

International Economics Policy Briefs

The ILO and Enforcement of Core Labor Standards

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Although many deny it, a linkage between trade policy and labor standards clearly exists.¹ The International Labor Organization (ILO), long ignored and belittled, is suddenly popular with various constituents who desperately want to deflect pressure to incorporate labor standards in trade agreements and the World Trade Organization (WTO). As a result, the ILO today is getting significantly more attention, more political support, and more resources to deal with core labor standards, especially child labor. In 1998, with strong support from the United States, other developed country governments, and key representatives of employers and workers, the ILO adopted a new Declaration on Fundamental Principles and Rights at Work. In 1999, the ILO approved a new convention to combat the worst forms of child labor, a convention that is being

¹ See also Elliott, 1998, International Labor Standards and Trade: What Should be Done? in *Launching New Global Trade Talks: An Action Agenda, Special Report 12*, ed. Jeffrey J. Schott, and Elliott, 2000, *Getting Beyond No...! Promoting Worker Rights and Trade*, in *The WTO after Seattle*, ed. Schott, both published by the Institute for International Economics.

ratified at the fastest rate in ILO history. This year, for the first time, the ILO invoked Article 33 of its constitution in an effort to compel Burma to abolish forced labor.

The question, which many long-time ILO observers answer skeptically, is whether the increased attention can be translated into sustained and more effective promotion of international labor standards. The answer ultimately depends on whether the commitment to that goal is more than skin-deep. Many developing-country governments insist at WTO forums that the ILO is the "competent body to set and deal with labor standards," but at the

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same time they have resisted efforts to strengthen its enforcement role. One might also raise questions about the sincerity of the United States, which has ratified only two of the eight core ILO conventions.² But the United States willingly accepted increased scrutiny with respect to the core labor standards when it promoted the 1998 Declaration. It was also one of the first to ratify the new convention on child labor and

² The United States has ratified convention no. 105 on the abolition of forced labor and the new convention, no. 182, on the worst forms of child labor; the Clinton administration submitted no. 111 on nondiscrimination in employment for ratification but the Senate has not acted; it has taken no action to ratify convention no. 29 on the prohibition of forced labor, no. 87 or 98 on freedom of association and collective bargaining; no. 138 setting a minimum age for work, or no. 100 on equal remuneration.

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has sharply increased its contribution to the ILO for technical assistance to implement the Declaration and to fund programs of the International Program on the Elimination of Child Labor (IPEC).³

Thus far, those who want to strengthen the ILO have garnered enough support to move ahead, in part, by pointing to the importance of the institution's credibility if the skeptics want to divert pressure on the WTO to enforce labor standards. At its best, however, the ILO alternative will not satisfy many of the critics of globalization. Moreover, proponents of incorporating labor standards in the WTO are correct that it should address violations that are related to competition for export markets or foreign investment. Thus, the WTO should clarify that Article 20(e) applies to all forms of forced labor, not just prison labor, and it should examine the enforcement of labor standards in export processing zones. But the ILO *is* the competent body to set and enforce labor standards in general and it should be given the support necessary to do the job.

The ILO's Tools

Whether at the local or international level, enforcement of law, standards, and norms relies on three basic tools—sunshine, carrots, and sticks. The ILO has traditionally relied primarily on sunshine, through its elaborate supervisory mechanisms, and carrots in the form of technical assistance. Until the Burma forced-labor case, the use of sticks was limited primarily to peer pressure. In recent years, the ILO has moved to strengthen all three of these tools.

Sunshine and the Declaration on Fundamental Principles

The ILO has extensive mechanisms for supervising the application of conventions, including both a routine reporting-and-review process and ad hoc procedures for handling complaints by worker or employer groups or governments regarding another member's compliance. Article 22 of the ILO constitution requires member governments to report routinely on conventions they have ratified, while Article 19 may be invoked to request periodic reports from members explaining why they have not ratified a particular convention and describing what they are doing under their national laws to achieve the goals of the convention.

The Committee of Experts on the Application of Conventions and Recommendations (CEACR) reviews both types of reports each year and prepares its own report, noting cases of progress as well as problems

³ The Clinton administration increased its contribution to IPEC ten-fold in 1999 and proposed increasing it another 50 percent for fiscal 2001, to \$45 million. Congress approved the administration's request for \$20 million in fiscal 2000 for the ILO's program of technical assistance to improve enforcement of core labor standards, up from \$0, and is expected to approve the same amount for fiscal 2001. *ILO Focus* 13, no. 1, 2000 (Spring), Washington Branch Office of the ILO, p. 7.

in implementation. The CEACR may also choose to address a potential problem by submitting a "direct request" for additional information to a member government. Another layer of supervision and peer pressure is added at the annual International Labor Conference when the Conference Committee on the Application of Conventions and Recommendations meets to review the CEACR report. In addition to a general discussion, the Conference Committee discusses individual cases and invites governments to explain problems in applying ratified conventions. Its report may include references to cases of special concern, including "continued failure to implement."

In addition to these reporting requirements, any worker or employer organization, not just those formally appointed as delegates to the ILO, can make representations under Article 24 of the ILO constitution when they feel a member government is not complying with a convention it has ratified. Because it is regarded as a fundamental constitutional obligation of all members, however, complaints regarding violations of freedom of association may be brought against any member government, regardless of convention ratification status, and referred to the Committee on Freedom of Association for review.

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One problem with all this sunshine, however, is that the sheer volume of information—and the lack of attention to organizing it in user-friendly fashion—can overwhelm potential users and make the organization less rather than more transparent. There have been efforts to streamline reporting requirements, but, as more countries have joined and more conventions have been adopted, the total number of routine reports required has risen from an annual average of just over 600 in the 1930s to 2,036 in 1998, and the proportion submitted in timely fashion has fallen from roughly 85 percent to 71 percent in 1998. On the other hand, until recently, only countries that ratified conventions were required to report *routinely* on implementation.

In 1998, however, the International Labor Conference approved a Declaration on Fundamental Principles and Rights at Work with a follow-up mechanism that seeks to fill some of the gaps and to focus attention on the four internationally recognized core principles:

- freedom of association and the "effective recognition of the right to collective bargaining";
- freedom from forced labor;
- the "effective abolition of child labor"; and
- nondiscrimination in employment.

The follow-up mechanism requires *all* member countries who have not ratified one or more of the eight conventions associated with these rights to report annually on what they are doing to promote the principles involved, though not the more detailed legal obligations in the conventions. Employer and worker groups are invited to provide comments on the submissions and a group of independent expert-advisers then examines the reports and writes an introduction to the compilation of national reports. In addition, the director-general is to prepare an annual global report on each one of the four principles in turn to highlight overall trends in respect for the

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core principles. The first global report, released in May, focused on freedom of association; the next report, in 2001, will focus on forced labor.

The initial results from this new mechanism are mixed. While only a little over 50 percent of the required country reports were received in time to be reviewed by the committee of expert-advisers, that figure probably exaggerates the degree of willful non-compliance. The laggards, who are clearly identified in a table in the experts' introduction, are overwhelmingly countries with the fewest resources, those involved in internal conflicts, or those lacking a functioning central government. Among the reports submitted, however, the experts noted that many are inadequate to provide a baseline against which progress can be measured, as was intended, and they lamented the fact that so few employer and worker groups chose to comment on the reports. Overall, the experts' introduction to the compilation of country reports was clearly written, frank in identifying weaknesses in the reporting process, and provided useful suggestions for improving it.⁴ In future reports, however, they should go further in identifying those countries whose reports are inadequate or where particular problems are evident.

Potentially more useful for those trying to discern the overall status of core labor standards around the world is the director-general's global report. Unfortunately, this idea was opposed by some important developing country delegates during the debate on the 1998 Declaration and several of them abstained from the vote, nearly denying it the quorum needed to gain approval. When the first global report was discussed

at the June 2000 International Labor Conference, many of the same countries criticized Director-General Juan Somavia for "naming names," including pointing to "manifest violations" of freedom of association in Saudi Arabia, Oman, the United Arab Emirates, Bahrain, Qatar, and Equatorial Guinea, where worker organizations are either prohibited or so restricted as to be meaningless.⁵ The report also highlights the "more frequent denial of the right to organize" that occurs with "legislatively imposed monopolies," such as those in China, Cuba, Iraq, Sudan, Syria, and Vietnam. To his credit, Somavia rejected the criticism and noted that "it is difficult to see how the Office can do credible reporting unless countries are identified and facts are stated."⁶

A more valid criticism of the report, echoed by employer and worker delegates alike, was that it did not adequately distinguish fundamental violations of freedom of association from more detailed legal obligations, such as the treatment of public-sector workers. Going beyond naming names to more clearly prioritizing violations or to putting countries in categories by degree of violation is politically sensitive and unlikely to occur in the foreseeable future. The information is in the various ILO reports, however, and it would be useful for some external group to compile such an assessment. Enforcement of core labor standards is probably too complex to capture in a simple ranking like the Transparency International "perceptions of corruption index," but it should be possible to assign countries to broad categories. In order to capture the dynamic nature of standards enforcement, such an assessment should reflect, not just the current level of enforcement, but whether the country is moving forward, backward, or standing still. If it is moving backward or standing still, the assessment should also indicate whether the lack of progress is due to government policy or to lack of capacity.

Another issue that should be addressed as the process evolves is the 4-year reporting cycle. Once the first cycle of reports is completed and a baseline picture drawn, it would be useful to shift to an annual report that sums up the progress made in all four areas over the previous year. Perhaps the report could retain the rotating focus on one core area, but then update in an appendix what has been accomplished during the previous year in the other

⁴ All the reports under the follow-up mechanism are available on the ILO Web site at <http://www.ilo.org>.

⁵ The Gulf countries protested being singled out in the report and, privately, some ILO officials concede there should have been more context in the report. The Gulf countries are in an unusual position with respect to freedom of association because of the high proportion of foreigners in the workforce; but they recognize the problem and have asked the ILO to increase technical cooperation to address it.

⁶ Reply by the Director-General to the Discussion of his Report, Provisional Record 25, International Labor Conference, 88th Session, Geneva, 2000.

areas. An annual update would both make the report more useful to outside observers and assist the governing body in identifying future priorities.

Carrots

In addition to increasing transparency, another objective of the follow-up to the Declaration is to identify priorities for technical assistance. The most effective and sustainable means of improving implementation of core labor standards is to provide technical and financial assistance to countries that want to improve enforcement but lack the resources to do it. The final phase of the Declaration follow-up cycle each year is a report to the governing body in November identifying the technical assistance priorities that derive from the various reports. The Declaration and

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its follow-up have already attracted increased financial contributions from developed country members who are interested in ensuring its effectiveness. There are also other manifestations of a trade-labor standards linkage in the ILO's regular technical cooperation program, including three recent programs that are particularly interesting.

Two of these cases involve child labor in South Asia and derive from cooperative agreements involving the ILO, the governments of Pakistan and Bangladesh, respectively, the business community, nongovernmental organizations (NGOs), and other international organizations, such as UNICEF. The first case arose when Senator Tom Harkin (D-IA) introduced legislation in the US Congress to ban imports of products made with child labor. Though the bill never passed, Bangladeshi garment manufacturers perceived a threat to their exports and fired tens of thousands of children from their factories. Fearing for the future of the children, the ILO and UNICEF negotiated a memorandum of understanding (MoU) with the Bangladesh Garment Manufacturers' Association providing that all children working in the sector would be removed, but not until schools were available for them. The parties also agreed on joint funding and a monitoring plan to be overseen by the ILO. Since the MoU was signed in 1995, 353 schools have been created and the incidence of child labor in Bangladesh garment factories has dropped dramatically.⁷

The second case involves the soccer ball industry in Pakistan, which came under pressure to eliminate child labor after human rights activists revealed

the problem and began pressuring major marketers of soccer balls, including Nike and adidas, to take action. The memorandum of understanding that resulted in February 1997 was modeled on the Bangladesh agreement and was signed by representatives of soccer ball manufacturers, US importers, the Sialkot (Pakistan) Chamber of Commerce, and various NGOs, as well as the ILO and UNICEF. Because much of the stitching of soccer balls was done at home, a key part of the agreement was to establish stitching centers that could be more easily monitored. Like the Bangladesh agreement, the Sialkot MoU also provides for education, training, and other rehabilitative services for the children previously employed in stitching soccer balls and tasks the ILO with monitoring the agreement. In the first 18 months of the agreement, manufacturers accounting for nearly 70 percent of Sialkot's production of soccer balls were participating, roughly half their production had been transferred to stitching centers, and 5,400 children were enrolled in the "village education and action centers" created by the program.⁸

The third ILO program evolved out of a bilateral textile agreement negotiated between Cambodia and the United States in 1998. US negotiators offered to expand the size of Cambodia's export quota by 14 percent if "working conditions in the Cambodia textile and apparel sector substantially comply with" local law and internationally recognized core standards. In the first review in December 1999, US officials concluded that substantial compliance had not been achieved but, in recognition of the progress that had been made, it offered a 5 percent quota increase to be implemented when Cambodia completed an agreement with the ILO to establish an independent monitoring program. Some ILO officials were initially leery, fearing that external monitoring would further weaken existing local capacity. The ILO agreed to the plan only after gaining a commitment from US officials to provide \$500,000 for a parallel program to provide technical assistance and training to the Cambodian labor ministry. The United States is also providing \$1 million of the \$1.4 million cost of the 3-year monitoring program, with the Cambodian government and the Garment Manufacturers' Association splitting the balance (US Trade Representative press release, 18 May 2000).

Sticks

In addition to routine reporting and review of compliance and the spotlight of the new Declaration on Fundamental Principles, the ILO provides multiple avenues for worker, employer, and government representatives to raise issues of alleged noncompliance. Article 26 of the constitution is the provision reserved for the most serious cases and complaints,

⁷ US Department of Labor, Bureau of International Labor Affairs, *By the Sweat and Toil of Children: Efforts to Eliminate Child Labor* 5, Washington, 1998, p. 89.

⁸ *Ibid.*, p. 91.

and unlike Article 24 representations, may be made only by official ILO delegates.

After a complaint is made, the ILO governing body tries to resolve it by seeking the member's permission to send a Direct Contacts Mission to discuss the problem. If that is not sufficient, a Commission of Inquiry may be appointed to investigate the charges. The commission will report its findings and, if appropriate, make recommendations as to how the member can make its laws and practices consistent with the relevant convention. The target of the complaint is given the opportunity to appeal to the International Court of Justice. If the commission's findings are not appealed or are upheld, the country will be asked to report on what it has done to implement the commission's recommendations.

Up to this point, Article 26 procedures are similar to those often proposed for a WTO social clause and many people believed that the similarities end here, with the ILO having no enforcement power. Until recently, that would not have been a bad assumption because the provision in the ILO constitution authorizing action to compel compliance had never been invoked. Nevertheless, Article 33 provides that, if satisfactory compliance is not forthcoming, "the governing body may recommend to the conference such action as it may deem wise and expedient to secure compliance therewith."⁹

Until 1946, Article 33 looked even more like a social clause, explicitly providing that members could take "measures of an economic character" against another member refusing to come into compliance with the recommendations of a Commission of Inquiry.¹⁰ A constitutional review undertaken after World War II broadened Article 33 to "leave it to the governing body's discretion to adapt its action to the circumstances of the particular case," but the amended language does not exclude the possibility of economic, or any other, sanctions.¹¹

⁹ International Labor Office, Measures, including action under article 33 of the Constitution...to secure compliance by the Government of Myanmar..., GB.276/6, 276th Session of the Governing Body, Geneva, November 1999.

¹⁰ International Labor Office, *Reports I and II and Constitutional Questions*, 29th Session of the International Labor Conference, 1946.

¹¹ Ibid. See also International Labor Office, Measures, including action under article 33 of the Constitution...to secure compliance by the Government of Myanmar..., GB.276/6, 276th Session of the Governing Body, Geneva, November 1999. Some argue that a reference to the UN Security Council in the 1946 constitutional review report should be interpreted as reserving to that body the power to impose economic sanctions. It is not clear, however, that this interpretation is consistent either with the plain language of Article 33 or with that period's much narrower interpretation of UN jurisdiction and much broader interpretation of national sovereignty.

¹² Quoted in *ibid.*, p. 4.

The Evolution of ILO Enforcement

In 1919, when the ILO was created, the Commission on International Labor Legislation observed that Article 26 had "been carefully devised in order to avoid the imposition of penalties, except in the last resort, when a State has flagrantly and persistently refused to carry out its obligations under a convention. It can hardly be doubted that it will seldom, if ever, be necessary to bring these powers into operation."¹² Indeed, between 1919 and 1960, there was only one Article 26 complaint and in the following 40 years an average of only six complaints per decade was received. In all, only six Commissions of Inquiry have been appointed.¹³ None of these commission reports were appealed to the International Court of Justice and, although implementation of the commissions' recommendations appears to have been mixed, the application of Article 33 was never raised—until this year.¹⁴

In March 2000, the governing body invoked Article 33 for the first time in the ILO's history and recommended . . . action against Burma because of its failure to comply.

The problem of forced labor in Burma is long standing but, according to the Commission of Inquiry report, it accelerated after a military junta seized power in 1988 and especially in the early 1990s when the regime undertook a massive infrastructure-building campaign as part of an effort to attract tourists and foreign investment. In 1996, a number of worker delegates filed an Article 26 complaint regarding forced labor in Burma and a Commission of Inquiry was appointed in March 1997. The commission completed its report in July 1998 and called on

¹³ See *International Labor Standards: How Are They Enforced?* on the ILO Web site <http://www.ilo.org>.

¹⁴ One assessment finds that most governments have accepted the findings of commission reports. Poland, however, refused to cooperate with the Commission of Inquiry appointed to investigate a freedom of association complaint raised in the early 1980s when the government was trying to break the Solidarity union movement. Germany also rejected the finding by a commission that it unfairly discriminated against public employees for political reasons. In other cases, governments nominally accepted the conclusions of a commission but remedial actions often have been inadequate. See Cesare P.R. Romano, *The ILO System of Supervision and Compliance Control: A Review and Lessons for Multilateral Environmental Agreements*, E-96-1, International Institute for Applied Systems Analysis, Laxenburg, Austria, May 1996. The Washington Office of the ILO has also commissioned a report to examine cases of progress on worker rights, due at least in part to ILO pressure.

the Government of Burma to bring its laws and practice into compliance with Convention No. 29 by May 1999. In the absence of a constructive response from Burma, the June 1999 International Labor Conference approved a resolution that condemned its refusal to comply with the commission's recommendations, prohibited technical assistance, except as might be necessary to implement the recommendations, and banned Burma from most meetings, the first such action in ILO history. It also requested that the governing body consider whether further action under Article 33 might be justified.

Even this modest penalty attracted opposition from some members.¹⁵ Cuba, seconded by Mexico, Colombia, and Venezuela, offered a motion to separate the part of the resolution condemning Burma's noncompliance from the portion imposing penalties. The motion was defeated by voice vote when representatives of the employer and worker groups, joined by government members from the United States and United Kingdom, indicated their opposition thereby ensuring that it would not receive the necessary two-thirds approval.¹⁶

In March 2000, the governing body invoked Article 33 for the first time in the ILO's history and recommended that the June 2000 International Labor Conference take further action against Burma because of its failure to comply. The decision, approved without a vote, suggests a variety of actions that the International Labor Conference might take, including calling on member states "to review their relationship with the Government of Myanmar [Burma] and to take appropriate measures to ensure that Myanmar 'cannot take advantage of such relations to perpetuate or extend the system of forced or compulsory labor...'" Possible actions also include calling on other international organizations to consider whether any of their activities "could have the effect of directly or indirectly abetting the practice of forced or compulsory labor."

In May, the regime in Burma, which had repeatedly denied that forced labor occurred and refused to cooperate with the Commission of Inquiry, suddenly reversed course and invited the ILO to send a technical mission to discuss resolution of the problem. While the regime admitted that forced labor might have been a problem in the past, they insisted that it no longer was and that Article 33 action was unnecessary. Though the technical mission praised the openness and cooperation they received from officials

¹⁵ At the time of the resolution, Burma was not receiving any technical assistance and had received a total of just \$1.5 million from 1991-96. The ban on meetings is also more about symbolism than substance since no member can be barred from constitutionally authorized governing body and International Labor Conference meetings.

¹⁶ *ILO Focus* 12, no. 2, Summer/Fall 1999, Washington Branch Office of the ILO, p. 1

in Burma, they noted that no concrete action had been taken to implement the commission's recommendations. On May 27, just before the Conference opened, the labor minister of Burma sent a letter to the director-general, claiming that they had taken steps against forced labor, were willing to "take into consideration appropriate measures...to ensure the prevention of such occurrences in the future," and wanted to continue the dialogue begun by the technical mission.¹⁷

Burma's neighbors in East Asia seized on the apparent concessions and took the lead in arguing at the Conference that the decision on Article 33 action should be delayed until the following year when Burma's actions could again be evaluated. The workers' group argued for immediate implementation of the actions proposed in the resolution forwarded to

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the Conference by the governing body in March. They ultimately agreed, however, to an employer group compromise that called for Conference approval of the proposed measures against Burma, but a delay in implementation to test Burma's pledge to take action. This version of the resolution, which passed 257 to 41 (with 31 abstentions), sets November 30, 2000, as the date the resolution will take effect unless the governing body determines that Burma has taken sufficient and concrete actions to comply with the Commission of Inquiry's recommendations.

Some observers complain that the resolution underscores the weakness of the ILO because it does not directly impose sanctions against Burma but calls on member governments and other UN organizations to take appropriate action. But this view ignores the fact that the WTO also authorizes member governments to take action to remedy violations but does not directly impose them itself. The ILO's response is not very different from the WTO approach in that it leaves it to relevant member governments to determine, within prescribed limits, the cost of enforcement they are willing to bear.

Are the WTO's Teeth Really Sharper?

The constitutional review undertaken by the ILO in 1946 was triggered by the need to adapt to the UN system and the expected expansion of its membership to include former colonies and less developed

¹⁷ Report of the ILO Technical Cooperation Mission to Myanmar, Provisional Record 8, International Labor Conference, 88th Session, Geneva, 2000.

countries. In this context, the report accompanying the recommendations for amendment of the constitution recognized both the limitations of sanctions and the importance of a genuine commitment to change on the part of key domestic actors. The report argues

that the problem is primarily one of national standards of law enforcement and that international action should therefore be directed towards promoting the progressive development of more effective national administrative machinery....

What is not often recognized by critics of the ILO's lack of teeth is that international enforcement of national regulations is a far cry from enforcement of international bargains to liberalize foreign market access. This is a lesson that the WTO is also learning as it extends its reach well beyond national borders.

Industry representatives pushed aggressively to move protection of intellectual property rights (IPRs) from the World Intellectual Property Organization to the WTO because "the WTO has teeth." But while countries have largely complied with the letter of the new rules, effective enforcement of domestic IPR laws lags and will remain a problem where the will and capacity to enforce them is lacking. Studies of international financial institutions' efforts to condition their loans on far-reaching internal reforms also conclude that such conditionality is seldom effective unless the country is receptive to reforms and is seeking external assistance to implement them.

Extensive research on foreign policy and commercial trade sanctions also underscores the limited util-

ity of economic sanctions in areas of political sensitivity or where compliance is difficult to define or measure.¹⁸ Even adverse rulings by a WTO dispute settlement panel and subsequent trade retaliation by the United States have been insufficient to force European Union compliance in two politically sensitive cases involving agriculture and former colonial relationships. Arm-twisting simply has limited utility in these situations.

Thus, experience in a variety of areas suggests the ILO is right to focus on positive efforts to work with countries to improve enforcement of labor standards. But it also has the constitutional authority to respond to egregious violations when necessary and has now shown that it can do so. The real test of ILO credibility, however, will come over time as we see whether Burma is a precedent or an aberration. It is a small, poor, relatively isolated country and the violations were both egregious and well documented. Other cases will not be so easy. Moreover, credibility depends on balancing the need to show that the ILO is willing to confront larger and more powerful members with a pragmatic concern for the limits of ILO leverage and the costs of picking fights it knows it cannot win. Striking this balance will require continued creativity and innovation similar to what went into the development of the Declaration on Fundamental Principles, the technical cooperation programs in South Asia and Cambodia, and the Article 33 resolution sanctioning Burma.

¹⁸ Gary Clyde Hufbauer, Jeffrey J. Schott, and Elliott, *Economic Sanctions Reconsidered*, 3rd edition, forthcoming 2001, and Thomas O. Bayard and Elliott, 1994, *Reciprocity and Retaliation in US Trade Policy*, both published by the Institute for International Economics.