

# International Trade and Labor Standards: A Proposal for Linkage

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**Introduction**

Whether rights to trade ought to be made in any way conditional on the promotion of labor standards is an issue that currently engenders a great deal of heated disagreement.

This essay presents a proposal for linking trade and labor standards.<sup>1</sup> We develop a proposal for linking rights to participate in international

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1. Other such proposals have been made, all of which share some of the features of the proposal sketched below. E.g., Daniel S. Ehrenberg, *From Intention to Action: An ILO-GATT/WTO Enforcement Regime for International Labor Rights*, in HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 163, 168 (Lance A. Compa & Stephen F. Diamond eds., 1996); Int’l Confederation of Trade Unions, *Building Workers’ Human Rights into the Global Trading System* 66 (1999), <http://www.icftu.org/www/english/els/escl99BWRGTS.pdf> [hereinafter ICFTU (1999)]; Pharis J. Harvey et al., *Developing Effective Mechanisms for Implementing Labor Rights in the Global Economy*, Workers in the Global Economy § II(A), [www.laborrights.org/projects/globalecon/ilrf/index.html](http://www.laborrights.org/projects/globalecon/ilrf/index.html) (last visited Dec. 13, 2006).

trade with the promotion of basic labor standards.<sup>2</sup> We argue that implementing our proposal would improve working conditions and living standards in poor countries without imposing undue burdens, and would therefore be *one* means of advancing valued ends, and in particular the ends of justice.<sup>3</sup> We identify the arguments that have been offered (or could plausibly be offered) against linkage in order to show that, although these arguments articulate legitimate concerns, they rest on unwarranted assumptions concerning the practicability, likely effects, and appropriate framework for evaluating linkage.<sup>4</sup>

Our argument consists of five steps. First, we identify a proposition that proponents of linkage accept, and its opponents reject, as well as an objective that both groups seek to promote. Second, we identify the arguments that can be offered against linkage, thus defined. Third, we show why proposals for linkage that do not possess certain features should be rejected on the basis of these arguments. Fourth, we identify additional features of a proposal for linkage that would suffice in order for it to be immune to these arguments. This process enables us to identify a class of proposals for linkage that withstand all of the standard objections. We argue that such proposals are superior to non-linkage proposals in promoting a common objective of the groups on both sides of the linkage debate. Fifth, to provide a concrete starting point for discussion, we describe one such proposal.

Although we will take as our premise that gains from trade can exist, nothing in our argument relies on a specific view regarding the trade policy that maximizes these gains.<sup>5</sup>

## I. What is Linkage?

Proposals to promote labor standards can be divided into two types: those that involve linkage and those that do not. Further, all proposals to promote labor standards, whether or not involving linkage, can be characterized according to how they answer the following two questions:

(Q1) What are the labor standards to be promoted?

(Q2) How should labor standards be promoted?

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2. It is possible that other valued objectives, such as promoting environmental quality or respect for human rights norms more broadly may also be promoted through linkage. We take no stand on these issues here.

3. We are assuming that global institutional reforms that promote better working conditions and living standards for less advantaged persons in the world without placing significant burdens on more advantaged persons advance the ends of justice. Widely varying conceptions of justice would affirm this view.

4. A number of preferential trading agreements, e.g. NAFTA, CAFTA, United States-Cambodia trade agreement, United States-Jordan trade agreement, U.S.-Chile trade agreement, contain provisions regarding labor standards. See also Tobias Buck, *EU to Offer Rewards to 'Good' Poor Countries*, *Financial Times*, Oct. 20, 2004.

5. Specifically, we do not assume that free trade is always the policy that maximizes the gains from trade.

Disagreements between opponents and proponents of linkage either concern the objectives that should be promoted or the means of promoting them. Both opponents and proponents of linkage seem to affirm the following proposition:<sup>6</sup>

*Proposition O: A very important factor in determining whether an institutional arrangement for the governance of the global economy should be viewed as superior to another is whether it improves the level of advantage of less advantaged persons in the world to a greater extent.*

Those who affirm this proposition are committed to the view that improving the level of advantage of less advantaged persons in the world is a very important objective, which we therefore refer to henceforth as “the objective.” Advantage can be understood in various ways.<sup>7</sup> We leave it unspecified other than presuming that for members of the labor force advantage is generally enhanced by higher employment, higher real wages and improved working conditions. We define “labor standards” as the level of real wages and the quality of working conditions. Together with higher employment, the improvement of labor standards is an important way of increasing the level of advantage of less advantaged persons.

We understand *basic* labor standards to refer to a specified level of attainment of labor standards that is deemed *minimally adequate*. If it is desired, in order to fix ideas, the basic labor standards may be conceived in terms of the “core” labor standards promoted by the ILO. The ILO’s core labor standards consist of “freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.”<sup>8</sup> Although we leave the exact content of these basic labor standards deliberately unspecified (since the argument that we present below does not depend on any highly specific conception of them), we think it implausible that an account of basic labor standards would not include some reference to standards of each of these kinds. We think that any plausible account of basic labor standards will also additionally make reference to a level of real wages that may be deemed minimally adequate in each context, although

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6. We deliberately formulate this proposition abstractly to accommodate the broad range of views that are present in the literature.

7. Although the way in which individual advantage is conceived will undoubtedly influence the specific policies and institutional arrangements that are deemed desirable, the arguments for and against linkage discussed in this essay are largely independent of the choice of a particular conception, within reasonable bounds of variation. See, e.g., *UTILITARIANISM AND BEYOND* (Amartya Sen & Bernard Williams eds., 1982); *QUALITY OF LIFE* (Martha C. Nussbaum & Amartya Sen eds., 1993); *JOHN RAWLS, A THEORY OF JUSTICE* (1971) [hereinafter *RAWLS* (1971)], for a discussion of different conceptions of individual advantage.

8. INTERNATIONAL LABOR ORGANIZATION, *DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK* § 2(a)-(d) (June 1998), available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-dtxt.htm> (last visited Dec. 13, 2006).

we do not take a position here as to what that level should be.<sup>9</sup>

Similarly, our argument assumes the value of the objective identified without relying on any specific interpretation of it (within some reasonable range of variation). We understand an institutional arrangement to be a set of norms or rules (whether formal or informal) that govern the interaction of the participants of a social system (e.g., countries engaged in international trade). Proponents of linkage adhere to the following proposition, and opponents of linkage reject it (in relation to the organization of the international economy):

*Proposition L: It is desirable to bring about an institutional arrangement in which rights to trade are made conditional upon the promotion of labor standards, and there is reason to believe that such an arrangement can be brought about and sustained.*

*Proponents of linkage must answer Q2 (at least) in a manner that reflects their adherence to proposition L.*<sup>10</sup> Opponents of linkage must claim either that it is undesirable to bring about an institutional arrangement in which rights to trade are made conditional upon the promotion of labor standards, or that the institutional arrangements of this kind which would be desirable are infeasible.

It is often presumed in discussions of linkage that linkage proponents necessarily favor the application of trade sanctions to countries that fail adequately to promote labor standards. In fact, this is in no way entailed by

9. It may be helpful to contrast proposals to further the achievement of basic labor standards with proposals to further the achievement of labor standards as such. Whereas the former are concerned with minimally adequate labor standards (however defined), the latter may seek the attainment of still higher labor standards regardless of the levels already attained. Proposals of the latter kind are not our focus here.

10. Many recent critics of linkage have characterized the idea of linkage much more narrowly than we have. Arvind Panagariya, for example, has claimed that “[t]he trade-labor link effectively requires countries to raise standards to the level desired by importing countries or face trade sanctions by the latter. It is argued that a country that adheres to higher labor standards within its national boundaries has the moral right to suspend trade with another country that does not adhere to equally high labor standards.” ARVIND PANAGARIYA, *LABOR STANDARDS AND TRADE SANCTIONS: RIGHT END WRONG MEANS* 5 (Jan. 15-16, 2001), available at <http://www.columbia.edu/~ap2231/Policy%20Papers/Hawaii3-AP.pdf> (last visited Dec. 13, 2006) [hereinafter Panagariya (2001)]. Clearly it is possible to oppose linkage as Panagariya has characterized it without opposing linkage as we understand it. Indeed, few (if any) linkage proponents would endorse linkage as Panagariya understands it, and in what follows we express full agreement with the criticisms that have been advanced by Panagariya and others of this type of linkage. Similarly, Srinivasan frames disagreement about linkage in terms of differing views regarding whether diversity in labor standards among nations is legitimate. T.N. SRINIVASAN, *DEVELOPING COUNTRIES AND THE MULTILATERAL TRADING SYSTEM: FROM GATT TO THE URUGUAY ROUND AND THE FUTURE* (2d ed. 2000). This is misleading, since many linkage proposals (such as the one sketched below) not only allow that diversity of labor standards amongst nations is legitimate, but insist that attempting to “harmonize” them under present conditions would be illegitimate. See ICFTU (1999), *supra* note 1, at 31; Pharis J. Harvey et al., *Developing Effective Mechanisms for Implementing Labor Rights in the Global Economy*, WORKERS IN THE GLOBAL ECONOMY § II(D).

Proposition L, since a system that *offers*<sup>11</sup> countries additional trading opportunities if they promote labor standards adequately, without sanctioning them when they do not, is a form of linkage as defined by Proposition L.<sup>12</sup> Indeed, we argue below that extending additional opportunities to countries that adequately further labor standards will play an important role in a feasible and effective system of linkage.

## II. Step One: What Linkage Proponents Must Show

What is linkage and what are the conditions under which it is desirable to “link” things? At least three distinct types of linkage can be relevant in designing institutional arrangements.

A first type of linkage is that which arises as a result of the interdependence of different attainments (in health, education, security, and so on) in the process of evaluation. The assessment of an outcome may depend on the extent to which distinct objectives are each attained. When attainments of more than one kind necessarily enter jointly into the evaluative process, we may refer to this as “evaluation linkage.” Evaluation linkage influences the design of institutions, since the desirability of each outcome depends on the extent of all of the attainments that define that outcome. Each institutional arrangement may give rise to different combinations of desirable and undesirable attainments. It may moreover sometimes be impossible to assess the desirability of specific attainments without taking due account of other attainments. The choice among different institutional arrangements must be made on the basis of the extent to which the combinations of attainments to which they give rise contribute to some “master-goal.”<sup>13</sup>

A second type of linkage is that in which the promotion of distinct attainments is taken to be the objective of some agent.<sup>14</sup> For example, it might be required that a government agency discharge more than one function, such as the prevention and the curing of illness, or the health and

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11. The distinction between sanctioning and offering additional opportunities depends on having specified a baseline. Such a baseline can be identified on the basis of various (empirical and normative) criteria. A common misunderstanding is that it can only be defined on the basis of empirical considerations, such as whether a measure restricts or expands the opportunities possessed *ex ante* by the parties.

12. A system that provides a country with additional *permissions* (e.g., to impose tariffs on foreign products) if it adequately promotes labor standards is also a form of linkage as defined by Proposition L since the rights to trade that it accords to *other* countries are made conditional on the promotion of labor standards. We do not focus on linkage of this kind below but note that proposition L accommodates it.

13. We borrowed the term “master-goal” from Thomas Pogge, *On the Site of Distributive Justice: Reflections on Cohen and Murphy*, 29 PHIL. & PUB. AFFAIRS 137, 155 (2000). Formally, individual attainments  $a_1, a_2, \dots, a_n$  contribute to the attainment of a master-goal defined by an objective function  $U(a_1, a_2, \dots, a_n)$ . It does not necessarily follow that this objective function is additively separable. As a result, it is often impossible to evaluate the marginal contribution of each attainment to the master-goal, and thus of the optimal combination of attainments to be pursued, without determining the extent of other attainments.

14. This agent could be individual or “collective,” i.e., a group or an organization.

educational achievements of young children. We may refer to this type of linkage, in which distinct ends are assigned to single agents, as “agency linkage.”

A third type of linkage is that in which the rights of agents are made conditional on their conducting themselves in a specific way. For example, the right to receive certain social benefits may be made conditional on having paid (or on having promised to pay) taxes. Let us refer to this type of linkage as “rights linkage.”<sup>15</sup>

Those who affirm and deny Proposition L disagree about whether there ought to be rights-linkage between trade and labor standards. They need not disagree about either evaluation-linkage or agency-linkage as defined above. In particular, both proponents and opponents of proposition L appear to accept evaluation-linkage between trade and labor standards. However, they disagree about rights-linkage between these domains since they differ over whether rights to trade ought to be made conditional on adequately promoting some labor standards.

It is important to note that opponents of rights-linkage (in which rights to trade are made conditional upon the promotion of labor standards) need not oppose agency linkage (in which single agents<sup>16</sup> are charged with the goals of promoting trade and promoting labor standards). They may find it desirable that some agency aim both to promote trade and the observance of basic labor standards, while opposing the conferral on any agency of the power to limit agents’ rights to trade on the basis of whether or not they have adequately promoted basic labor standards. On the other hand, those who affirm rights linkage must affirm some kind of agency linkage, as they must affirm that some agent(s) ought to be charged with making authoritative determinations regarding whether or not other agents have or have not adequately promoted basic labor standards, and how their conduct in this area should affect their rights to participate fully in international trade.

What reasons might there be to affirm or reject evaluation, agency, or rights linkage as defined above? Reasons to affirm or reject evaluation linkage seem perhaps most obvious. Attainments of more than one kind ought necessarily to enter jointly into the evaluative process whenever each type of attainment is deemed important in evaluating outcomes. For example, health and educational achievements ought to be “evaluation-linked,” for social institutions, because both are important in assessing the outcomes generated by such institutions.

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15. Rights-linkage as we understand it is linkage between the possession of rights and the undertaking of certain conduct (the exercise of their rights in a specific way) and is distinct from another type of linkage that might also deserve the term rights-linkage: that in which an agent’s possession of one right is made conditional on his or her possession of some other right.

16. Possibly more than one: agency-linkage requires that at least some agents be charged with promoting distinct ends, but it does not require that each end be promoted by only one agent.

Whether different attainments should be agency-linked depends largely on how effectively alternative assignments of aims to agents would promote the desired ends. In some contexts, charging a single agent with promoting more than one attainment may be an effective way to promote the attainments that are desired, whereas in other contexts they may be better promoted by a more functionally differentiated system in which distinct agents are charged with promoting distinct attainments. The judgment as to whether such functional differentiation is desirable will depend heavily on empirical considerations.

Whether rights-linkage is desirable depends on considerations of two kinds. The first consideration, effectiveness, is empirical. Whether rights-linkage is effective depends on whether two or more attainments (such as enhanced levels of trade and the attainment of basic labor standards) are achieved more or less by linking rights to participate in trade with the promotion of basic labor standards? The second consideration, appropriateness, concerns additional moral considerations that may be relevant to justifying rights-linkage. For example, while some may argue that making the right to vote conditional on not having been found guilty of serious criminal offences is *morally* appropriate (whether or not such conditionality contributes to desired ends such as voter participation or reductions in crime) others may deny this. Rights confer benefits on agents, and it may or may not be held that an agent should be conferred such benefits if they have failed to abide by specific normative standards. *Throughout the rest of this paper, when we refer to proponents and opponents of "linkage" we mean proponents and opponents of Proposition L, and therefore of rights-linkage only.*

It is possible to favor only specific linkage proposals (and then only under specific conditions). For example, certain linkage proponents argue that linking trade and labor standards through the WTO is undesirable because the WTO by its very nature is hostile to labor standards. However, such persons may endorse linkage under an alternative institutional order of world trade. Similarly, those who object to a form of linkage that allows developed countries unilaterally to bring trade sanctions against those countries they deem to have violated labor standards may not object to a form of linkage that precludes potentially opportunistic misuse of this kind. Furthermore, those who reject the idea that the rights of countries to trade internationally may be made conditional on the extent to which they adequately promote basic labor standards can endorse the idea that those countries that make marked improvements in their promotion of such standards ought to acquire further rights to trade. Our goal in this paper is not merely to defend Proposition L but to develop criteria for distinguishing plausible from implausible linkage proposals.

We shall argue that any system for guaranteeing mutual access to markets (a rule-based system of international trade) can potentially be enhanced by making rights to trade conditional on the promotion of those standards in an appropriate way (i.e., through linkage). In doing so, we do not presuppose that the system for guaranteeing mutual market access (in

relation to which linkage is being considered) is the WTO, although, for simplicity, we shall often assume in our discussion here that the trading system that we are considering is the WTO. The case that we make here for linkage, therefore, potentially applies to all multilateral trading agreements.

Proponents of linkage hold that there exists at least one proposal for linkage that, all things considered, is desirable to bring about in current conditions. Opponents of linkage contend that there is not *even one* proposal for linkage that, all things considered, is desirable to bring about (at least in current conditions). To reject this view, it would be sufficient for advocates of linkage to show that there is at least *one* proposal for linkage that, all things considered, is desirable to bring about (in current conditions). The central task of this paper is to demonstrate this. We do so by showing that there is a class of proposals for linkage that meets *all* of the objections that are commonly advanced (and widely held to be plausible) against proposals for linkage and that, moreover, linkage proposals which belong to this class would perform better than non-linkage proposals in promoting the objective (as defined in Proposition O above) that we presume is shared by both proponents and opponents of linkage. In doing so, we meet a much stronger test than is strictly necessary in order to sustain Proposition L, which depends on the existence of *a* proposal for linkage that it is desirable to bring about, all things considered.<sup>17</sup>

### III. What Linkage Opponents Must Show

Principles that are commonly espoused with respect to the organization of the domestic economy can be invoked in favor of linkage. Regulations protecting labor standards in the domestic economy effectively condition the right to produce and trade goods and services on adherence to some standards. Failure to abide by labor regulations protecting basic labor standards breaks fundamental rules governing membership in a cooperative economic union whose members are provided certain economic privileges (e.g., to produce and to trade with one another) as a condition of their full membership in the union. People who reject Proposition L in the context of international trade<sup>18</sup> must provide a compelling account of why the provision of economic privileges (in particular trade) should be made conditional on adherence to labor standards-related requirements in the domestic context but not in the international context.<sup>19</sup>

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17. We are referring here to what is needed to demonstrate Proposition L to those who accept Proposition O. Different arguments may be necessary to persuade those who reject Proposition O to accept Proposition L.

18. See, e.g., CONSUMER UNITY & TRUST SOC'Y, THIRD WORLD INTELLECTUALS AND NGOs' STATEMENT AGAINST LINKAGE ¶¶ 1, 3 (Sept. 6, 1999), <http://cuts-international.org/twin-sal.htm> [hereinafter TWIN-SAL].

19. Some individuals have been hostile to such conditionality in both the domestic and international contexts, e.g., libertarians such as Robert Nozick, and consequentialists who have favored the "unfettered" free market such as Milton Friedman, but this is distinctly the view of a minority. Dani Rodrik notes a useful point that is related to, but distinct from, that which we raise above: trade may be viewed (in the abstract) as a technology that allows inputs to be transformed into outputs. Dani Rodrik, *Labor Stan-*

One reason why some may reject Proposition L with respect to international trade is that they believe that international cooperation in this area will be unsuccessful, even though it is in principle desirable. Those who believe this, however, must explain why international cooperation with respect to the promotion of labor standards should be expected to be less successful than international cooperation to promote other goals. In particular, the WTO, which is favored by many fierce opponents of linkage, is itself a system of international cooperation intended to promote a goal (greater world trade and its potentially resulting benefits). Although existing forms of international cooperation in diverse areas may be flawed, they are widely thought to improve upon alternatives in which there is no such cooperation. Indeed, the WTO system is itself often cited by opponents of linkage as being a cooperative system for the governance of international trade which significantly improves upon its predecessors by offering countries more reliable access to one another's markets and a fairer system of resolving trade disputes that may arise amongst its members. Those who reject linkage as a means of achieving its stated aims must explain why international cooperation is likely to be much less successful in this area than in other areas in which they affirm that international cooperation has been successful.

The arguments we offer below will be especially relevant to those who believe linkage to be appropriate in the domestic economy but inappropriate in the international economy, and who accept that multilateral institutions enabling international cooperation can be effective in at least some contexts. We do not attempt to address all of the arguments of those who object in principle to all labor market interventions, or to all multilateral institutions. Few prominent critics of linkage hold either view. If they did, they would be critics of labor market interventions, or of multilateral institutions more generally, rather than of linkage as such.<sup>20</sup>

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*dards in International Trade*, in EMERGING AGENDA FOR GLOBAL TRADE 35, 41 (Robert Z. Lawrence et al. eds., 1996) [hereinafter Rodrik (1996)]. It is widely agreed that production technologies may not be employed in the domestic economy without regard to whether or not they violate minimal labor standards. Those who advocate some restrictions on the production "technologies" that may be used in the domestic economy but reject such restrictions in the global economy must, Rodrik argues, make clear why these two spheres should not be treated in a like manner. *Id.* at 42. It may, however, be argued that this comparison obscures the potentially morally relevant distinction between production at home and production abroad. Some moral conceptions may disvalue violations of minimal labor standards that affect workers within a country to a greater extent than they disvalue such violations abroad.

20. Although it is certainly true, as Richard Freeman has argued, that the debate about trade and labor standards is often simply "one of a set of running battles between those who believe the unfettered market can do no wrong and those who believe governmental regulations can make things better," Rodrik (1996), *supra* note 19, at 37 (quoting Richard Freeman, *A Hard-Headed Look at Labor Standards*, in INTERNATIONAL LABOR STANDARDS AND ECONOMIC INDEPENDENCE 80 (Werner Sengenberger & Duncan Campbell eds., 1994)), it nevertheless does seem that many linkage critics heartily affirm the role of various domestic regulations of labor and product markets.

#### IV. Step Two: Arguments against Linkage

We identify below five partially overlapping objections to linkage. We believe that this classification of arguments is exhaustive of the arguments that can plausibly be advanced against linkage.

##### A. Standard Objection One: Linkage is self-defeating or inconsequential

This type of argument claims that linkage will either be inconsequential or that it will backfire and have the opposite of its intended effect on the objective of improving the level of advantage of less advantaged persons in the world. It is therefore often claimed that, while perhaps well intentioned, linkage will ‘hurt those it is meant to help.’

It is widely alleged that countries will opportunistically misuse the possibilities for restricting imports that are provided by linkage in order to protect their domestic producers and harm those elsewhere.<sup>21</sup> The opportunities to trade available to poor countries will diminish. The world trading system will gradually become subordinated to powerful interests, and gains from trade will contract.<sup>22</sup> Linkage will be used as an excuse to limit the access of developing country exporters to developed country markets through the imposition of tariffs or quotas, or will impose cost-raising improvements to labor standards on developing countries that will diminish the income of developing countries, since it will reduce their gains from trade by interfering with the basis of those gains—the reallocation of production according to comparative advantage.<sup>23</sup>

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21. In particular, it is argued that influential interests (such as labor unions and employers in some industries) in developed countries would benefit from reduced competition from countries with low-cost labor and therefore press for such opportunistic misuse. See, e.g., GOTE HANSSON, *SOCIAL CLAUSES AND INTERNATIONAL TRADE* 34-38 (1983); Jagdish Bhagwati, *Policy Perspectives and Future Directions*, in *INTERNATIONAL LABOR STANDARDS AND GLOBAL ECONOMIC INTEGRATION* 57, 60 (Gregory K. Schoepfle & Kenneth A. Swinnerton eds., 1994); JAGDISH BHAGWATI, *IN DEFENSE OF GLOBALIZATION* 122-34 (2004) [hereinafter Bhagwati (2004)]; JAGDISH BHAGWATI, *THE WIND OF THE HUNDRED DAYS* 274 (2000) [hereinafter Bhagwati (2000)]; Drussila K. Brown, *Labor Standards: Where do They Belong on the International Trade Agenda?*, 15 *J. ECON. PERSPECTIVES* 89, 102-03 (2001) [hereinafter Brown (2001)]; T.N. Srinivasan, *International Trade and Labor Standards from an Economic Perspective*, *CHALLENGES TO THE NEW WORLD TRADE ORGANIZATION* 219, 239 (1996); Panagariya (2001), *supra* note 10 at 9; Kaushik Basu, *Child Labor*, 37 *J. ECON. LITERATURE* 1083, 1092 (1999) [hereinafter Basu (1999)]; GEORGE TSOGAS, *LABOR REGULATION IN A GLOBAL ECONOMY* 27-28 (2001); Jose M. Salazar-Xirinachs, *The Trade-Labor Nexus*, 3 *J. INT’L ECON. L.* 377, 380-81 (2000); Martin Khor, Director of Third World Network, *Rethinking Liberalisation and Reforming the WTO* § 5 (Jan. 28, 2000), available at <http://www.twinside.org.sg/title/davos2-cn.htm> (last visited Dec. 13, 2006); MUCHKUND DUBEY, *SOCIAL CLAUSE: THE MOTIVE BEHIND THE METHOD*, available at <http://www.aidc.org.za/?q=book/view/71&PHPSESSID=4be77ce78ffc2de752f57c783c9c1145> (last visited Dec. 13, 2006); Gregory Shaffer, *WTO Blue-Green Blues*, 24 *FORDHAM INT’L L.J.* 608, 621 n.44 (2000).

22. See, e.g., TWIN-SAL, *supra* note 18, at 5; Bhagwati (2000), *supra* note 21, at 320; Jagdish Bhagwati, *Free Trade and Labor* (2001), [http://www.columbia.edu/~jb38/ft\\_lab.pdf](http://www.columbia.edu/~jb38/ft_lab.pdf) [hereinafter Bhagwati (2001)].

23. See Nicholas D. Kristof & Sheryl WuDunn, *Two Cheers for Sweatshops*, *N.Y. TIMES MAG.*, Sept. 24, 2000, at 70; Vivek H. Dehejia & Yiagadessen Samy, *Trade and Labour*

Moreover, it is argued that linkage will have a negligible or perverse effect on the living standards and working conditions of most workers because of its limited reach. First, it is contended that linkage will only affect export-producing sectors, which may account for only a small fraction of the labor force in most developing countries.<sup>24</sup> Second, it is held that linkage is likely to have a negligible or perverse effect on the working conditions, employment, and wages even of many workers in export production.<sup>25</sup> It will thus allegedly most likely drive bad practices in export-oriented production out of sight rather than out of existence. By raising the cost of hiring workers, the imposition of labor standards will therefore cause a reduction of employment.<sup>26</sup> The living conditions of displaced workers may even worsen, since they will either become unemployed or will be employed in sectors with employment conditions that are no better (and possibly worse) than those they formerly enjoyed. Third, linkage will increase relative inequalities in working conditions or in command over resources, creating a “labor aristocracy.”<sup>27</sup> This may be undesirable under certain interpretations of the objective.<sup>28</sup>

Finally, it has been argued that introducing labor standards through linkage reduces the advantages of individuals by impeding them from entering into contracts through which they expect to enhance their well-being. For example, TN Srinivasan argued that “parents would allow their children to be employed in their own economic enterprise or as wage workers only if, given their market and non-market constraints, family welfare is enhanced by the use of children’s time in such employment rather than in other activities (including being in school). Thus proscription of such labor, if strictly enforced without compensation, would lower family welfare of those who are already desperately poor.”<sup>29</sup>

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*Standards—Theory, New Empirical Evidence, and Policy Implications* 20-25 (CESifo, Working Paper No. 830, 2002).

24. See, e.g., CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, *BREAKING THE LABOR-TRADE DEADLOCK* 3 (Carnegie Endowment, Working Paper No. 17, 2001).

25. See, e.g., KEITH E. MASKUS, *SHOULD CORE LABOR STANDARDS BE IMPOSED THROUGH INTERNATIONAL TRADE POLICY* 33-35 (World Bank, Working Paper No. 1817, 1997), available at <http://ssrn.com/abstract=44605> (last visited Dec. 13, 2006); Brown (2001), *supra* note 21, at 100.

26. See LYN SQUIRE & SETHAPUT SUTHIWART-NARUEPUT, *THE IMPACT OF LABOUR MARKET REGULATIONS* 7-11 (World Bank Pol’y Dept., Working Paper No. 1418, 1995); Panagariya (2001), *supra* note 10, § 2.5; Carnegie Endowment, *supra* note 24, at 3; Pranab Bardhan, *Some Up, Some Down*, 26 *BOSTON REVIEW* (Feb./Mar. 2001); PRANAB BARDHAN, *SOCIAL JUSTICE IN THE GLOBAL ECONOMY* 13 (2000).

27. See, e.g., CARNEGIE ENDOWMENT, *supra* note 24, at 3; Bhagwati (2000), *supra* note 21, at 143-44.

28. In particular, it will be undesirable according to those views which hold that the level of advantage is directly or indirectly influenced by the extent of inequalities (for example, in working conditions or command over resources).

29. T.N. Srinivasan, *International Labor Standards Once Again!*, in *INTERNATIONAL LABOR STANDARDS AND GLOBAL ECONOMIC INTEGRATION* 34, 37 (1994) [hereinafter Srinivasan (1994)]; see also Basu (1999), *supra* note 21, at 1093; MASKUS, *supra* note 25, at 22.

B. Standard Objection Two: Linkage is an inferior means of promoting the goals it is intended to promote

It is sometimes argued that there are superior means of achieving the goals of linkage.<sup>30</sup> Such arguments do not entail a denial that linkage may achieve its objectives but rather involve an insistence that there are other, better means of achieving them.<sup>31</sup> In particular, opponents of linkage claim that alternative approaches perform at least as well as linkage at promoting the ultimate ends of improved labor standards and improved levels of advantage for the globally less advantaged. Examples of alternative approaches include moral suasion to bring about voluntary compliance with ILO standards,<sup>32</sup> market pressure facilitated by social labeling (e.g. “ratcheting”<sup>33</sup> labor standards, “rugmark”<sup>34</sup> style social product labels), and international and intra-national resource transfers, perhaps conditioned on adequately promoting basic labor standards.<sup>35</sup> It could be argued with respect to international resource transfers, for example, that linkage is unnecessary as a means of promoting labor standards improvements in poorer countries because the incentives that could be provided to these countries by a linkage scheme could equally well, or indeed better, be provided by such transfers. Additional resource transfers could be offered to those countries that undertake specified measures to improve labor standards. Since trade preferences granted to specific countries are likely to lead to distortions in the pattern of trade (i.e., shifts in production away from their lowest cost locations), global income will be higher when such preferences are not present. It can be argued that (so long as there are

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30. We deal in this section with the *outcomes* that are expected to arise as a result of alternative institutional arrangements. We are concerned here with “comparative static” comparisons of distinct outcomes. Comparisons of the cost of *transition* from the status quo to distinct institutional arrangements are dealt with below, under the heading of feasibility.

31. Note that the set of “superior means” (SM) arguments and the set of “inconsequential/self-defeating” (I/S) arguments overlap, and it is not necessarily the case that one is contained in the other. Any argument that recognizes linkage as being at least partially effective in attaining its goals, though less effective than the alternatives, is an SM argument and not an I/S argument. Any argument that views linkage as unable to achieve its aims, but also views all other feasible policy interventions as being unable to achieve those aims, is an I/S argument and not an SM argument. The “tragic sense of life” underlying this perspective is one that does not appear to be prevalent in the debate on linkage. Most I/S arguments are also SM arguments.

32. E.g. Jagdish Bhagwati, *Trade Liberalisation and “Fair Trade” Demands*, 18 *WORLD ECONOMY* 745, 757 (1995); Bhagwati (2000), *supra* note 24, at 160-62; Bhagwati (2001), *supra* note 22, at 5 (“[A] good tongue-lashing . . . can unleash shame.”); Jagdish Bhagwati, *Free Trade: Why AFL-CIO, the Sierra Club and Congressman Gephard Should Like It*, 43 *AMERICAN ECONOMIST* 3, 11 (1999) [hereinafter Bhagwati (1999)]; see also MASKUS, *supra* note 25, at 67; Ajit Singh & Ann Zammit, *Labor Standards and the “Race to the Bottom”*, 20 *OXFORD R. OF ECON. POL’Y* 85, 102 (2004).

33. Archon Fung et al., *Realizing Labor Standards, in CAN WE PUT AN END TO SWEATSHOPS?* 3, 4-5 (Archon Fung et al. eds., 2001).

34. See, e.g., Rodrik (1996), *supra* note 19, at 60; KIMBERLY ANN ELLIOT & RICHARD B. FREEMAN, *CAN LABOR STANDARDS IMPROVE UNDER GLOBALIZATION?* 27-48 (2003); Panagariya (2001), *supra* note 10, § 3.2; MASKUS, *supra* note 25, at 21.

35. Srinivasan (1994), *supra* note 29, at 35.

efficient international tax and transfer instruments available with which to redistribute the higher global income in the manner desired) a system providing financial incentives alone for the promotion of labor standards is always superior to one that includes trade incentives. Indeed, it may be held that even *unconditional* financial transfers to poorer countries could have the effect of leading to improvements in labor standards, if they influence the interest in, and capacity of countries to enhance labor standards (e.g., because labor standards are a “luxury good”).

Linkage is also often deemed to be inferior to non-linkage alternatives because it is said to be in contravention of the conclusions that may be drawn from economic theory concerning sound institutional design. There are two primary versions of this claim. The first is that linkage allegedly violates a principle which is sometimes referred to as the “two birds” principle, according to which it is always best to employ as many instruments as there are objectives. Employing fewer instruments than there are objectives is said generally to lead to an inferior attainment of the objectives.<sup>36</sup> The principle is interpreted by the critics of linkage as implying that at least as many independent institutions are required as there are objectives, and that entrusting the promotion of two or more objectives to one institution will lead to an inferior attainment of each.<sup>37</sup> Critics of linkage claim that they and linkage opponents are concerned to promote two distinct objectives—maximizing the gains from trade and reducing disadvantage (by promoting improved labor standards and higher employment), and that the best approach for achieving these goals would be to dedicate an independent institution to achieving each. They argue that the two-birds principle implies that, at the international level, the concerns of workers are best served by promoting them through an independent agency, such as the ILO, rather than by confusing the mandate of the existing institution (the WTO) that is presently charged with fostering the growth of world output through trade by charging it additionally with promoting labor standards.<sup>38</sup>

The second version of the claim is that a well-known theorem of international trade (which demands that ‘domestic distortions’ be ‘corrected at the source’ in order for a first-best optimum to be attained) demonstrates that linkage is inferior to other means of obtaining its goals. The content

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36. Bhagwati (1999), *supra* note 32, at 10; Bhagwati (2000), *supra* note 24, at 277-78.

37. Professor Jagdish Bhagwati writes, “[Linkage] wind[s] up harming both trade liberalization (which is the true objective of the WTO) and advancement of the social and moral agendas. . . . The underlying reason for such an unsatisfactory outcome is that you are trying to kill two birds with one stone. Generally, you cannot. . . . [By] trying to implement two objectives, the freeing of trade and the advancing of social and moral agendas, through one policy instrument such as WTO, you will undermine both. You will miss both birds.” Bhagwati (2000), *supra* note 24, at 277-78. *See also* T.N. SRINIVASAN, *DEVELOPING COUNTRIES AND THE MULTILATERAL TRADING SYSTEM* (2d ed. 2000) [hereinafter Srinivasan (2000)].

38. Bhagwati (2001), *supra* note 22, at 4; Bhagwati (1999), *supra* note 32, at 10-11; Bhagwati (2000), *supra* note 24, at 278. *See also* Srinivasan (2000), *supra* note 37, at 72-73.

of the theorem and the attempt to apply it to the analysis of linkage will be discussed further below.

The third version of the claim is that linkage is not needed to achieve its aims, since an appropriate system of international trading rules can be designed that does not incorporate linkage and which leaves countries free to choose the level of labor standards appropriate to them, while fully reaping the gains from international trade.<sup>39</sup> Kyle Bagwell and Robert Staiger offer an ingenious economic argument to suggest that linkage is not necessary in order to achieve its aims. In particular, they propose the addition of a new rule to the multilateral trading system (which will be defined and discussed further below).<sup>40</sup> The authors presume that there is a social value to be attached to higher labor standards, and an economic value which derives from greater gains from trade, and that these are to be added (or more generally aggregated) in defining the maximand (which they refer to as “the domestic surplus”) that is pursued by the government in each country. They point out (see their observation two) that “international negotiations over tariffs alone will lead to a globally inefficient outcome described by partial tariff liberalization and a weakening of labor standards in import competing industries.” In other words, the outcome that results from an international trading system designed without consideration for labor standards will be one in which both the degree of tariff liberalization and the extent of labor standards will be suboptimal, in the sense that the domestic surplus objective will not be met to the maximum extent feasible in all countries. The underlying reason for this has to do with (a) the fact that lowering labor standards in import-competing industries is a means of strengthening the market access of domestic, import-competing industries and diminishing that of foreign industries producing the imported good, and (b) if labor standards are set independently by each country without regard to the “external effect” that this decision has on the gains from trade experienced by other countries, then labor standards and tariffs will be jointly set at levels that are not optimal.

They also point out (see their observation three) that this problem can be overcome in one of at least three ways. The first proposed method is for labor standards to be introduced directly into trade negotiations as objects of interest. This amounts to a form of linkage, since the failure of a country to meet its labor standards commitments under such agreements would presumably entail consequences in the form of the failure by other countries to meet their commitments (whether regarding trade or labor standards), thereby leading the system to satisfy Proposition L. The second and the third proposed methods incorporate a rule which can in principle eliminate the incentive of individual countries to use labor standards as a

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39. See Kyle Bagwell & Robert W. Staiger, *The Simple Economics of Labor Standards and the GATT*, in *SOCIAL DIMENSIONS OF U.S. TRADE POLICY* 195, 197 (Alan V. Deardorff & Robert M. Stern eds., 2000). See generally Srinivasan (2000).

40. See Bagwell & Staiger, *supra* note 39; see also Kyle Bagwell & Robert W. Staiger, *The WTO as a Mechanism for Securing Market Access Property Rights*, 15 *J. ECON. PERSPECTIVES* 69 (2001).

means of increasing market access, and thereby permit the optimal level of labor standards as well as trade liberalization to arise. The rule requires countries to engage in “Kemp-Wan adjustments.” Adjustments of this kind demand that if a country raises (or lowers) its labor standards, then it must correspondingly raise (or lower) its import tariffs so as to maintain the foreign export price (i.e., the price received by foreign producers which export their goods to the country) at an unchanged level.<sup>41</sup> Rule systems for international trade which demand such adjustments eliminate the incentive to lower labor standards in order to enhance the market access of domestic producers. Such rule systems enable countries to put in place labor standards at the level that *they* deem “optimal” as long as they undertake to revise their import tariffs so as to maintain an unchanged level of market access for foreign producers. This general approach is advertised by the authors as enabling national sovereignty to be respected while helping to protect labor standards attainments.

Along the same lines, it has also been argued that a linkage scheme is likely to reflect the preconceptions and priorities of external actors (perhaps arising from their greater wealth or cultural specificity) and thus to demand that developing countries put in place labor standards that are inappropriately high. The present level of labor standards in poorer countries may be inadequate, and action on the part of domestic actors to increase this level may indeed improve the condition of the least advantaged. A linkage scheme, however, may require that the level of labor standards demanded be so high that it leads to outcomes which are inferior to those which would have been achieved through domestic activism (and perhaps even relative to the status quo).

### C. Standard Objection Three: Linkage creates an unfair distribution of burdens

First, as noted above it is argued that loss of jobs caused by the imposition of labor standards is likely to harm most those persons who are most in need, such as poor children, women, and men.<sup>42</sup> It is perverse that less advantaged persons throughout the world—those that linkage is intended to help—will disproportionately bear the burdens imposed by linkage.<sup>43</sup> The imposition of labor standards is likely to create a loss of livelihood (and perhaps even of lives, it is claimed) in developing countries, while consumers in developed countries will likely experience only a relatively small increase in prices.

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41. In principle, there is a corresponding rule involving export items and export subsidies, which the authors do not discuss.

42. See, e.g., Kristof & WuDunn, *supra* note 23. Kristof and WuDunn’s article is cited at length approvingly in Bhagwati (2004), *supra* note 21, at 175. See also Basu (1999), *supra* note 21, at 1114.

43. For examples of critics who have made that argument, see Maskus, *supra* note 25, at 49; Brown (2001), *supra* note 21, at 105-06; Arvind Panagariya, *Trade-Labour Link: A Post-Seattle Analysis*, in GLOBALIZATION UNDER THREAT 101, 110 (Zdenek Drabek ed., 2001) [hereinafter Panagariya (2001b)].

Second, it is argued that linkage arbitrarily and unfairly targets only some of the sectors and firms in developing countries that practice poor labor standards. In particular, only export producing firms belonging to the formal sector (and therefore effectively subject to state regulation) will be directly targeted, despite others being equally or more guilty of seriously objectionable labor practices.<sup>44</sup>

Third, it is argued that so-called “violations of labor standards” may occur for morally justified reasons, in which case penalizing violators of labor standards is unfair. In particular, employers who “violate labor standards” are in fact offering “exploited” workers the opportunity to improve their life circumstances.<sup>45</sup> Given the difficult background conditions faced by these workers, it is alleged that employers act well by offering them work, and deserve credit rather than punishment.<sup>46</sup> It has been suggested in this vein that labor standards violations may be morally justified because such violations may enable some agent to fulfill moral obligations to other agents or that it may help her further other ends which she has reason to value. For example, by being inattentive to labor standards an employer may be able to hire more employees than otherwise, or realize profits which ultimately generate benefits for poorer persons (by enabling voluntary transfers to such persons to be increased or by augmenting the demand for domestic goods and services produced by employing such persons). Disregard for labor standards can enable an employer to increase the amount of good that she does. Finally, she may be able to pursue other ends that she has reason to value, such as providing her children with a sound education. It may be argued that an employer can plead some justification for her indifference to labor standards if the good that is produced by that indifference is significant. In practice, the regrettable necessity to “do bad in order to do good” may arise due to competitive pressures. A factory owner in a developing country, for example, may be compelled to disregard labor standards in order to compete effectively with other firms that do the same. Moral dilemmas of this kind are prevalent in the contemporary world, and frequently unavoidable.

Fourth, it is argued that linkage makes the citizens of one country bear the costs of satisfying the preferences of citizens of another country.<sup>47</sup> If a country chooses to outlaw child labor in its own territory, the costs of this sovereign choice are borne in the first instance by the citizens of that country. It is argued that this is as it should be. People ought not to impose the costs of achieving the values that they hold dear on others who may not attach the same priorities to these values, at least in their present circumstances. In contrast, linkage requires that the countries (e.g., those in the developing world) that bear the cost (in particular, the direct cost of

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44. See, e.g., Singh & Zammit, *supra* note 32, at 95-96.

45. Kristof & WuDunn, *supra* note 23; Bhagwati (2004), *supra* note 21, at 175; see also Carnegie Endowment, *supra* note 24, at 3.

46. See Bhagwati (2004), *supra* note 21, at 172-73 (citing the hypothesis that U.S.-run factories provide higher wages because they have higher productivity).

47. Panagariya (2001), *supra* note 10, §2.1.

achieving labor standards and the indirect cost of lost output) are different from those that gain the benefit (e.g., the satisfaction of the preferences of many in developed countries that certain labor standards be attained).

Fifth, it is argued that linkage represents an *illegitimate* abridgement of fundamental freedoms.<sup>48</sup> To use Robert Nozick's memorable phrase, linkage prohibits "capitalist acts between consenting adults."<sup>49</sup> It is frequently argued, moreover, that if restricting rights to trade are unavoidable, then fundamental fairness requires that such restrictions should apply to products of particular *kinds* rather than ones produced in particular places or by particular *processes*, unless a compelling reason (such as maintaining national security) can be provided to depart from this principle. The extension of 'most favored nation' trading status (which requires that each country be treated no worse than others) to a wider range of countries has made the world trading system fairer. This is a major achievement that must be protected.<sup>50</sup>

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48. A recent Cato Institute publication puts this point rather gushingly as follows:

The threat of using trade restrictions to advance human rights is fraught with danger. Free trade is itself a human right and rests on an individual's rights to life, liberty, and property—rights the U.S. Founding Fathers regarded as inalienable and self-evident. When the federal government closes U.S. markets to countries with governments that deny their citizens certain civil liberties, it robs those citizens of one more freedom and undermines the market dynamic that in the end is the best instrument for creating wealth and preserving freedom. . . . Free Trade Is a Human Right: The proper function of government is to cultivate a framework for freedom by protecting liberty and property, including freedom of contract (which includes free international trade)—not to use the power of government to undermine one freedom in an attempt to secure others. The right to trade is an inherent part of our property rights and a civil right that should be protected as a fundamental human right. The supposed dichotomy between the right to trade and human rights is a false one. Market exchange rests on private property, which is a natural right. As moral agents, individuals necessarily claim the right to liberty and property in order to live fully and to pursue their interests in a responsible manner. The freedom to act without interference, provided one respects the equal rights of others, is the core principle of a market economy and the essence of human rights. Without private property and freedom of contract, other rights—such as free speech and religious freedom—would have little meaning, because individuals would be at the mercy of the state. The human-rights fabric is not made stronger by unraveling economic liberties in the hope of enhancing other liberties. Protectionism violates human rights. It is an act of plunder that deprives individuals of their autonomy—an autonomy that precedes any government and is the primary function of just governments to protect. . . . The danger of buying into the argument that restricting trade with China will increase human rights is that such an argument diminishes the significance of the moral case for free trade, politicizes economic life, and weakens the market-liberal vision—a vision that needs to be strengthened in order to protect civil society and human liberty.

James A. Dorn, *Trade and Human Rights: The Case of China*, 16 CATO J. (1996), available at <http://www.cato.org/pubs/journal/cj16n1-5.html> (last visited Dec. 13, 2006).

49. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 163 (1974).

50. Personal conversation with Kamal Malhotra.

D. Standard Objection Four: Linkage is context-blind and politically imperialistic

There are two senses in which it is widely argued that linkage is context-blind. First, linkage ostensibly prevents a country from choosing policies that appropriately reflect its level of development. The urgency of improving the living standards of people in poor countries requires that priority be given to rapid development, even though this may lead to the violation of labor standards.<sup>51</sup> Although regrettable, such violations must be viewed as a necessary evil. There are two distinct reasons that may be offered for prioritizing development over promotion of labor standards. First, the premature imposition of labor standards can act as an obstacle to the development process. It may even be that development can only take place *through* the 'violation' of 'labor standards.' The fact that even so-called 'basic' labor standards were widely violated in factories during the European industrial revolution is well known. Second, the importance that is attached by the citizens of a country to labor standards may change as their country develops.<sup>52</sup> Fulfillment of labor standards may be a "luxury good," for which the intensity of the preference increases with income.<sup>53</sup> It is asserted that to fail to respect the preferences that individuals have for themselves is to act paternalistically, imposing the preferences of the currently rich on those who are currently poor.

It is claimed that endorsing universal human rights is wholly compatible with insisting that the weight attached to the improvement of labor standards relative to other goals (such as the fulfillment of other rights, or the improvement of aggregate welfare) should vary with context. Such critics claim that whereas opponents of linkage are context-sensitive proponents of human rights, proponents of linkage are (at best) context-insensitive proponents of human rights and (at worst) context-insensitive proponents of satisfying the preferences of the rich.<sup>54</sup>

A second sense in which linkage is said to be context-insensitive is that it is a form of cultural imperialism. It is alleged to unfairly impose a moral vision that is specific to a single cultural sphere. It is asserted that even when stated at a high level of generality, any set of purportedly "basic" labor standards (such as the 'core' labor standards defined by the ILO) is culturally specific. This objection challenges the very idea that there is a universally binding set of standards, since by definition such standards are not culturally specific.

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51. The narrower objective of promoting basic labor standards of those who are employed will in this case allegedly conflict with the broader objective of improving the level of advantage of less advantaged persons more generally. The implicit premise of the argument is that the gain in attaining the latter objective justifies the loss in attaining the former.

52. Srinivasan (2000), *supra* note 37.

53. This assumption is common in the literature. See, e.g., Basu (1999), *supra* note 21, at 1100, 1103-04.

54. See, e.g., Bhagwati (2000), *supra* note 24, at 163; Paul Krugman, *One in the Eye with an American Pie*, BANGKOK POST, Feb. 17, 2000; Shaffer, *supra* note 21, at 624-25; Srinivasan (2000), *supra* note 37.

It is argued that these standards are influential merely because great importance is attached to them in the developed countries, many of which happen to share a specific cultural tradition. Such critics claim that there is no universally acceptable rationale that can be provided for any given set of basic labor standards, nor is it possible to develop an “overlapping consensus” among different parties (who might be imagined to have distinct rationales for accepting these standards) in favor of accepting such standards.<sup>55</sup> Even if it is agreed that there are some basic standards (stated in an adequately general way) that are universally relevant, these must be defined further in order to be practically applied.<sup>56</sup> But this further step cannot be taken, it is therefore maintained, without appealing to the preconceptions and priorities of a specific culture. Detailed interpretations of standards are thus likely to conflict. Indeed, it is sometimes asserted that the practices that constitute so-called “violations of labor standards” are in fact sometimes an integral part of traditional family and work life in certain societies. It is suggested, for example, that “child labor” can offer a humane and effective form of teaching and apprenticeship.<sup>57</sup> The imposition of ‘basic labor standards’ in such a situation is alleged therefore to amount to nothing less than cultural imperialism.

Lastly, it is argued that linkage is a form of *political* imperialism. State sovereignty guarantees the right of the citizens of a country to choose their domestic institutions and policies, including the organization of work and production. It is argued that linkage significantly limits such rights and is therefore a violation of state sovereignty.

#### E. Standard Objection Five: Linkage is infeasible

Critics of linkage often claim that it is infeasible. What do they mean by this? One sense in which a proposal may be deemed infeasible is that it is judged *impossible* to bring about or maintain. Another sense in which a proposal may be deemed infeasible is that it is believed that efforts to bring it about and maintain it are “likely to fail,” where this phrase refers to some threshold of likelihood (call it P) that is deemed relevant to the choice of policies (in the sense that any proposal that is unlikely to succeed with likelihood P is not worth pursuing for this reason). It might thus be argued that a morally legitimate system of linkage will be exceedingly difficult or indeed impossible to implement and maintain (i.e., that it will fail with likelihood of at least P). Many empirical claims are presented in support of the idea that linkage is infeasible. It is sometimes objected, for example, that a linkage scheme would be infeasible because it would violate the existing rules of the international trading system. In particular, it is claimed that the rules of the WTO system preclude linkage. For example, it is suggested that a central principle undergirding the WTO (and previous to it the GATT) is the ‘most favored nation principle,’ which requires that

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55. Srinivasan (2000), *supra* note 37, at 73-77. The literature on “Asian values” is replete with such claims.

56. See, e.g., Brown (2001), *supra* note 21, at 91.

57. See, e.g., Basu (1999), *supra* note 21, at 1089.

all exporting countries' goods be treated identically by an importing country, and that this principle precludes linkage since linkage potentially requires discrimination amongst countries. Many empirical claims are presented in support of the idea that linkage is infeasible. It is alleged, for instance, that developing countries will "simply not accept" the incorporation of labor standards into the discussion of trade issues.<sup>58</sup> If linkage is established, it is said, it will be because it is imposed by powerful and rich countries, in which case it will be unduly coercive and therefore morally illegitimate. There are also groups in developed countries, such as users of imported intermediate inputs and consumption goods, which will be implacably opposed to linkage. Those who are in favor of linkage, on the other hand, are numerous and disorganized, and are very likely to remain so. Furthermore, there is little agreement among proponents of linkage regarding the appropriate form and content of the linkage proposal. For all these reasons, it is argued, the 'political will' to establish linkage does not exist.<sup>59</sup>

One reason that the 'political will' to establish linkage allegedly does not exist is that *all* countries are vulnerable to charges of having violated basic labor standards.<sup>60</sup> It is argued that, recognizing their own vulnerability, states will tend to forego opportunities to establish linkage, or if it is established, they will fail to bring charges against other countries, in which case the system of linkage will fail to emerge. It is also sometimes suggested that the informational requirements of implementing and sustaining a system of linkage are daunting. Linkage requires that authorities be able to monitor millions of small firms, many of which are in the informal sector, in every region of the world. This requires the cooperation of governments, which may believe that linkage will only diminish their gains from trade and thus be reluctant to provide such cooperation. It is argued by critics of linkage that it is highly unlikely that these difficulties can be overcome.<sup>61</sup>

## V. Step Three: Ruling Out Linkage Proposals

To justify Proposition L, we will identify a class of linkage proposals that withstands the five standard objections raised by linkage critics identified in Section V. Some linkage systems very obviously fail to do so, because they straightforwardly fail to meet a number of the objections. In this section we argue that those institutions that fail to be rule-based and

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58. See, e.g., Carnegie Endowment, *supra* note 24, at 4; Jagdish Bhagwati, *The Question of Linkage*, 96 AM. J. INT'L L. 126, 128, 131 (2002).

59. See, e.g., Theodore H. Moran, *Trade Agreements and Labor Standards* 6 (Brookings Institution Policy Brief No. 133, 2004), available at [http://www.southern.org/content/sc/sc.asp?edition\\_date=062204.txt](http://www.southern.org/content/sc/sc.asp?edition_date=062204.txt) (last visited Dec. 13, 2006).

60. Bhagwati has often cited a Human Rights Watch report on the United States' violation of the right to organize in connection with this claim. See, e.g., Bhagwati (2004), *supra* note 21, at 177, 192, 247, 251.

61. See, e.g., Mark Levinson, *Wishful Thinking*, in ARCHON FUNG ET AL., CAN WE PUT AN END TO SWEATSHOPS? 54, 54 (2001).

impartial, to arise through a process of fair negotiation, or to incorporate adequate burden sharing between countries will not meet some of these objections.

First, note that systems of linkage can be of two types, those that are imposed on one or more of the parties and those that are not imposed on any of the parties. The latter type of scheme can be called an unimposed scheme. An important class of unimposed schemes are those arising through a process of fair negotiation. We understand a process of fair negotiation as one in which the conclusion of the negotiation is defined by agreement of all of the parties to the negotiation, and in which the procedures leading to a conclusion of the negotiation are equitable and uncoercive. It may be seen from this definition that a process of fair negotiation minimally involves the absence of imposition, although it involves other features as well. We take as our premise that a morally legitimate system of linkage must be unimposed.<sup>62</sup> We further note that those which originate in a process of fair negotiation are especially attractive from a normative standpoint. Because all systems that arise from a process of fair negotiation are unimposed, it is sufficient (although not necessary) to assume that a linkage scheme originates in such a process in order to safeguard it from the objections applicable to an imposed scheme. We choose therefore to focus on linkage schemes which arise from a process of fair negotiation in what follows.

An imposed system would be more likely to harm developing countries and unfairly distribute the burdens of adequately promoting labor standards, and would therefore be perceived as (and would indeed be) morally illegitimate. Moreover, a scheme that is widely perceived to be morally illegitimate is much less likely to be successful in securing compliance.<sup>63</sup> For both of these reasons, imposed systems of linkage should be rejected.<sup>64</sup>

Second, as noted above, a potential risk of linking trade and labor standards is that rich countries may opportunistically use linkage as a means of unfairly protecting their markets from low cost developing country exports. If linkage can easily be used as a disguised instrument of protectionism, it may well be self-defeating because it will reduce income and employment in developing countries. Allowing countries unilaterally to determine whether the requirements to adequately promote labor standards have been met, and what actions should be taken when they have not

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62. We are not committing ourselves to the view that no imposed institution could under any conditions be legitimate. However, it is our judgment that under present conditions it is highly unlikely that an imposed system of linkage would be legitimate.

63. This idea is associated with the work of Hans Kelsen. Cf. RAWLS (1971), *supra* note 7, at 567.

64. See Philip Alston, *Labor Rights Provisions in U.S. Trade Law*, in HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 71, 73-83 (Lance A. Compa & Stephen F. Diamond eds., 1996) for an interesting discussion of the reasons to reject the system of linkage imposed by the United States through its General System of Preferences (GSP).

been met, clearly invites misuse.<sup>65</sup> The importance of establishing a transparent and rule-based system that protects against such misuse is therefore evident. For a system of linkage to promote labor standards effectively, an adequate number of countries must find it in their interest to participate. It will otherwise have to be imposed, in which case it will be illegitimate. A system that is open to opportunistic misuse is indeed likely to eliminate incentives for uncoerced participation on the part of developing countries.

Third, forms of linkage that lack adequate burden sharing should be rejected. Any form of linkage is likely to impose costs on certain groups. We refer to these direct and indirect costs as the 'burdens' generated by linkage.<sup>66</sup> A scheme for burden sharing is one that changes the distribution of these costs by reducing the burdens of those who would otherwise bear them and increasing the burdens of those who would otherwise not. For example, it is often supposed that establishing basic labor standards in poor countries will cause a decrease in employment. If this does indeed occur, burden sharing might reduce these costs through various domestic policy instruments (such as social insurance, credit, employment generation, and job retraining programs), which reduce the costs of adjustment suffered by individuals, as well as through various international policy instruments (such as resource transfers from North to South) that reduce the costs of adjustment suffered by countries (and in particular the cost of their implementing domestic policies such as those mentioned above).<sup>67</sup> Alternatively, the feared reduction in employment may be averted in a different way, such as by offering the countries that undertake such reforms more favorable access to markets for their exports through additional trade liberalization.<sup>68</sup>

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65. See *id.* ("[T]he United States is . . . imposing its own, conveniently flexible and even elastic, standards upon other states."); see also Terry Collingsworth, *International Worker Rights Enforcement*, in HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 227, 229-33 (Lance A. Compa & Stephen F. Diamond eds., 1996) for a discussion of some of the abuses by the United States of the GSP.

66. The baseline against which these costs can be measured can, of course, be specified in different ways, such as the status quo ex ante or an appropriate counterfactual, for example, what would have occurred pursuant to the previous rules, or some other morally appropriate benchmark.

67. The Kyoto Protocol has a burden-sharing component (Article 11), as did the framework convention on climate change agreed to at the Rio conference in 1992. As Srinivasan describes this later convention, "[It] set explicit goals under which several rich nations agree to emission-level-reduction targets (i.e., to return, more or less, to 1990 levels), whereas the commitments of the poor countries were contingent on the rich nations' footing the bill." Srinivasan (2000), *supra* note 37. Technical cooperation and financial aid are provided to countries so that they can comply with WTO rules. Bilateral trade agreements, such as the US and Cambodia textile and apparel agreement (Article 10 (E)) also offer examples of this kind. The burden sharing that took place with respect to reforming the labor practices of the Bangladeshi garment sector is discussed in Elliot & Freeman (2003), *supra* note 34, at 113. The linkage proposals developed by the ICFTU (1999) and the ILRF (2001) both demand burden sharing.

68. Unlike Srinivasan, who seems to view international burden sharing through income transfers and linkage as *alternative and mutually exclusive* means of promoting labor standards, we view such transfers as essential to any plausible linkage proposal. Srinivasan (2000), *supra* note 37, at 74. We argue below that there are reasons why a

Our concern in this paper is to explore possible institutions governing international trade that would not merely be feasible but also morally legitimate. For an institutional reform to be morally legitimate it must not only serve morally valuable objectives. The costs of implementing the reform must be distributed fairly. For example, it is widely held that the costs engendered by an institutional reform should be allocated in a way that is sensitive to the capacity of agents to bear them.<sup>69</sup> Indeed, many critics of linkage not only accept this view, but also criticize linkage by pointing to it, arguing that the burdens imposed by linkage will be unfair because they will be borne by those who are least able to bear them, i.e. poor persons in poor countries. There are other principles that are relevant to determining the appropriate distribution of burdens. The fact that some agent has or is contributing to the problems that an institutional reform is meant to address, for example, is widely held to strengthen that agent's responsibility to bear the burdens of implementing it.<sup>70</sup> Although it is difficult to determine with great precision whether and to what extents different agents have contributed to shortfalls in basic labor standards, it seems likely that agents in both the North and South have made substantial contributions to such shortfalls. Indeed, in cases in which there is evidential uncertainty concerning whether an agent has contributed to deprivations, the agent may nevertheless be plausibly viewed as having compelling reasons to help alleviate the deprivations in order to avoid the possibility that they have failed to remedy deprivations to which they had in fact contributed.<sup>71</sup> A linkage system that does not include adequate burden sharing should therefore be rejected.

A system that imposes burdens on poor countries but does not require rich countries to share these burdens will also be infeasible. It will not provide adequate incentives for developing countries to join it without having been coerced, since they will bear the preponderance of costs generated

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scheme that employs income transfers alone as a means of promoting labor standards will likely be inferior to one that combines these with trade incentives, and that a plausible linkage scheme will combine trade and non-trade incentives. For a discussion of the kinds of complementary policies that may be necessary to combat objectionable forms of child labor, see Drusilla K. Brown et al., *Child Labor: Theory, Evidence, and Policy, in INTERNATIONAL LABOR STANDARDS* 195, 225-37 (Kaushik Basu et al. eds., 2003) [hereinafter Brown (2003)].

69. Cf. ROBERT E. GOODIN, *PROTECTING THE VULNERABLE* 186 (1985); Peter Singer, *Famine, Affluence, and Morality*, *WORLD HUNGER AND MORALITY* 26, 26-27 (William Aiken & Hugh LaFollette eds., 2d ed. 1996); PETER UNGER, *LIVING HIGH AND LETTING DIE* 62-72 (1996). Even those who reject this claim may have reason to be sensitive to the distributional consequences of proposed institutional reforms if they believe that the present unequal distribution of advantages has emerged from a historical process in which rights that they wish to see respected have been violated. See, e.g., Hillel Steiner, *An Essay on Rights* 266 ("Redress transfers are redistributions which, very broadly, *undo* the unjust redistributions imposed by encroachments on rights: they restore just distributions."); THOMAS W. POGGE, *WORLD POVERTY AND HUMAN RIGHTS* 14 (2002).

70. See, e.g., Christian Barry, *Applying the Contribution Principle*, 36 *METAPHILOSOPHY* 210, 211-13 (2005). For examples of other principles, see Goodin, *supra* note 69, and David Miller, *Distributing Responsibilities*, 9 *J. POL. PHIL.* 453 (2001).

71. See, e.g., Barry, *supra* note 70, at 213-14.

by the linkage system in the absence of burden-sharing.<sup>72</sup> The alternative, an imposed system of linkage, would be illegitimate.<sup>73</sup>

A negotiated system will be feasible only if countries judge that a trading system that involves linkage will further their interests in comparison with the status quo (in which they may trade even without complying with labor standards). Without such incentives the transition to a negotiated linkage system will be infeasible. The willingness of countries to comply will be influenced by the incentives that are offered to them. Without assurance that the costs that a linkage system imposes will be diminished, countries are unlikely to participate or fully comply with its demands. An important determinant of whether a country's participation and compliance with linkage can be made feasible will be the domestic pressures faced by its government. An adequate coalition of agents (individuals, firms, and interest-groups) within countries must find it in their interest to endorse the participation of their country in a linkage system, and the country's compliance with the rules of such a system, if it is to be effective. Whether or not they possess such an interest will be influenced by the size of the burdens and benefits they expect to experience as a result of linkage.<sup>74</sup> Without assurance that the costs that linkage imposes on individual and groups will be diminished or eliminated, they are unlikely to have such an interest.<sup>75</sup> Moreover, agents in developing countries will be more likely to support linkage if they believe that burdens are being shared fairly across and within countries. The perception that the system of linkage is fair is likely to be important in determining whether it is feasible to implement and sustain.<sup>76</sup> Moreover, the extent to which producers find

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72. This concern is not unique to a system for promoting labor standards, as mentioned earlier. Similar issues arise in other areas of international cooperation such as the promotion of environmental standards, as is ably discussed in Raghbendra Jha & John Whalley, *Migration and Pollution* (2003), available at <http://rspas.anu.edu.au/economics/publish/papers/wp2003/wp-econ-2003-07.pdf>. In discussing the conditions under which India might be willing to agree to a system of linkage, Rob Jenkins emphasizes the importance of developed countries sharing substantially in the burdens of linkage (as well as making greater progress in fulfilling their commitments under the Uruguay Round Agreements). Rob Jenkins, *India and the Trade-and-Labour-Standards Controversy*, 4-7 (2001), available at <http://www.gapresearch.org/governance/The%20Politics%20of%20Trade%20in%20India.pdf>. A similar point is made in reference to other developing countries by Kevin Kolben in *The New Politics of Linkage: India's Opposition to the Workers' Rights Clause*, 13 *IND. J. GLOBAL LEGAL STUD.* 225-259 (2006).

73. The level and nature of burden sharing required to make a linkage scheme feasible may be different from that required to make it morally legitimate. The level of burden sharing that is adequate will have to be determined in light of both considerations.

74. This is borne out by studies of attitudes toward linkage among trade unions in the South, which show that they possess much greater receptivity to linkage proposals than is widely believed. See the results of the remarkable survey of developing country trade unions reported in Gerard Griffin et al., *Trade Unions and the Social Clause: A North South Union Divide?* 8-11 (Nat'l Key Ctr. in Indus. Relations, Working Paper No. 81, 2002) (finding that 95% of union members in the global South favored international trade agreements that protect core labor standards), and the sources cited therein, reporting similar conclusions.

75. See Jenkins, *supra* note 72, at 3; see also Srinivasan *supra* note 10, at 70.

76. See *supra* note 63 and accompanying text.

that there is profit in evading labor standards will influence the extent to which a country can readily comply with them. Incentives to comply with these standards are required. Financial resources may be required in order to provide such incentives. Countries are unlikely to have an interest in establishing incentives for producers to enhance labor standards, and may even lack the ability to do so, if they are not themselves offered incentives to adopt the desired policies, and the necessary means to do so.

It has been argued that *plausible systems of linkage must at a minimum be unimposed, transparent and rule-based, and involve adequate burden sharing*. In addition to these three central characteristics, it may be necessary that linkage systems have *additional* features, as we shall see below, if they are to withstand all of the standard objections.

#### VI. Step Four: Identifying Linkage Proposals that Meet the Standard Objections - A Constructive Procedure

Proponents of linkage must identify an institutional arrangement that is both feasible and desirable to bring about. Such an arrangement must possess the three features identified above, and perhaps more. At a minimum, they must be transparent and rule-based, incorporate adequate international burden sharing, and arise through a process of fair negotiation among states. In this section, we will attempt to show that it is possible to identify such institutional arrangements. Throughout the section, we employ what we refer to as a “constructive procedure” to clarify and emphasize the role that the requirements already identified play in making a linkage proposal immune to the standard objections, as well as to identify *additional* requirements of a proposal for linkage which, when combined with those requirements already identified, will permit the proposal to withstand the standard objections.<sup>77</sup>

The constructive procedure that we employ takes the following form. We consider the first of the standard objections, and identify whether additional conditions are required to enable the proposal to withstand this objection. We then consider the second of the standard objections, and similarly identify whether still more conditions will be required to enable the proposal to rebut this objection. We continue this procedure, adding additional requirements that are necessary to overcome the standard objections cumulatively considered to that point, until we have exhausted them. As the standard objections identify reasons that proposals for linkage are ostensibly inferior to non-linkage proposals, we will thus have identified a class of proposals for linkage which may not be deemed inferior to non-linkage proposals on the basis of these particular objections, and which may indeed improve upon such non-linkage proposals. Addressing the standard objections in this way serves also to further clarify the content of the requirements already identified above.

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77. For our argument to succeed, it is sufficient to identify one class of proposals for linkage that satisfies the standard objections. It is therefore no embarrassment to fail to identify *all* the classes of proposals that satisfy the standard objections.

It is important to note, however, that even if no linkage proposals withstand all the standard objections, it would not follow that Proposition L cannot be sustained. Showing this would require a demonstration that some non-linkage proposal was superior on balance to all linkage proposals. Our constructive procedure for identifying a desirable class of linkage proposals requires that members of this class satisfy all of the standard objections. However, this is not required for some linkage proposals to be superior on balance to all non-linkage proposals, even if they perform worse than non-linkage proposals in one or another respect. We therefore set a more stringent task for ourselves than is required to justify Proposition L.

If Proposition L is true, then there exists a specific institutional arrangement for which it is true. We assume that any such institutional arrangement will have the following features.

(1) A *Complaints Function* that is defined by who (e.g., countries, persons, non-governmental organizations, public institutions) can make a complaint about labor standards non-compliance, how they can register their complaint, against whom such complaints can be lodged (e.g., countries or firms), and under what conditions (e.g., failure to adhere to or adequately promote labor standards on the territory of a country or by firms owned, managed, or registered in a country).

(2) A *Fact-Finding Function* that is defined by who (international organizations, governments, non-governmental organizations, individuals, etc.) is charged with determining whether there has been compliance with a standard, and the procedures that must be followed in investigating complaints—for instance, rules of evidence-gathering and presentation (as may be found in a domestic court or existing dispute resolution bodies of international organizations).

(3) An *Adjudication Function* that is defined by how the validity of the complaint is to be determined on the basis of the evidence provided (including the rules of adjudication, etc.) and by the steps to be taken in the event of failure to adhere to labor standards.

(4) A *Promotion Function* that is defined by how compliance with labor standards is to be brought about, including the actions that should be undertaken to promote compliance with labor standards and by whom. These actions might take the form of resource transfers, technical assistance, the withdrawal of enhanced trading rights offered to countries under the linkage system, or the further limitation of rights to trade in the case of repeated failure to abide by the requirements of the linkage system. Such actions may or may not be triggered by a formal complaint.

The four functions can be combined in a single institution, or distributed across different agents and institutions.<sup>78</sup>

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78. Different models can both be observed in the world and in the proposals that have been advanced about how best to promote labor standards. See, e.g., Ehrenberg, *supra* note 1; G.B. Nath, *Linking International Labour Standards with Trade: Implications*

The *sine qua non* of a system of linkage is that it must include at least some incentives related to trade amongst the incentives that it offers to agents to foster improved labor standards. Incentive schemes related to trade, whether or not related to labor standards, may vary in three ways. First, they may vary in terms of the subjects (e.g., countries or firms) whose rights to trade are broadened or limited; the deciders (e.g., a duly authorized adjudicative body or individual countries); and the executors (e.g., sets of countries or firms), which are required to enforce such broadened or limited rights to trade. Second, they may vary in terms of the circumstances under which they allow or demand that an agent's rights to trade be broadened or limited. Third, they may vary in terms of the manner in which an agent's rights to trade may themselves be broadened or limited. For example, the existing Dispute Settlement Body of the WTO can be characterized in these terms as follows. First, the subjects of the system are individual countries, the decider is the Dispute Settlement Body itself, and the executors are the complainants who come before the Dispute Settlement Body. Second, a country's rights to trade may be limited by the Dispute Settlement Body only if it has judged that the country has violated its existing obligations under the WTO. Third, a limitation on a country's right to trade under the system takes the form of tariffs which the Dispute Settlement Body authorizes the complaining countries to introduce against the country that has been found to be in violation.

Proponents of Proposition L favor an institutional arrangement in which rights to trade are made conditional upon the promotion of labor standards. There are many different ways of understanding the requirement of promoting labor standards. For example, a state might be said to have failed to promote a labor standard adequately if it (a) actively engages in practices that diminish the attainment of the standard; (b) fails to require of agents falling under its jurisdiction that they refrain from practices that diminish the attainment of the standard; (c) fails to engage in practices that promote the attainment of the standard; (d) fails to encourage agents falling under its jurisdiction to engage in practices that promote the attainment of the standard; (e) fails to require agents falling under its jurisdiction to engage in practices that promote the attainment of the standard. Although the specific conception of the requirement that states promote labor standards is deliberately left open here, we do indicate some features that it must have below.

We now proceed to implement the constructive procedure, by considering in turn each standard objection.

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for India, 41 INDIAN J. OF LABOUR ECON. 1005, 1011 (1998) (contrasting the structural weakness of the ILO with the WTO's capability for enforcement); Rohini Hensman, *World Trade and Workers' Rights*, 33 ANTIPODE 427, 442-46 (2001); ICFTU (1999), *supra* note 1, at 53; Harvey et al., *supra* note 1, §III; ELLIOT & FREEMAN, *supra* note 34, at 90-92; Kevin Kolben, *Trade, Monitoring, and the ILO: Working to Improve Conditions in Cambodia's Garment Factories*, 7 YALE HUM. RTS. & DEV. L.J. 79 (2004).

A. Response to Objection One: Linkage is self-defeating or inconsequential

What would be required to show that linkage will hurt those it is meant to help? To identify whether the statement is true, it is necessary to do three things. First, we must identify what might be called the focal group (all of those who are the intended beneficiaries of the reform) and determine whether or not they would benefit from it.<sup>79</sup> For the purposes of this argument we assume that the intended beneficiaries include all members of the group that we refer roughly as “less-advantaged persons across the globe.” Second, we must identify the focal variables—those features of the members of the focal group that are deemed relevant to assessing the level of their advantage or disadvantage. We assume here that we are concerned with labor standards, employment, real wages, and other factors that contribute to advantage, broadly understood. Third, insofar as the focal group (“those whom it is meant to help”) is made up of more than one person, we must invoke some principle that can be used to identify the overall level of advantage experienced by this group. This is important, since it is very easy to imagine that some members of the less advantaged as a group may be made worse off by a reform even while it makes most of the members of that group much better off. While we do not endorse here any particular principle specifying how the advantages of different members of the focal group should be aggregated for the purposes of assessing a reform, we do reject that view that showing that some members of this group (however few) are harmed by a reform is in itself sufficient to show that it has “harmed those it is meant to help.”<sup>80</sup>

In what follows, we shall argue that a well-designed system of linkage will not in fact “hurt those it is meant to help” and indeed can help them. This does not necessarily mean that every single member of the less advantaged as a group would be made better off were such a system to be brought into being. Indeed, this is true of few, if any, reforms, including many that are advocated by fierce opponents of linkage. Take, for instance, key institutional reforms associated with worldwide trade liberalization, such as the ending of the Multi-Fiber Arrangement (MFA) in 2005. There are many exporters and countries who benefited from this agreement who have likely been made worse off by its abolition, even though more countries (and poor persons) may have benefited from its abolition. It does not immediately follow from the fact that the abolition of the MFA has hurt some that this reform “hurts those it is meant to help.”

Robert Staiger has presented a powerful economic argument as to why linkage is unlikely to hurt those it is meant to help, and indeed may help

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79. We draw here on the terminology developed in AMARTYA SEN, *THE STANDARD OF LIVING* (1987).

80. It does not follow from this rejection, of course, that we are indifferent to the losses of those in the focal group who do worse under the new system. We favor measures that minimize these losses.

them.<sup>81</sup> He points out that the rationale of the WTO has been to provide reliable conditions of mutual market access to countries engaged in international trade. The binding of tariff rates (i.e., the placing of ceiling on tariffs) by the WTO has had as its premise that, left to themselves, countries will engage in a damaging competition to maximize access to markets of their own producers, which will result in a collectively self-defeating outcome. Hence, a rule-based multilateral trading system in which countries' freedom to raise tariffs unilaterally is eliminated is in the interests of all. Staiger points out that this very argument suggests that a floor on labor standards is also in the interests of all. The reason is that once tariffs are bound, countries have available to them only one major instrument for increasing their own producers' access to markets, namely labor standards. In particular, by lowering (or failing to raise) their own labor standards, countries can reduce the costs of their producers and increase these producers' competitive advantage. As a result, incentives for a self-defeating "regulatory chill" which puts downward pressure on labor standards are created by the prohibition on a self-defeating "beggar-thy-neighbour" policy of competitive inflation of tariffs. As a result, the gains generated through a rule-based system of international trade in the form of the WTO may only be achievable alongside minimal labor standards by extending the scope of the system to incorporate labor standards, for example by requiring the promotion of labor standards as a condition for participating fully in the world trading system—in short, linkage.<sup>82</sup> The force of this argument will depend on the strength of the incentives that are actually present for countries to engage in a race to the bottom, which is an empirical matter about which we do not express a view here. However, Staiger does present incentive-based reasons to believe that a regulatory chill of this kind may exist. If it does indeed exist, then a convincing case would arise for linkage as a means of both enhancing the gains from trade and improving social outcomes.<sup>83</sup>

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81. It should be pointed out that Staiger himself resists the description of his argument as an argument for linkage by attempting to distinguish between the economic rationale and the moral or political rationale for maintaining a floor for labor standards. Robert W. Staiger, *A Role for the WTO*, in *INTERNATIONAL LABOR STANDARDS* 273, 277 (Basu et al. eds., 2003). However, it is clear that the argument Staiger provides is an argument for linkage as we define it (in Proposition L); Josh Ederington, *Trade and Domestic Policy Linkage in International Agreements*, 43 *INT'L ECON. REV.* 1347, 1361 (2002) (using game theory to show that, at least under certain circumstances, linkage can increase the ability to enforce the domestic provisions of an international agreement, in this case higher labor standards).

82. Bagwell and Staiger have presented an alternative way of avoiding such problems, in which countries are required to abide by specific rules when adjusting their labor standards but are not required to promote them to any specific extent. Bagwell & Staiger, *supra* note 39, at 225-26. We discuss their proposed possible solution in detail below, presenting reasons that why some of its elements may be beneficially incorporated into a linkage system.

83. "Race to the bottom" is a widespread but unfortunate name for the more general concern that competitive pressures will undermine efforts to secure basic labor standards. It is unfortunate because it suggests that, absent evidence of *deterioration* of labor standards over time, competitive pressures that undermine efforts to *raise* labor

It has often been assumed that linkage will likely be used as a “fig leaf” for protectionism in the North that will diminish the effective access of Southern exporters of goods produced in a labor-intensive manner to Northern markets. However, this assumption is unwarranted. Indeed, there are reasons to believe that exactly the *opposite* may be true.

In particular, linkage is strongly desired by at least some influential constituencies in the North, and further trade liberalization in the North is desired by at least some constituencies in the South. As a result, a “trade” between South and North in which the South accepts linkage and the North liberalizes access to its markets can potentially benefit each. A system of linkage could offer entrants to the system liberalized access to Northern markets as an initial benefit of membership, along with progressively increased access to the same markets as a reward for meeting their further obligations under the system.<sup>84</sup> In this way, a linkage system could mitigate or even entirely neutralize the adverse effects on the competitive position of Southern countries that may result from the improvements in labor standards that they undertake. Indeed, even those developing countries which fail to promote labor standards may be made better off as a result of a linkage scheme. Strikingly, this can be true *even* if limitations on their rights to trade are imposed! The reason is that such countries will experience increased demand for their relatively lower cost exports if their competitors’ costs increase due to labor standards improvements. The net effect of an increase in tariffs faced by the country in Northern markets and this increase in demand for the exports produced by such a country is therefore difficult to gauge.

Discussions of linkage have been dominated by the presumption that they must entail sanctions against developing countries, but this seems an unduly narrow view of the form that linkage must take. A system of linkage need not in any way involve sanctions, since it may operate purely by offering benefits to developing countries that are *additional* to those that they are presently guaranteed under the rules of the WTO system. While it is likely that a plausible system of linkage will allow for the possibility of limiting rights to trade in extreme cases, it is by no means necessary that it must rely solely on such negative inducements to achieve its aims. It is on the contrary entirely likely that a plausible system of linkage will need

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standards are not present. This conclusion would be false, because even if labor standards were everywhere improving, it would not follow that the threat of being undercut by others with lower labor standards was not exerting *downward pressure* on labor standards. Indeed, it is entirely consistent with the fact that much more rapid improvements in labor standards might be obtainable were stronger incentives provided to countries to do so. In such a case, there would be (to use Staiger’s phrase) a “regulatory chill” but not an observable race to the bottom. The former concept depends on a counterfactual comparison, while the latter depends on a purely empirical one.

84. Such incentives are already part of the European Union’s Generalized System of Preferences. See Buck, *supra* note 4. It is interesting to note that the linkage proposal of the International Confederation of Free Trade Unions calls for “urgent removal of tariffs and import quotas for least developed countries respecting core labour standards.” ICFTU (1999), *supra* note 1, at 23.

to incorporate significant positive incentives in the form of granting developing countries enhanced access to the markets of developed countries.

This type of liberalized access to markets will bring gains from trade in the North as well as in the South. Since it leads to a lessening of the burdens that are experienced in the South as a result of improvements in labor standards, however, it qualifies as a form of burden-sharing under the definition we have outlined above.

There are reasons to believe that a "policy trade" of the kind we have outlined, in which developed countries ensure greater access to their markets by developing countries in return for acceptance of linkage by the latter, may well succeed.<sup>85</sup> The resistance of workers in developed countries to the liberalization of trade will likely lessen if they believe that liberalization will be accompanied by improvements in labor standards in developing countries, since this will marginally reduce the competitive pressure that they will face in a liberalized environment. As noted above, these workers also have a stated moral interest in the material advancement of workers elsewhere. Workers in developing countries are likely to welcome a policy trade of this kind, as it ensures them the ability both to improve labor standards (with all its attendant benefits) and will provide the additional employment that is created as a result of liberalization of trade in developed countries.

Owners of fixed capital in import-competing industries in the North are likely, on the basis of their material interests, to most prefer the policy combination of linkage without additional trade liberalization. The worst policy combination from the standpoint of their material interests is likely to be additional trade liberalization without linkage. The two other policy combinations (additional trade liberalization with linkage, and no additional trade liberalization and no linkage) are of intermediate value and are ambiguously ranked from the standpoint of their material interests. It is clear, however, that these owners of capital are likely to oppose liberalization less if it is accompanied by linkage. Owners of fixed capital in export-producing industries in the South may, on the basis of their material interests, most prefer the policy combination of liberalization in the North without linkage. The worst policy combination from the standpoint of their material interests is likely to be linkage without additional trade liberalization. The two other policy combinations (additional trade liberalization with linkage, and no additional trade liberalization and no linkage) are of intermediate value and are ambiguously ranked from the standpoint of

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85. See also Jenkins, *supra* note 72, at 3, 5-7 (predicting that India, which has opposed linkage, might accept it if wealthy countries abide by Uruguay Round agreements that require them to open their markets in certain cases). The Indian Government Commission on Labour Standards and International Trade issued a report expressing an open-minded position on linkage, especially if appropriate supports were to be offered by developed countries. The chair of the commission, Subramaniam Swamy, argued in a subsequent book that India could be a net gainer should linkage be implemented, in part because of the competitive advantages it would gain relative to countries which would be unlikely to adequately promote labor standards. See generally Kolben, *supra* note 72.

their material interests. It is clear, however, that these owners of capital are likely to oppose linkage less if it is accompanied by liberalization. The pattern of interests outlined above gives some reason to believe that additional liberalization with linkage is a policy "trade" that could realistically be proposed and sought in international negotiations.

The fear that linkage can become a disguised instrument of protectionism takes two specific forms, which we now consider in more detail. The first is that if individual countries (or groups of countries) have discretion over whether the labor practices in other countries constitute sufficient grounds for limiting rights to trade, this will enable them to use that discretion opportunistically.

This fear is well founded with respect to any form of linkage in which those countries that complain about labor standards non-compliance are also charged both with determining whether there has been compliance with these standards, and with deciding whether it is justified to impose a specific sanction. However, the fear is not well founded if the linkage system prevents individual countries from making unilateral determinations of this kind. In that case such opportunistic use would not be as readily possible.<sup>86</sup>

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86. It is far from clear that the motivation behind linkage is in fact protectionism. Krueger attempted to examine this assumption by identifying the constituencies whose representatives supported the Harkin Bill in the U.S. Congress, which proposed the imposition of specific trade sanctions on countries exporting goods produced with child labor. He concluded that self-interested material motives were not discernible from the empirical profile of these constituencies. Alan Krueger, *Observations on International Labor Standards and Trade* 13-23 (Nat'l Bureau of Econ. Research, Working Paper No. 362, 1996) [hereinafter Krueger (1996)]. Krueger's argument is cited in Basu (1999), *supra* note 21, at 1092, and criticized in Bhagwati (2004), *supra* note 21, at 244-45. Sandra Polaski argues that where trade treaties have contained a labor clause, it has generally not been misused for protectionist ends. SANDRA POLASKI, TRADE AND LABOR STANDARDS 14 (2003), available at [http://www.carnegieendowment.org/pdf/files/Polaski\\_Trade\\_English.pdf](http://www.carnegieendowment.org/pdf/files/Polaski_Trade_English.pdf) (last visited Dec. 13, 2006) [hereinafter POLASKI (2003)]. A similar finding is presented by Elliott and Freeman, who discuss in detail the existing evidence on such motivations. ELLIOTT & FREEMAN, *supra* note 34, at 84. Critics of linkage often argue as if the mere fact that support for linkage may be due in part to protectionist concerns rules out the possibility that it is desirable. This is false, since it is possible that agents may do the right thing for the wrong reasons or from questionable motivations, just as they may do the wrong thing for the right reasons and from pure motivations. As Alan Krueger, *The Political Economy of Child Labor*, in INTERNATIONAL LABOR STANDARDS: HISTORY, THEORIES AND POLICY 251 (Kaushik Basu, et al. eds., 2003) rightly points out, "[e]ven if international labor standards were motivated by self-interest, they nonetheless may raise welfare in less developed nations. . . . And the converse is also true: even if international labor standards were motivated by humanitarian concerns they may hurt those they are intended to help in developing countries." Of course, the motivations of agents are certainly relevant in forming predictions about how they will act. It may be quite reasonably feared that if protectionist motives drive at least some of those who support linkage, any system of linkage that emerges will likely be used for protectionist purposes. However, even agents with largely self-serving motivations can be expected to comply with a system of rules if it provides them with the right incentives to do so. The WTO is built on the premise that situating trade negotiations within a transparent and negotiated system of rules with a binding and impartial dispute settlement mechanism can promote a fairer world trading system, notwithstanding the often self-seeking motivations of the states who participate in the system. Indeed, it seems

A rule-based and impartial system of linkage can incorporate fact-finding and adjudication mechanisms that would prevent such opportunism. For example, it might be required that countries present their complaints to a transparently constituted and functioning representative body. Such a body would interpret, assess, and act on the claims presented to it with reference to a system of rules. Requirements of various kinds, such as that the findings and reasoning of the body be presented for public scrutiny, can help to ensure that it functions in the desired manner. Approaches to fact-finding and adjudication of this kind are familiar, even if sometimes difficult to implement fully in practice. They may be found in both domestic and international settings.<sup>87</sup>

Institutions of this kind are intended to function in a transparent, rule-based, and impartial way. Although they may fall short of these goals, the existence of such shortfalls would not be a sufficient reason to reject the existence of the institutions if they improve upon the outcomes that would arise in their absence.<sup>88</sup>

A related fear is that even a rule-based and transparent system of fact-finding and adjudication may indirectly act as a fig leaf for protectionism. In particular, the system of rules may function in such a way as to privilege the protectionist interests of rich countries. The interests of rich countries may be privileged both in the content of the rules and in their implementation. For example, only countries in whose territory basic labor violations occur may be made liable for them, attaching no responsibility to countries whose firms directly or indirectly participate in practices that lead to such violations.<sup>89</sup> Alternatively, the decision-making body may be inappropri-

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implausible that any system of international trading rules can be created that could effectively guard *entirely* against such opportunistic misuse.

87. Examples include the National Labor Relations Board in the United States and comparable bodies in other countries, the WTO's Dispute Settlement Body (DSB), existing free trade agreements with labor provisions such as the U.S.-Jordan Free Trade Agreement, the North American Agreement on Labor Cooperation, and the Canada-Chile Free Trade Agreement. See POLASKI (2003), *supra* note 86, at 13-14; Sandra Polaski, *Cambodia Blazes a New Path to Economic Growth and Job Creation* 14 (Carnegie Endowment for Int'l Peace Paper No. 51, 2004) [hereinafter Polaski (2004)]; Sandra Polaski, *Protecting Labor Rights Through Trade Agreements: An Analytical Guide*, 10 J. INT'L L. & POL'Y 13, 17-20 (2004) [hereinafter Polaski (2004a)]. See generally Kolben, *supra* note 78. Ehrenberg, *supra* note 1, at 168 proposes that an "Admissibility Committee" comprised of nine members appointed jointly by the ILO and the GATT/WTO and charged with determining whether complaints with respect to the observance of labor standards (specified in terms of eight publicly stated criteria) are admissible for consideration by a linkage enforcement scheme. See also ICFTU (1999), *supra* note 1, at 52-53 (describing how the ILO could report to the WTO on violations of core labor standards); Harvey et al., *supra* note 1, §III (proposing that the ILO interact with independent monitors of labor violations).

88. Cf. Hensman, *supra* note 78, at 433. Indeed, many prominent critics of linkage defend the WTO on similar grounds.

89. It may also be feared that the standard of proof required for establishing that labor standards violations have taken place may be set so low as to make it easy for rich countries to establish claims that labor standards have been violated and difficult for poor countries to deny such claims.

ately influenced by the interests of rich countries, either due to its composition or to the incentives offered to its members.

The legitimate concerns raised by these objections can be allayed through an appropriate institutional design. Specifically, a transparent, participatory, and consensual procedure for *establishing* the linkage system can significantly diminish the possibility of undue influence being exercised by the rich countries. It is unlikely that such a process would lead to a system that systematically favors the interests of rich countries in the manner feared.<sup>90</sup> A transparent, participatory, and consensual process of negotiation is likely to lead to a system of rules more acceptable to developing countries. For example, it may be required of developed countries that they take responsibility for ensuring that their firms do not participate in labor standards violations. Moreover, demonstration of a very high likelihood that a country has egregiously and systematically failed to comply with the requirements of the linkage system may be required before a country's trading opportunities are in any way diminished.<sup>91</sup> In such a system, the determination that there are isolated instances of failures to adequately promote labor standards in a poor country would be insufficient to trigger limitations on its rights to trade. It is notable that existing adjudication systems, such as domestic courts and international dispute resolution mechanisms (such as the Dispute Settlement Body of the WTO), often establish stringent standards of proof in order to meet such concerns.<sup>92</sup> Moreover, the threshold for triggering limitations on rights to trade may be made context-sensitive, and in particular dependent on a country's level of development. We see no reason why a system of linkage could not also be made context-sensitive in this way.

There are two main responses to the objection that the imposition of labor standards will diminish the income of developing countries by reducing their gains from trade through interfering with the basis of those gains—the reallocation of production according to comparative advantage. First, the basis for the gains from trade is the difference in the costs of production for particular goods across countries. For instance, goods that are produced in a labor intensive way are likely to be produced most cheaply in countries that have a relative abundance of labor. The objection is grounded in the premise that the cost advantages of developing countries

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90. This is consistent with the widely discussed concept of the progressive realization of human rights. Existing international treaties do often make allowances for the level of development of countries. Examples include the Kyoto protocol and the TRIPS agreement.

91. Indeed, the Ehrenberg, ICFTU, and Harvey, Collingsworth, and Athreya proposals cited above all insist on such a requirement.

92. Even the WTO DSB, which has not arisen from a truly transparent and participatory process, often makes decisions that are not in the interests of member countries, including the most powerful. See, e.g., PANEL REPORT, UNITED STATES – TRANSITIONAL SAFEGUARD MEASURE ON COMBED COTTON YARN FROM PAKISTAN, WT/DS192/R (May 31, 2001). For a description of the recent ruling on cotton, which Brazil won against the United States, see *U.S. Loses Cotton Fight with Brazil*, BBC NEWS, Mar. 3, 2005, available at [news.bbc.co.uk/2/hi/business/4316671.stm](http://news.bbc.co.uk/2/hi/business/4316671.stm) (last visited Dec. 13, 2006).

that presently exist would be substantially undermined if not eliminated by the introduction of labor standards. Although it is true that the basis of gains from trade would be reduced by increases in the costs of labor in developing countries that may arise from the imposition of labor standards, there is in fact no reason to believe that this impact would be substantial, especially if labor standards were to be adopted simultaneously in a large number of developing countries. The price elasticity of demand for the exports of an individual developing country may be relatively large in magnitude due to the presence of alternative sources from which the exports produced by developing countries can be procured. However, the price elasticity of product demand for the exports of developing countries taken as a whole is likely to be relatively small in magnitude, as the decisive cost advantage enjoyed by developing countries in the production of labor intensive items will not disappear as a result of the cost increases that are likely to be generated by the adoption of labor standards [see Appendix].<sup>93</sup> In the presence of large North-South cost differentials, the level of cost increase needed to make uneconomical Southern production of commodities that employ labor intensively in their production (i.e., to displace production from the South to the North rather than from one developing country to another) would have to be massive indeed, making implausible the notion that linkage could offer an effective “fig leaf” for Northern protectionism.<sup>94</sup>

Even in the absence of coordination among developing countries, however, there are other ways in which individual developing countries can enhance labor standards while continuing to reap the gains from trade. For example, a country can implement a wage subsidy simultaneously with the imposition of labor standards, so as to maintain the costs to employers of hiring workers at exactly the same level as prior to the introduction of labor standards. A policy combination of this kind would allow a country to fully reap the gains from trade, as ingeniously shown in the classic argument of Bhagwati and Ramaswamy.<sup>95</sup> In fact, whether or not developing countries coordinate among themselves when imposing labor standards, it can be ensured that there is *no loss* in the gains from trade by implementing

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93. Cf. Gene M. Grossman & Alan B. Krueger, *Environmental Impacts of a North American Free Trade Agreement*, THE MEXICO-U.S. FREE TRADE AGREEMENT 13, 48 (1993). Alan Krueger emphasizes this point, arguing that for this reason it would be difficult for developed countries to exploit labor standards to achieve protectionist ends. Krueger (1996), *supra* note 86, at 12. See also POLASKI (2003), *supra* note 86, at 13 (stating that currently competition for manufacturing occurs only among developing countries, since textile, apparel, footwear, electronics, etc. are produced almost exclusively in low-wage countries). Basu (1999), *supra* note 21, at 1114 acknowledges the desirability of collective coordination of standards. Robert Pollin et al. find that increasing the cost of labor, by increasing wages or raising labor standards, does not consistently lead to job losses. Robert Pollin et al., *Global Apparel Production and Sweatshop Labour: Can Raising Retail Prices Finance Living Wages?*, 28 CAMBRIDGE J. ECON. 153, 156-60 (2004).

94. See Krueger (1996), *supra* note 86, at 12; cf. Grossman & Krueger, *supra* note 93, at 48.

95. Jagdish N. Bhagwati & V.K. Ramaswamy, *Domestic Distortions, Tariffs and the Theory of Optimum Subsidy*, 71 J. POL. ECON. 44, 44-50 (1963).

a policy combination of this kind. In an accompanying technical paper,<sup>96</sup> it is shown that the implementation of such wage subsidies can lead to improvements in labor standards without a change in any country's pattern of production and trade (thereby furthering the interest of all countries).

One possible objection is that implementing such a "first-best" policy combination would be infeasible for many developing countries due to limitations on their ability to tax and transfer efficiently. However, developing countries would not necessarily need to raise all of the relevant resources internally. Rather, international burden sharing can enable developing countries *wholly* to avoid the perceived tradeoff between improving labor standards and maximizing the gains from trade. Indeed, we have insisted from the outset that any plausible linkage proposal must incorporate adequate burden sharing.

Further, wage subsidies aimed at neutralizing the cost-raising effect of labor standards improvements need not necessarily be provided by the developing country government. In principle, other agents, including buyers and developed country governments, could provide such wage subsidies to the producers in developing countries that improve labor standards. For example, a large multinational corporation could identify the extent to which labor standards improvements have caused increases in labor costs in the factories that supply to it, and directly provide countervailing wage subsidies to these suppliers. The cost of such wage subsidies could be borne entirely by the firm, or shared by other stakeholders and the entities representing them, such as governments. Alternatively, the government of a developed country which imports goods produced in a developing country that has improved labor standards could in principle pay wage subsidies directly to the firms in the developing country which produce these products for export. The objection that the low administrative capacity of developing countries stands in the way of the provision of countervailing wage subsidies in these countries is irrelevant if the wage subsidies are provided in these ways.

Of course, the inherent difficulties of collecting adequate information concerning the extent of the cost increases that result from labor standards improvements at individual production sites and of administering the provision of wage subsidies will be present in the implementation of any of these schemes. However, the mere existence of such difficulties is not reason alone to dismiss such schemes as infeasible. In what follows we shall assume for expository simplicity that the entity administering the wage subsidy is the government of the developing country in which production occurs.

If it is not possible to neutralize fully the cost-raising impact of labor standards improvements through the provision of an appropriate wage subsidy, it may still be possible partially to neutralize this impact through

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96. See Sanjay G. Reddy, *Pareto-Improving International Labor Standards Agreements: A Simple Model* (Working Paper, 2006), available at <http://ssrn.com/abstract=930113>.

other second-best policies. For example, developed countries which import goods whose cost of production is increased by the labor standards improvement can reduce tariffs or implement import subsidies so as to ensure that the cost of these goods to importers is unchanged. A measure of this kind would not require that any international resource transfers be made, and would not depend on the limited administrative capacities of developing countries. However, such a policy can only partially neutralize the cost-raising impact of labor standards improvements, because (i) it cannot reverse the change in relative prices of different factors of production and the resulting change in the combination of inputs (e.g., capital and labor) used in the production process - which takes place in the developing country as a result of the labor standards improvement, and because (ii) it makes exporting a good to a country in which there is such a subsidy more attractive than exporting the good to a country which does not have an equivalent subsidy or selling it at home. In assessing a proposed import subsidy the distortions introduced by it must be weighed against its possible benefits.

In principle, the first-best policy combination for a country to adopt if it wishes to reap the gains from trade and raise labor standards is simultaneously to introduce enhanced labor standards, wage subsidies that neutralize the labor cost-raising effects of the introduction of enhanced labor standards, and the optimal trade policy (e.g., free trade) so as to maximize the gains from trade. This first-best policy combination can in principle be adopted unilaterally. Why do countries fail to do so? The reasons are varied and complex. They likely relate to the incentives faced by governments, and limitations on their ability to undertake efficient taxation and transfers.<sup>97</sup> By requiring the provision of additional international transfers

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97. Note that free trade with the wage subsidy and enhanced labor standards and free trade without the wage subsidy or enhanced labor standards are each Pareto superior to autarky (in principle) but that the two free trade alternatives may not be Pareto comparable, because some may do strictly better under the former scheme, and others may do strictly better under the latter scheme, depending on the nature and extent of the ex-post taxes and transfers that are implemented. The Pareto ranking of free trade and autarky depend on the (1) existence or absence of a domestic distortion; and (2) correction of a domestic distortion at the source or failure to correct the domestic distortion at the source. The ranking is as follows (assuming the existence of efficient tax and transfer instruments and specializing, for simplicity, to the case of production distortions): (1) Without a domestic distortion: free trade is Pareto superior to autarky, because there are gains from trade which can be redistributed in a lump sum fashion. This is because each unit produced for export satisfies the condition that the world price exceeds the true domestic cost of production; (2) With a domestic distortion; (2.1) If the domestic distortion is corrected at the source then free trade is Pareto superior to autarky, because there are gains from trade which can be redistributed in a lump sum fashion. Again, this is because each unit produced for export satisfies the condition that the world price exceeds the true domestic cost of production. [The correction of the domestic distortion at source ensures that producers' perceived costs are equal to the true domestic costs of production]; (2.2) If the domestic distortion is not corrected at the source, then it is ambiguous whether or not free trade is Pareto superior to autarky, since it is ambiguous whether there are gains from trade. Whether or not there are gains from trade will depend on the nature and extent of the distortion. Consider the following illustrative example. A country produces an exportable commodity (say oil) with a

and conditioning rights to trade on the adequate promotion of labor standards, linkage can create powerful incentives for countries to adopt the first-best policy combination that fosters labor standards and allows countries to reap gains from trade.

It is important to note that, from this perspective, proponents and opponents of linkage can agree fully on the benefit of undistorted free trade, and indeed both can favor institutional arrangements that give rise to identical patterns of production and net exports. They need disagree only on the best international instruments with which to promote appropriate domestic policy choices that further the interests of workers.

The argument that the imposition of labor standards through linkage will have negligible or perverse consequences because of the limited reach of those standards takes several forms.

The first “negligible or perverse effect because of limited reach” argument of linkage opponents is that the imposition of labor standards through linkage will only affect export-producing sectors. There are three ways to respond to this claim. First and most importantly, a system of linkage need not and should not restrict itself to requiring that efforts to promote basic labor standards take place in export-producing sectors.<sup>98</sup> Indeed, the system that we envision would require that basic labor standards be promoted throughout a country, and would provide the same set of inducements (whether positive or negative) for governments to ensure that such efforts are undertaken regardless of the type of production involved.<sup>99</sup> Second, even a linkage system that targets only export-produc-

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great deal of attendant pollution per unit produced. This externality is not internalized. [If it were, say through an appropriate Pigouvian tax (case 2.1), then the marginal unit produced would represent its true domestic (social) cost of production. In that case there would be gains from trade, since oil would be produced for export if and only if the world price were greater than or equal to the true domestic cost of production. Since the externality is not internalized (case 2.2), oil will be exported as long as the world offer price is greater than or equal to the domestic producer cost. However, since the marginal domestic producer cost is lower than the true marginal domestic cost, there will be a social cost created by these units produced for export. At the margin, the revenue garnered by the sale of these units on the world market will exceed the true domestic cost of their production. Whether there are gains from trade will depend on whether, on average, for the additional units sold due to trade opening the average true domestic cost of their production is higher or lower than the world price. In principle, whether this is so is ambiguous and depends on the level of the world price and the nature and extent of the domestic distortion.

98. Rohini Hensman reports that while “[o]n the whole, the proposal for a workers’ rights clause in WTO agreements too has been greeted in a positive spirit by informal sector activists. . . . Once again, this does not mean that all aspects of the proposal are accepted without criticism - for example, the suggestion that it will apply only to export production is seen as a defect - but, rather, that these activists are open to the possibility of using international pressure to secure rights for workers who have little hope of getting them through purely domestic action.” Rohini Hensman, *The Impact of Globalisation on Employment in India and Responses from the Formal and Informal Sectors* 21 (CLARA, Working Paper No. 15, 2001).

99. Systems of linkage are often, but need not be, justified on the grounds that failure to respect basic labor standards gives an “unfair advantage” to some countries that must be corrected. Instead, linkage can be justified on the ground that the trading system provides an effective means of altering the incentives faced by countries, creating an

ing sectors can benefit indirectly workers in other sectors. For example, improvements in wages and working conditions in export production will require employers in other sectors to compete for workers by also offering improved wages and working conditions.<sup>100</sup> If linkage results in an increase in workers' collective representation through labor unions, this may indirectly benefit workers who are not unionized. For example, unions may help to represent the interests of workers as a whole in the political process. Moreover, unions may also gain resources with which to organize workers elsewhere in the economy.<sup>101</sup> Third, it may be argued that the effect of linkage on working conditions in export sectors is in itself important, and provides adequate reason to pursue linkage.

The second "negligible or perverse effect because of limited reach" argument of linkage opponents is that even workers in the export sectors will be benefited negligibly or indeed harmed. There are three responses to this claim. First, as Bhagwati and Ramaswami have shown in their classic paper, there exists a combination of "first-best" policies that will wholly eliminate the negative impact of labor standards on employment.<sup>102</sup> The provision of an appropriate wage subsidy to firms can fully counteract any increase in labor costs that they may face as a result of linkage. This implies that the country's national income in the presence of this (linkage-cum-wage-subsidy) policy combination will be identical to that which would prevail in the absence of all of the elements of the policy combination (i.e., neither linkage nor wage subsidy). It follows that a country can afford to implement such a policy combination so long as it has access to appropriate fiscal (tax and transfer) instruments. If a country does not have access to appropriate fiscal instruments, then assistance from international institutions or donors (as presumed will be present in all plausible

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environment that better enables and urges them to promote basic labor standards. By justifying linkage in terms of "unfair trade," and referring to countries that do not respect basic standards as "free riders," IFCTU (1999), *supra* note 1, at 43, proponents of linkage fail to place enough emphasis on a very important class of persons who are harmed by these failures, namely the workers in countries that fail to promote basic labor standards. For this reason, our proposal for linkage (sketched below) differs from others, such as Ehrenberg's, whose would allow penalties only against countries whose exports are produced in a way that disrespects basic standards (and only against such exported goods). See, e.g., Ehrenberg, *supra* note 1, at 172-73.

100. This must be true if the labor supply curve is upward sloping or entirely inelastic, as typically assumed.

101. See, e.g., Richard B. Freeman, *Spurts in Union Growth: Defining Moments and Social Processes* 10 (Nat'l Bureau of Econ. Research, Working Paper No. 6012, 1997), available at <http://papers.nber.org/papers/w6012.v5.pdf> (last visited Dec. 13, 2006); Karl Moene & Michael Wallerstein, *Social Democracy as a Development Strategy*, GLOBALIZATION AND EGALITARIAN REDISTRIBUTION (P. Bardhan et al. eds., 2005), available at [http://discuss.santafe.edu/files/globalization/SFI\\_dvifigs.pdf](http://discuss.santafe.edu/files/globalization/SFI_dvifigs.pdf) (last visited Dec. 13, 2006). Note also that the opposite conclusion could result, for example if labor unions represent a "labor aristocracy" that successfully demands that public resources be put to purposes other than those that benefit the most disadvantaged.

102. See generally BHAGWATI & RAMASWAMY, *supra* note 95. For discussion, see Arvind Panagariya, *Bhagwati and Ramaswami: Why it is a Classic* 13 (Nov. 8, 2000), available at <http://econwpa.wustl.edu/eps/it/papers/0308/0308004.pdf> (last visited Dec. 13, 2006).

approaches to linkage) may still ensure that it has adequate resources with which to implement the first-best policy combination. Second, even if the first-best policy combination is unavailable, linkage will not necessarily reduce employment significantly. In order for a reduction in employment to occur, increases in labor costs must cause a displacement of production to other countries (developing or developed) or a substitution from a more labor-intensive to a less labor-intensive production technique. We have suggested above that increases in labor costs alone are unlikely to eliminate the substantial cost advantage of developing countries over developed countries in labor-intensive production. We have also noted that the simultaneous enhancement of labor standards by many developing countries will greatly reduce the potentially deleterious effect of linkage on employment. Finally, the decisive advantage of labor-intensive production techniques in developing countries is unlikely to be eliminated by the increase in wages entailed by linkage. An analysis of the likely impact of increases in unit costs based on the existing data on the share of labor costs in the unit costs of exports from developing countries suggests this.<sup>103</sup> Third, even if the employment losses from linkage are unavoidable and non-negligible, that may not be a sufficient reason to reject linkage. One reason is that linkage may result in improvements in the wages and working conditions of those who continue to be employed. As a result, improvements in the welfare of families and workers considered as a group may well occur even in the presence of employment losses.<sup>104</sup>

The third “negligible or perverse effect” argument is that linkage will cause an increase in relative inequality. There are four responses to this claim. First, it is far from clear that the net effect of linkage, even if it benefits only some workers, will be to increase inequality. It is clear that improvements in wages of some workers will increase the gap between these workers and those who are worse off, but that it will decrease the gap between these workers and those who are better off. The net effect on “inequality” is ambiguous. Second, the empowerment of some workers (even a “labor aristocracy”) may benefit others, insofar as this empowerment strengthens the voice of workers’ representatives in the political process.

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103. See Appendix.

104. Implicit in this proposition is the application of an appropriate social welfare (or “aggregation”) function. An example of an aggregation function to which it clearly applies is that defined by the total wage bill. See, e.g., Martin Rama, *The Consequences of Doubling the Minimum Wage: The Case of Indonesia* (World Bank, Working Paper No. 1643, 1996), available at <http://ssrn.com/abstract=604935> (showing that in Indonesia, a ten percent increase in average wages, induced by an increase in the minimum wage, was associated with a two percent decrease in wage employment, implying a significant increase in the overall wage bill as a result of the minimum wage increase). The seminal detailed empirical research presented by Harrison and Scorse concerning the impact of “anti-sweatshop” activism on labor market outcomes in Indonesia comes to the conclusion that such activism has had ambiguous results, causing decreases in employment and wages in some sectors and increases in employment and wages elsewhere (including some of the firms targeted by activists). See Ann Harrison & Jason Scorse, *Moving Up or Moving Out? Anti-Sweatshop Activists and Labor Market Outcomes* 32-35 (Nat’l Bureau of Econ. Research, Working Paper No. 10492, 2004), available at <http://www.nber.org/papers/w10492.pdf>.

Third, even if the net effect of linkage is to increase relative inequality it may still be desirable, insofar as it improves the absolute condition of many individuals.<sup>105</sup> Fourth, the state may implement additional policies to shape the final distribution of advantages as desired.

Finally, it is sometimes alleged that linkage will reduce the well-being of individuals by impeding them from entering into contracts that enhance their well-being. There are a number of reasons to reject this argument. First, it does not follow from the fact that each household is better off by undertaking a particular action that a general restriction on the ability to undertake the action makes it worse off. The effect of an action on a household's welfare depends on the actions of other households. A general prohibition on such actions by all households may transform an action that increases the welfare of a particular household into one that decreases its welfare. For example, any particular family's material welfare may be enhanced by child labor because the child's earnings are necessary to meet the family's basic needs. In that case, the family might prefer to send a child to work rather than to school. However, if child labor was proscribed in general, adult wages might rise due to the resulting constriction of the labor supply.<sup>106</sup> If the household's income were to rise sufficiently as a result of this increase in adult wages then the basic needs of the household might be met without a contribution from child labor, in which case the family might now prefer to send children to school rather than to work. In cases of this kind, a prohibition on child labor will *increase* the welfare of households.<sup>107</sup> Second, even if households are made initially worse off as a result of the restriction they may be made better off by being compensated. A policy consisting of combining the restriction and a compensation scheme for those adversely affected by the restriction may lead to superior outcomes for all concerned.<sup>108</sup> Indeed, public policies combining restrictions and compensation in this way are increasingly being implemented in developing countries.<sup>109</sup> Third, the decision-maker within the household may not adequately take account of the interests of other members of the household. For example, the decision to send a child to work may be made by an adult who does not adequately take note of the impact

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105. See, e.g., DEREK PARFIT, *EQUALITY OR PRIORITY?* (1995).

106. See, e.g., Kaushik Basu & Pham Hoang Van, *The Economics of Child Labor*, 88 AM. ECON. REV. 412, 413 (1998) [hereinafter Basu & Van (1998)]; Basu (1999), *supra* note 21, at 1115 ("[A] large scale withdrawal of child labor can cause adult wages to rise so much that the working class household is better off."). Similarly, under certain conditions, eliminating the right of workers to enter into bonded labor contracts may benefit such workers, since the availability of such contracts may prevent more beneficial kinds of credit contracts from emerging. See Garance Genicot, *Bonded Labor and Serfdom: A Paradox of Voluntary Choice*, 67 J. DEV. ECON. 101, 119-22 (2002).

107. This is true on a subjective preference-based conception of welfare as employed in Basu & Van (1998), *supra* note 106, at 36-37. However, the assumption that household welfare can be conceived of without further disaggregation ought to be questioned.

108. An early example of this approach to child labor is presented in ARTHUR C. PIGOU, *THE ECONOMICS OF WELFARE* 751-53 (4th ed. 1960). An exemplary overview of existing approaches of this kind is presented in Brown (2003), *supra* note 68, at 225-37.

109. E.g., Mexico's *Progressa* and Brazil's *Bolsa Escola* programs.

of this decision on the child's present and future well-being. In such a case, public policies may enhance the well-being of some individuals although they harm the interests of other existing and future persons. Distributional judgments are therefore required in order to assess them. Fourth, an agent's decisions may not always promote her ultimate best interests, due to inadequate information, myopia, or questionable subjective preferences.<sup>110</sup>

B. Response to Objection Two: Linkage is an inferior means of promoting the goals it is intended to promote

We focus here on arguments that claim there are means other than linkage of achieving the goals of linkage and that they can promote these goals more effectively than linkage. As noted above, such arguments do not entail a denial that linkage may promote the goals that it is intended to promote. Rather, they insist that there are other better means of promoting the same goals. Proposed alternatives either rely solely on moral suasion or seek to bring about voluntary decentralized action on the part of countries, consumers, and firms. In either case they are unlikely to be very effective. Schemes relying on moral suasion are generally ineffectual primarily because they do not provide adequate incentives to raise labor standards. Schemes relying on voluntary decentralized action are inferior to other schemes because they appeal to only some agents and are therefore likely to be relatively ineffectual.

It is sometimes suggested that the ILO should play the leading role in fostering the improvement of labor standards.<sup>111</sup> The ILO has indeed contributed immeasurably and in many important ways to the cause of improved labor standards. In particular, the ILO has been instrumental in helping to bring about consensus on the labor standards to be promoted, and in offering technical assistance to countries wishing to design policies that have this effect. Regrettably, however, the promise of improved labor standards remains significantly unfulfilled. One important reason may be that incentives or disincentives available to the ILO to apply to countries in order to encourage them to promote labor standards that these countries

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110. This could perhaps be recognized by the agent herself under appropriate conditions. To take a rather tired example, although an alcoholic may reveal his preference for beer over beans, it is far from obvious that this preference reflects his best interests. A public policy that hinders the ability of the alcoholic to indulge his preference without restriction may be viewed as enhancing welfare. For discussion of the principles underlying judgments of this type, see, e.g., T. M. Scanlon, *Preference and Urgency*, 72 J. PHIL. 655, 658 (1975); Amartya Sen, *Positional Objectivity*, 22 PHIL. & PUB. AFF. 126, 134-36 (1993). On the outcomes that can arise under imperfect information, see generally Joseph E. Stiglitz, *The Contributions of the Economics of Information to Twentieth Century Economics*, 115 Q. J. ECON. 1441 (2000).

111. The 1996 WTO ministerial meeting, for instance, declared that "The International Labor Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them." World Trade Organization, Ministerial Declaration of 13 December 1996, WT/MIN(96)/DEC (1996).

have endorsed are limited in their effectiveness.<sup>112</sup>

Some opponents of linkage have argued for “strengthening” the machinery of the ILO as an alternative to linkage. It is clear that there is significant room for such strengthening. However, it is interesting to note that efforts to strengthen the supervisory machinery of the ILO in regard to basic labor standard have typically been resisted.<sup>113</sup> Even if significant strengthening of the ILO’s supervisory machinery were to be achieved, there is reason to doubt that there would be a marked effect on the outcomes that are realized in the absence of a substantial enhancement of the incentives that the ILO can offer to countries (in return for their promotion of basic labor standards). We do not argue that linkage is the only means of providing such incentives, but we do argue both that it is one such means and that it is not obvious that there are other means that are superior to it in this respect. It should be noted in this regard that linkage is a form of strengthening the ILO and not an alternative to doing so. Indeed, in the proposal for a system of linkage sketched below, we envision an important role for the ILO.

It is widely recognized that arrangements for international cooperation must include adequate incentives and disincentives if they are to be successful in promoting the behavior that they seek to promote. It is commonly held, for instance, that it is not feasible to reduce and eliminate national control over weapons of mass destruction through a program that depends solely upon the voluntary cooperation of each and every national government, due to quite familiar problems of collective action. Without enforcement through unilateral action or multilateral treaties containing binding mechanisms of monitoring and enforcement, countries may lack assurance that reductions in their military power are being matched by those of their competitors, and each may believe that they benefit by “defecting” from the system. Indeed, the WTO system is widely viewed as an advance over its predecessors because it provides disincentives to its members to violate or infringe one another’s rights to trade. This is a feature of the WTO system that has been a central reason for the praise bestowed on it by many prominent critics of linkage.

A major reason why linkage is desirable is that it can create strong incentives for governments and employers to take steps to enhance labor standards. We have claimed that although they *could* take such steps even in the absence of linkage (especially if international burden-sharing mea-

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112. There is only one case known to the authors of the ILO having applied penalties to a country due to violation of labor standards: Myanmar in 1996. See ELLIOTT & FREEMAN, *supra* note 34, at 95.

113. For example at the 1997 International Labor Conference. The ILO remains relatively “toothless” even after the “strengthening” of countries’ reporting requirements. See, e.g., Hensman, *supra* note 78; ELLIOTT & FREEMAN, *supra* note 34, at 96-100; International Confederation of Free Trade Unions, *Belarus Is Once Again Censured by the ILO* (June 14, 2005), available at <http://www.icftu.org/displaydocument.asp?Index=991221860&Language=en> (describing the ILO’s inability to punish Belarus’s violations of trade union rights).

tures are present), they are less likely to do so in the absence of linkage than in the presence of an appropriate form of linkage.

As we recognize, a world with a system of linkage may be one in which limitations on rights to trade are never actually enacted, but in which the prospect that such limitations may occur is sufficient to induce governments and employers to improve labor standards. This suggests, however, that there may be superior means of achieving the goals of linkage that do not involve linkage. In particular, a system of non-trade incentives to enhance labor standards (such as international financial transfers that are conditional on improving labor standards) may be superior. Alternative schemes for providing incentives to improve labor standards are unlikely to prove superior to a well-designed system of linkage. A system that involves non-trade (in particular, financial) incentives alone will likely be unattractive for four reasons.

First, as pointed out by Chang<sup>114</sup> any scheme that involves positive inducements alone may produce perverse effects insofar as it encourages countries initially to weaken the standards that it seeks to promote or to exaggerate the costs of improving standards in anticipation of ultimately receiving financial inducements to make such improvements. Of course, both trade and non-trade measures can take the form of either positive or negative inducements (as judged against an expected status quo). This does not therefore provide a reason to favor a linkage or over a non-linkage scheme as such. However, trade measures are likely to provide for greater flexibility in this regard, since there is a limited range of non-trade incentives which can be applied. Even when such incentives are potentially applicable their scope of application may be restricted (for example, countries that are not already recipients of net financial transfers can only be presented with positive financial inducements).

Second, to achieve the same incentive to promote labor standards that would arise under a system offering both trade and non-trade incentives (which we shall refer to as a “mixed regime”), the non-trade incentives that would have to be offered to poor countries would be necessarily greater.<sup>115</sup> In particular, the budgetary cost of these inducements to rich country governments would be higher than under a mixed regime. As a result, implementing and sustaining a system to promote labor standards involving non-trade (in particular, financial) inducements alone would be less likely to be feasible.

Third, significant and sustainable improvements in labor standards will likely require action on the part of countries in both the North and the South, those that are the sites of ownership, registration and management of firms, as well as those that are the sites of production. Adequate action by Northern countries is unlikely to result from the non-trade incentives

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114. See generally Howard Chang, *Carrots, Sticks, and International Externalities*, 17 INT'L REV. L. & ECON. 309 (1997).

115. See, e.g., Giancarlo Spagnolo, *Issue Linkage, and International Policy Cooperation*, (FEEM, Working Paper No. 49.96, Mar. 1999), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=163173](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=163173).

that would be offered by any scheme to promote labor standards, since those countries would themselves have to finance such a scheme.

Fourth, trade incentives can be used to express appropriate moral attitudes more flexibly than non-trade (in particular, financial) incentives can do. For example, it would be unfair to require Northern countries that do not actively participate in conduct that undermines labor standards to make net transfers to those that do for the purpose of providing the latter with incentives to desist from such conduct. Northern countries that do promote labor standards may quite reasonably ask why they should not receive rewards for their actions rather than being “punished” by being required to provide resources to other Northern countries which actively engage in conduct that undermines labor standards. A system that requires such net transfers from “good citizens” to “bad citizens,” whether they are located in the North or in the South, seems therefore both unfair and likely to be infeasible. We would, for example, find it disturbing if a government were to offer monetary rewards to ex-criminals guilty of violent crimes for each year that they desisted from committing further violent crimes, even if this were a very effective system indeed. The analogy is far from exact, but does starkly capture the contrasting responses that may be appropriate to expressing moral opprobrium and disapprobrium.<sup>116</sup>

If the arguments above—to the effect that all feasible and morally legitimate schemes involve a mixed incentive regime—are valid, then a new question arises: what form should be taken by the disincentives that the system includes? In principle, these disincentives could take many forms. However, there are relatively few practical instruments available with which to create effective disincentives for countries without resorting to the use of force, which seems quite generally inappropriate for the purpose of promoting labor standards. The ability to impose limitations on rights to trade is one of the most powerful instruments of this kind. Indeed, it has been widely employed toward this end in the past. There is also evidence of its past value in encouraging countries to undertake specific actions.<sup>117</sup>

We may conclude: a well-designed system of linkage is likely to be more effective in providing incentives to countries to improve labor standards than alternatives that do not involve linkage.

There also exist a number of proposals to promote labor standards through voluntary decentralized action on the part of consumers and firms. These include voluntary codes of corporate conduct and product labeling (“fair trade” initiatives) and consumer boycotts.<sup>118</sup> There is reason

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116. For an argument in this direction with respect to trade and environmental standards, see generally Howard Chang, *An Economic Analysis of Trade Measures to Protect the Global Environment*, 83 GEO. L.J. 2131 (1995).

117. For example, it is widely believed that such restrictions played a role in the end of the apartheid regimes in Southern Africa (i.e. South Africa, Zimbabwe/Rhodesia, and Namibia).

118. See, e.g., S. PRAKASH SETHI, *SETTING GLOBAL STANDARDS: GUIDELINES FOR CREATING CODES OF CONDUCT IN MULTINATIONAL CORPORATIONS* (2003); ELLIOTT & FREEMAN, *supra* note 34, at 27-48; Fung et al., *supra* note 61, at 5-6; KARL SCHOENBERGER, *LEVI'S CHILDREN: COMING TO TERMS WITH HUMAN RIGHTS IN THE GLOBAL MARKETPLACE* (2000).

to believe that some of these proposals can be helpful in promoting labor standards. However, they are unlikely to achieve as much as systemic policies such as linkage. One reason to believe this is that voluntary measures on the part of consumers and firms are unlikely to be universally adopted, leading to a “patchwork” of solutions containing holes in protection (possibly many and large) that permit poor labor standards to continue to exist.<sup>119</sup> Another reason is that private agents may adopt standards that impose undue costs upon the affected parties in developing countries, without adequate consultation with them. For example, a group of consumers may unilaterally define and impose a set of labor standards that are insensitive to the context faced by the producers. The burden of fulfilling labor standards may in a real sense fall disproportionately upon producers. Moreover, agents in developing countries (firms and workers) may be unduly coerced into participating in such schemes in order to gain access to markets. Boycotts and other forceful measures may be as coercive as the types of linkage rightly rejected by linkage opponents.

These are strong reasons to doubt the claim that the promotion of a decentralized patchwork alone is the best policy for promoting labor standards. Indeed, it has been pointed out by Rodrik that this is one reason why, “we routinely object to labeling as [the sole] solution to similar concerns in the domestic setting.”<sup>120</sup> The comparison with domestic policy strongly suggests that it is possible that labor standards will be better promoted by a systematic policy solution than by a decentralized patchwork of voluntary initiatives. If such a decentralized patchwork is preferred it must be for at least one of three reasons. The first reason is that it is more efficacious in promoting the goal of promoting labor standards. The second reason is that it is preferable on procedural grounds. The third is that it is feasible whereas alternative approaches are not. In the previous section and immediately above we presented arguments against the view that linkage was consequentially inefficacious compared to its alternatives. In subsequent sections, we will present arguments against the view that linkage should be ruled out on procedural grounds or because it is infeasible. In this way, we will demonstrate that the promotion of a decentralized patchwork of solutions alone does not constitute the first-best policy for promoting labor standards.

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119. For evidence on how codes of conduct fail (often due to competitive pressures) to be fully incorporated into firms' buying practices, see, e.g., OXFAM INT'L, *TRADING AWAY OUR RIGHTS: WOMEN WORKING IN GLOBAL SUPPLY CHAINS* 38-39 (2004), available at [http://www.oxfam.org.uk/what\\_we\\_do/issues/trade/downloads/trading\\_rights.pdf](http://www.oxfam.org.uk/what_we_do/issues/trade/downloads/trading_rights.pdf) (last visited Dec. 13, 2006); HONG KONG CHRISTIAN INDUSTRIAL COMMITTEE, *HOW HASBRO, McDONALD'S, MATTEL AND DISNEY MANUFACTURE THEIR TOYS* 29-31 (2001), available at <http://www.cic.org.hk/download/CIC%20Toy%20Report%20Web%20eng.pdf> (last visited Dec. 13, 2006); KENNETH A. RODMAN, *SANCTIONS BEYOND BORDERS: MULTINATIONAL CORPORATIONS AND U.S. ECONOMIC STATECRAFT* (2001).

120. Rodrik (1996), *supra* note 19, at 61.

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It has been claimed by some critics of linkage that a principle of institutional design first advanced by Jan Tinbergen (which they refer to as the “two birds principle” although that was not the name given to it by Tinbergen) rules out linkage. Does this claim have merit? To examine this question, it is useful to understand Jan Tinbergen’s original argument for this principle in detail. As recognized by Tinbergen, it is impossible to discuss the problem of policy choice coherently without making reference to an overall social preference relation, the greater satisfaction of which we

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121. *Id.*

may refer to as the “master goal.”<sup>122</sup> The appropriate conception of the master goal will depend upon the normative perspective of the evaluator.<sup>123</sup> Different social states will be associated with different levels of achievement of the master goal.

In practice, many desirable characteristics of social states—for example, a higher aggregate income or a more even income distribution—can be promoted only indirectly through the adoption of appropriate policies that influence these characteristics. For example, higher aggregate income or a more even income distribution may be achieved through an appropriate choice of relevant “policy levers” such as trade, tax, and expenditure policies. Tinbergen refers to the available policy levers as “instruments” and to the characteristics of the social state that the policy-maker seeks to promote (in order to enhance the master goal) as the “targets.”

The “two birds principle” can be understood as holding that achieving the desired levels of two distinct targets would in general require at least two distinct instruments. Where it is true, this is a consequence of the elementary logic of maximization. Suppose that there were only one instrument, the setting of which influences the attainment of each of the targets. For example, tariffs on imported goods may influence both the level of aggregate income and the income distribution. In general, the setting of the instrument that gives rise to the optimal attainment of one of the targets will not be the setting that gives rise to the optimal attainment of the other target. Therefore, sub-optimal attainment of at least one of the targets will have to be accepted. In contrast, if each of the targets had been advanced by its own independent instrument, then no such problem need have arisen; each of the targets could simultaneously have been optimally attained. For example, if the tariff rate is set to maximize aggregate income and an adequately efficient system of tax and transfer can be used to achieve the desired income distribution, then the theoretical impossibility of simultaneously achieving the desired aggregate income and the desired income distribution disappears.

This reasoning is not particular to the case of two targets but rather applies to an arbitrary number. In general, at least as many instruments as targets are required in order for it not to be impossible simultaneously to attain the desired levels of all of the targets. However, strictly speaking, this condition is neither necessary nor sufficient. Rare instances may arise

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122. Tinbergen uses the term “general interest” and refers to a “collective ophelimity function” that represents this general interest “in whatever sense that may be taken” and which is “the object to be maximised.” This entity is apparently “a function of a certain number of variables which we shall call the target variables,” select numerical values of which are referred to as the targets. The targets are presumed to be chosen so as to maximize the ophelimity function. In contrast, instruments are “variables under the command of the government.” JAN TINBERGEN, *ON THE THEORY OF ECONOMIC POLICY* 1, 7 (1966).

123. Utilitarians, for example, may conceive of this master goal in terms of world welfare and, moreover, specifically understand welfare in terms of subjective preference satisfaction or pleasure. In contrast, Rawlsians evaluate social institutions in terms of the level of social primary goods they engender for their least advantaged participants.

in which the desired levels of two targets can be attained simultaneously by using a single instrument appropriately. But a 'fluke' of this type cannot be relied upon.<sup>124</sup> Similarly, the availability of as many instruments as targets does not guarantee that the desired levels of all of the targets can simultaneously be attained. There may be factors that prevent this. If a single policy instrument plays a role in determining the level of attainment of more than one target, then both targets are very unlikely to be maximized simultaneously. For example, if the effects on income distribution of the choice of tariff rate can only be imperfectly neutralized (for example, because efficient tax and transfer instruments are unavailable) then a single instrument (the tariff rate) can have an unavoidable effect on more than one target (namely, the aggregate income and the income distribution). As a result, it will not generally be possible to attain the desired level of aggregate income *and* the desired income distribution.<sup>125</sup> In that case, it will be necessary to sacrifice the attainment of one of the targets to some degree.

Those who rely on the two birds principle to criticize linkage do not make clear what targets they have in mind (although they refer vaguely to "the freeing of trade" and to "moral and social agendas"). For the principle to come into play, we must be faced with a situation in which there are two or more distinct goals that we are trying to promote. Are the "freeing of trade" and "moral and social agendas" really distinct goals? At a superficial level they certainly appear to be, since promoting free trade does not itself entail anything with respect to the improvement of labor standards. At a deeper level, however, it is not obvious that they are truly distinct. This is because proponents of free trade typically defend the promotion of free trade not as an end in itself, but on the grounds that maximizing world output through trade can serve a master goal, such as improving the level of advantage of persons, understood in some way (by, for example, bringing about increases in employment and real wages for workers and increases in consumption generally).

Advocates of free trade correctly view it as a possibly important instrument in furthering the master goal, through its potentially beneficial effect on material well-being. Those who are concerned with improving labor standards do so because they too are concerned with such a master goal. Indeed, they hold that the raising of labor standards is a target that should be pursued because it should enter constitutively into the master goal - i.e., that it ought directly to influence the ordering of alternative social states of affairs. It can thus be argued that the contrast between the promotion of

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124. See, e.g., Bhagwati (2002), *supra* note 58.

125. See, e.g., Jagdish Bhagwati & V.K. Ramaswami, *Domestic Distortions, Tariffs and the Theory of Optimum Subsidy*, 71 J. POL. ECON. 44 (1963); Jagdish Bhagwati et al., *Domestic Distortions, Tariffs and the Theory of Optimum Subsidy: Some Further Results*, 77 J. POL. ECON. 1005 (1969). Another reason that it may be impossible to attain the level of multiple targets despite the existence of at least as many instruments as targets is the existence of possible causal interdependencies amongst the targets themselves (as have been, for instance widely believed to exist between inflation and unemployment). See, e.g., TINBERGEN (1966), *supra* note 122; J. TINBERGEN, *ECONOMIC POLICY: PRINCIPLES AND DESIGN* (1967).

trade and the "moral and social agenda" is not between two goals, but between one *means of* promoting a single goal and another means of doing so. In that case, the case of trade and labor standards is not one in which the principle has any application, and so it cannot in itself be adduced as a reason against linkage.

Despite this vagueness in linkage critics' characterization of the targets being promoted, we shall make an assumption as to what these critics have in mind in order to assess further their arguments. We shall, for purposes of exposition, suppose that the two targets with which they are concerned are the maximization of world output and the promotion of labor standards (as we have expansively defined them here). The critics of linkage argue that these two targets must be promoted through at least two distinct instruments, and therefore that linkage (which on their account charges a single institution with promoting the two distinct targets) cannot be optimal.

The "two birds principle" implies that at least two distinct instruments are generally required to achieve maximally two distinct targets. Critics of linkage who claim that the two birds principle gives us reason to reject linkage presume that there exist at least two distinct targets that advocates of linkage and non-linkage alike wish to achieve, but that proponents of linkage intend to adopt fewer than this number of instruments in order to do so. However, this is false. Proponents of linkage can recognize that it is desirable to wield as many instruments as targets, but nevertheless call for the use of the distinct instruments to be coordinated appropriately.

The implicit assumption made by critics of linkage that multiple instruments cannot be wielded by a single institution is unwarranted. The optimal configuration of instruments may in principle be achieved in many different ways, and therefore the relationship between the optimal number of instruments and the optimal number of institutions can in principle vary. For example, the optimal configuration of instruments might be implemented by a central planner who has the ability to wield each of the instruments. Alternatively, the optimal configuration of instruments might be implemented by decentralized decision makers (independent institutions) acting in coordination with one another. A final possibility is that the optimal configuration of instruments might be implemented by decentralized decision makers (independent institutions) acting without coordination in pursuit of individually assigned targets. If there exists an optimal configuration of instruments, then *in principle* it is possible to attain it through *any* one of these three arrangements. If the optimal configuration of instruments cannot be achieved through all three of these arrangements, this must be for *empirical reasons*, related, for instance, to the incentive structures and informational flows that affect the ability of different arrangements to promote the targets effectively.

Critics of linkage seem to believe that the targets that are to be promoted can best be promoted by the third option; decentralized decision makers independently acting in pursuit of individually assigned targets (in particular, the maximization of world output through free trade, and the

raising of labor standards). Specifically, they argue that the best outcomes will be achieved if the responsibility for the promotion of world trade is left to a single institution (the WTO) and the responsibility for the promotion of labor standards is similarly left to a single institution (the ILO). Proponents of linkage argue that targets such as high employment and real wages, decent working conditions and high world output may best be promoted by a system involving coordination between decision-makers involved in conferring rights to trade and those concerned with promoting labor standards. Although it has widely been presumed that linkage requires a single institution to take responsibility for promoting world trade and labor standards, this need not be so. Linkage can also be achieved through appropriate forms of coordination between distinct institutions. The alternative options for promoting the attainment of targets must necessarily be compared on *empirical* grounds.<sup>126</sup>

The preceding discussion has shown that a linkage system need not violate the “two birds principle” (at least as understood by Tinbergen).

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126. Jan Tinbergen himself strongly supported an *integrated* international policy to deal jointly with employment and growth objectives. Tinbergen identifies six broad areas in which “tasks should be performed on a world basis, although some may also be subjected to cooperation on a regional basis, under supervision on a world level.” J. TINBERGEN, INTERNATIONAL ECONOMIC INTEGRATION 145 (1954). It is evident that Tinbergen views the areas suitable to be addressed at a centralized (world) level to be determined wholly on empirical grounds. Foremost among these empirical grounds is whether the instruments in question have a “supporting” or a “conflicting” role in the sense that “the use of such an instrument by one country will support the policies of the other countries” or whether its use by one country “conflicts with the objectives of other countries’ policies.” See *id.* at 98-99. The framers of the post-war institutional scheme also considered such integration of objectives quite attractive. For example, the International Trade Organization (“ITO”) was originally proposed by John Maynard Keynes at the Bretton Woods Conference to further the expansion of world trade as a means to the ends of development, adequate wages, labor standards, and full employment. The Havana Charter, which provided for the creation of the ITO, contained an explicit reference to “Fair Labour Standards” (in Chapter II, Article 7 of the Charter) providing for the need to “take fully into account the rights of workers,” recognizing that because “unfair labour conditions, particularly in production for export, create difficulties in international trade, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory” and requiring that the ITO “consult and co-operate with the International Labour Organisation” toward this end. However, the ITO did not come into being because of the failure of the U.S. Senate ultimately to ratify it. For the history of the ITO, see generally Richard Toye, *Developing Multilateralism: The Havana Charter and the Fight for the International Trade Organization, 1947-48*, 25 THE INT’L HIST. REV. 253 (2003); Daniel Drache, *The Short but Significant Life of the International Trade Organization: Lessons for Our Time* (Centre for the Study of Globalisation and Regionalisation, Working Paper No. 62/00, Nov. 2000); THOMAS W. ZEILER, FREE TRADE AND FREE WORLD: THE ADVENT OF GATT (1999); Howard M. Wachtel, *Labor’s Stake in the WTO*, THE AMERICAN PROSPECT, Mar. 1, 1998, at 34; Mark Levinson, *Global Is as Global Does?*, THE NATION, Dec. 18, 1999, at 42; WILLIAM DIEBOLD, JR., *The End of the ITO*, in ESSAYS IN INTERNATIONAL FINANCE (1951); WILLIAM ADAMS BROWN, JR., THE UNITED STATES AND THE RESTORATION OF WORLD TRADE (1950). On the view of the parties to the ITO that labor standards concerns must play a role in the organization, see generally Toye, *supra* note 126; Drache, *supra* note 126. For a discussion of the wage-based view of labor standards endorsed in the early stages of GATT negotiations, see generally Elissa Alben, *GATT and the Fair Wage: A Historical Perspective on the Labor-Trade Link*, 101 COLUM. L. REV. 1410 (2001).

Distinct instruments may be distributed across institutions in different ways, and the institutions may or may not coordinate the use of these instruments. The best distribution of rights to use instruments across institutions and the appropriate form and degree of coordination in the use of these instruments must necessarily depend on empirical judgments. It may be thought that it is better to assign the right to use specific instruments to institutions that possess special expertise or capabilities. For example, it has often been argued that the ILO ought to be responsible for defining, monitoring, and promoting labor standards because of its special expertise and institutional capabilities in the area of labor rights. On the other hand, it may be thought that coordination in the use of distinct instruments can enhance effectiveness. For example, it has sometimes been suggested that the ILO is “toothless.”<sup>127</sup> One reason to imagine that linkage may help to advance labor standards is that the prospect that rights to trade may be conditioned on the adequate promotion of labor standards may help to give “teeth” to this otherwise “toothless” institution. Empirical considerations of this kind must necessarily play a determining role in assigning instruments to institutions and in establishing the type of coordination between institutions that is appropriate.

Recent game-theoretic literature on “issue linkage” sheds light on the detailed empirical considerations that play a role in determining whether linkage is desirable. Agents are typically concerned with outcomes (“issue areas”) of diverse kinds. Moreover each outcome with which an agent is concerned can be influenced by diverse actions that this agent and others undertake. When the outcomes realized by each agent are the joint consequence of her conduct and the conduct of others, then it is possible that decentralized and uncoordinated choices of conduct by agents will lead to outcomes that are sub-optimal (in the sense that a negotiated agreement to undertake different conduct could lead to an improved outcome for all). Often, the same agents face each other in such strategic interactions (in which negotiated agreements could bring about improvements) in connection to multiple outcomes. For example, governments may have an interest in the level of national income they possess as well as in the level of pollution that their populations experience, and outcomes in each of these dimensions may be influenced by others’ choices as well as their own. In this example, there are two distinct outcome dimensions, and in each of them governments may act in isolation or in conjunction with other governments (on the basis of negotiated agreements, for example concerning ceilings on tariffs or on CFC emissions).

Is it possible to identify conditions under which unified negotiation over multiple issue areas (aimed at producing a single agreement covering the different issue areas together) is superior to disaggregated negotiations over multiple issue areas (aimed at producing individual agreements over the different issue areas)? One way to assess whether a specific approach to negotiation is superior is to ask whether the outcomes produced by the

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127. See, e.g., Hensman, *supra* note 78; Collingsworth, *supra* note 65.

agreement to which these negotiations would give rise would be superior from the standpoint of all agents. Of course, the outcomes that arise when all agents obey their obligations under a negotiated agreement may differ from those that arise when agents fail to obey these obligations. It may therefore be important to assess a negotiated agreement not only in relation to the outcomes that would arise if all agents were to abide by their obligations under the agreement but those that may be likely to arise given the incentives that agents may possess to deviate from these obligations. Whether an agreement is self-enforcing (in the sense that agents have an interest in abiding by their obligations under it when other agents do the same) is of special interest in the analysis of international agreements, since there is no supra-national enforcement authority.

Recent game-theoretic literature has included attempts to address this question. Spagnolo,<sup>128</sup> for example, points out that—from the point of view of enforceability—unified and disaggregated negotiations can be compared with each other in relation to two considerations. The first concerns how the unification of negotiations can improve the allocation of enforcement power across dimensions (in a sense to be defined below). The second concerns how the unification of negotiations influences the valuation placed by each agent on the threat of the withdrawal of future cooperation (which is the sole basis for securing cooperation in self-enforcing agreements) relative to the valuation placed on present non-cooperation.

How can the unification of negotiations improve the application of enforcement powers across dimensions? The unification of negotiations can enable a superior allocation of enforcement powers across issue areas by permitting unused enforcement power to be redistributed from one issue area to another. In particular, the enforcement power available in one issue area may be in “surplus” in the sense that the punishment for deviation presented by the threat of withdrawal of future cooperation in that area may be greater than necessary to secure cooperation with the agreement in that area alone (specifically, the value of the benefits of foregone future cooperation may be greater than the value of the benefits of immediate non-cooperation).<sup>129</sup> On the other hand, the enforcement power available in another issue area may be inadequate in the sense that the threat of withdrawal of future cooperation in that area may be insufficient to secure the desired level of cooperation in that area (specifically, the value of the benefits of foregone future cooperation may be less than the value of the benefits of immediate non-cooperation). When this is the case, linking issue areas can increase cooperation in the area in which enforcement

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128. See generally Spagnolo, *supra* note 115; see also Nuno Limão, *Trade Policy, Cross-border Externalities and Lobbies: Do Linked Agreements Enforce More Cooperative Outcomes?*, 67 J. OF INT'L ECON. 175 (2005).

129. Specific subsets of possible strategies are considered in the formal analyses by Spagnolo and the other contributors to this emerging body of literature. See also Nancy Chau & Ravi Kanbur, *The Race to the Bottom, from the Bottom*, 73 ECONOMICA 193 (2006) (especially section IV) for a recent example of such a contribution which focuses specifically on labor and environmental standards, and which attempts to identify conditions under which international agreements on standards may be sustainable.

power is inadequate without decreasing cooperation in the area in which enforcement power is in surplus. Linking issue areas can enable unused (or “slack”) enforcement powers to be used by reallocating them among issue areas. From this perspective, issue linkage can never diminish the enforceability of agreements and can often enhance it.

How does the unification of negotiations influence the valuation placed by each agent on the threat of withdrawal of future cooperation relative to the valuation placed on the benefit of present non-cooperation? Let us assume that when there is issue linkage and cooperation is withdrawn as a punishment for non-cooperation, it is withdrawn in all issue areas simultaneously, and when cooperation takes place it takes place in all issue areas simultaneously. Let us further assume that when issues are not linked and cooperation is withdrawn as a punishment for non-cooperation in a given issue area, it is withdrawn in that issue area alone. The central question then becomes that of whether the relative benefits of future cooperation and present non-cooperation change when issue linkage takes place. It can be shown that this depends on how the agents value different combinations of attainments in the distinct issue areas and on the specific causal interconnections between issue areas.<sup>130</sup>

It has been suggested that economic theory precludes linkage for another reason. Panagariya, for example, has argued that “. . . the targeting literature, pioneered by Bhagwati and Ramaswami (1963) and Bhagwati (1971) tells us that when an economy is in a sub-optimal equilibrium, the

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130. Spagnolo, *supra* note 115 focuses on the implications of the agents' valuations of different combinations of attainments whereas Limão, *supra* note 128 focuses on the implications of the causal interconnections between distinct issue areas. According to Spagnolo, there are two kinds of cases to consider. The first is that in which the outcomes are substitutes in the sense that increases in the level of achievement in one outcome dimension are valued less when the level of achievement in the other outcome dimension is higher. The second is that in which the outcomes are complements in the sense that increases in the level of achievement in one outcome dimension are valued more when the level of achievement in the other outcome dimension is higher. When the outcomes are substitutes, then the threat of withdrawal of future cooperation in one issue area alone may be relatively ineffective because cooperation in the other issue area may secure rest of the advantages that would have been achieved had there been cooperation in the two issue areas together. When the outcomes are complements, then the threat of withdrawal of cooperation in one issue area alone may be relatively effective, because when cooperation in the second issue area is taking place, then the threat of withdrawal of cooperation entails a significant loss of benefit. Paradoxically, the withdrawal of future cooperation in both issue areas together may not be as effective because the value attached to cooperation in each area diminishes when cooperation in the other issue area does not take place. From the above analysis, it follows that when the issue areas are substitutes, linking them will be advantageous with respect to both of the aspects of enforcement. When the issue areas are complements, whether linking them will be advantageous from the standpoint of enforcement depends on the empirical question of whether the gains from improved allocation of slack enforcement power are greater than the losses from lessened effectiveness of the threat of withdrawal of future cooperation. Therefore, there is no general reason to prefer disaggregated negotiations to linked negotiations from the standpoint of enforcement. For discussion of related issues, see generally P. Conconi and C. Perroni, *Issue Linkage and Issue Tie-In in Multilateral Negotiations*, 57 J. OF INT'L ECON. 423 (2002); Josh Edderington, *Trade and Domestic Policy Linkage in International Agreements*, 43 INT'L ECON. R. 1347 (2002).

first best policy is to correct the underlying distortion at its source. Once this is done, there is no reason to intervene elsewhere in the economy. Thus, if the market happens to produce suboptimal labour standards, we should correct this distortion directly rather than through an indirect instrument such as trade sanctions. Under the direct approach, once labour standards have been set at the optimal level, free trade remains the optimal trade policy in the traditional sense. Purely from an efficiency standpoint, a case cannot be made for linking trade and labour standards.”<sup>131</sup>

The theorem referred to here concerns distortions in the economic sense, i.e. instances in which the true social cost of an act of production or consumption diverges from the private cost experienced by those responsible for making a production or consumption decision, or in which the true social benefit of an act of production or consumption diverges from the private benefit of those responsible for making a production or consumption decision. How might this conception of a “domestic distortion” apply to the case of “sub-optimal” labor standards? In order to apply the “economic” framework in this way it would be necessary to think of acts of production in which labor standards are inadequately high as being ones in which the true “social cost” of the act of production is greater than its perceived private cost.<sup>132</sup> For this to be true, however, the increment between private cost and true social cost would have to be a cost experienced by *someone* other than those involved in the production process itself who are parties to the wage labor transaction, or a cost attributed to those persons but not perceived by them. If one of the parties to the wage labor transaction (worker or employer) perceived the cost, then it would be fully ‘internalized’ within the contracting decision and a ‘distortion’ would not exist. Who might these others who experienced the social costs generated by production with poor labor standards be? They could only be other individuals in the country concerned, or indeed individuals in other countries.

In either case, a “correction of the domestic distortion at the source” in the form of a tax meant to bring the perceived private cost of production into line with the true social costs of production would indeed be a possible correction to the domestic distortion, and one which would potentially increase domestic welfare (if the ‘externality’ is suffered by other individuals within the country) or world welfare (if the ‘externality’ is suffered by individuals in other countries).<sup>133</sup> Although this is indeed an instance of the theory of the correction of a domestic distortion at the source, it is by

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131. Arvind Panagariya, *Trade-Labour Link: A Post-Seattle Analysis*, in GLOBALISATION UNDER THREAT: THE STABILITY OF TRADE POLICY AND MULTILATERAL AGREEMENTS 101, 104 (Zdenek Drabek ed., 2001).

132. This narrowly welfarist normative framework is clearly insufficient for capturing the normative significance of labor standards. However, we cannot further address this issue in this section.

133. Other conditions are required, such as the existence of efficient tax and transfer instruments. In the absence of such instruments, there is no guarantee that redistribution of the gains from trade can produce a Pareto improvement.

no means obvious why the implementation of such a solution is inconsistent with linkage, contrary to assertions made in the literature. The theory recommends that domestic policies be used to correct domestic distortions and stresses that the existence of a domestic distortion fails to affect the optimal choice of trade policy. Indeed, linkage is a specific *means* of ensuring that countries adopt appropriate domestic policies and does not require that countries adopt any particular trade policy. It leaves countries free to choose the optimal trade policies that they would otherwise choose.

What of the claim that an appropriate system of international trading rules can be designed that does not incorporate linkage, leaving countries free to choose the level of labor standards appropriate to them (and achieving the objectives of linkage) while similarly fully reaping the gains from international trade?

Bagwell and Staiger (see the earlier presentation of their argument) present a scheme for eliminating the strategic incentive to depress labor standards in order to enhance domestic producers' market access. It incorporates a requirement to undertake Kemp-Wan adjustments, which require that when a country raises (or lowers) its labor standards it must correspondingly raise (or lower) its import tariffs so as to maintain the prices received by foreign producers. However, the game-theoretic insight which they present and exploit is more widely applicable than they seem to recognize. In particular, whereas they assume that the maximand that *ought* to be pursued is also that which is pursued by governments, these two ideas should in general be distinguished. The value of enhancing labor standards may not be fully recognized in the "objective function" of the government. In the terms of Bagwell and Staiger, the social valuation,  $\lambda$ , which is placed on higher labor standards by the government may not correspond to the normatively appropriate valuation of these higher standards. This may be true for two distinct reasons. It may be thought that the appropriate normative valuation on labor standards is that which corresponds to an aggregate of the subjective preferences of the country's population.<sup>134</sup> In that case, it is necessary to ensure that the government's valuation of higher labor standards corresponds to that of the population. However, there is no guarantee that the aggregation function used by the government appropriately reflects the subjective preferences of the population it represents. For example, the government may attribute overriding importance to satisfying the preferences of wealthier and more politically influential citizens, while comparatively neglecting the preferences of workers and the poor. This is a pedestrian "political economy" insight of a kind that is familiar to trade economists, who often express concern that protectionist interest groups that engage in "rent seeking" or "directly unproductive activities" undermine the propensity of the state to pursue the public good.<sup>135</sup> Second, it may be thought appropriate to assign a normative valu-

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134. See, e.g., T.N. Srinivasan, *Comment*, in *SOCIAL DIMENSIONS OF U.S. TRADE POLICY* 236 (Alan V. Deardorff & Robert M. Stern eds., 2000).

135. See Jagdish N. Bhagwati, *Lobbying and Welfare*, 14 *J. PUB. ECON.* 355 (1980); see also Jagdish N. Bhagwati, *Directly Unproductive: Profit-Seeking (DUP) Activities*, 90 *J. POL.*

ation to labor standards in which the valuation placed on higher labor standards is not based merely on the subjective preferences of the population. However, there is no assurance that the government of every country will value higher labor standards to an *appropriate* degree.

Hence, even a system incorporating adjustments of the kind recommended by Bagwell and Staiger may not lead to the socially optimal level of labor standards (i.e., that level which corresponds to the normative valuations or labor standards and other ends). Additional incentives may be required in order to encourage countries to raise their labor standards to the socially optimal level in each country (recognizing fully that this social optimum may depend on the country's present stage of development and other relevant conditions). A system of linkage incorporating burden sharing can provide these additional incentives. Ultimately, linkage is in its very essence a system for providing incentives for countries to choose freely to improve labor standards to a larger degree *than they might otherwise*.

No inherent conflict exists between the idea that the world trading system should incorporate linkage and the idea that it should require Kemp-Wan adjustments of the kind proposed by Bagwell and Staiger. Indeed, it may be desirable jointly to incorporate both linkage *and* the requirement for such adjustments. Consider the following example. There are two countries, A and B, which possess some initial levels of labor standards. Now, suppose that country A's labor standards are below the level minimally demanded of it by the linkage scheme (determined in light of its present circumstances) and that country B's labor standards are above the level minimally demanded of it by the linkage scheme (determined in light of its present circumstances). The linkage scheme provides incentives for country A to raise its labor standards but does not provide incentives for country B to do so. Moreover, country B may have an incentive to *lower* its labor standards in order to confer greater market access to its domestic producers, for the reasons suggested by Bagwell and Staiger. The result that arises from the strategic interaction between countries will be suboptimal, because of the externality pointed to by Bagwell and Staiger: world gains from trade will be lower than otherwise. In order to eliminate the incentive of country B to lower its labor standards, and ensure an optimal outcome, the rule system could incorporate the requirement of Kemp-Wan adjustments in addition to linkage. In that case, country B could not lower its labor standards without correspondingly lowering its import tariffs. As a result, the incentive for country B to lower its labor standards purely to increase the market access of domestic producers of import competing goods would be eliminated. Similarly, the increase in labor standards in country A could be accompanied by a decrease in foreign tariffs on the items exported by country A (so as to maintain undiminished or indeed to enhance the level of access to foreign markets by the country's exporters) as we recommend.

We may imagine a range of labor standards-related considerations being incorporated into the world trading system. The linkage scheme could require that countries promote labor standards to a minimally adequate extent, as determined in light of the country's level of development and other relevant considerations. The scheme would require that the trading partners of countries that make improvements to labor standards in accordance with the requirements of the scheme lower their import tariffs for good from the country, apply import subsidies, or offer other incentives which offset any cost these improvements may generate for the country. The rules of the trading system might also require that Kemp-Wan adjustments be undertaken by countries with labor standards above the level minimally required of them by the linkage scheme, in the event that they seek to lower these labor standards. This would be a means of discouraging countries from using reductions in labor standards as a means of seeking increased market access for their domestic producers as recommended by Bagwell and Staiger. Finally, the rules of the trading system might permit such countries to raise their labor standards further still without any such adjustments. The resulting world trading system, incorporating both linkage and an asymmetrical requirement for Kemp-Wan adjustments, would possess the attractive feature that it would be likely to encourage countries to improve their labor standards while ensuring high and stable levels of mutual market access. This is only a sketch of one possible form that a world trading system incorporating linkage could desirably take.

What of the claim that a linkage scheme is likely to reflect the preconceptions and priorities of external actors and will thus push developing countries to put in place labor standards that are inappropriate (or inappropriately high)? A linkage scheme need not reflect the preconceptions and priorities of external actors. Indeed, any unimposed scheme must appeal to some constituents within a country for it to be entered into by that country. As a consequence such a scheme is likely to allow for the level of labor standards promotion expected of individual countries to vary with the level of development of the country and other relevant features of the national context. Indeed (as argued further below) such context-appropriate application is called for in order to meet other standard objections to linkage. The labor standards identified as worthy of promotion in any plausible linkage scheme ought to reflect the priorities of domestic activists and stakeholders. There is simply no guarantee that those domestic constituencies that best represent the interests of less advantaged persons will be able to influence policy sufficiently to achieve concrete measures to promote labor standards. By drawing on the experience of domestic actors that promote the interests of the less advantaged in identifying relevant standards, by strengthening their hand relative to other groups with different priorities, and by avoiding the cost in foregone trade and investment that would have been borne by countries which attempt to promote labor standards unilaterally, a linkage scheme will likely give rise to efforts to promote labor standards that are ultimately more beneficial to the less

advantaged than those which could be achieved through domestic activism alone.

In all of this we have assumed that labor standards are a good worthy in themselves of being promoted. If measures to improve labor standards are not worthy in themselves of being promoted but are only a means to an end (e.g., utility) then there may be other better ways of enhancing that ultimate end, viz. avoiding the labor supply “distortion” (and attendant deadweight loss) caused by labor standards improvements (which may be viewed as making working at certain jobs “artificially” attractive, thereby influencing both the labor-leisure decision and occupational choices) and undertaking instead ex-post redistributions of income. We reject this utilitarian framework which assumes that all harms suffered can be compensated ex-post. We also note that this approach presumes the existence of adequately efficient tax and transfer instruments, adequate information with which to identify beneficiaries, and the actual use of the available instruments. The realism of each of these assumptions may be questioned. Further, the standard international trade models typically appealed to by linkage opponents feature fixed endowments of labor. Under this assumption, the concern that improved labor standards will distort the labor-leisure decision does not arise.

### C. Response to Objection Three: Linkage creates an unfair distribution of burdens

It is argued by linkage critics that linkage is likely to most harm persons who are least advantaged. However, we have already shown, in addressing above the objection that linkage is self-defeating or inconsequential, that this argument is unconvincing. A linkage system can be designed in a way that minimizes or eliminates its possible adverse effects and ensures that it becomes an effective instrument on behalf of less advantaged persons.

Second, it is argued by linkage critics that it unfairly (because arbitrarily) affects only some persons, sectors, and firms. It is important to note that an agent has obligations to undertake certain actions (or avoid others) irrespective of what *other* agents are doing. For example, a husband’s complaint that it is unfair to prevent him from beating his wife because others are not being prevented from beating their wives is illegitimate. It may be argued that an agent’s obligations to promote at least some basic labor standards are independent of whether other agents fail similarly to promote them.<sup>136</sup> It is also argued by linkage critics that a linkage system will

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136. There are plausible exceptions to the idea that the conduct of an agent ought to be evaluated independently of others’ conduct. For example, there is a long tradition of argument that has emphasized that the obligation of agents to refrain from armament or attack depends on whether they have assurance that other agents abide by corresponding obligations. But cases of this kind appear to involve special conditions, for example, that those whose well-being is put at risk by the agent’s failure to meet the requirement themselves reciprocally put the agent at risk through their failures to abide by this same requirement.

unfairly affect only those countries that are the physical sites of export production. However, there is no reason that a linkage system must take note of the failure adequately to promote labor standards *only* in those countries which are the physical sites of production. It seems likely that an effective and fair system of linkage will encourage appropriate actions by all countries involved in any stage of the production process, including those that are sites of registration, ownership and management.<sup>137</sup>

Third, critics of linkage claim that linkage would unfairly penalize individuals for failing to promote specified labor standards, even where doing so is morally justified because of the consequences that are realized, or the agent-relative moral ends that are thereby furthered. However, the mere fact that an individual's choice can be given a plausible rationale does not make costs that may be imposed on such an individual to discourage a particular choice unfair. Policies may rightly be designed so as to give greater weight to certain interests (e.g., those of workers) as compared to others (e.g., those of factory owners). Moreover, many of the hard choices that are faced in an environment in which incentives to promote basic labor standards are weak may disappear in an environment in which such incentives are present. If public policies discourage child labor, for example, a factory owner may no longer be forced to employ child labor in order to compete successfully with other firms. International burden sharing can also mitigate these costs and distribute them more fairly. The concern of critics of linkage that it will penalize individuals in poor countries for failing to promote labor standards can be side-stepped if international burden sharing adequately diminishes the necessity for poorer countries to be inattentive to poor labor standards if they are to pursue other valued ends.

The fourth claim of linkage critics is that it makes the citizens of one country bear the cost of satisfying the preferences of those of another country. In response, it should first be noted that the desirability of promoting basic labor standards arises not merely from the value of satisfying a preference (in this case the "tastes" of the well-off) but rather arises from the moral value of promoting them.<sup>138</sup> Second, the premise of this objection to linkage is that poor countries will necessarily bear the cost of fulfilling the moral obligation to promote basic labor standards. However, this premise need not be true. As argued above, the costs to developing countries entailed by linkage may be small, especially if sufficient numbers of (otherwise competing) developing countries participate in the linkage system. Indeed, the remaining developing countries (those which do not undertake labor standards improvements) may experience *increases* in demand for

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137. Other proposals for linkage have failed to take adequate account of the responsibilities of countries that are the sites of registration, ownership or management of firms, directly or indirectly linked to violations of basic labor standards. A linkage system that fails to broaden its jurisdiction in this way inappropriately focuses on the punishment of developing countries by developed countries. Thus, it will lack legitimacy and effectiveness.

138. There is indeed a wide consensus that this is the case, as the widespread reference in the debate to ILO conventions and other international legal documents specifying international norms makes clear.

their exports as a result of the efforts of other countries to improve labor standards (which will make goods produced in the former countries relatively cost-competitive). Further, as argued above, all plausible approaches to linkage must include adequate burden sharing in which developed countries transfer resources to developing countries. Finally, as described above, a plausible system of linkage will require actions to promote labor standards of all countries, not only those that are sites of production in which basic labor standards are not adequately promoted.

The fifth claim of critics is that linkage illegitimately abridges fundamental freedoms. It is claimed that individuals should be free to enter into contracts with one another, and that rights to trade internationally without impediment are grounded in this principle. However, this proposition is exceedingly difficult to sustain—some contractual arrangements, although voluntary, may be unduly coercive or exploitative (and therefore illegitimate) because of the background conditions in which they are entered into. In such cases, it may be morally required either that the stronger party refrain from entering into the contract or that the contracts entered into guarantee terms that are superior to those that would merely suffice to entice the weaker party to enter the contract.<sup>139</sup>

Proponents of linkage need not deny that there are rights to trade, or that these rights are important. Rather, they need only contest the nature and priority of rights to trade as understood by critics of linkage who emphasize these rights.<sup>140</sup> Few would argue that there is a comparable status to rights to trade within a domestic economy, where it is generally thought reasonable to forbid the trade of goods produced with stolen property, produced by employing slave labor or child labor, or that impose a serious risk of harm on intermediaries and consumers. The scope of rights to trade should be determined in light of their contribution to the fulfillment of valuable ends, which may plausibly include basic labor standards.

#### D. Response to Objection Four: Linkage is context-blind and politically imperialistic

Let us first address the claim that linkage is context-blind because it is insensitive to a country's level of development. It can be responded that the requirement that countries promote basic labor standards need not be applied in a context-independent way. Rather, countries may be required to respect a few fundamental requirements (for example, to outlaw slave labor and child prostitution) regardless of their level of development,

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139. See, e.g., G.A. COHEN, HISTORY, LABOUR, AND FREEDOM 209-38 (1988); ALAN WERTHEIMER, EXPLOITATION 207-46 (1996).

140. It is common to all rights that they may be asserted without insisting on their absolute priority or unconditionality. This is also recognized in law. Famously, asserting that there is a right to free speech does not establish that people can everywhere and anywhere say what they want. See, e.g., *Schenck v. United States*, 249 U.S. 47 (1919) (holding that the most stringent protection of free speech rights will not protect a man who falsely shouts fire in a theater and causes a panic).

whereas they may be required to respect other requirements only if their level of development is sufficiently high.<sup>141</sup> Further, it must be recognized that it takes time and resources to achieve even basic standards. Limitations on rights to trade ought to be avoided and imposed only when absolutely necessary to deter the most egregious and persistent violations of basic norms (such as the prohibition of slave labor). Explicit allowance can and should be given to countries to demonstrate good faith efforts to promote standards to an extent and in a manner appropriate to their level of development. The obligation to promote labor standards can also be made contingent not only on the level of development of the country but on the pertinent facts, including the nature of the affected industry. Although increased costs may not greatly affect the competitiveness of “infra-marginal” industries which enjoy significant cost advantages with respect to competing sources of the same goods and services, they may have large adverse effects on the competitiveness of “marginal” industries in which production within a country (or in the developing countries considered as a group) is barely viable. The empirical facts concerning an industry can and should be taken account of in determining the extent to which cost increases resulting from labor standards improvements can be reasonably absorbed.

Moreover, financial and technical assistance (made possible through international burden sharing) should be provided to countries to enable them to realize the improvements in labor standards that are feasible for them to achieve at their level of development. Although countries may reasonably plead that the costs of ensuring even basic labor standards are prohibitively high at their current level of development, they cannot make this plea if they are provided external assistance (material and technical) sufficient to reduce substantially or eliminate the costs that they would face in promoting these standards. The burden-sharing element in plausible proposals for linkage ensures that developing countries will face diminished costs when enhancing labor standards.

For a linkage proposal to be context sensitive, it is important that the aims and procedures of the linkage system (including the basic standards to be promoted and the criteria for determining compliance) be defined through a process of fair negotiation, which (as noted above) is a requirement of all plausible systems of linkage.

Let us now consider the claim that inattention to basic labor standards is a necessary condition for development. This is an empirical claim and, as such, it may be questioned on empirical grounds. It is far from obvious that development requires (or even permits) that any (let alone all) basic labor standards be neglected. It is necessary to distinguish between the instrumental and the intrinsic relevance of basic labor standards to development. The attainment of at least some basic labor standards must be understood as constitutive of development; promoting these standards is a

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141. See Penny Abeywardena, *Interview with Jagdish Bhagwati*, RIGHTS NEWS, Fall 2004, at 2-3.

form of promoting development itself.<sup>142</sup> Further, labor standards may be instrumentally valuable because they facilitate other aspects of development. For example, the elimination of child labor may help to bring about universal basic education which may in turn help to foster economic growth, or higher wages may foster increased productivity.<sup>143</sup> Indeed, countries often further certain basic labor standards without apparent impediment to their development.<sup>144</sup> Finally, even if the neglect of basic labor standards were causally relevant to the rapid development of specific countries in the past (for instance, during the British industrial revolution) it would not follow that this is so today, since economic and technological conditions have changed. For example, there now exist richer countries which can provide transfers to developing countries that can diminish the costs that would otherwise be entailed by the promotion of basic labor standards. The element of burden sharing that must be incorporated into all plausible linkage proposals can ensure that such diminution will take place.

If a system of linkage is legitimate, then the obligations that it ascribes to those who are party to it are ones that *morally* bind them. For a system to create moral obligations for those who are party to it, two conditions must hold. First, the country must have chosen to enter into the system voluntarily—it must not have been unduly coerced into joining it. This may be called the criterion of “external legitimacy.” Second, its decision to join the system must have resulted from a process that took adequate account of the interests and perspectives of its citizens.<sup>145</sup> This may be called the criterion of “internal legitimacy.” Processes can take adequate account of the interests of citizens in various ways. They may do so by allowing citizens and their representatives a direct say over such decisions through referenda or other democratic mechanisms, by providing them with opportunities to present their views in open public discussion in a manner that influences decisions, or by being otherwise systematically

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142. See, e.g., Amartya Sen, *Well-Being, Agency and Freedom: The Dewey Lectures 1984*, 82 J. PHIL. 169 (1985) on consequentialist theories directly valuing rights fulfillment.

143. See, e.g., Partha Dasgupta & Debraj Ray, *Inequality as a Determinant of Malnutrition and Unemployment: Policy*, 97 ECON. J. 177 (1987); Ross Levine & David Renelt, *A Sensitivity Analysis of Cross-Country Growth Regressions*, 82 AM. ECON. REV. 942 (1992); HARVEY LEIBENSTEIN, *ECONOMIC BACKWARDNESS AND ECONOMIC GROWTH* (1957); Michael J. Piore, *International Labor Standards and Business Strategies*, in U.S. DEPARTMENT OF LABOR, *INTERNATIONAL LABOR STANDARDS AND GLOBAL INTEGRATION: PROCEEDINGS OF A SYMPOSIUM* 21(1994); Moene & Wallerstein, *supra* note 101.

144. See, e.g., DANI RODRIK, *THE NEW GLOBAL ECONOMY AND DEVELOPING COUNTRIES: MAKING OPENNESS WORK* (1999). It has been argued that governmental enforcement of labor standards has created incentives for technological and organizational innovation and thereby enhanced economic growth in Europe and the United States. See generally Moene & Wallerstein, *supra* note 101 (studying European cases); Piore, *supra* note 143 (studying the nineteenth-century U.S. textile industry); Kenneth D. Boyer, *Deregulation of the Trucking Sector: Specialization, Concentration, Entry, and Financial Distress*, S. ECON J. 481 (1993).

145. We apply this concept broadly here, so as potentially to encompass those who may not hold formal citizenship rights, such as legal residents or long-term residents.

responsive to them.<sup>146</sup>

The tests of internal and external legitimacy must be satisfied in order for a system of linkage to be legitimate.<sup>147</sup> It must be underlined, however, that these criteria of moral legitimacy do not directly provide instructions for institutional design. A system of linkage may permit states to join it in the way that they have historically joined many international treaties—through governments becoming signatories—or it might require something more stringent, such as ratification by a popular assembly, as also demanded for certain existing international treaties. In either case, the moral assessment of the resulting system must take note not merely of whether the legal requirements of entry into the system were satisfied, but of whether the system satisfies criteria of internal and external legitimacy, thus resulting in legal obligations of membership which are also *morally* binding.

Let us now consider the specific claim that linkage represents a form of cultural imperialism. To rebut this charge it is not necessary to demonstrate that there exist specific universally applicable standards that bind all societies regardless of whether they endorse them. It need only be shown that a system of linkage can be designed to safeguard against the possibility of cultural imperialism. This can be done in three ways.

First, the standards that the system promotes must be *identified* in a manner that avoids the charge of cultural imperialism. The standards must be specified abstractly enough that they permit appropriate context-specific variation in their interpretation and application. Only standards specified in this way are likely to be a subject of the broad consensus that is required in order for a linkage system to enjoy wide acceptance. Standards that emerge from a process that takes due account of opinions within states as well as between states, and that seeks to reasonably accommodate variation in the specification of the standards to the direction of opinion that is present, will be more likely to be the subject of this type of broad consensus.<sup>148</sup> Thus, requiring that the standards promoted through the linkage system emerge from such a process is a means of avoiding the charge of cultural imperialism.

Second, the linkage system must *be applied* in a manner that avoids the charge of cultural imperialism. This may be partially assured by the requirements that the linkage system be impartial and rule-based. There is, of course, a danger that the rules for applying the standards (as distinguished by the standards themselves) will be improperly culturally specific. One way of guarding against this prospect is to require that

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146. Rawls' concept of a "decent consultation hierarchy" is a concept of the latter kind. JOHN RAWLS, *THE LAW OF PEOPLES: THE IDEA OF PUBLIC REASON REVISITED* 71 (1999). Whether it is sufficient for regimes to be of this kind or whether regimes must have democratic characteristics in order to guarantee the (internal) moral legitimacy of the linkage scheme which they join is a question which we do not directly address here.

147. We leave open the question of whether these necessary conditions for legitimacy are also sufficient.

148. The tripartite model of decision-making in the ILO offers a suggestive instance of such a process, which has led to notable consensus of this kind.

participation by states in the system of linkage not be unduly coerced. Such a safeguard against cultural imperialism may not suffice if states fail to adequately represent the range of interests of the diverse groups within them. For this reason it is important also to require that the linkage system have two additional safeguards, relating respectively to the process by which the scheme is instituted and the process by which it functions on an ongoing basis.

First, to avoid the danger that states unfairly privilege the interests or perspectives of some, the linkage scheme must not only derive from a process of fair negotiation among states, but also derive from a process that ensures that appropriate account is taken of viewpoints within states. Requiring that states engage in adequate internal consultation as a condition of entering into and participating in the linkage system is one way of ensuring this. Referenda or other means of direct democratic endorsement are forms that such consultation can take. However, it has been historically rare for such stringent mechanisms of gaining popular consent to precede the entry of states into international treaties. Many such treaties are widely held to be legitimate, including those that impinge on sensitive cultural issues (for example, international treaties concerning human rights), despite failing to receive explicit prior popular endorsement. The legitimacy of such treaties is often thought to rest on the fact that over time they have won wide retrospective endorsement by individuals throughout the world, despite their having failed to receive explicit prior popular endorsement. When states fail to engage in direct internal consultations prior to becoming signatories of an international treaty, their decisions may nevertheless reflect or come to reflect the opinions of a populace. This kind of responsiveness is often all that is demanded in order for an international treaty to be deemed (adequately) legitimate. Governments of countries with democratic institutions are typically presumed to reflect popular consent when they enter into international obligations. Insofar as they do not, governments in democracies open themselves to possible sanction, and the possibility that withdrawal from the obligations may occur under successor governments. For these reasons, although prior popular endorsement of international agreements is desirable to avoid the charge of cultural imperialism, it is not always deemed strictly necessary.

Second, the system of linkage must incorporate measures that ensure that appropriate account is taken in an ongoing manner of viewpoints within states. Since non-democratic regimes may neither engage in explicit internal consultation nor be adequately responsive to the views of their populations, it cannot be guaranteed that a non-democratic regime will reflect the legitimate interests of its population. Further, regimes of all kinds may fail to give adequate weight to the legitimate interests of minorities. A safeguard against both of these possibilities is to create rule-based mechanisms within the linkage system by which complaints about either the content or the application of its standards can be heard. A system of linkage that incorporates these safeguards will fairly take account of viewpoints within states.

Although it is true that there are diverse and conflicting perspectives in the world concerning what is demanded by morality and justice, it does not follow from this fact (of moral and cultural diversity) that agreement on institutions that promote specified ends will be impossible.<sup>149</sup> Whether or not we can succeed in coming to agreement on the standards to be promoted and the means of promoting them is an empirical question.

It is important to note that cultural imperialism can flourish even in the absence of linkage. Indeed, in choosing which labor standards to uphold and to what extent, states often express the conceptions and interests of specific groups and deny those of other groups. In this context, a linkage system may even prove to be an important means of *combating* cultural imperialism. Further, though cultural imperialism is one evil to be avoided, it is not the only evil. The evils attendant the neglect of basic labor standards must be weighed against the concern that linkage will be culturally imperialistic. To minimize the risk of cultural imperialism, a system of linkage may permit the conception of the basic labor standards that are to be promoted to reflect cultural specificities to an appropriate degree.

What of the allegation that linkage is a form of political imperialism? There are two responses to this allegation. First, the kind of system of linkage that we envision would not violate state sovereignty because it could only be brought about through the agreement of states which have not been unduly coerced. Once adopted, such a system would of course place constraints on domestic institutions and policies, but this is true of any other significant international agreements. Indeed, one of the features of state sovereignty is that sovereign states are at liberty to join or withdraw from agreements that selectively limit their freedoms.

It is fruitful here to distinguish between “proceduralist” and “substantivist” understandings of the criteria to be used to determine when contracts are freely entered. A “proceduralist” understanding holds that contracts into which agents enter are freely entered as long as agents (in this case countries) are procedurally free to choose not to enter the contract. On this understanding, the outcomes arising from either choosing to enter the contract or not choosing to do so are irrelevant to determining whether or not the contract is freely entered into. A “substantivist” understanding asserts that whether a contract is freely entered into can depend not only on the existence of procedural freedom but also on the outcomes foreseeably arising from choosing to enter the contract or not to do so, which together with the choices themselves comprise the structure of the choice system.<sup>150</sup> In particular, in the presence of specific kinds of “adverse background conditions” which make the decision not to enter into a contract extremely costly, we may have reason to conclude that a contract was not freely entered into. On a proceduralist understanding, the existence of the procedural freedom of action of countries to join an interna-

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149. See generally JOHN RAWLS, *POLITICAL LIBERALISM* (1993); JOHN GRAY, *TWO FACES OF LIBERALISM* (2000).

150. See, e.g., COHEN, *supra* note 139.

tional agreement or not to do so is sufficient to determine that these contractual obligations, once entered into, morally bind them. On a substantivist understanding in contrast, information about the procedural freedom of action which countries enjoy in regard to whether to join an international agreement must be supplemented by information about the structure of the choice situation in order to determine whether these contractual obligations, once entered into, morally bind them.<sup>151</sup> An appropriately designed system of linkage can give to countries an adequate degree of freedom of choice (such that their entry into the system may be viewed as not unduly coerced) under the substantivist as well as the proceduralist understandings. We defer a fuller discussion of this idea to the section on feasibility considerations below.

This response, however, will not address the concerns of those who hold that international agreements (including the WTO) are objectionable not because they infringe upon state sovereignty but because they infringe upon popular sovereignty.<sup>152</sup> The concern of those who hold such views is that international treaties can limit the capability of a country's populace to exercise its prerogatives to govern itself in an ongoing way. For example, the WTO regime limits the freedom of governments to introduce certain domestic policies subsequent to joining the organization, even if they have widespread popular support. In response, it must be pointed out that, at least in this respect, international agreements are not altogether dissimilar from constitutions, which also limit the freedom of a populace to exercise its collective will. Whether the limits thus set can be viewed as legitimate is typically thought to depend on the content of the constitution as well as its origins (e.g., in a fair prior process of collective choice). Similarly, the acceptability of international treaty obligations in a democratic society depends on the extent to which these obligations help to express and promote ends that are viewed as valuable, and the extent to which they derive from a fair prior process of collective choice.

International agreements need not always limit the ongoing exercise of popular sovereignty, even in the most immediate sense; some treaties may strengthen the likelihood that hitherto excluded persons and groups will have a role in decision-making. Linkage may have such an impact, insofar as it enhances the associational freedoms of workers and strengthens their capacity to engage in collective bargaining, and insofar as it lessens the material constraints they face in doing so.

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151. Not all legally binding contracts are morally binding. See David Singh Grewal *Network Power and Globalization*, 17 *ETHICS & INT'L AFF.* 89, 92-93; see also COHEN, *supra* note 139. We will not address these important concerns at much greater length here, as they seem not to be raised in present discussions of linkage. To the extent they apply to the linkage proposal we make here they would certainly seem also to apply to assessments of whether the entry of countries into the WTO and many other international treaty bodies is unduly coerced.

152. See JOHN GRAY, *FALSE DAWN: THE DELUSIONS OF GLOBAL CAPITALISM* 18 (1998).

## E. Response to Objection Five: Linkage is infeasible

It is sometimes objected that a linkage scheme would be infeasible because it would violate the existing rules of the international trading system. In particular, it is claimed that the rules of the WTO system preclude linkage. For example, it is suggested that a principle central to the WTO (and previous to it the GATT) is the ‘most favored nation principle’ (which requires that all exporting countries’ goods be treated identically by an importing country) and that this principle precludes linkage since linkage potentially requires different treatment of exports from different countries.<sup>153</sup> To demonstrate that a proposal is infeasible, it must be shown that the changes to existing rules envisioned by it would be exceedingly difficult, or indeed impossible, to introduce or sustain. It is true that widely accepted rules may be difficult to overturn. For example, it may be necessary to convince many people of the merit of changing rules in order to change them, and they may have already made plans that are predicated on the existing rules. However, the objection that a proposal to change a system of rules is infeasible simply because the change would legitimate actions prohibited by the rules already in place is not *in itself* a sustainable objection.

It is far from obvious, in any case, that linkage need violate the existing rules of the international trading system. For example, exceptions to the MFN principle already exist. For instance, developed countries have long been permitted in the GATT and WTO to offer special and differential treatment to exports from developing countries. Further, under the Generalized System of Preferences, exports from some developing countries have received favorable treatment relative to exports from others. While the merits of these practices have been questioned, they have until recently been accepted.

The existing legal framework of the world trading system (and in particular the WTO) is open to interpretation and may be more flexible than commonly thought. For example, it can be plausibly argued that existing WTO rules demand that countries offer each other a specified level of market access without requiring that this market access be achieved through any specific combination of measures (such as tariff “bindings” or ceilings). Indeed, they can be interpreted as prohibiting countries from attempting to increase the access of their producers to foreign markets and to decrease the access of foreign producers to domestic markets by any means, including the lowering of labor standards.<sup>154</sup> Finally, it can be plausibly argued that GATT article XX permits a country to promote legitimate objectives (such as environmental or social goals) by using the level of market access it offers to other countries as an incentive to take actions which promote these ends (as long as this use does not constitute “a dis-

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153. Personal conversation with Kamal Malhotra.

154. For a discussion of the issues of legal interpretation involved, see, e.g., Kyle Bagwell, Petros C. Mavroidis, & Robert W. Staiger, *It's a Question of Market Access*, 96 *AM. J. INT'L L.* 56 (2002).

guised restriction on international trade” or “a means of arbitrary or unjustifiable discrimination between countries”).<sup>155</sup> We will not deal further with the objection that linkage is infeasible because it is not permitted by the existing rules of the world trading system, which we conclude is unconvincing. We now turn to the deeper objections that may be offered concerning the infeasibility of linkage.

It is alleged by linkage opponents that linkage is infeasible in two ways. First, an acceptable linkage system will be exceedingly difficult (or indeed impossible) to introduce. Second, a linkage system will be exceedingly difficult (or indeed impossible) to sustain.

For a system of linkage to be deemed feasible, it must be shown that there exists a feasible *transition path* to it, and that if it is brought into being, it would survive, i.e. that it is *stable*. In order to defend a proposal against the charge that it is infeasible it is not necessary to demonstrate that efforts to implement it *will* succeed. It is sufficient to show that the likelihood that efforts to bring it about and maintain it will fail is *less* than some relevant threshold, which we may refer to as P. We will attempt to show that linkage is feasible in this sense. Any such demonstration will require empirical conjectures about which there may be reasonable disagreement. There may also be reasonable disagreement about the threshold of likelihood P that is relevant for determining feasibility in a given context. We cannot and do not therefore offer a definitive argument in favor of the feasibility of the kind of linkage scheme that we envision. Rather, we seek to show that the arguments that critics of linkage have presented to show that such schemes are infeasible are unconvincing. To do so, we will identify conditions under which linkage of an appropriate form could be implemented that could plausibly arise or be brought about through the actions of agents. That successfully implementing the proposal may require prolonged political agitation is not in itself an embarrassment. History is replete with examples of institutional innovations which seemed at first infeasible, either because their coming about appeared to require political conditions that were deemed highly improbable or because it was thought that they would, if brought about, be unsustainable. For example, the prospect for the emergence and sustenance of public support for the poor of a kind that is now widespread in advanced societies was once widely viewed as being very small.<sup>156</sup>

A central issue in determining the feasibility of the proposal concerns the motives that can realistically be attributed to agents (individuals, firms or states). It is clear that some proposals will be feasible if moral agents are assumed to be significantly motivated by other-regarding moral principles

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155. See generally Chang, *supra* note 116; Chang, *supra* note 114.

156. See generally THOMAS ROBERT MALTHUS, AN ESSAY ON THE PRINCIPLE OF POPULATION (1798) and DAVID RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION (1821) for a highly skeptical view of these prospects, based on the perspective that public supports for the poor would generate perverse effects (of sufficient magnitude to undermine the impact of the supports themselves) on population growth and work effort.

but infeasible if the same agents are assumed to be significantly motivated by narrowly self-seeking concerns. There is considerable uncertainty about what motives agents actually have. It seems clear that agents are generally motivated neither purely by other-regarding concerns and commitments to moral principles nor purely by narrowly self-seeking concerns.<sup>157</sup> We take this minimal and unspecific claim as our starting point. We hope to show that on this reasonable understanding of agents' motivations, there is reason to believe that a normatively legitimate system of linkage can be brought about and maintained.

It is interesting to note that agents, including states, often affirm that moral ends inform their actions. Correspondingly, opponents of linkage sometimes argue that states should oppose linkage precisely for the reason that they do possess such concerns.<sup>158</sup> Although the motives that agents hold *at present* are certainly relevant to our judgments about feasibility, the possibility that agents' motives may change with the context (including institutional arrangements) that they inhabit must also be considered when seeking to determine what is feasible.<sup>159</sup>

To show that an international institutional arrangement is feasible, it is not necessary to prove that all countries would participate in the system, or would always comply with its rules. No existing or past international institutional arrangement of note satisfies this demand. On the other hand, it is clear that a sufficient degree of participation and compliance is necessary for us to deem that a 'system' exists.<sup>160</sup> We leave open the precise degree of participation and compliance required to deem that a system of linkage exists, and aim merely to show that the normatively legitimate scheme can be designed in such a way as to secure an adequately high degree of participation and compliance.

For a system of linkage to be feasible it must secure the participation and compliance of countries to an adequate degree. In particular, the system must be incentive-compatible in the sense that an adequate number of countries must find that their aims (however conceived) are more fully advanced by participating in the system and complying with its requirements than not. This requires that the system be designed so as to achieve its objectives by presenting an adequate number of countries with incentives of this kind. This problem of mechanism design may or may not be solvable.

We seek to identify whether a *morally legitimate* system of linkage is feasible. This requirement poses no significant challenge under a proceduralist conception of the conditions under which contracts are freely entered. According to such a conception, the system is legitimate as

157. See, e.g., Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317 (1977); AMARTYA K. SEN, ON ETHICS AND ECONOMICS (1988).

158. See, e.g., TWIN-SAL, *supra* note 18.

159. See, e.g., RAWLS (1971), *supra* note 7.

160. Indeed, it is the norm in international treaties to deem that they have come into force when there have been a sufficient number of signatories or ratifications.

long as countries are procedurally free to choose whether or not to join it, which may be straightforwardly ensured through appropriate design of the rules of entry. However, under the contrasting substantivist conception it may be difficult to design a system of linkage that is both feasible *and* morally legitimate: establishing the set of incentives and disincentives necessary to make the system incentive-compatible *may* make non-membership so costly as to raise legitimate concerns as to whether membership in the system was freely entered into. If the substantivist conception is held to, the system of linkage should be designed so that countries (specifically those facing adverse background conditions) are not presented with incentives and disincentives of a kind and magnitude which gives rise to the concern that their decisions to participate and comply can plausibly be viewed as unduly coerced.

Consider, for example, two alternative designs for a system of linkage, each of which is aimed at creating a structure of incentives that will encourage participation (in the system and compliance with its rules). In the first design, member countries of the linkage system present a poor country ("Haitiopia") with the following choice: participate in the system of linkage or face an economic sanction. In the second design, member countries of the linkage system present Haitiopia with the following choice: participate in the system of linkage and receive a benefit that it would not otherwise receive. Given a sufficient magnitude of sanction or benefit, both systems would meet the incentive-compatibility requirement that they create strong incentives for countries to participate in the linkage system. However, they may not both meet the requirement of moral legitimacy. In both cases, Haitiopia is procedurally free to choose whether or not to become a member. Hence, the linkage system satisfies the proceduralist test of legitimacy irrespective of the magnitude of the benefit or sanction. On the other hand, from a substantivist point of view, sanctions (and even offers) can be unduly coercive. If the sanction would result in highly adverse conditions (such as widespread impoverishment and a breakdown of public security), for example, then it appears that Haitiopia may be unduly coerced by the threat of such a sanction. Similarly, where adverse background conditions severely limit the options available, it may not be possible for Haitopians to consider seriously any action other than that which elicits the benefit, and to offer such a benefit may be unduly coercive. A substantivist perspective on choice and legitimacy requires that we consider the details of the background circumstances of Haitopians and of the choices they are offered before a judgment can be formed as to whether they are unduly coerced to enter the system. In order for a system of linkage to be deemed legitimate from a substantivist perspective, it may have to be carefully designed. If it is not believed that all existing international agreements are illegitimate, then it seems plausible that it is possible to design a system of linkage that satisfies these requirements of legitimacy.

We will now sketch two possible approaches to creating and maintaining a system of linkage.<sup>161</sup>

The first approach we will consider involves the incorporation of linkage into the “single undertaking” which members of a trade agreement (e.g., the WTO) provide to one another. The second approach we will consider involves treating linkage as a “special undertaking” which may be entered into optionally by countries participating in the trade agreements. For simplicity, we refer to the WTO rather than to trade agreements in general in what follows.

It is important to note that some considerations regarding feasibility apply in both of these cases. For example, in discussing whether linkage is indeed “self-defeating or inconsequential” we have argued above that a policy “trade,” in which developing countries offer to promote labor standards in return for additional trade liberalization, aid, or other concessions by developed countries, may be in the interest of both developed and developing countries. As a result, there is reason to reject the claim that linkage is clearly infeasible. However, let us explore the problem of feasibility more fully.

Let us first assess the approach of incorporating linkage into the “single undertaking” provided by WTO members to one another. The single undertaking refers to the idea that each WTO member has a single set of obligations that must be abided by *in toto* rather than “a la carte.” Consider the stability properties of a system in which linkage is incorporated into the single undertaking of WTO members. A system, once it exists, can effectively collapse either due to the exit of participants from the system or due to the widespread failure to act in accordance with the rules of the system. A WTO system incorporating linkage as part of the single undertaking is likely to be stable in each of these respects. This is because the benefits to be gained by membership in the linkage system arise as part of a complete package of benefits provided by WTO membership, which is widely viewed as very attractive. Similarly, compliance with the rules of the system is made more likely by the fact that non-compliance may result in a wide range of consequences, including the possible loss of the range of benefits that would otherwise be gained from WTO membership, and which can only be gained through acceptance of the linkage system. Consider now the feasibility of transition to such a system. Changes or extensions to WTO rules have in the past been instigated by coalitions consisting of a sufficiently large and influential number of countries, typically including some influential rich countries and some influential developing countries. Linkage could come about similarly. Why would countries find linkage to be in their interest and thus join such a coalition?

Some developing countries would wish to join an initial coalition for a number of reasons, of which we will mention four. First, as mentioned, linkage could (insofar as it is in the interest of developed countries) provide a useful bargaining chip with which to gain benefits of diverse kinds,

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161. We recognize that additional approaches may also exist.

including further liberalization of trade, investment, and resource transfers.<sup>162</sup> Second, it could help to protect workers in developing countries by diminishing the propensity of all countries to engage in a damaging “regulatory chill” or “race to the bottom” in labor standards.<sup>163</sup> Third, it could help to promote the interests of some influential groups in developing countries. Workers stand to benefit from the promotion of labor standards. Capitalists may also benefit, although this is less obvious.<sup>164</sup> Fourth, there may be a moral motive for joining. Such considerations may be of different importance in different developing countries, depending on individual circumstances (including transitory political factors). We have not tried to show that these factors would operate decisively in favor of linkage in any one developing country, but rather to argue that they would create reason for a sufficient number of developing countries to view linkage favorably.

There are also reasons why developed countries might wish to join an initial coalition, of which we will mention four. The first reason is that workers in developed countries may have an interest in linkage insofar as it marginally diminishes the competition they face from developing countries which have lower labor costs. Lower labor costs in developing countries may influence employment and wages in developed countries either directly through the reallocation of production (as anticipated in the standard Heckscher-Ohlin-Vanek international trade theory) or through indirect “threat effects.” More importantly, linkage may diminish the propensity of all countries (developed and developing) to engage in a damaging “regulatory chill” or “race to the bottom” in labor standards. It is important to note that from the standpoint of the feasibility concern, it is sufficient that workers perceive that there is such downward pressure on labor standards; it is not necessary that it actually exist. However, as noted above, Bagwell and Staiger have presented a powerful economic argument as to why such downward pressure is indeed likely to occur in the present WTO system, and as to why minimal labor standards can be achieved in

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162. This suggests that proponents of trade liberalization who are critical of its current pace should favor linkage. In the present political climate, it is far from obvious that adopting linkage will bring about a *lesser* degree of trade liberalization than would otherwise take place. See, e.g., Polaski (2004), *supra* note 87.

163. There is considerable evidence of such competitive pressures among developing countries, most recently as a result of the end of the Multi Fiber Arrangement. Unsurprisingly in this context, there is, contrary to popular impression, considerable evidence of support for linkage by developing country labor unions. See, e.g., Griffin et al., *supra* note 74. There is archival evidence that strong support for the labor standards provisions in the proposed post-war ITO was provided at the post-war Havana Conference by representatives of developing countries (in particular, Cuba and India). The authors were alerted to this evidence through conversations with Mark Levinson.

164. The literature on efficiency wages suggests that there may be productivity gains to be achieved as a result of higher wages, although whether this will result from general, as opposed to firm-specific or industry-specific, wage increases depends on the specific mechanism by which it is assumed that wages enhance productivity. Collective action problems among employers can lead to the failure to realize these gains in the absence of determined coordination (as emphasized, for instance, in the literature on the nutrition-productivity relationship).

this system only by extending its scope to in some way incorporate labor standards. The second reason is that capitalists in developed countries may have an interest in linkage. This may be for a variety of reasons. For instance, as a group they may stand to benefit from improved labor standards in developing countries for much the same reason that capitalists in developing countries may do so. The promotion of basic labor standards may improve the quality and reliability of the developing country labor force that is available to developed country capitalists to make use of directly through investment and indirectly through trade.<sup>165</sup> Further, some capitalists in developed countries (in particular, those who operate domestic labor-intensive, import-competing industries) may marginally benefit from measures that reduce the cost advantages of producers abroad. Yet another reason why some capitalists in developed countries may have an interest in linkage is that it would enable them to avoid the public scrutiny and prejudice that often accompanies the perception that they disregard basic labor standards. In particular, those firms that already take steps to protect themselves from this charge may have little to lose and much to gain from a system of linkage, as it may make it less necessary than at present for them to undertake costly private efforts to police the practices of their subsidiaries and suppliers, and diminish the competition that they face from firms that do not promote labor standards. Of course, some individual firms that produce or source goods in developing countries and that rely on a reputation (contrasting with that possessed by other firms) for promoting labor standards as a central means of generating demand for their products, may conceivably prefer to maintain the status quo.<sup>166</sup> The third reason is that countries that become initial members of a pro-linkage coalition may gain a reputational advantage, which may increase the demand for products produced by firms owned or managed in the country, or otherwise benefit them.<sup>167</sup> A fourth reason is that they may be motivated to support linkage for specifically moral reasons.

Would this "single undertaking" approach to implementing linkage be morally legitimate? In particular, would it avoid being unduly coercive? There are two kinds of concerns which may be raised about the legitimacy of introducing linkage in this way. A first concern may be raised by those who believe that the WTO is already unduly coercive and therefore morally illegitimate. It may be argued that a modified system involving linkage, incorporating it into the single undertaking, will also be unduly coercive, *a fortiori*. A second concern may be raised by those who believe that the WTO is at present a morally legitimate system, but who may think that

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165. The possible collective action problem among employers may otherwise prevent productivity-enhancing investments in the labor force.

166. Of course, on the other side, there is the risk to firms that linkage will reduce the ability of firms to threaten workers in developed countries with relocation as a means of gaining concessions. Such relocation threats may be a determinant of profits in industries in which rent-sharing takes place.

167. See, e.g., Elizabeth Becker, *Low Cost and Sweatshop-Free*, N.Y. TIMES, May 12, 2005, at C1.

linkage will deprive it of its legitimacy because undue coercion will be required to implement and sustain it once linkage is incorporated into the single undertaking.

Amongst those who share the first concern (that the existing WTO is already unduly coercive) there are those who believe that a modified WTO system (perhaps significantly different from that which exists at present) incorporating the single undertaking is feasible and would be morally legitimate, and those who believe that *all* feasible WTO systems incorporating the single undertaking would be morally illegitimate. It can be argued in response to the first group that a revised WTO system that met the requirements of legitimacy would likely *remain* legitimate if it were to incorporate linkage. It is not clear why the incorporation of an appropriate form of linkage would disturb the legitimacy of such a system. Those who believe this to be likely must explain why. Indeed, the incorporation of linkage may be among the revisions to the WTO system, which are required in order for it to become legitimate. The second group cannot, by definition, be convinced that even a radically revised WTO system incorporating a single undertaking could be morally legitimate. However, we will present reasons below why these critics may have reason to accept the legitimacy and feasibility of a linkage system based on a separate undertaking.

Those who possess the second concern (i.e., who believe that the WTO is at present a morally legitimate system but who fear that linkage will deprive it of its legitimacy because it will require undue coercion to implement and sustain) should be reassured by the set of principles that we have identified above, which would protect a system of linkage against the charge of moral illegitimacy. Unless these critics can present reasons why these principles are insufficient to guarantee the legitimacy of a linkage system, their concerns appear unfounded. Based on these considerations, we reject the view that a morally legitimate system of linkage based on a single undertaking is evidently infeasible to bring about and sustain.

Let us now consider the second approach, in which linkage is adopted as a “separate undertaking” entered into optionally by some countries as a set of commitments that is additional to other trade-related commitments they may already have. We address the transition to the linkage system first. Why would a country participate in such a system of linkage? A developing country might wish to participate for at least six reasons, each of which has been discussed in detail above. First, the linkage system offers participants the possibility of gaining a *quid-pro-quo* in the form of market access, investment or resources. Second, a participant may benefit from the reputation effects associated with participating in the system. Consumers may wish to purchase preferentially goods produced in member countries, and socially responsible investors may wish to locate there. Firms concerned about consumer disapproval of labor standards violations will find it advantageous to locate in such countries. Third, it is in the interest of workers in a country for it to participate in the system. The reputation effects mentioned above only strengthen our earlier reasoning.

Fourth, it may be in the interest of capitalists in the country for it to participate in the system. Again, reputation effects strengthen the reasoning presented above in relation to the single undertaking. Fifth, participating in the system is a way of solidifying ties with the other countries that are members, which may serve expressive ends or have instrumental benefits. Sixth, there may be specifically moral motivations for participating in the system.

A developed country might wish to participate for at least five reasons, each of which has again been discussed in detail above, in relation to the single undertaking. First, it may benefit from the reputation effects associated with joining the system. A developed country that participates in the system gains the benefit of “appearing to be a moral leader and a friend of workers’ interests.” Second, it is in the interest of workers in the country for it to participate in the system, for the reasons outlined above, including diminishing the propensity of all countries to engage in a damaging “regulatory chill” or “race to the bottom” in labor standards. Third, it may be in the interest of capitalists in the country for it to participate in the system, for the reasons outlined above. Fourth, participation in the system is a way of solidifying ties with the other countries that are members, which may serve expressive ends or have instrumental benefits. Fifth, there may be specifically moral motivations for participating in the system.

Let us now consider the stability properties of a system of linkage involving a separate undertaking. A system, once it exists, can effectively collapse either due to exit from the system or due to the widespread failure to act in accordance with its rules. There is reason to believe that at least some countries would have incentives to join the system. These reasons would also provide incentives to stay in the system. The reputation effects of joining, for example, may be more than undone by withdrawing from the system. There is no reason for us to think that the reasons why countries joined the system would disappear over time, even if the system sometimes results in individual rulings that are not in their interest.

Compliance with the rules of the system of linkage can be promoted by designing the system of linkage in a manner that gives countries compelling incentives. The role of the rule-based mechanism in governing the system, and in defining the consequences of non-compliance will play an important role here. Since large sanctions for non-compliance may trigger withdrawal from a linkage system based on a separate undertaking, positive incentives, public pressure and moral suasion will likely need to play a significant role. Ultimately, compliance results from the fact that the countries that participate are self-selecting. In joining the system they have affirmed their willingness to comply with its requirements.

Finally, let us consider the moral legitimacy of the separate undertaking approach. As before, we may consider the legitimacy of the system from proceduralist and substantivist perspectives. The procedural legitimacy of this approach is as strong as in the single undertaking model, since countries are free not to participate. From a substantivist perspective, the legitimacy of this approach is if anything stronger than in the case

of the single undertaking approach since the costs of non-participation are lower. Based on these considerations, we reject the view that a morally legitimate system of linkage based on a separate undertaking is evidently infeasible to bring about and sustain.

We have argued that there exist two plausible approaches to creating and maintaining a system of linkage that are morally legitimate. Critics of linkage may contend that although our arguments are sufficient to show that efforts to achieve linkage may not necessarily fail, they are not sufficient to show that they will fail with likelihood less than the threshold required,  $P$ , and that this turns the argument in their favor. Those who argue in this way must show two things: they must justify their chosen threshold  $P$ , and they must argue convincingly that we have not shown above that the likelihood of failing to achieve linkage is less than this level.

There are thus two types of disagreements that can arise with respect to feasibility: disagreements about whether the threshold is met and disagreements about what the threshold should be. Disagreements about whether the threshold is met are empirical in nature, for example relating to divergent estimates of the power of different agents to change the world through specified actions. Disagreements about what the threshold should be are ultimately normative in nature (though they are influenced by empirical facts). This is because the charge that a proposal is infeasible (in the sense that efforts to achieve it are likely to fail with likelihood  $P$ ) is intended to dissuade efforts to bring it about. The mere fact that efforts to achieve a desirable outcome are likely to fail is not reason enough to neglect those efforts, unless there is a cost (including an opportunity cost) to doing so for which we ought to account. Whether such costs are sufficient that they ought to dissuade us from striving to achieve the desirable outcome will depend on their nature and magnitude, and the normative significance that we attach to them. The appropriate threshold  $P$ , which determines linkage's feasibility, cannot be specified without reference to broader judgments, concerning for instance the value to be attached to attaining the ends of the scheme and the disvalue to be attached to failing to attain these ends, the availability of alternative means of achieving the same ends and the likelihood that these alternative means will fail or succeed. It is necessary to take note of the actions that are available, the outcomes which these actions could result in, the likelihoods associated with each of the outcomes, and the value to be attached to distinct potential outcomes in order to make well-founded decisions. Thus, the identification of the threshold of likelihood according to which infeasibility is to be judged demands addressing a problem of decision making under uncertainty, requiring attention to a range of relevant normative and empirical considerations.

#### F. Outcome of the Constructive Procedure

We have identified features of a linkage system which, appropriately understood, are sufficient for it to withstand the standard objections to linkage. We saw earlier that in order for proposition L to be satisfied, the

system of linkage to which it refers must at the least *be unimposed, be transparent and rule-based, and involve adequate burden sharing*. The constructive procedure has once again highlighted these requirements and has led to the identification of two additional requirements, which are that a linkage system must incorporate measures that ensure that adequate account is taken of viewpoints within states, and be applied in a context-sensitive manner. Therefore, for Proposition L to hold, it is sufficient that the linkage system to which it refers *satisfy the following requirements, as defined above: it should be unimposed, transparent and rule-based, involve adequate burden sharing, incorporate measures that ensure that appropriate account is taken of viewpoints within states, and be applied in a context-sensitive manner*. We have noted that a fair and effective system of linkage will likely demand action to promote labor standards not only from countries that are the sites of production, but also by countries in which firms involved in the process of producing or marketing goods are located, owned or managed. We have argued that there is reason to believe that systems of this kind can be brought about and maintained. Therefore Proposition L is satisfied.

## VII. Step Five: A Sketch of a Linkage System

We have identified above a class of linkage systems that withstands the standard objections that are made to such systems. In order to provide a more concrete starting point for discussion, we offer below a detailed description of a member of this class.

Any system of linkage will require administration. Who should be responsible for this administration? In order to answer this question we should take note of some relevant facts. First, there are existing institutions (in particular the WTO) that govern rights to trade. If a system of linkage is put in place, these institutions will either have to cede some of their responsibilities or incorporate the principles of linkage into their activities. Suppose that the members of a linkage system also belong to a trade agreement which guarantees them a right to trade with one another. Since the linkage system makes their right to trade with one another conditional upon promotion of labor standards, but the trade agreement does not, the rights guaranteed by the two systems conflict. Second, there are existing institutions (in particular the ILO) that have authority to define, monitor, and promote labor standards.

One way to maintain the mandates and relevance of existing institutions (such as the ILO and the WTO) while introducing linkage is to make them jointly responsible for its administration. We emphasize that by doing this we do not thereby assume either the legitimacy or the desirability of the current form of these institutions. It is possible that both institutions should be substantially reformed in order to play a legitimate role in the system of linkage sketched below.<sup>168</sup> One means of deferring to the

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168. It is hardly difficult to find flaws in these institutions.

expertise of the ILO in matters of labor standards and the WTO in matters of trade is to propose an Agency for Trade and Labor Standards (ATLAS) jointly governed by the WTO and ILO, to administer linkage. We sketch the elements of such a proposal below. Many features of the proposed system are already part of the ILO's approach to labor standards promotion even in the absence of linkage.<sup>169</sup>

#### A. Activities of the Agency

The Agency will undertake two different types of activity. The first is *developmental*, while the second is *adjudicative*. In its developmental role, the agency will help countries to identify and execute measures that promote adherence to labor standards. In its adjudicative role, the agency will determine whether serious neglect of labor standards has occurred, and if so what steps ought to be taken by the country to remedy this neglect. Neither of these activities will alone suffice to address a complex global problem such as inadequate promotion of labor standards. Neglect of adjudicative activities may both undermine the rule-based nature of the regime and lead to inadequate incentives for countries to conform to their obligations under the system, whereas neglect of developmental activities may lead to an inadequate focus on constructive measures that can help to promote labor standards.

#### B. Instruments of the Agency

##### 1. *The Secretariat:*

The primary function of the secretariat is to provide administrative support.

Every country will be invited periodically (for example, every two years) to submit a "labor standards progress report" to the secretariat outlining the extent to which it is meeting its obligations under the system to promote labor standards at home and abroad. These obligations include those to share the burdens generated by efforts to promote labor standards abroad and promoting good practices by firms registered or managed in the country or owned by its citizens. The report will identify priorities for action. The requirement to submit such a report is one that will bind *all* member countries, whether rich or poor. A country's repeated failures minimally to meet its agreed obligations to share burdens and to foster sound practices on the part of its firms may expose it to censure or withdrawal of preferences, just as a country's repeated failure minimally to ensure that basic labor standards are adequately promoted on its territory may similarly expose it.

The secretariat will make publicly available the labor standards progress report submitted by each country and related documents resulting from the scrutiny of this progress report by a peer-and-partner-review com-

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169. See INTERNATIONAL LABOUR ORGANIZATION, *supra* note 8 (providing for periodic self-reporting by countries, reviews of those reports by experts, and the provision of technical assistance in response to needs identified in these reports).

mittee (introduced below). The secretariat will provide aid and technical assistance to countries to formulate and implement their action plans, whenever requested. It will maintain and develop required expertise internally and maintain strong links with organizations and individuals who possess relevant expertise.

The secretariat will manage a multilateral burden-sharing fund, collecting contributions from countries and disbursing them to countries to support their action plans. These funds will be disbursed according to various criteria, and will be triggered by the recommendation of a peer-and-review committee (introduced below), the recommendation of the linkage system's adjudicative body (introduced below), or the request of countries themselves.

The secretariat will actively provide information to the worldwide public concerning member countries' current obligations under the system of linkage and the procedures for expressing concern or initiating an investigation.

The staff of the secretariat will be selected on the basis of open competition according to merit-based criteria. The performance of the secretariat will periodically be reviewed by a governing council consisting of representatives of the ILO, the WTO and member countries and by a visiting committee of experts. The reports of the governing council and the visiting committee will be publicly distributed. The governing council will have final authority over the organization and operation of the secretariat. Its individual members will be elected for single terms without possibility of re-election.

## 2. *Peer and Partner Review Committees:*

The governing council of the Agency will periodically constitute a "peer-and-partner review" committee (PPRC) to assess each country's progress, according to transparent criteria established by the linkage agreement. The PPRC's membership will be chosen to be broadly representative, and include members from geographically diverse developed and developing countries. Its members will include representatives of states and non-state organizations, including workers' organizations. The PPRC will assess each country's labor standards progress report. It may supplement public sources and submissions with its own research concerning practices of a country's firms and conditions prevailing in the country. The PPRC may conduct site visits and public consultations in any member country, or otherwise gather evidence. For example, a PPRC may examine conditions at production sites in countries other than the country being reviewed if firms owned or registered in the country being reviewed operate there.

The secretariat will provide advice and technical assistance to the PPRC as requested. The PPRC will recommend actions that the country can take to enhance its compliance with the requirements of the system. The country will then be invited to respond to these recommendations through the provision of an action plan for promoting agreed labor stan-

dards, including explicit goals, time-bound schedules, and verifiable targets. The PPRC will respond formally to the country's action plan. It may make public recommendations as to how a country should modify its action plan. It may recommend the disbursement of funds from the multi-lateral burden-sharing fund to support the action plan as a whole or specific components of it. If a country is deemed to be in serious breach of its obligations under the system then the PPRC may thus inform the advocate's office, for its possible action.

### 3. *The Advocate's Office:*

The advocate's office will investigate potentially egregious violations of agreed labor standards and determine whether or not formally to initiate a complaint in the adjudicative body. It may do so on its own initiative or as the result of a notice brought to it by a PPRC, a country or a member of the public. In addition to filing complaints itself, it will provide information and assistance to potential complainants who wish to submit grievances to the adjudicative tribunal.

### 4. *The Adjudicative Tribunal:*

The adjudicative tribunal will decide on the merits of concerns brought to its attention and identify actions that are feasible and desirable for countries to undertake. Any person, organization, or country may submit a complaint to the adjudicative body. The tribunal will decide which concerns to consider (on the basis of established criteria). The tribunal may commission studies and research that it finds pertinent to the investigation of concerns registered with it. Upon completing their study of an issue, the tribunal has one of a number of options. It may determine that a concern has no merit and prescribe no actions. Alternatively, it may rule that the concern is substantiated and call for one of a number of actions. These may include: recommending that technical and financial assistance be disbursed to a country from the burden-sharing fund to help it promote agreed labor standards; requiring that a country formulate an action plan to promote agreed standards and report back in due course on the actions that it has taken; and, as a last resort, recommending that other countries (perhaps all of them) withdraw trade preferences or other supports accorded to a country in a commensurate manner and to an appropriate degree. The members of the tribunal will be elected by an appropriate super-majority of the governing council on the basis of their qualifications, including technical expertise and contribution to geographical and social diversity.

### 5. *Participation in the System of Linkage*

WTO rules must be made consistent with the rules of the system of linkage. It does not follow from this, however, that all WTO members must be bound by the rules of the linkage system. Indeed, at an early stage in the introduction of a system of linkage it seems more likely that it would form part of a "separate undertaking" (i.e., a system which WTO members

join by choice) rather than a part of the “single undertaking” of WTO membership (that binds all WTO members). At least some countries are likely to find benefits in joining a linkage system. Moreover, the voluntary character of such a system would defuse fears that it constitutes ‘an attempt to impose the agenda of developed countries.’ Over time as confidence in the system of linkage increases, it is possible that it will develop into a system that all countries enter.

## Conclusion

We have demonstrated that there exists a class of proposals for linkage that would withstand the standard objections that are advanced against such proposals. Indeed, we have argued that there are systems of linkage that would help to promote a goal of both linkage opponents and advocates (improved living standards of workers in poorer countries and the well-being of the globally less advantaged) to a larger extent than would any proposals for the governance of international trade that do not include linkage, without notably detracting from other goals that they have.

Proposals for linkage have been criticized on the ground that they allegedly reflect the priorities of developed countries, and are likely to harm the interests of those they are meant to help. However, it has been shown above that this conclusion rests on a narrow interpretation of the form that linkage must take. An appropriately designed system of linkage may in fact become a powerful aid to the interests of poorer countries by decreasing the costs that they face at present when pursuing policies to enhance labor standards. Further, such a system may powerfully aid the interests of less advantaged persons in poorer countries by creating incentives for governments to implement policies that benefit them. A linkage system can extend the range of considerations to which transparent rules are applied in the governance of international trade, and embody a compact between countries through which they advance shared moral aims and equitably distribute the burdens that arise in pursuing these aims.<sup>170</sup>

The debate on linkage has been overly narrow due to a lack of institutional imagination. The assumptions of its participants regarding the form that linkage must take have led to a widespread conclusion that it is evident that linkage is undesirable. We have challenged this assumption. We have not argued that bringing about linkage should be the most important priority for action. We have simply claimed that the possible benefits of a linkage system of the type we have described are sufficient to warrant fur-

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170. The present Director General of the WTO, Pascal Lamy, has noted that there is at present an “imbalance of our international legal order” and has argued that it is therefore desirable to develop an understanding of WTO law as complementing and supporting other international legal orders which focus on non-trade concerns, as well as to strengthen these other legal orders. See Pascal Lamy, Director-General of the WTO, *The Place and Role of the WTO (WTO Law) in the International Legal Order*, Address before the European Society of International Law (May 19, 2006) available at [http://www.wto.org/english/news\\_e/sppl\\_e/sppl26\\_e.htm](http://www.wto.org/english/news_e/sppl_e/sppl26_e.htm). Our proposal appears not to be at odds with an emerging interpretation of WTO jurisprudence.

ther intellectual and practical exploration. Whether linkage should be a priority for action cannot be determined in advance of such exploration. This is true not only of proposals for linkage but of all policies and institutional changes that may be proposed and which have yet to be brought about. There are of course other competing priorities for action, the choice among which ought to depend upon the probable long-term effects of pursuing them. The proposal for linkage advanced above is only one of many possible means of increasing the extent to which global economic institutions and rules better serve the interests of globally less advantaged workers specifically and of globally less advantaged persons generally.

Should linkage of the kind we have described turn out to be infeasible because certain influential agents remain implacably opposed to it (perhaps for no other reason than that it would somewhat erode the privileges they enjoy at present), this would show not that linkage is undesirable but that reforms that would make international institutions more just are being resisted by those who do not prioritize the goal of justice. At the least, this finding would help us better to ascribe moral responsibilities for the inadequacies of the world in which we live. Whether linkage is infeasible for this or any other reason can only be determined in the crucible of experience.

At the heart of the reasoning we have adopted is the idea that worthy institutional reforms must bring about desirable consequences, involve legitimate processes, and be possible to implement and sustain. Through reasoning we have tried to free the imagination. This is but a beginning. Practical knowledge and worldly experiment can make the imagined real.

## APPENDIX: Empirical Evidence on the Likely Effects of Improvements in Labor Standards

We have shown above that the arguments from economic theory that are most often adduced against linkage not only fail to demonstrate that linkage is undesirable, but suggest instead that the opposite may be true. In this appendix, we consider the empirical evidence concerning the likely effects of improvements in labor standards in developing countries.

It is widely feared that enhanced labor standards will diminish the comparative advantage possessed by countries with relatively low labor costs, and thus impede their ability to export relatively labor-intensive goods to developed countries. It is argued that the incentive to invest in such countries in order to export to developed countries will thereby also be diminished. This will in turn, it is suggested, damage the development of currently poorer countries.

Does current evidence offer support for these fears? At least two types of evidence are relevant to examining this question.

### *Estimating the Impact of Labor Increases: Accounting Exercises*

The first type of evidence concerns the share of total (direct and indirect) labor costs embodied in the unit production costs of goods which are exported from developing countries to developed countries. If this share (which we will refer to henceforth as the “share of labor costs in unit costs”) is low, then the argument that increases in labor costs will significantly erode the relative advantages which poor countries possess in producing labor intensive products may be implausible.<sup>171</sup> For example, if the share of labor costs in unit costs is twenty percent, then a doubling of labor costs would in turn result in a twenty percent increase in production costs. If the initial cost advantage associated with producing the good in poor countries is large enough then this increase would not be sufficient to eliminate the cost advantage of poor countries in the production of the good. Existing evidence suggests that the cost advantages associated with producing goods that employ labor intensively in their production in developing countries rather than developed countries are indeed significant.<sup>172</sup>

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171. We use the phrase “labor intensive products” to denote goods that could be the subject of export-oriented production in labor abundant countries because their production in all countries involves the relatively intensive use of labor as compared to other factors of production. There are of course technical problems which are involved in presenting this definition, which following the custom we sidestep.

172. The question may quite reasonably be raised as to why a good is produced at all in developed countries if there are large cost disadvantages associated with production of the good in developed countries. One answer may be that the figures compared refer to variable costs. Developed country production of labor-intensive goods, which would otherwise be uneconomical, may occur due to the existence of prior investments in plant and fixed capital. Developed country production may also take place due to other advantages it may have, for instance proximity to markets (making it possible, for instance, to meet “just-in-time” production demands). See FREDERICK H. ABERNATHY ET AL., *A STITCH IN TIME: LEAN RETAILING AND THE TRANSFORMATION OF MANUFACTURING* 269 (1999). Finally, there may be less developed country production of the *same* goods as

What is the evidence on the share of labor costs in unit costs? Evidence from individual industries and countries suggests that the share of direct labor costs in unit costs is relatively low. Of course, these figures may significantly understate the share of labor costs in unit costs, as they do not account for the labor costs indirectly embodied in the cost of other inputs to the production process.

Table 1: Some evidence on the share of direct labor costs in unit costs

“Most knowledgeable experts agree that in-country production costs in these [developing] countries rarely exceed 10 percent of the end-user prices of these products in MNC major markets, which are usually in industrially advanced countries. It is estimated that direct labor costs range from 2 to 5 percent of the ex-factory cost of the product.” <sup>173</sup>
“A well-known brand of sneakers may retail for \$75 in the United States and contain less than \$2 in direct labor costs in Vietnam, China or other overseas locations.” <sup>174</sup>
“A typical branded men’s polo shirt retails for between \$30 and \$50 in the United States, whereas the direct labor cost of manufacturing this shirt in a developing country is less than \$1.” <sup>175</sup>
“Tang Yang Indonesia . . . gets around \$13 for every pair of shoes it makes for Reebok, paying only \$1 for labor . . . The shoes typically sell for \$60 to \$70 a pair.” <sup>176</sup>
The average share of direct labor costs in the retail price of toys produced in southern mainland China is very low (mean across types of toys: 2.50 percent and the standard deviation across types of toys: 1.34 percent). <sup>177</sup>
The share of labor costs of non-supervisory workers in unit costs of men’s casual shirts produced in Mexico is 11.2 percent. <sup>178</sup>
The share of wages in total production costs for a television manufacturer in Tijuana, Mexico is 10 percent. <sup>179</sup>

In order to advance beyond the existing (largely anecdotal) evidence, we have undertaken a calculation of our own, based on the UNIDO industrial statistics database.<sup>180</sup> From this database, we have calculated for the year 2000 the share of direct labor costs (wages and salaries) in total input

are produced in developing countries than is at first suggested by the generally available data, which covers highly aggregative categories of goods. Specific goods even within labor intensive production (especially those which require higher skills and specialized knowledge to produce) may still be most economical to produce in developed countries, whereas other goods may be wholly uneconomical to produce in developed countries at prevailing wage rates. Although the mass production of T-shirts is quite likely to take place in a developing country, the production of an expensive dress shirt in a small batch that follows the pattern of a fashion designer in a metropolitan capital is far less likely to be undertaken in a developing country.

173. SETHI, *supra* note 118, at 58.

174. *Id.*

175. *Id.*

176. *Id.* at 59.

177. See HONG KONG CHRISTIAN INDUSTRIAL COMMITTEE, *supra* note 119, table 2.

178. See Pollin et al., *supra* note 93, table 5.

179. See Ian Carson, *The Tijuana Triangle: Mexico’s Northern Border Is Modern Manufacturing on the Move*, THE ECONOMIST, June 20, 1998, at S3.

180. U.N. INDUSTRIAL DEVELOPMENT ORGANIZATION, INDUSTRIAL STATISTICS DATABASE AT THE 3-DIGIT LEVEL OF ISIC (INDSTAT3 Rev. 2) (2004) [hereinafter UNIDO].

costs and in the total (ex-factory) value of output for enterprises producing manufactured goods of any kind in all the countries for which sufficient data existed (about forty in total, with some variance in this number across industries). Direct labor costs as a share of total input cost were calculated by dividing the reported “wages and salaries of employees” by total input costs (conceived based on the definitions in the UNIDO database as the value of output minus value added plus wages and salaries). Direct labor costs as a share of the total ex-factory value of output were calculated by dividing the reported “wages and salaries of employees” by the value of output. The results of this calculation for distinct income-based country classes and the highly aggregative “total manufactures” category of goods are reported in Table 2 below. Results for all specific industries at the 3-digit level are available online.<sup>181</sup> The labor costs included refer to all wages and salaries, including those of managerial workers.

As may be seen from Table 2, the average share of direct labor costs in the total input costs for “total manufactures” is 9.9 percent for the low income countries and 12 percent for the lower middle income countries. As may also be seen from the table, the average share of direct labor costs in the total ex-factory value of output for “total manufactures” is 7 percent for the low income countries and 8.5 percent for the lower middle income countries in the sample. These results do not account for the difference (arising from marketing, transportation and markups) between the ex-factory value of output and its retail value, and therefore substantially overstate (perhaps by a factor of ten, as suggested by Table 1) the share of direct labor costs in final retail costs. On the other hand, the data is based on *all* manufacturing enterprises (not just those producing goods for export). If manufactured goods produced for export are more labor intensive than those produced at home for home consumption, then the figures reported below will understate the share of labor costs in total costs and in the value of output of exported manufactures. It is necessary to study exported items specifically before coming to firmer conclusions. Unfortunately, there is no data source that makes this straightforward to do.

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181. See Summary of Data on the Share of Direct Labor Costs in the Total Costs of Surveyed Manufacturing Enterprises (by industry and income level of country), available at <http://www.alternatefutures.org>.

Table 2: Wages and Salaries as a Share of Input Costs and the Value of Output<sup>182</sup>

"TOTAL MANUFACTURES"	WAGES AND SALARIES IN 2000 AS:	
	SHARE OF TOTAL INPUT COST	SHARE OF TOTAL EX-FACTORY VALUE OF OUTPUT
AVERAGE (HIGH INCOME COUNTRIES)	0.165	0.135
STANDARD DEVIATION	0.046	0.045
AVERAGE (UPPER MIDDLE INCOME COUNTRIES)	0.12	0.093
STANDARD DEVIATION	0.04	0.031
AVERAGE (LOWER MIDDLE INCOME COUNTRIES)	0.12	0.085
STANDARD DEVIATION	0.029	0.02
AVERAGE (LOW AND MIDDLE INCOME COUNTRIES)	0.116	0.086
STANDARD DEVIATION	0.034	0.025
AVERAGE (LOW INCOME COUNTRIES)	0.099	0.07
STANDARD DEVIATION	0.03	0.012

It would be right to object that these figures may be relatively uninformative for the present purpose, as a general improvement in labor standards would raise the indirect as well as the direct labor costs of production, and thereby have a much larger impact than these figures suggest on final costs of production in developing countries. Unfortunately, we have not been able to identify any studies that calculate these indirect costs for industries of interest in developing countries. Such a study would have to identify the labor costs incurred at each stage of a (possibly quite complex) domestic and international production chain culminating in the production of a final good for export.

We have attempted to address this concern through an analysis based on the empirical data reported above and some simplifying assumptions. Using a simple arithmetical model we can calculate the total (direct and indirect) labor costs that would arise under various assumptions.<sup>183</sup> We allow the number of stages of the process leading to the production of a good in the "South" to vary between two and five. We also allow the share of direct labor costs in the total costs specific to each stage either to be a constant or to vary in an increasing or decreasing arithmetic progression.<sup>184</sup> We constrain the share of direct labor costs in total costs at the

182. Sources: UNIDO, *supra* note 180; see World Bank Country Classification, available at <http://worldbank.org/data/countryclass.html>.

183. An Excel spreadsheet containing the arithmetical model is available at <http://www.alternatefutures.org>.

184. Which assumptions are appropriate is far from obvious. There is some reason to believe that in developing countries, the stages of production antecedent to the final one may be more labor-intensive, but also that they may employ workers at lower wages. The net impact on the share of labor costs in total costs is ambiguous.

final stage to correspond to that observed in the UNIDO data. On the basis of these assumptions, it is straightforward to calculate the share of total (direct and indirect) labor costs in the unit costs of manufactured goods in the South ( $\theta$ ). Total labor costs are much higher than direct labor costs alone and increase with the number of stages of the production process that are assumed. Finally, by assuming a certain ratio of the unit cost of production of the good in the North as compared to the South ( $\lambda$ ),<sup>185</sup> it is possible to calculate the multiple by which wages in the South would have to increase in order to eliminate the cost advantage of production in the South. We refer to this multiple ( $\alpha$ ) as the “indifference ratio.” It is defined by the requirement that  $\alpha\theta + (1 - \theta) = \lambda$ . I.e.,  $\alpha = (\lambda + \theta - 1)/\theta$ . Implicit in the calculation of an indifference ratio is constancy of the production technique (and hence, of the labor and non-labor inputs employed to produce a unit of output). Of course, if adjustments to the production technique as a result of increases in labor costs are permitted, this will only increase the extent to which wage increases in the South may be absorbed without eliminating the cost advantage of Southern production, since any adjustments made by producers can only decrease their costs. Moreover, if improvements in labor productivity result from the increase in wages or labor standards (for any of a range of reasons, such as the existence of nutrition-productivity linkages) this too will increase the extent to which wage increases in the South may be absorbed without eliminating the cost advantage of Southern production. As well, since the Southern labor costs estimated in the data refer to all wages and salaries, including those of managerial workers, the multiple by which labor costs of line workers may be increased without eliminating the cost advantage of Southern production may be significantly underestimated by these figures. From these standpoints, the estimates provided of indifference ratios are conservative.

Since the ratio of the unit cost of production of goods in the North as compared to the South is in general unknown, we calculate indifference ratios for various scenarios (ranging from a cost differential of 2:1 to a cost differential of 10:1).<sup>186</sup> We present results for a benchmark scenario in

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185. Of course, in practice the good may not be economical to produce in the North. In that case, this ratio is best interpreted as that which *would* prevail if the good were to be produced in the North (at the prevailing factor prices, using cost-minimizing technique).

186. This ratio is known for specific goods and countries. In 1997, the unit cost to retailers of a casual men’s shirt produced in the U.S. was estimated \$7.58 and the unit cost to retailers of a casual men’s shirt produced in Mexico \$4.45. Unit costs of producing clothing items in other developing countries have been deemed comparable to those in Mexico. See ABERNATHY ET AL., *supra* note 172, at 223-42; see also Pollin et al., *supra* note 93. In 2001, the unit cost to retailers (“unit price realization”) of a men’s shirt was \$4.21 in Bangladesh and \$4.02 in China. See Gopal Joshi, *Overview of Competitiveness, Productivity, and Job Quality in South Asian Garment Industry*, in *GARMENT INDUSTRY IN SOUTH ASIA: RAGS OR RICHES?* 8 (Gopal Joshi ed., 2002). In 2003, the average export price for trousers, underwear, woven shirts and knit shirts was \$1.84 in China, \$7.63 in the U.S., and \$4.42 in other exporting countries. See NAT’L COUNCIL OF TEXTILE ORGS., *ANALYSIS SHOWS CHINESE APPAREL PRICES 76% BELOW U.S. PRICES AND 58% BELOW REST OF WORLD’S PRICES* (Dec. 15, 2004), available at <http://www.ncto.org/newsroom/pr200414>. asp. In December 2004, with the assistance of the UNITE union, the authors inter-

which the share of direct labor costs in unit costs is assumed to be constant across stages of production, and equal at each stage to that reported in the empirical (UNIDO) data for 2000. In Table 3, we present these results for “Total manufactures” and selected industries. The full range of tables is available from the authors, but may also be constructed by the reader employing her own preferred scenario (using the provided spreadsheet and UNIDO data). It may be observed that the multiple by which labor costs must be increased across the board to eliminate the cost advantage of Southern production is usually very large, and is at least three even under a highly conservative assumption (that the unit cost of manufacturing a good in the North is only twice the unit cost of manufacturing the same good in the South). In short, there is room to *at least* triple real wages of workers in the South without there arising any possibility of the cost advantage of Southern production being lost. Of course the possibility of substitution occurring among Southern producers is not considered in this counterfactual. However, the likelihood of such substitution may be less than is widely believed. There is evidence to suggest that labor costs are a less important determinant of decisions concerning which developing country to locate production and investment in than are infrastructure quality, reliability of suppliers and other considerations.<sup>187</sup>

A related but distinct question concerns the impact of higher Southern labor costs on final retail prices and thereby on consumer demand. As already argued, the ratio of costs of production to final retail prices of most Southern exports sold in northern markets is small, as a result of which these sales effects may be minor. This case is made very ably in the context of global apparel production by Pollin, Burns and Heintz, who demonstrate that a doubling of wages of non-supervisory production level workers in the garment industry in Mexico would result in increases in final retail prices of garments exported to the U.S. of between one and three percent.<sup>188</sup>

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viewed New York manufacturers of girls' specialty dresses engaged in global subcontracting of garment production. We were told that costs of production in Mexico are roughly one-third those in the U.S. and costs of production in China and Sri Lanka are roughly one-fifth of those in the U.S. The assumption of a ratio of unit costs of about two seems, in light of these reports, to be wholly reasonable.

187. See, e.g., George Wehrfritz & Alexandra Seno, *Succeeding at Sewing*, NEWSWEEK, Jan. 10, 2005, at 38 (“According to AT Kearney, labor for a shirt made in Bangladesh runs just \$1.52, compared with \$2.28 in China, but after factoring in materials and transportation, the total cost of the Chinese shirt is \$11.15—almost a dollar cheaper.”). Labor costs in the garment industry are lower in Bangladesh than in China but overall production costs are lower in China than in Bangladesh: Keith Bradsher, *Bangladesh Survives to Export Again: Competition Means Learning to Offer More Than Just Low Wages*, N.Y. TIMES, Dec. 14, 2004, at C1. The relative unimportance of labor costs as compared to other considerations that play a role in the decision to source garments in one developing country rather than another is forcefully emphasized in a recent guide for garment industry buyers. DAVID BIRNBAUM, BIRNBAUM'S GLOBAL GUIDE TO WINNING THE GREAT GARMENT WAR (2000).

188. See Pollin et al., *supra* note 93, table 7.

*Estimating the Impact of Labor Standards Improvements: Cross-Country Comparisons*

The second type of evidence concerns the apparent impact of labor standards on export performance and foreign direct investment, as revealed through cross-country comparisons. A number of such studies, most adopting regression analysis, have been conducted recently. Such studies are difficult to interpret for a variety of reasons. For example, commonly used measures of the enforcement of labor standards (such as ratification of ILO conventions) may not signify actual enforcement. More importantly, the association of labor standards enforcement with economic outcomes (export performance or intake of foreign investment) may be informative with regard to the impact of unilateral improvements in labor standards, but may be entirely uninformative with regard to the potential impact of *coordinated* improvements in labor standards. Such coordinated improvements are likely to diminish the revenue and employment impact of increases in each country's labor costs, by reducing the possibilities for substituting for imports from a given country with imports from a lower cost producer elsewhere. Such coordination reduces the magnitude of the elasticity of product demand faced by each country for its exports when increases in price are driven by improvements in labor standards.

Despite the methodological difficulties just highlighted, it is worthwhile to examine the results of recent studies based on inter-country comparisons of the apparent impact of labor standards on export performance and foreign direct investment. Dehejia and Samy offer a thoughtful survey of this literature. They find, based on their own work and that of others that, "there is no clear-cut link, either in theory or in practice, between the level of stringency of labor standards and a country's comparative advantage, whether it is measured by its terms of trade (in the theoretical model) or the extent to which it affects export performance (in the empirical work)."<sup>189</sup> Whereas Mah found that ratification of ILO conventions was associated with inferior export performance, "OECD found no evidence that countries with low labour standards achieved a better export performance than countries with high labour standards."<sup>190</sup> Mah did not control for "natural determinants of comparative advantage," thereby justifying some skepticism. Rodrik found that "labor standards are significant determinants of labor costs when one controls for productivity; but they are not important determinants of comparative advantage, the latter being determined mostly by factor endowments."<sup>191</sup> Dehejia and Samy find in their cross-country regressions that when "realistic" indicators of labor standards are used, there is no significant association between labor standards and export performance.<sup>192</sup> However, when less informative indicators (in

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189. Dehejia & Samy, *supra* note 23, at 32.

190. Jai S. Mah, *Core Labour Standards and Export Performance in Developing Countries*, 20 *WORLD ECON.* 773 (1997).

191. Dehejia & Samy, *supra* note 23, at 15; see Rodrik (1996), *supra* note 19, at 52-59.

192. Dehejia & Samy *supra* note 23, at 21.

particular possibly unenforced ILO ratifications) are used, then lower labor standards are associated with a higher level of export performance. The authors conclude that, “we obtain rather weak evidence (especially given that we do not put too much faith in conventions ratified as realistic indicators) supporting the view that countries characterized by low labor standards have a comparative advantage in trade.”<sup>193</sup> It is also interesting to note that in their time-series analysis of Canada-U.S. trade, Dehejia and Samy find that two of three measures of labor standards “indicate that higher labor standards have led to an *improvement* in export performance.”<sup>194</sup>

Singh and Zammit also present an illuminating survey of the evidence. They report that “[The UK Department for International Development] has recently reviewed evidence on core labor standards and competitiveness. . . . However, these studies find no evidence of a negative relationship between higher labor standards and the FDI that a country receives.”<sup>195</sup> They report that “other studies indicate that higher labour standards tend to reduce labour-intensive manufactured exports. . . . Although there are very few economy-wide or comparative international studies of the effects of labour standards on economic development, there is considerable research which investigates the micro-level effects of standards on both firms and workers in developing countries. . . . In general, these indicate both negative and positive outcomes, and suggest that the effect of labour standards in developing countries is likely to be complex, depending on country- and industry-specific factors.”<sup>196</sup>

The fear that increased labor standards will diminish the comparative advantage possessed by countries with relatively low labor costs, and thus impede their ability to export relatively labor-intensive goods to developed countries has thus far received little empirical support.

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193. *Id.* at 23.

194. *Id.* at 31 (emphasis added).

195. See generally Singh & Zammit, *supra* note 32.

196. See *id.* at 94.

Table 3: Indifference Ratios for Total Manufactures and Sample Industries<sup>197</sup>

TOTAL MANUFACTURES					
SHARE OF TOTAL LABOR COSTS IN UNIT COSTS (SOUTH)					
Beta	Delta	N	Theta		
0.099	0	2	0.240		
		3	0.337		
		4	0.422		
		5	0.496		
INDIFFERENCE RATIOS: (ALPHA)					
NUMBER OF PRODUCTION STAGES					
		2	3	4	5
ASSUMED	2	6.31	4.72	3.93	3.46
RATIO OF	3	11.63	8.45	6.87	5.92
UNIT COSTS	4	16.94	12.17	9.80	8.39
(NORTH/SOUTH)	5	22.25	15.89	12.73	10.85
	10	48.82	34.51	27.39	23.16
FOOD PRODUCTS					
SHARE OF TOTAL LABOR COSTS IN UNIT COSTS (SOUTH)					
Beta	Delta	N	Theta		
0.066	0	2	0.240		
		3	0.337		
		4	0.422		
		5	0.496		
INDIFFERENCE RATIOS: (ALPHA)					
NUMBER OF PRODUCTION STAGES					
		2	3	4	5
ASSUMED	2	8.83	6.40	5.18	4.46
RATIO OF	3	16.67	11.80	9.37	7.92
UNIT COSTS	4	24.50	17.20	13.55	11.37
(NORTH/SOUTH)	5	32.34	22.60	17.74	14.83
	10	71.51	49.59	38.66	32.12

197. "Beta" is the average share (for low-income countries) of direct labor costs in unit costs at the final stage of the production process. "Delta" is the increment by which the share of direct labor costs in unit costs is assumed sequentially to increase (i.e., in arithmetic progression) at each stage of production prior to the final stage. "Theta" is the share in unit costs of the total labor costs incurred directly and indirectly over the entire production process. "N" is the number of stages in the production process.

LEATHER PRODUCTS					
SHARE OF TOTAL LABOR COSTS IN UNIT COSTS (SOUTH)					
Beta	Delta	N	Theta		
0.128	0	2	0.240		
		3	0.337		
		4	0.422		
		5	0.496		
INDIFFERENCE RATIOS: (ALPHA)					
NUMBER OF PRODUCTION STAGES					
		2	3	4	5
ASSUMED	2	5.17	3.97	3.37	3.02
RATIO OF	3	9.35	6.94	5.74	5.03
UNIT COSTS	4	13.52	9.90	8.11	7.05
(NORTH/SOUTH)	5	17.69	12.87	10.48	9.07
	10	38.56	27.71	22.34	19.15

PLASTIC PRODUCTS					
SHARE OF TOTAL LABOR COSTS IN UNIT COSTS (SOUTH)					
Beta	Delta	N	Theta		
0.108	0	2	0.240		
		3	0.337		
		4	0.422		
		5	0.496		
INDIFFERENCE RATIOS: (ALPHA)					
NUMBER OF PRODUCTION STAGES					
		2	3	4	5
ASSUMED	2	5.89	4.45	3.73	3.30
RATIO OF	3	10.79	7.89	6.45	5.59
UNIT COSTS	4	15.68	11.34	9.18	7.89
(NORTH/SOUTH)	5	20.58	14.78	11.90	10.19
	10	45.05	32.01	25.53	21.68

RUBBER PRODUCTS					
SHARE OF TOTAL LABOR COSTS IN UNIT COSTS (SOUTH)					
Beta	Delta	N	Theta		
0.125	0	2	0.240		
		3	0.337		
		4	0.422		
		5	0.496		
INDIFFERENCE RATIOS: (ALPHA)					
NUMBER OF PRODUCTION STAGES					
		2	3	4	5
ASSUMED	2	5.27	4.03	3.42	3.05
RATIO OF	3	9.53	7.06	5.83	5.11
UNIT COSTS	4	13.80	10.09	8.25	7.16
(NORTH/SOUTH)	5	18.07	13.12	10.67	9.21
	10	39.40	28.27	22.75	19.48

		TEXTILES							
SHARE OF TOTAL LABOR COSTS IN UNIT COSTS (SOUTH)		INDIFFERENCE RATIOS: (ALPHA)							
Beta	Delta	N	Theta	NUMBER OF PRODUCTION STAGES					
				2	3	4	5		
0.147	0	2	0.240	ASSUMED	2	4.67	3.64	3.13	2.82
		3	0.337	RATIO OF	3	8.34	6.27	5.25	4.65
		4	0.422	UNIT COSTS	4	12.01	8.91	7.38	6.47
		5	0.496	(NORTH/SOUTH)	5	15.68	11.54	9.50	8.29
					10	34.04	24.72	20.13	17.41

		WEARING APPAREL							
SHARE OF TOTAL LABOR COSTS IN UNIT COSTS (SOUTH)		INDIFFERENCE RATIOS: (ALPHA)							
Beta	Delta	N	Theta	NUMBER OF PRODUCTION STAGES					
				2	3	4	5		
.250	0	2	0.240	ASSUMED	2	3.29	2.73	2.46	2.31
		3	0.337	RATIO OF	3	5.57	4.46	3.93	3.62
		4	0.422	UNIT COSTS	4	7.86	6.19	5.39	4.93
		5	0.496	(NORTH/SOUTH)	5	10.14	7.92	6.85	6.24
					10	21.57	16.57	14.17	12.80

