimp Products, Oct. 12, 1998, WT/DS58/AB/R, at para. 133. This differs from the case of child labor in two respects. First, the population of one nation is the exclusive concern of that nation’s government. Second, there is little nexus between the United States and foreign child laborers.

116. See *supra* text accompanying notes 18-32.

117. Robert Howse & Michael J. Treblicock, *The Free Trade-Fair Trade Debate: Trade, Labor, and the Environment*, in *ECONOMIC DIMENSIONS IN INTERNATIONAL LAW: COMPARATIVE AND EMPIRICAL PERSPECTIVES* 186, 215 (Jagdeep S. Bhandair & Alan O. Sykes, eds., 1997) (arguing that the fact that the action is unilateral might be enough to condemn it. Unilateral action has previously been condemned by a GATT panel as violating the requirement of necessity. The panel used a least restrictive means approach and concluded that “since the United States had not exhausted the avenues for a negotiated cooperative solution that would have avoided trade disruption” the measures could not be considered “necessary.”).

118. Agreement on Technical Barriers to Trade, Apr. 15, 1994, reprinted in JOHN H. JACKSON ET AL., 2002 DOCUMENTS SUPPLEMENT TO LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASE, MATERIALS AND TEXT 149-73.

119. *Id.* at 164; See also Glut, *supra* note 19, at 1234. It is not entirely clear that a ban on child labor would be considered a technical barrier under WTO case law. See *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, Sept. 18, 2000, WT/DS135/AB/R, for a discussion of this issue. In that case, the WTO Appellate Body limited the definition of “technical barrier” to those regulations that deal with identifiable groups of products. *Id.* at para. 70. However, they noted that a ban on asbestos did deal with an identifiable group of products—that is, all products. *Id.* paras. 72, 74. According to the Appellate Body “product characteristics” include things like “composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity.” *Id.* at 67. This would seemingly exclude bans on child labor. There is no discussion, however, on what constitutes a “related processes or production method.” The use of child labor might fit within this category.

120. GATT 1994 art. 2.2, *supra* note 106, at 150.

121. Glut, *supra* note 19, at 1234-35. See also GATT 1994 arts. 2.12, 12, *supra* note 106, at 151, 161-62.

technical regulations... take account of the special development, financial and trade needs of developing country Members."¹²² This suggests that developing countries would get additional leeway when defending themselves in front of a WTO panel.

Given these obstacles it would be a mistake to use unilateral trade bans in the name of protecting children. The danger of making things worse is too great and the likely benefits are too small. A World Bank paper notes, "there is virtually no economic case favoring the use of bilateral or multilateral trade penalties against labor standards.... On the other hand, the economic case against such penalties is strong."¹²³

d. Countervailing Duties and GATT

Some commentators suggest that child labor might be condemned under international law as either a subsidy or as dumping.¹²⁴ Under GATT both subsidized and dumped goods can have countervailing duties applied to them.¹²⁵ However, child labor does not fit comfortably within either of these molds.

1. Subsidy

Under WTO law a subsidy is defined as a "financial contribution by a government" where a "benefit is thereby conferred."¹²⁶ A financial contribution includes, *inter alia*, a situation where "government revenue that is otherwise due is foregone."¹²⁷ These requirements are likely to doom any claim that the allowance of child labor is a subsidy.

Some argue that by failing to enforce laws regarding child laborers, developing nations confer a benefit on producers who violate those laws with impunity.¹²⁸ However, even if we assume that a subsidy exists,¹²⁹ the mere

122. GATT 1994 art. 12.3, *supra* note 106, at 161. *See also* GATT 1994, art. 12.4, *supra* note 106 ("Members therefore recognize that developing country Members should not be expected to use international standards as a basis for their technical regulations . . . which are not appropriate to their development, financial and trade needs.").

123. KEITH E. MASKUS, SHOULD CORE LABOR STANDARDS BE IMPOSED THROUGH INTERNATIONAL TRADE POLICY? 67 (World Bank Working Paper No. 1817, 1997); *see also* Basu and Tzannatos, *supra* note 10, at 151 (noting that "[i]n a very poor economy it is entirely possible that the demand for labor is so low that . . . a ban on child labor can backfire, leaving the children and their parents impoverished and risking starvation.").

124. Stevenson, *supra* note 77, at 164-66.

125. *See* GATT 1994 art. VI, *supra* note 106, at 23-24; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 15, 1994, *reprinted in* JOHN H. JACKSON ET AL., 2002 DOCUMENTS SUPPLEMENT TO LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASE, MATERIALS AND TEXT 174-97 [hereinafter Anti-dumping Agreement]; Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, *reprinted in* JOHN H. JACKSON ET AL., 2002 DOCUMENTS SUPPLEMENT TO LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASE, MATERIALS AND TEXT 253-94 [hereinafter SCM].

126. SCM arts. 1.1(a)(1), 1.1(b), *supra* note 125, at 253.

127. SCM art. 1.1(a)(1)(ii), *supra* note 125, at 253.

128. Stevenson, *supra* note 77, at 165. Though a weak argument, presumably the revenue forgone could be the fines that could have been imposed. Daniel S. Ehrenberg argues that "'actionable' subsidies should be expanded to include gross and persistent violations of the prohibition against forced

existence of a subsidy is not condemned by the WTO. Subsidies are only condemned if they are considered "specific" under Article 2 of the Subsidies Agreement.¹³⁰

Specific subsidies are either export contingent,¹³¹ aimed at inducing import substitution,¹³² or targeted at a specific "enterprise or industry or group of enterprises or industries."¹³³ Since this so-called "child labor subsidy" would be available to any industry in the country, it would be considered a general subsidy (allowable) rather than a specific subsidy (impermissible).¹³⁴ Therefore, under WTO law the United States could not take action against this so-called 'subsidy.'

2. Social Dumping

The final argument¹³⁵ considered in this Article is whether allowing child labor is a type of "social dumping."¹³⁶ Dumped goods are those sold at less than their "normal value."¹³⁷ If dumping is found, the complaining nation may impose a duty on the dumped goods so long as the duty is not greater than the margin of dumping.¹³⁸

While some argue that dumping should be found when a country lacks appropriate levels of social legislation,¹³⁹ this is not supported by the text of GATT. To find dumping a product's selling price in the importing nation must be "less than the comparable price, in the ordinary course of trade, for the like product

or child labor." Daniel S. Ehrenberg, *The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor*, 20 YALE J. INT'L L. 361, 393 n. 263 (1995). However, as the agreement is currently written, there is no textual support for this expansion.

129. See generally, SCM *supra* note 125. A developing country that found itself in front of a WTO panel would have a strong argument that there is no subsidy under the definition in the SCM agreement.

130. See SCM art. 2, *supra* note 125, at 254.

131. See SCM arts. 2.3, 3.1(a), *supra* note 125, at 254-55. Some might argue that the allowance of child labor is actually export contingent. See Ehrenberg, *supra* note 128, at 393 n.265 (arguing that it is difficult to classify subsidies, and that if the subsidy is given to all industries but export industries primarily benefit, the subsidy "may be better classified as an export subsidy"); See U.S. DEPT. OF LABOR, *supra* note 15, at 2. Given that the export sector employs only a small portion of all child laborers such re-characterization is not appropriate here as the export industry does not receive a majority of the benefits of child labor.

132. SCM arts. 2.3, 3.1(b), *supra* note 125, at 254-55.

133. SCM art. 2.1, *supra* note 125, at 254.

134. *But see* Ehrenberg, *supra* note 128, at 393 n. 265 (indicating that the subsidy must be "specific" but arguing that a child labor subsidy should still be actionable).

135. See, e.g., Diller & Levy, *supra* note 108, at 685-686. Some have also argued that Article XXIII of GATT 1994 might provide an avenue for attacking child labor. Since those arguing this agree that the "use of Article XXIII in the context of child labor appears problematic under the new WTO rules," this article will not consider the issue. See also GATT 1994 art. XXIII, *supra* note 106, at 47, which states that the provisions of Article XXIII apply when "any benefit accruing to [a country] directly or indirectly under [the] Agreement is being nullified or impaired . . . as the result of . . . the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement."

136. Stevenson, *supra* note 77, at 164-66.

137. See GATT 1994 art. VI:1, *supra* note 106, at 23.

138. See GATT 1994 art. VI:2, *supra* note 106, at 23.

139. Stevenson, *supra* note 77, at 165; Ehrenberg, *supra* note 128, at 392-93.

when destined for consumption in the exporting country.”¹⁴⁰ If there are no domestic prices the lower of the following should be used: “the highest comparable price for the like product for export to any third country in the ordinary course of trade”¹⁴¹ or “the cost of production of the production in the country of origin plus a reasonable addition for selling cost and profit.”¹⁴² None of these definitions allow for consideration of the regulatory environment that generated the costs and prices of the exporting nation.¹⁴³ None of these definitions would result in finding the price in the importing nation was lower than the price in the exporting nation due to the use of child labor.¹⁴⁴ If the export price is not lower there is no dumping margin and there cannot be a countervailing duty.¹⁴⁵

Furthermore, during GATT negotiations both Canada and the United States argued that “dumping” should only refer to “price dumping.”¹⁴⁶ The Cuban delegation’s proposal, which would have condemned dumping “whether practiced through the mechanism of price, freight rates, currency depreciation, sweated labor, or by any other means,” was rejected.¹⁴⁷

Article VI was not meant to apply to so-called “social dumping” and should not be expanded. If this “social dumping” argument was successful, the coverage of this provision could conceivably apply anywhere labor standards differed between nations—a result unlikely contemplated by the signatories of GATT.¹⁴⁸ From an economic standpoint, the case for harmonized labor standards is weak. In fact, harmonization can end up hurting the poor nations that the proponents of such harmonization claim they want to help.¹⁴⁹

140. See GATT 1994 art. VI:1(a) *supra* note 106, at 23.

141. GATT 1994 art. VI:1(b)(i), *supra* note 106, at 23.

142. GATT 1994 art. VI:1(b)(ii), *supra* note 106, at 23.

143. See GATT 1994 art. VI, *supra* note 106, at 23.

144. See Anti-dumping Agreement art. 2.1, *supra* note 125, at 174. If the price of the good was cheaper by \$2 because of the use of child labor, it would be sold for \$2 less in both the exporting and importing nations. See *id.* at 174–75 (definitions refer to prices and costs and not to the regulatory environment that those costs were generated in); 19 USC § 1677(15) (2000) (requiring that the sale be “in the ordinary course of trade.” This includes sales in the exporting country even if the product embodies the work of children and refers to regular business practices. For example, under U.S. law the term “means the conditions and practices which . . . have been normal in the trade under consideration with respect to merchandise of the same class or kind.” This definition does not exclude the use of child labor.)

145. See GATT 1994 art. VI:1, *supra* note 106, at 23. Additionally the complaining nation must prove “material injury to an established industry.” Some of the industries (such as carpet weaving) that utilize child labor may not have a developed country counterpart, making them immune from this type of attack. A developed country that has no harmed industry should have no ability to complain since lower prices can only benefit that country.

146. See Diller and Levy, *supra* note 108, at 681.

147. *Id.* at 680–681; See also Stevenson, *supra* note 77, at 165.

148. See Belgian Family Allowances, Nov. 7, 1952, G/32 - 1S/59 (declaring a government procurement statute that imposed a levy on goods originating in countries deemed to have an inadequate family allowance system to be a violation of GATT).

149. Drusilla K. Brown et al., *International Labor Standards and Trade: A Theoretical Analysis*, in *1 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE?* 227, 269–72 (Jagdish Bhagwati and Robert E. Hudec eds., 1996). Although these authors believe allowing child labor might

CONCLUSION

Increased globalization has not been and will not be a major determinant of the prevalence of child labor. Developing nations should not restrict trade in the hopes of reducing child labor. Developed countries should not impose unilateral trade bans on goods produced with child labor. First, the likely consequences of a unilateral trade ban are negative, with the most vulnerable suffering the greatest. Second, such action would be impermissible under WTO law.

Child labor is a problem that has afflicted every nation. As wealth has grown the problem has receded. Protectionist demands disguised as humanitarian concerns should be resisted. Trade should be allowed to continue to exert a positive influence on standards of living across the globe.

be thought of as an "unfair" trade practice, they note that the imposition of a countervailing duty will hurt labor in the low-income country. *Id.* at 270-272. They further note that gains from trade to high-income countries do not require the efficient allocation of resources in low-income countries; these gains are generated from the ability to trade at prices different than the world without trade. *Id.* at 271.

III. APPENDIX

Table 5. Child Labor and Openness (Static Model) – 1960, 1970, 1980, 1990, 1995, and 2002

	1960		1970		1980	
	(IMP + EXP)	(EXP)	(IMP + EXP)	(EXP)	(IMP + EXP)	(EXP)
Constant	2.84*** (0.35)	3.01*** (0.29)	2.44*** (0.34)	2.64*** (0.26)	2.75*** (0.29)	2.88*** (0.22)
GNI per Capita	0.1709*** (0.03)	0.1708*** (0.03)	0.1077*** (0.02)	0.1056*** (0.02)	0.0951*** (0.02)	0.0874*** (0.02)
GNI	0.0106 (0.02)	0.0073 (0.02)	0.0390** (0.02)	0.0355*** (0.01)	0.0273** (0.01)	0.0266** (0.01)
OPEN	0.09** (0.04)	0.08** (0.03)	0.11*** (0.04)	0.10*** (0.03)	0.08** (0.03)	0.08*** (0.03)
R ² =	58.7	58.7	60.8	61.8	59.9	60.8
n =	84	84	103	103	122	122

	1990		1995		2000	
	(IMP + EXP)	(EXP)	(IMP + EXP)	(EXP)	(IMP + EXP)	(EXP)
Constant	2.98*** (0.24)	3.19*** (0.18)	3.15*** (0.23)	3.38*** (0.17)	3.17*** (0.21)	3.37*** (0.16)
GNI per Capita	0.0647*** (0.01)	0.0600*** (0.01)	0.0589*** (0.01)	0.0578*** (0.01)	0.0558*** (0.01)	0.0527*** (0.01)
GNI	0.0249** (0.01)	0.0217** (0.01)	0.0205** (0.01)	0.0164** (0.01)	0.0200** (0.01)	0.0166** (0.01)
OPEN	0.10*** (0.03)	0.09*** (0.02)	0.09*** (0.03)	0.08*** (0.02)	0.10*** (0.03)	0.09*** (0.02)
R ² =	51.9	52.9	50.1	50.2	50.0	51.5
n =	144	144	151	151	137	137

A positive coefficient means as the variable increases, the prevalence of child labor decreases. Standard errors are in parentheses. * means statistically significant at the 10%-level. ** is at the 5%-level and *** is at the 1%-level.

Table 6. Child Labor and Openness (Dynamic Model – Change Measured at 2000)

	1960		1970		1980	
	(IMP + EXP)	(EXP)	(IMP + EXP)	(EXP)	(IMP + EXP)	(EXP)
Constant	11.27*** (1.14)	11.46*** (1.10)	9.79*** (0.94)	9.93*** (0.88)	6.40*** (0.58)	6.33*** (0.59)
Δ GNI per Capita	0.0004*** (0.00)	0.0004*** (0.00)	0.0004*** (0.00)	0.0004*** (0.00)	0.0004** (0.00)	0.0004** (0.00)
Δ GNI	0.0000 (0.00)	0.0000 (0.00)	0.0000* (0.00)	0.0000* (0.00)	0.0000* (0.00)	0.0000* (0.00)
Δ OPEN	-0.01 (0.02)	-0.01 (0.04)	-0.01 (0.02)	-0.01 (0.03)	-0.02 (0.02)	-0.04 (0.03)
R ² =	15.1	14.8	20.2	20.0	9.9	10.5
n =	69	69	85	85	84	84

	1990		1995	
	(IMP + EXP)	(EXP)	(IMP + EXP)	(EXP)
Constant	3.97*** (0.34)	3.93*** (0.33)	1.88*** (0.15)	1.88*** (0.15)
Δ GNI per Capita	0.0009*** (0.00)	0.0009*** (0.00)	0.0007* (0.00)	0.0006* (0.00)
Δ GNI	0.0000** (0.00)	0.0000** (0.00)	0.0000** (0.00)	0.0000* (0.00)
Δ OPEN	0.01 (0.01)	0.01 (0.02)	0.01 (0.01)	0.02 (0.01)
R ² =	11.1	10.9	7.8	7.5
n =	84	84	86	86

A positive coefficient means as the variable increases, the prevalence of child labor decreases. Standard errors are in parentheses. * means statistically significant at the 10%-level. ** is at the 5%-level and *** is at the 1%-level.

Table 7. Child Labor and Changes

	(IMP + EXP)	(EXP)
GNI per Capita/ GNI per Capita _{t-10}	0.01 (0.01)	0.01 (0.01)
GNI/ GNI _{t-10}	-0.17*** (0.05)	-0.17*** (0.05)
OPEN/ OPEN _{t-10}	-0.09 (0.06)	-0.07 (0.05)

A negative coefficient means as the variable increases, the prevalence of child labor decreases. Standard errors are in parentheses. * means statistically significant at the 10%-level. ** is at the 5%-level and *** is at the 1%-level.