

Trade Policy and Labour Standards

Michael J. Trebilcock *

Robert Howse **

INTRODUCTION

The trade/labour linkage has a long history.¹ It has become one of the most contentious contemporary issues in trade and labour policy circles and debates.² The idea of using international labour standards to protect workers from economic exploitation was first promoted by individual social reformers in Europe in the first half of the 19th century at the early stages of the Industrial Revolution. The work of these reformers was later taken over by various nongovernmental organizations. Calls for international labour legislation increased dramatically during the second half of the 19th century and found expression in various international organizations that were formed (often international associations of trade unions).

Intergovernmental action for international labour legislation began to be reflected in international conferences beginning in 1890. Many of these early efforts were motivated by the concern that in the absence of international labour standards,

* University of Toronto Faculty of Law

** University of Michigan Law School

¹ See Steve Charnovitz, “The Influence of International Labour Standards on the World Trading System: An Historical Overview”, *International Labour Review* 126 (1987), 565-584; Virginia Leary, “Workers’ Rights and International Trade: The Social Clause”, in Jagdish Bhagwati and Robert Hudec (eds.), *Fair Trade and Harmonization*, Vol. 2, Cambridge, MA 1996, 177-230; Baatlhodi Molatlhegi, Trade and Labour Interface in the Context of Economic Integration: The Case of the Southern African Development Community, Doctoral Thesis, University of Toronto Faculty of Law 2000.

² For an excellent review of the surrounding debates, see Brian Langille, “Eight Ways to Think About International Labour Standards”, *Journal of World Trade* 31 (1997), 27.

international competition in an environment of increasingly freer trade would precipitate a race to the bottom. The Treaty of Versailles in 1919 established the ILO.³ The preamble of the ILO Constitution notes that “the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries.”⁴ Under Article 33 of the ILO Constitution, the governing body may recommend that the Conference take such actions as it may deem wise and expedient to secure compliance with recommendations of commissions of inquiry or where the matter has been referred to the International Court of Justice with the recommendation of the Court.⁵ Some commentators have suggested that this does not completely rule out the question of trade sanctions, as is contemplated as a possibility in the case of recent adverse ILO determinations against Myanmar (Burma) with respect to forced labour.⁶ The ILO, a tripartite organization of government, employers and worker representatives, however, has mostly pursued its mandate by setting minimum international labour standards through Conventions and Recommendations, subject in the former case to ratification by member states and promoted by investigation, public reporting and technical assistance, but not formal sanctions.⁷

The ILO formally entered the trade / labour interface debate in 1994 at the time of discussion of a possible inclusion of a social clause in the GATT / WTO, the establishment of a link between trade and labour in differing forms within NAFTA and the EU, and the conditioning of trade preferences and concessions by some developed countries on respect for labour standards. The ILO set up a Working Party on the social dimensions of the liberalization of international trade but in 1995, the ILO’s governing body concluded that the Working Party would not pursue the question of trade sanctions and that further discussion of a link between international trade and social standards or a sanction-based social clause mechanism would be suspended.⁸ In 1998, however, the ILO adopted a Declaration of Fundamental Principles and Rights at Work providing that all members have an obligation to respect and promote certain core labour standards

³ Citation needed.

⁴ Citation needed.

⁵ Citation needed.

⁶ Citation needed.

⁷ Citation needed.

⁸ Citation needed.

(CLS): 1) freedom of association and the right to engage in collective bargaining, 2) the elimination of forced labour, 3) the elimination of child labour, 4) the elimination of discrimination in employment. This Declaration parallels in many respects references to core international labour standards in the UN Universal Declaration of Human Rights (1948) the UN Covenant on Civil and Political Rights and the UN Covenant on Economic, Social and Cultural Rights that came into force in 1976.⁹ The ILO membership, however, rejected a proposal by its Director-General in 1997 that the ILO promote and administer a country - based certification and labelling program for products from countries complying with core labour standards.¹⁰

The 1948 Havana Charter that was intended to embody the framework for a new world trading system declared that “Members recognize that unfair labour conditions, particularly in production for export, create difficulties in international trade and accordingly each member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory.”¹¹ The Havana Charter, however, was never adopted because of opposition in the U.S. Congress¹², and the GATT in Article XX refers only to measures relating to products of prison labour (Article XX(e)), measures necessary to protect public morals (Article XX(a)), and measures relating to human life or health (Article XX(b))¹³. The Ministerial Declaration following the first WTO Ministerial Conference in Singapore in 1996 appears to have removed labour issues from the WTO agenda and remitted them to the ILO.¹⁴ The recent Doha Ministerial Declaration re-affirms this position.¹⁵

A number of international commodity agreements, starting with the first

⁹ See Baathodi Molatlhegi (2000) Chap. 3; Patricia Stirling, “The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: Proposal for Additions at the World Trade Organization”, *American University Journal of International Law and Policy* 11 (1996), N. 1, 1-46.

¹⁰ See Christopher McCrudden and Anne Davies, “A Perspective on Trade and Labour Rights”, *Journal of International Economic Law* 3 (2000), No. 1, 43-62; [full name]H. Cullen, “The Limits of International Trade Mechanisms in Enforcing Human Rights: The Case of Child Labour”, *The International Journal of Children’s Rights* 7 (1999), 1-29.

¹¹ Citation needed.

¹² Citation needed.

¹³ Citation needed.

¹⁴ Citation needed.

¹⁵ Doha Ministerial Declaration, November 14, 2001.

international tin agreement of 1954, contain labour standards provisions, but no dispute settlement or enforcement mechanisms.¹⁶ According to critics, the inclusion of such clauses were intended to protect industries in developed countries from competition from developing countries.¹⁷

Under 1984 U.S. Generalized System of Preferences (GSP) legislation, the U.S. President, in determining eligibility for GSP status, must take into account, amongst other things, whether the concerned country is taking steps to ensure internationally recognized workers' rights.¹⁸ The Caribbean Basin Economic Recovery Act of 1983 was the first U.S. legislation in recent history to condition trade on foreign labour standards.¹⁹ The U.S. Omnibus Trade and Competitiveness Act of 1988 expanded the provisions of the 1974 Trade Act to cover cases involving alleged violations of internationally recognized labour rights: if investigations by the U.S. Trade Representative show that U.S. trade rights have been violated, his or her office may authorize retaliatory measures, including imposition of restrictions on imports from the concerned country.²⁰

The EU first mooted the possibility of linking labour standards to trade preferences by proposing the introduction of labour standards into the Lomé Convention in 1978 to ensure that developing countries with labour conditions which met the requirements of international labour conventions should not be penalized in their trade with the EEC by being out-competed by countries that do not comply with such conventions.²¹ This proposal was not implemented in the face of intense opposition from developing countries.²² In 1994, the EU finally established a link between trade and labour standards in the context of its relationship with developing countries through its GSP system, in which additional GSP preferences were offered to countries committing

¹⁶ Citation needed.

¹⁷ Baatlhodi Molatlhegi (2000) Chap. 2.

¹⁸ Citation needed.

¹⁹ Citation needed.

²⁰ For a useful review of the evolution of labour standards in US trade policy legislation, see Drusilla Brown, Alan Deardorff, and Robert Stern, "International Labour Standards and Trade: A Theoretical Analysis", in Jagdish Bhagwati/Robert Hudec (eds.), Fair Trade and Harmonization, Vol. 1, Cambridge, MA 1996, 236-266.

²¹ Citation needed.

²² Citation needed.

themselves to respect international labour standards.²³

With respect to trade and labour standards linkages in regional trading arrangements, within the European Union, the social dimension of European integration took concrete form in 1991 when eleven of the twelve member states (excluding the United Kingdom) signed the community's Charter of Fundamental Social Rights.²⁴ Another important step in the development of EU social policy was the adoption by the 11 members (excluding the UK) of the Protocol on Social Policy at Maastricht in 1991.²⁵ The content of the Social Chapter is fundamentally the same as that of the Charter and contains a number of guarantees of basic labour rights. Under NAFTA, the North American Agreement on Labour Cooperation (NAALC) requires the NAFTA parties to effectively enforce their own labour laws, and they are subject to specialized dispute settlement processes and ultimately fines enforceable through trade sanctions in the event of findings of non-enforcement.²⁶

As noted above, the recent Doha Ministerial Declaration launching a new multilateral Round, confirms the 1996 Singapore Ministerial Decision to remit all international labour standards issues to the ILO. The issue of a trade / labour linkage, however, seems unlikely to go away. Regionally, the potential expansion of NAFTA into a Free Trade Area of the Americas (FTAA) will raise the scope and status of the NAFTA Labour Side Accord in this broader context. Furthermore, unilateral trade actions by states on account of labour practices prevailing in other states may well provoke trade disputes that will require adjudication by international trade dispute settlement bodies.

I. THE CHOICE OF POLICY OBJECTIVE

Reviewing both contemporary and historical debates about the case for a trade policy-labour standards linkage, several normative rationales for a trade policy-labour standards linkage emerge and are often largely elided in debates, which then greatly complicates the task of evaluating the appropriate choice of instrument and choice of institutional arrangement for vindicating the chosen policy objectives.

²³ Baatlhodi Molatlhegi (2000) Chap. 2; [full name] H. Cullen (1999).

²⁴ Citation needed.

²⁵ Citation needed.

²⁶ Citation needed.

A. UNFAIR COMPETITION

It is often argued that countries that sell goods into export markets that are produced by processes that fail to respect or comply with internationally recognized labour standards are engaging in an unfair form of competition that deprives domestic producers in export markets and producers and exporters in third country markets who comply with these standards of legitimate market share.²⁷ Countries in which internationally recognized labour standards are not complied are often accused of “social dumping,” or indirect or implicit and illicit subsidization.²⁸ These economic activities, entailing either lax labour laws or ineffective enforcement of nominally compliant laws (or both), are analogized to economic dumping and direct subsidization that may attract anti-dumping duties or countervailing duties under Article VI of the GATT and current WTO Agreements on anti-dumping and subsidization and countervailing duties.²⁹

Without further and careful specification, this rationale for linking international trade policy and/or sanctions with labour standards is largely incoherent. From the perspective of importing countries, generically lower labour costs in exporting countries enhance consumer welfare in importing countries, and by more than reductions in producer welfare in the latter. From the perspective of exporting countries, particularly developing countries, the latter rightly argue that in the early stages of industrialization entailing mass production of low technology products e.g. textiles, clothing, footwear, processed agricultural products, low cost and low skilled labour is one of the principal sources of their competitive advantage.³⁰ To deny them the ability to exploit this advantage is to consign them forever to low value-added commodity production for

²⁷ Perhaps list examples here.

²⁸ Perhaps list examples here.

²⁹ See Dani Rodrik, “Labour Standards in International Trade: Do They Matter and What to do About Them”, in Robert Z. Lawrence *et al.* (eds.), Emerging Agenda for Global Trade: High Stakes for Developing Countries, Policy Essay No. 20, Overseas Development Council, Washington, DC 1996, 35-79; Adelle Blackett, “Whither Social Clause? Human Rights, Trade Theory and Treaty Interpretation”, *Columbia Human Rights Law Review* 31 (1999), No. 1, 1-80.

³⁰ Example here.

developed country markets (“hewers of wood and drawers of water”).³¹ However, it is crucial not to overstate the significance of this source of comparative advantage. While it is true that the earnings of low skilled workers relative to high skilled workers in the US and other developed countries have declined in recent years (or unemployment levels increased), most empirical studies show that increased trade with low wage developing countries may account for at most twenty per cent of this reduction, and most of the increase in the wage gap between skilled and unskilled workers is attributable to technological change and, in the case of the US, also to rapidly declining rates of unionization.³² More importantly, there is almost no evidence that the reduction in relative earnings of unskilled workers in developed countries that is reasonably attributable to increased trade with developing countries relates to noncompliance with core labour standards rather than simply lower wages. Even in this latter respect, as Paul Krugman and many other economists have pointed out,³³ the growth rate of living standards essentially equals the growth rate of domestic productivity. In the case of the US, exports are only ten per cent of the GNP, which means the US is still almost 90 per cent an economy that produces goods and services for its own use. Data show almost a one-to-one relationship between labour productivity and labour costs in manufacturing in a wide range of developed and developing countries.³⁴ Labour productivity, or total factor productivity, is a function of many factors, including public investments in education and training, health care, infrastructure and law and order. Thus, it is a fallacy to assume that low wages are the principal driving force behind today’ s global trade or foreign direct investment flows. This relationship between labour productivity and labour costs explains why internationally most firms are not seeking to relocate to e.g. Bangladesh despite its low wages, and why most international trade and foreign direct investment flows are still dominated by developed countries as countries of origin and countries of destination.

³¹ Citation needed.

³² For extensive reviews of the empirical literature, see Drusilla Brown, “International Trade and Core Labour Standards: Survey of the Recent Literature”, OECD Occasional Papers No. 43, Paris 2000; Keith Maskus, “Should Core Labour Standards Be Imposed Through International Trade Policy?”, Policy Research Working Paper 1817, World Bank, Washington, DC 1997.

³³ Paul Krugman, Competitiveness: A Dangerous Obsession, in Pop Internationalism, Cambridge, MA 1997.

Economic theory strongly suggests that the immediate imposition of common international labour standards across-the-board, based on developed country standards, would substantially reduce total economic welfare as conventionally measured in importing countries, exporting countries, and globally.³⁵ This theory is of course a mischaracterization of what those who favour linkage are ‘demanding’, which is at most a gradual progressive movement towards higher standards as appropriately contextualized to the situation of individual developing countries. Besides, at least with respect to CLS, the welfare effects of compliance are likely to be positive in developing countries themselves. Price effects in importing countries are likely to be minor. An important OECD study published in 1996 concluded that compliance with CLS is likely to have no negative implications for exporting countries in terms of export and growth performance.³⁶ There remain some skeptics about the welfare implications of particular CLS.³⁷ A recent ILO study, using state of the art techniques of economic modeling predicts, however, that substantial welfare gains from the elimination of child labor over a two decade period, net the required investment in education and related programmes.³⁸ Another study, by Morici and Schultz, echoes the OECD 1996 conclusions, finding a significant positive correlation between improvements in respect for CLS and economic growth and development in Southern countries.³⁹

Even stated in fairness rather than welfare terms, if it is unfair for firms and

³⁴ Dani Rodrik, *Has Globalization Gone Too Far?*, Washington, DC 1997.

³⁵ See Drusilla Brown, Alan Deardorff, and Robert Stern; also Drusilla Brown (2000); Keith Maskus (1997).

³⁶ See OECD, “Trade, Employment and Labour Standards: A Study of Core Workers’ Rights and International Trade”, Paris 1996; Dani Rodrik, “Labour Standards in International Trade: Do They Matter and What to do About Them”, in Robert Z. Lawrence *et al.* (eds.), “Emerging Agenda for Global Trade: High Stakes for Developing Countries”, Policy Essay No. 20, Overseas Development Council, Washington, DC 1996, 35-79.

³⁷ See Drusilla Brown (2000); Keith Maskus (1997) (for example, the scope of the collective bargaining entitlement, or the peremptory termination of child labour without pre-empting inferior substitution effects through rendering basic education more accessible).

³⁸ International Labour Office, *International Programme on the Elimination of Child Labour, Investing in Every Child: An Economic Study of the Costs and Benefits of Eliminating Child Labour*, Geneva, December 2003.

³⁹ Peter Morici and Evan Schultz, *Labor Standards in the Global Trading System* (Washington D.C., Economic Strategy Institute, 2001).

workers in developed countries to have to compete with firms and workers in developing countries with access to low paid, low skilled labour, by the same token it is equally unfair for developing countries to have to compete with firms and workers in developed countries that depend on highly skilled labour forces, highly developed infrastructure, large public investments in education and research and development, extensive health care systems, effective law and order, and superior institutions, in most cases reflecting collective or public investments on a scale that far exceeds the capacity of most developing countries. Thus, this unfair competition argument, in and of itself, is totally indeterminate and carries high risks of the trade policy-labour standards linkage being exploited for protectionist ends. In this respect, it is important to emphasize that the unfair competition argument focuses principally on the welfare implications of non-compliance with international labour standards for citizens or interests in *importing countries*.

B. THE RACE TO THE BOTTOM

As the brief historical exegesis of the trade/labour linkage in the introduction to this article makes clear, a major motivation for promoting international labour standards in the first place and then subsequently a trade policy-labour standards linkage⁴⁰, is that low labour standards (including low wages) in exporting countries may undermine higher labour standards in importing countries and precipitate a so-called “race to the bottom” – a form of prisoner’s dilemma – that can only be pre-empted by international agreement on and enforcement of minimum labour standards.⁴¹

This argument is a variant on the unfair competition argument reviewed above, but rather than assuming that importing countries will maintain the *status quo* with respect to their more stringent labour standards and accept a loss of market share, it instead assumes that such countries will in fact progressively dilute them in order to avoid losing market share to imports from countries in which these standards are not adhered to, resulting in a low level equilibrium trap where all countries relax their labour

⁴⁰ (as, for example, reflected in the preambles to the ILO Constitution and Havana Charter)

standards to what many regard as suboptimal levels, yet all countries simply retain their preexisting share of trade or investment after the race to the bottom has run its course.

Despite the durability of this concern, for reasons given above⁴², there is little reason to suppose that liberal trade and investment regimes will precipitate a race to the bottom. Moreover, the empirical evidence provides no support for the claim that liberal international trade and investment regimes are leading developed countries to relax their CLS or labour standards generally, or that foreign direct investors are investing in countries with weak CLS.⁴³ Indeed, the evidence suggests that, with the notable exception of China, countries with weak CLS attract very little FDI either in general or specifically in the sectors where CLS are weak. Even Export Processing Zones (EPZs) typically provide superior employment conditions to surrounding markets.⁴⁴ Some commentators, while conceding that weak CLS in some developing countries have not caused a weakening of labour standards generally in developed countries, argue that developing countries with weak CLS that compete against each other in export markets may be stuck in a low-level equilibrium trap with respect to efforts to enhance CLS vis-à-vis each other.⁴⁵ If the OECD and later findings discussed above are well-founded,⁴⁶ this concern is not warranted. It is important to emphasize that race-to-the-bottom concerns, like unfair competition concerns, largely emanate from the perceived welfare implications of non-compliance with international labour standards for citizens and interests in *importing countries*.⁴⁷

C. CORE LABOUR STANDARDS AS HUMAN RIGHTS

⁴¹ See Elissa Alben, “GATT and the Fair Wage: A Historical Perspective”, *Columbia Law Review* 101 (2001), No. 6, 1410-1447.

⁴² most notably that differences in conditions of employment largely reflect differences in productivity and refer to supra note x.

⁴³ See Robert Flanagan, “Labour Standards and International Competitive Advantage”, Working Paper, Standard Business School, November, 2002.

⁴⁴ See Drusilla Brown (2000); Keith Maskus (1997).

⁴⁵ See Keith Maskus (1997); Kaushik Basu, “The View from the Tropics, in *New Democracy Forum: Stepping Up Labour Standards*”, *Boston Review*, February/March 2001.

⁴⁶ that CLS have no adverse effects on export performance and economic growth, and may have positive effects REFER TO supra note x...

⁴⁷ Citation needed.

Various core labour standards have been characterized as human rights in the UN Universal Declaration of Human Rights, the subsequent International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. The ILO's 1998 Declaration of Fundamental Principles and Rights at Work enumerates a short list of core international labour standards which are defined more fully in eight background Covenants that are incorporated by reference, i.e. freedom of association and collective bargaining, the elimination of forced labour, the elimination of child labour, and the elimination of discrimination in employment.⁴⁸ These rights are consistent with the characterization of certain core labour standards or rights as human rights, especially those that guarantee basic freedom of choice in employment relations.

As Amartya Sen argues in his recent book, *Development As Freedom*,⁴⁹ the basic goals of development can be conceived of in universalistic terms where individual well-being can plausibly be viewed as entailing certain basic freedoms irrespective of cultural context: freedom to engage in political criticism and association, freedom to engage in market transactions, freedom from the ravages of preventable or curable disease, freedom from the disabling effects of illiteracy and lack of basic education, freedom from extreme material privation. According to Sen, these freedoms have both intrinsic and instrumental value.⁵⁰ Importantly, in contrast to the unfair competition and race-to-the-bottom rationales for linking international trade policy and international labour standards, the human rights perspective focuses primarily on the welfare of citizens in *exporting*, not *importing* countries. The assumption underlying this concern with basic or universal human rights is that failure to respect them in any country either does not reflect the will of the citizens but rather decisions of unrepresentative or repressive governments, or alternatively majoritarian oppression of minorities, e.g. children, women, racial or religious minorities, or alternatively again paternalistic concerns that citizens in other countries have made uninformed or ill-advised choices to forego these basic rights.⁵¹

In our view, the linkage of international trade policy, including trade or other

⁴⁸ Citation needed.

⁴⁹ Amartya Sen, *Development as Freedom* (N.Y.: Alfred A. Knopf, 1999).

⁵⁰ Citation needed.

⁵¹ Citation needed.

economic sanctions, with core labour standards that reflect basic or universal human rights, is a cogent one. When citizens in some countries observe gross or systematic abuses of human rights in other countries, the possible range of reactions open to them include diplomatic protests, withdrawal of ambassadors, cancellation of air landing rights, trade sanctions or more comprehensive economic boycotts, or at the limit military intervention. Arguing that doing nothing is always or often the most appropriate response is inconsistent with the very notion of *universal* human rights. In extreme cases, such as war crimes, apartheid, the threat of chemical warfare in the case of Iraq, genocide in the case of Serbia, or the Holocaust in the case of Nazi Germany, excluding *a priori* economic sanctions from the menu of possible options seems indefensible. Whether it is the most appropriate option may, of course, be context-specific and depend both on the seriousness of the abuses and the likely efficacy of the response (choice of instrument issues to which we turn next). But it is sufficient for present purposes to restate the point that to the extent that core labour standards are appropriately characterized as basic or universal human rights, a linkage between trade policy and such labour standards is not only defensible but arguably imperative, in contrast to the other two rationales for such a linkage which, despite their much longer historical lineage, largely spurious and inconsistent with the central predicates of a liberal trading system. Core labour standards viewed as basic or universal human rights, however, by promoting human freedom of choice, are entirely consistent with a liberal trading regime that seeks to ensure other human freedoms, in particular the right of individuals to engage in market transactions with other individuals without discrimination on the basis of country of location.⁵²

Having said this, the scope and definition of the class of human rights viewed as sufficiently universal as to warrant potentially the imposition of trade sanctions for their violation is problematic in various respects. Even CLS are not susceptible to uncontentious understandings of their scope. Should child labour be defined only in terms of a minimum working age or should some subset of exploitative child labour practices be targeted? What practices exactly constitute discrimination in the workplace?

⁵² See Baatlhodi Molatlhegi (2000) Chap. 3; Christopher McCrudden and Anne Davies, (2000); Sarah H. Cleveland, "Human Rights Sanctions and International Trade: A Theory of Compatibility", *Journal of International Economic Law* 5 (2002), No. 1, 133-189.

What constitutes forced labour beyond slavery? When is freedom of association and the right to engage in collective bargaining fully respected, given that most countries deny or limit the right to strike in various contexts? Beyond CLS, while civil rights, e.g. to be free from genocide, apartheid, torture, detention without trial, etc., may be reasonably well-understood and commonly subscribed to (at least in principle), political rights, e.g. to engage in political association, criticism or dissent or even to vote, are much less widely recognized.⁵³ Economic, social and cultural rights, are even less universally accepted.⁵⁴ These issues have major implications for the choice of instrument and choice of institutional arrangements for structuring the trade policy-labour standards linkage, to which we turn below.

II. THE CHOICE OF INSTRUMENT

A. ILO CONVENTIONS AND “SOFT” OR VOLUNTARY INITIATIVES

The ILO Conventions are on the one hand binding legal instruments and on the other hand “soft” generally speaking as regards enforcement or compliance; there is no general dispute settlement mechanism available to address claims of violation; rather compliance is usually dealt with through investigation and reporting by ILO organs and the provision of technical assistance to enable countries to build capacity to implement them. Thus, compliance with ILO norms depends on a combination of public identification, embarrassment and shaming (a mild stick), and technical assistance to promote compliance (a mild carrot). In only one case has the ILO had resort to a mechanism in its constitution that allows the Organization to instruct or recommend that Members take economic measures to address non-compliant behavior—the case of Burma, which will be discussed further below.

The ILO has been widely criticized by proponents of a trade / labour linkage for ineffective enforcement of its norms and indeed variable ratification of its Conventions

⁵³ Patricia Stirling (1996).

by many countries, including major developed countries such as the United States (which has, of course, been a prominent proponent of a trade / labour linkage).⁵⁵ Many of the “soft” market-driven mechanisms described below have emerged in part out of frustration by NGOs and other interest groups with the ineffectiveness of the ILO.

One class of ‘soft’ instruments entails a range of certification, labelling, and voluntary code of conduct mechanisms that purport to identify firms or products that conform to core international labour standards and hence are responsive to information market failures if consumers in importing countries derive private disutility from consuming goods produced in violation of CLS.⁵⁶ The efficacy of these mechanisms turn largely on market reactions to the signals that they entail, principally by consumers and to a lesser extent by investors. These instruments are attractive in some respects in their focus on consumer (not producer) welfare in importing countries in that they depend on consumer preferences and a willingness to pay to vindicate those preferences and hence are consistent with the normative predicate of liberal trade theory, which largely focuses on the potential for free trade to enhance consumer welfare. Typically, such mechanisms are either self-initiated by firms or industry associations or are initiated by non-governmental organizations of various kinds, who negotiate them with firms or trade associations. The most ambitious initiative of this kind to date is the Global Compact, launched by UN Secretary - General Kofi Annan in 1999 and entailing voluntary corporate endorsements of nine principles, including CLS.⁵⁷ Among the most prominent scholarly advocates of voluntary approaches are Archon Fung, Dara O’Rourke and Charles Sabel, who argue for a strategy which they refer to as “Ratcheting Labor Standards”.⁵⁸ This strategy would entail an ambitious programme of information-gathering and monitoring of firms, which would be systematically compared with their peers operating in the same part of the world in terms of labor rights performance.

⁵⁴ Economist Magazine, August 18, 2001, “The Politics of Human Rights” 9; “Human Rights” 18 et seq; Michael Ignatieff, Human Rights as Politics and Idolatry, (Princeton, NJ, 2001.)

⁵⁵ Citation needed.

⁵⁶ See Richard Freeman, “A Hard-Headed Look at Labour Standards”, in US Department of Labour, Bureau of International Labour Affairs (ed.), International Labour Standards and Global Economic Integration; Proceedings of a Symposium, Washington, DC 1994.

⁵⁷ Citation needed.

Assuming that consumers in rich countries will reward firms that do better than their competitors and engage in “best practices”, Fung, O’Rourke and Sabel argue that if the monitoring and evaluation program is credible, firms will start to compete with each other with respect to labor standards performance, thus ratcheting up those standards.⁵⁹

In August 2003, the UN Sub-Commission on the Promotion and Protection of Human Rights unanimously adopted the “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,” which seeks to provide a universal framework for corporate responsibility, guiding the many uncoordinated existing voluntary initiatives.⁶⁰ In respect of rights of workers, the norms prohibit forced or compulsory labour, economic exploitation of children (which notably falls short of a prohibition of child labour as such), the obligation to provide a “safe and healthy working environment”, and to provide workers “with remuneration that ensures an adequate standard of living for them and their families”, and freedom of association and collective bargaining.⁶¹ The content of these rights is linked to various binding international human rights instruments, both of the ILO and the UN.⁶²

“Soft” or voluntary approaches suffer from a number of limitations. Currently, they apparently apply to a small percentage of exports in a number of sectors where non-compliance with core labour standards is thought to be common e.g. about five per cent of exports in the textile and clothing industries, and they vary widely in various dimensions e.g. i) which core labour standards are recognized, ii) how these core labour standards are defined, if at all; iii) and how effectively adherence to these standards is monitored, if at all.⁶³ In explaining the low, inconsistent, and often ineffective

⁵⁸ Citation needed.

⁵⁹ Archon Fung, Dara O’Rourke and Charles Sabel, “Realizing Labor Standards”, Boston Review, February/March 2001; see the critical responses by, among others, Mark Levinson and Ian Ayres, in the same issue of Boston Review.

⁶⁰ Citation needed.

⁶¹ Citation needed.

⁶² Citation needed.

⁶³ See Janelle Diller, “A Social Conscience in the Global Marketplace? Labour Dimensions of Codes of Conduct, Social Labelling and Investor Initiatives”, in *International Labour Review* 138 (1999) No. 2, 99-129; Adelle Blackett, “Global Governance, Legal Pluralism and the Decentered State: A Labour Law Critique of Codes of Corporate Conduct”, *Indiana Journal of Global Legal Studies* 8 (2001) No. 2, 401-447; Drusilla Brown, “Can Consumer Product Labels Deter Foreign Child Labour

application of these mechanisms, a number of explanations suggest themselves which in turn raise serious questions about attaching primacy to consumer preferences in importing countries in this context, despite the initial appeal of mechanisms that depend on consumer welfare as their reference point and the compatibility of this reference point with the predicates of free trade.⁶⁴ First, consumers, even if fully informed about conditions under which imports are being produced and violations of core international labour standards that particular modes of production may entail, in fact do not care enough about the intrinsic values reflected in these core labour standards (viewed as basic or universal human rights) to put their money where their mouth is. However, even if this were to be the case, the fact that the process of production and exchange may entail production or consumption externalities for other citizens in exporting or importing countries, as is largely inherent in the notion of universal human rights, suggests that consumer preferences cannot be decisive in a human rights context.

A second explanation is that consumers in importing countries do care about these human rights values but are poorly informed about the conditions under which the goods they are consuming are produced in exporting countries. The cost of acquiring this information exceeds the value that they place on this information. In this respect, the voluntary and decentralized nature of the soft law mechanisms currently employed in this context almost certainly exacerbates the information problems faced by consumers in importing countries. As noted above, the proposal by the Director- General of the ILO in 1997 that the ILO should promote an integrated scheme for increasing the effectiveness of consumer choice by labelling exports as having been produced in countries that conform to core international labour standards was rejected by the main decision-making body of the ILO, in large part because of strenuous opposition from developing countries.⁶⁵

Yet a further explanation for the low, inconsistent and often ineffective application of these mechanisms is that consumers in importing countries do care about

Exploitation?”, Discussion Paper 99-19, Department of Economics, Tufts University, Medford, MA 1999.

⁶⁴ See Debate “New Democracy Forum: Stepping Up Labour Standards”, Boston Review, February/March 2001.

⁶⁵ See *supra* note(s) x – xy.

these intrinsic human rights values but confront serious collective action problems. For instance, individual consumers who may be prepared to pay a premium for goods produced in conditions that meet core labour standards will be concerned that other consumers who share their concerns may opportunistically purchase lower-priced goods while relying on other consumers to bear the financial costs of vindicating their collective preferences. If, however, every consumer suspects every other consumer of being likely to behave opportunistically⁶⁶, an effective voluntary collective response may not emerge.

A recent major World Bank study examined the relatively modest results attained so far through voluntary corporate responsibility.⁶⁷ The study came to the following conclusion, based on consultations with the various stakeholders in such schemes, including businesses:

Overall, the consultations, and subsequent analysis, indicate that while meaningful progress has been made in apparel, and to a lesser degree in agriculture, the existing “system” of implementation may be reaching its limits in terms of its ability to deliver further sustainable improvements in social and environmental workplace standards. This is in some ways natural when one considers that current approaches are not the result of a systematic effort to marshal the forces of the public and private sectors, trade unions and NGOs, and workers. Instead, it is clear from the consultations that current efforts are the result of a series of steps often taken through ad hoc and isolated decisions.⁶⁸

Beyond these reasons for not according primacy to consumer preferences in this context, a further serious limitation is associated with soft law mechanisms that link consumer responses to imports of offending goods, e.g. goods made with child or forced labour, conflict diamonds, etc.⁶⁹ These mechanisms are unresponsive to violations of either core labour standards viewed as universal human rights or universal human rights defined more broadly that are occurring in non-traded goods sectors. For example, it is widely agreed that most child labour is not employed in export sectors (between five and ten per cent) but rather, in domestic agriculture, services, retail and the informal sector

⁶⁶ i.e. to free ride on their sacrifices

⁶⁷ Citation needed.

⁶⁸ World Bank Group, Corporate Social Responsibility Practice, *Strengthening Implementation of Corporate Social Responsibility in Global Supply Chains*, Washington D.C. October 2003.

⁶⁹ Citation needed.

generally.⁷⁰ Many abuses of civil and political human rights are not related in any direct way to traded goods sectors, e.g. civil rights abuses in Sudan and Burma, to take two current examples.⁷¹

B. HARD LAW OPTIONS

The first and most fundamental issue that arises in choosing hard law instruments is the scope of the trade policy-labour standards linkage. If we conceptualize at least core labour standards as universal human rights, how can we justify privileging these particular human rights over at least some subset of universally proclaimed universal human rights (subject to the definitional issues noted above)? Surely genocide, torture, detention without trial, etc. warrant at least as serious concern from the international community, and at least as serious a set of legal sanctions, as violations of core international labour standards. To privilege core labour standards over these other human rights is quite overtly to elide the various normative rationales for intervention reviewed earlier in this paper and to risk a protectionist rationale for trade or other economic sanctions.

Related to this point, a further issue arises relating to the scope of the linkage between trade policy and core labour standards: Why should trade or other economic sanctions be contingent on imports of offending goods? As in the discussion of market-driven soft law instruments and limitations thereof, why should child labour in non-tradable goods sectors or human rights violations in non-tradable goods sectors warrant any less concern, or any less severe sanctions, than such abuses in tradable goods sectors?

It follows from these two points that in our view, trade or other economic sanctions should not be confined to core labour standards, but should extend to at least some subset of universally accepted rights more generally, and that such sanctions should not be limited to imports of goods directly produced by the offending practices. This in fact suggests a very broad domain for linking trade and other economic sanctions with universal human rights. It also suggests, however, some significant constraints on their

⁷⁰ See Drusilla Brown (2000); Peter Morici, “Labour Standards in the Global Trading System”, Economic Strategy Institute, Washington, DC 2001.

invocation. In particular, both the substantive rules governing their invocation and the procedures by which they may be invoked should be consistent with the human rights rationale for intervention and should exclude the unfair competition and race to the bottom rationales for intervention.

In terms of substantive rules, this requirement assigns considerable significance to rules of non-discrimination and consistency. For example, suppose hypothetically that it is the case that the United States has no textile sector but a significant clothing sector and that child labour is employed in producing exports for the U.S. market in India in both sectors but the United States seeks to impose trade sanctions only against clothing imports from India and not textile imports. Alternatively, even if the United States seeks to apply trade sanctions against both clothing and textile imports from India, it may not seek to do so against similar imports from Pakistan made with child labour for geopolitical or other reasons. While it is important to screen out cases of disguised protectionism in cases where trade sanctions have been unilaterally invoked, ostensibly on human rights grounds, this should not require sanctioning countries either to apply sanctions to all countries in violation of CLS (or human rights), or none – an all-or-nothing requirement that is likely to make “the perfect enemy of the good”. In other words, as a matter of international trade law there should be a negative duty not to discriminate for protectionist reasons, but there should be no positive duty to take affirmative action.

While a sanctioning country may choose not to sanction all violations of CLS (or human rights) everywhere in the world, this form of trade sanction “underreach” should surely not be a legitimate concern of an international trade body, which cannot plausibly be transformed into a global human rights crusader. In contrast, the problem of sanction “underreach” may be a legitimate concern of other international organizations (such as the ILO, or UN Human Rights Committees), but this calls for action on their part (e.g. by adopting a regime like the Convention on International Trade in Endangered Species (CITES), *requiring* multilateral sanctions by members in particular cases).

For the WTO, the principal concern is sanction “over-reach”, where the sanctioning country’s actions in targeting some imports and not others seems principally

⁷¹ Citation/Explanation needed.

explicable on the basis that in the former case it has a domestic industry to protect and in the latter case it does not. Where it imposes trade sanctions in the latter case, they entail no costs to the domestic producers of competitive products (who are non-existent), but costs to domestic consumers. Such action can be viewed as an action against material interest that can only be explained by the sanctioning country's genuine concern with CLS (or human rights) violations in exporting countries (similarly in the case of bans on exports or foreign direct investment), where the government of the sanctioning state, by taking action, is seeking to solve collective action problems among its own consumers or citizens. On this approach, as indicated in the hypothetical example above, the differential treatment of clothing and textile imports from India would be suspect, but the failure to sanction similar imports from Pakistan, for non-trade related reasons, would not.

In terms of procedural requirements for the invocation of trade or other economic sanctions against violations of universal human rights in other countries, a number of options present themselves. First, a basic choice has to be made (although often overlooked in debates over the trade / labour standards linkage) between sticks and carrots. Rather like the European Community's GSP regime, it is not difficult to imagine developed countries offering developing countries significant trade concessions⁷² if they commit themselves to an accelerated phase out of offending labour or other human rights abuses. Unlike the Uruguay Round Agreements, which entailed for the most part a single undertaking by Member States, such an arrangement in this context might more appropriately take the form of a plurilateral agreement,⁷³ in which trade concessions are an option offered to developing countries and for those who choose it developed countries would bind their trade concessions.⁷⁴ The commitments made by countries to observe core international labour standards and other universal human rights would have to be reasonably precisely defined in terms of ILO or UN Conventions or Covenants, so that violations of these commitments could be rendered reasonably justiciable through an appropriate international dispute settlement process.⁷⁵ One of the limitations of the carrot

⁷² (e.g. accelerated implementation of the phase out of the Multifibre Arrangement)

⁷³ (like the Uruguay Round Government Procurement Code)

⁷⁴ (unlike GSP treatment).

⁷⁵ (perhaps vested in the WTO, but not necessarily or exclusively so as we explore further below).

option, as pointed out by Howard Chang,⁷⁶ however, is that it creates moral hazard problems in that countries may persist in violations or engage in more egregious violations in order to attract larger concessions (or carrots).

A second option would be to require all countries that are parties to either a regional or multilateral arrangement like the WTO to commit themselves to effectively enforcing their own existing labour laws (as under the NAFTA Labour Side Accord), with enforcement provided through supranational or international dispute settlement processes and penalties. The limitations of this option are obvious enough: first, it addresses only violations of core international labour standards and not other universal human rights; second, it assumes that member countries have already enacted substantive laws that reflect these standards and that the only problem is ineffective enforcement, which in many cases may not be the central problem.

A third option is to allow private party-initiated petitions for trade sanctions under domestic law analogous to anti-dumping duties and countervailing duties. We unequivocally reject this option as espousing in its most naked form the two rationales for a trade/labour standards linkage that we regard as illegitimate and as carrying the highest risk of protectionist abuse of this linkage.

A fourth option would be unilateral *state* action against imports from offending countries. This option is possible based upon the Article XX exceptions in the GATT, as will be explained in the next section of this paper. Article XX contains important disciplines to prevent measures that are disguised protectionism or have arbitrary elements. It would be expected, that were a WTO Member to justify such action under Article XX, the dispute settlement organs of the WTO would rely heavily on the judgment of the ILO and/or UN human rights organs in determining the seriousness of the situation to which the unilateral sanctions are a response. It would also be expected in determining whether the sanctioning state—and the international community—have exhausted less trade restricting alternatives.

An example of how such an option might work is the current ban by the United States on all trade with Burma, based upon grave labor and human rights abuses by the

⁷⁶ See Howard Chang, “Carrots, Sticks, and International Externalities”, (1997) 17 *International Review of Law and Economics*, 309-324.

current military junta.⁷⁷ In 2000, in response to the complete failure of the Burmese regime to respond to the recommendations of an ILO Inquiry into labour rights abuses, for the first time in its history, the ILO invoked Article 33 of its constitution, which allows the membership collectively to authorize or encourage compliance measures against a member by other members. In this case, ILO Members were

to review, in the light of the conclusions of the Commission of Inquiry, the relations that they may have with the member State concerned and take appropriate measures to ensure that the said Member cannot take advantage of such relations to perpetuate or extend the system of forced compulsory labour referred to by the Commission of Inquiry, and to contribute as far as possible to the implementation of its recommendations.

In 2003, the United States Congress adopted the Burma Freedom and Democracy Act (2003) , and cited in the preamble, the above recommendation of the ILO.⁷⁸ This Act banned all trade with Burma, but gave the President discretion to modify or lift the ban in the case of adequate progress towards the respect of core labour rights, *inter alia*.⁷⁹ Notably the legislation requires the President to consult with the Secretary General of the ILO in exercising his discretion under the Act⁸⁰; the assumption is that the future of US sanctions should be linked to multilateral judgements about the situation in Burma.

After the legislation passed virtually unanimously in both Houses and was signed into law by President Bush, very little international criticism was directed at the United States for its ban, including among delegates at the WTO.⁸¹ The legislation was not even mentioned by name in the recent Trade Policy Review of the United States in the WTO.⁸² The absence of criticism suggests that there is tolerance of unilateral action by the international community where that action is preceded by a clear multilateral determination that the country concerned is an egregious violator of core labour rights and that cooperative approaches for addressing the situation have been exhausted. Another factor is that the activist community within Burma, including the opposition leader, who had been put once again under house arrest, strongly supported the sanctions;

⁷⁷ Citation/explanation needed.

⁷⁸ Citation needed.

⁷⁹ Citation needed.

⁸⁰ Citation needed.

⁸¹ Citation/explanation needed.

they could thus not be characterized as the imperialistic imposition of “Western” values.

A fifth option would be for all member states who are parties to either regional or multilateral trading arrangements to negotiate a comprehensive set of rules setting out commitments to observe core international labour standards and other universal human rights.⁸³ On this approach, which is analogous in some respects to that entailed in the Uruguay Round TRIPS Agreement⁸⁴, trade sanctions would come at the end of the dispute settlement process and not at the beginning. In other words, a country complaining that another country was in violation of its core labour standards or other human rights commitment would have to demonstrate a breach of these commitments and would carry the burden of initiating and proving, at least *prima facie*, such violations, and only if the complaint is upheld by the dispute settlement body could retaliatory trade sanctions be authorized in the event that non-compliance continued. This approach has several virtues: first, trade sanctions cannot be imposed until there has been a multilateral judgment that a violation of relevant core international labour standards or other human rights has occurred, and the country seeking to impose such sanctions bears the initial burden of initiating a complaint and proving a *prima facie* case. Second, it has the virtue of any rule-based system of laying out the substantive ground rules with some precision in advance and thus minimizes the potential for protectionist abuse of the regime. Third, and relatedly, it renders problems of justiciability more tractable.

III. THE CHOICE OF INSTITUTIONAL REGIME

Having discussed the choice of objectives and the choice of instruments in the light of those objectives in shaping a trade/labour standards linkage, the remaining question is the choice of institutions to administer this linkage in the light of choice of objectives and choice of instruments. Two important and related considerations are relevant here: first, institutional specialization, as in many other domains, has many

⁸² Citation needed.

⁸³ (perhaps incorporating by reference relevant international documents).

⁸⁴ (which incorporates by reference the Berne, Paris and Rome Conventions)

virtues in vindicating desired policy objectives;⁸⁵ second, because human rights, not trade effects, motivate the trade / labour linkage that we advocate, vesting exclusive or even primary jurisdiction in an international trade body risks compromising the normative rationale for the linkage, e.g. by giving primacy to adverse trade effects in either importing or exporting countries.

In cases of egregious abuses of universal civil human rights, such as apartheid or genocide, it is difficult to imagine as plausible the vesting of this function in a trade organization like the WTO. Rather, following current international practices, one would imagine that the appropriate international organ for authorizing or perhaps requiring such sanctions is the UN Security Council. In other less egregious cases, there will still obviously be questions of institutional legitimacy and competence in vesting the administration of such a regime in a trade organization. One option here entails a sharp and exclusive institutional division of labour. For example, with respect to core labour standards, the authorization or requirement for the imposition of a trade or other economic sanctions could be vested in the ILO by way of elaboration of its sanctioning power under Article 33 of the ILO Constitution. This result would follow, by way of analogy, the example of regimes such as the above-mentioned CITES, which requires signatory states to ban imports of endangered species or products there from. Critics of the ILO, however, are sceptical of the willingness or capacity of the ILO to implement and administer effectively such a regime. Defenders of the ILO, on the other hand, may worry that the attachment of economic sanctions to the powers of the ILO may destabilize the organization, causing states to withdraw from membership or to withhold ratification of its Conventions to an even greater extent than is the case at present.

Another option is to imagine some form of horizontal coordination among international agencies, whereby the ILO for instance would be wholly or largely responsible for determinations of systematic and persistent violations of core labour standards, UN Committees on Human Rights for systematic and persistent violations of other universal human rights (other than the most egregious abuses), and the WTO would

⁸⁵ See T.N. Srinivasan, "International Trade and Labour Standards from an Economic Perspective", in Pitou van Dijk and Gerrit Faber (eds.), Challenges to the New World Trade Organization, (Den Haag/Boston 1996), 219-244.

be responsible for overseeing the implementation of sanctions and ensuring that arbitrary and unjustifiable forms of discrimination and disguised protectionism are avoided, as well as proportionality in the scale of the trade sanctions imposed. A variant on this option would be to have international organizations such as the ILO or UN Human Rights Committees nominate members to dispute settlement panels or the Appellate Body of the WTO in cases involving complaints of violations of core labour standards or other universal human rights, and at the same time take steps to render WTO dispute settlement process both more transparent and more inclusive in terms of admissibility of *amicus curiae* briefs from interested members of civil society.⁸⁶

Our preference would be for some form of horizontal co-ordination with specialized international agencies with expertise and legitimacy in the labour standards or human rights fields who would make determinations of systematic and persistent violations of relevant norms despite whatever carrots and sticks (assisting and shaming) that the agency typically first brings to bear on violators. Thus, the “necessity” test under Article XX would largely fall within these agencies’ domains, although such determinations may be precipitated by unilateral state trade action under one of the options reviewed in the previous section or a complaint by the targeted country. A reference under the DSU (Article 13) by the WTO panel seized with the complaint, when they refer to a relevant specialized international agency for findings on violations of relevant international norms. The WTO panel should accept these agencies’ determination as presumptively dispositive of the referenced issues. Indeed this option becomes much more attractive with this form of horizontal co-ordination. Such determination may also go some distance toward meeting the non-discrimination / disguised discrimination conditions in the chapeau to Article XX of the GATT.⁸⁷ With respect to the proportionality of the proposed trade response, the WTO for its part should again be influenced by the nature of the horizontal agency’s findings as to the seriousness and persistence of violations.

Because adverse trade effects are irrelevant in our proposed framework of analysis, trade sanctions cannot be quantified in these terms. Here, more imaginative

⁸⁶ See Michael Trebilcock and Robert Howse, The Regulation of International Trade (Routledge, London, 3rd. ed., 2005), chap. 4.

fashioning of trade remedies are called for. For example, the NAFTA Labour Side Accord provides for a system of fines, ultimately enforceable by trade sanctions, if a member state is found by a specialized panel to have engaged in a systematic and persistent practice of not enforcing its own labour laws, with the fine payable to the offending country to enhance its labour law enforcement.⁸⁸ This form of sanction suggests one option. Another option may entail denial of access to the dispute settlement process of the WTO as a complainant for so long as a member state is non-compliant. A yet further option is suspension of voting rights in the WTO while non-compliance persists. Crippling a non-compliant country, particularly a poor developing country, economically with trade sanctions should be reserved as the remedy of last resort.

IV. THE EXISTING AND EVOLVING LEGAL AND INSTITUTIONAL FRAMEWORK

A. THE WORLD TRADE ORGANIZATION

In the Havana Charter, which was to be the blueprint for the failed International Trade Organization (ITO), there was a stipulation that Members were to take measures against ‘unfair labour conditions’.⁴⁶ The GATT contains no explicit provision either permitting or requiring trade action against labour rights violations. Article XX(e), however, permits otherwise GATT-inconsistent measures ‘relating to the products of prison labour’.⁸⁹

In determining the legality of labour-rights related trade measures under the WTO framework, it is important to distinguish between four kinds of measures: trade measures that condition imports on the labor conditions under which specific products are

⁸⁷ Citation/explanation needed.

⁸⁸ Under Annex 39 of NAFTA, any monetary enforcement assessment shall be no greater than \$1 million (US) for the first year of the Agreement and thereafter no greater than .007 percent of total trade between the Parties during the most recent year for which data are available and must be paid into a fund to improve or enhance labour law enforcement in the Party complained against.

⁸⁹ Citation needed.

manufactured (for instance a ban on rugs manufactured with exploitative child labor); sanctions against a specific country or countries (the US ban on trade with Burma, mentioned above); labelling, voluntary codes of conduct and associated monitoring mechanisms; GSP preferences linked to labor rights performance.

The first kind of measure treats products differently based upon circumstances surrounding their production. Under Article I of the GATT, every WTO Member is required to provide unconditional most favoured nation treatment to every other WTO Member, with respect to “like products”.⁹⁰ The *Belgian Family Allowances* ruling^[cite] is often cited for the proposition that this requirement of unconditionality excludes the possibility of distinguishing between products based upon labor conditions. The *Belgian Family Allowances* case, however, dealt with conditionality based on the system of social protection adopted by particular countries. It was thus not origin-neutral, and in fact closer to the second kind of measure identified above. In the adopted *Canada-Autos* report, ^[cite] the panel held that non-discriminatory, i.e. non-origin based conditions were permissible even with respect to “like” products under Art. I: “We therefore do not believe that, as argued by Japan, the word “unconditionally” in Article I:1 must be interpreted to mean that making an advantage conditional on criteria not related to the imported product itself is *per se* inconsistent with Article I:1, irrespective of whether or not such criteria relate to the origin of the imported products.”⁹¹ On the other hand, a more recent panel, the EC-GSP panel, without even so much as a citation to *Canada-Autos*, took a very different approach to unconditionality in Art. I:1, holding that it excluded even origin-neutral conditions; however, the Appellate Body did not affirm the approach of the panel in EC-GSP because it took a different view of the threshold issue of how MFN applies in a situation where the complaint is about discrimination between developing countries who are the beneficiaries of a GSP program, finding that such discrimination must be addressed instead under the Enabling Clause, a specialized WTO instrument that deals with the Generalized System of Preferences. On the *Canada-Autos* approach, a genuinely (both *de jure* and *de facto*) origin neutral condition related to respect for core labour rights in the production of a product might well be found not to

⁹⁰ Citation needed.

⁹¹ (para. 10-24).

violate Art. I:1, even if products produced in violation of such rights were found to be “like” those that are not (an issue we will explore in more detail below, when we discuss National Treatment under the GATT). On the EC-GSP panel approach, there would clearly be a violation of Art. I:1, thus requiring that the measure be justified under an exception in Art. XX of the GATT.

Art. III:4 of the GATT requires that imported “products” receive treatment no less favourable than that to be afforded to “like” imported products (the National Investment principle). A longstanding issue in GATT and WTO jurisprudence is whether products may be considered “unlike” based upon process and production methods. In the *Asbestos* case [cite] the WTO Appellate Body set forth a framework for evaluating whether products are “like” under Art. III:4; this framework neither explicitly endorses nor rejects the idea that process and production methods are relevant to the assessment of likeness. The Appellate Body, however, reasoning strongly suggests that products may be considered like or unlike based on consumer tastes and habits. Thus, if there is sufficient evidence that consumers distinguish between products produced in conditions violating CLS and those produced in conditions consistent with CLS, or *would* distinguish these products if they had perfect information, then the former products might well be found to be “unlike” the latter. It should be noted that in the *Asbestos* case the Appellate Body emphasized that the principle of avoiding protectionism stated in Art. III:1 should inform determinations of “likeness”.⁹² Thus, in evaluating factors such as consumer preferences, the dispute settlement organs will be attentive to the possibility of protectionist manipulation or abuse as ingredients in product-based labour-rights trade measures.

Even if products produced in conditions that violate CLS were found to be “like” products not produced in such conditions, in order to establish a violation of Art. III:4, it would be necessary to show that the difference in treatment between “like” products leads to less favourable treatment of the “group” of imported products in relation to the “group” of like domestic products.⁹³ In the case of CLS, it might well be difficult to show such less favourable treatment of imports, since all ILO Members, and thus essentially all WTO Members, are equally obliged to conform with CLS; thus, such a

⁹² Citation needed.

⁹³ *EC-Asbestos*, para. 100.

condition is not, by definition, “less favourable” to exports, since exporting countries are just as much bound to ensure such rights are respected as importing countries.

By contrast to product-related measures of the kind just described, sanctions targetted at particular countries that violate CLS are very likely to be found to contravene Art. I of the GATT, since they discriminate based on the country of origin of the goods; it might of course be argued the discrimination is nevertheless based on origin-neutral *criteria*, namely CLS themselves. This argument, however, would only be persuasive if the importing country were to ban trade from all countries that run afoul of CLS, regardless of other factors, including geo-political considerations, which, as argued above, it would be unrealistic to expect. Further, a general import ban⁹⁴ would be a violation of Art. XI of the GATT, which outlaws prohibitions and quantitative restrictions on trade. Thus, such an import ban would need to be justified by the importing country under Art. XX.

The possibility has been raised that Article XX(a), which permits otherwise GATT-inconsistent measures ‘necessary to protect public morals’, might be invoked to justify trade sanctions against products that involve the use of child labour or the denial of basic workers’ rights.⁹⁵ In its ruling in *Shrimp/Turtle I* [cite] that Art. XX can be, in principle, used to justify measures that condition imports on other countries’ policies, the AB went beyond the case of XX(g) (“exhaustible natural resources”) which was at issue in that case and *explicitly* mentioned, *inter alia*, XX(a). There is no GATT or WTO jurisprudence on the interpretation of XX(a), and the reference to prison labour in XX(e), as well as the fact that explicit language on labour rights was in the failed Havana

⁹⁴ (because it does not impose a condition applicable to both domestic and imported products alike but rather targets imports alone)

⁹⁵ See C.T. Feddersen, *Der Ordre Public in der WTO: Auslegung und Bedeutung des Art. XX. Lit. a) GATT im Rahmen der WTO-Streitbeilegung* (Berlin: Duncker and Humboldt, 2002). The expression “public morals” in XX(a) has not been subject to judicial interpretation by the Appellate Body but this language, as it appeared in a similar exception in the General Agreement on Trade in Services was recently the subject of interpretation by a panel of first instance in the *US-Gambling* case. The panel considered that “public morals” denotes “standards of right and wrong conduct maintained by or on behalf of a community or nation.”(Paragraph 6.465) Human rights norms to which states have committed themselves as states in international instruments would necessarily fall within the notion of “standards of right and wrong conduct maintained by” a community or nation.

Charter, arguably suggests that if the GATT Article XX had been designed to encompass sanctions with respect to labour rights, explicit language would have been used to articulate such an exception. This being said, the interpretation of public morals should not be frozen in time, and with the evolution of human rights as a core element in public morality in many post-war societies and at the international level the content of public morals should extend to universal human rights, including labour rights. This view is consistent with a dynamic interpretation of Art. XX of the kind which the AB gave to Art. XX(g) in the *Shrimp/Turtle* case. Furthermore, in early 2004 the Office of the UN High Commissioner for Human Rights was preparing a study on “public morals” and human rights.⁹⁶ In the modern world, the very idea of public morality has become inseparable from the concern for human personhood, dignity, and capacity reflected in fundamental rights. A conception of public morals or morality that excluded notions of fundamental rights would simply be contrary to the ordinary contemporary meaning of the concept.

As interpreted by the AB in *Shrimp/Turtle* the “chapeau” of Art. XX provides an important check against protectionist or other abusive implementation of trade bans for ostensible labour rights purposes.⁹⁷ In determining whether measures in question are applied so as to constitute arbitrary or unjustified discrimination or a disguised restriction on international trade, the AB would examine factors such as whether a trade ban inappropriately singles out the target country, whereas other countries might, against the objective criteria in question, merit similar treatment. Here it would be important to determine whether the labour rights situation in the particular countries in question has been singled out as especially grave or warranting particular attention by the international community, including the ILO and the UN human rights organs⁹⁸. Here, it should be emphasized that the chapeau only prohibits arbitrary and unjustified discrimination against countries where the same conditions prevail—not *all* discrimination. Thus, a sanctions-imposing state might still justify singling out one target

⁹⁶ See further Steve Charnovitz, “The Moral Exception in Trade Policy”, Gabrielle Marceau, “WTO Dispute Settlement and Human Rights”, 13 *European Journal Intl. Law* 753 (2002).[clarify cites]

⁹⁷ Citation needed.

⁹⁸ (it will be recalled that this was clearly the case with Burma)

country and not including others where the labour rights situation is similarly grave, by citing geo-political or other principled policy reasons why it would be inappropriate to ban trade from the other countries in question.

Further the import ban must be “necessary” for the protection of public morals, according to the terms of para. XX(a)⁹⁹. The concept of “necessity” as elaborated by the AB in the *EC Asbestos* and *Korea Beef*[cite] cases in relation to other paras. of Art. XX where the word “necessary” appears, has a bifurcated structure. A measure may be necessary if it is “indispensable” to achieving the objective in question, which entails an examination of whether there is any reasonably available less trade restrictive alternative. Since as discussed above often a range of less restrictive alternative instruments might exist to address non-compliance with CLS, it would be up to the state seeking to justify its ban to show that these instruments have proven, or are likely to prove ineffective. To return to the example of Burma again, such a requirement might well be met where the ILO itself has essentially declared that other available alternatives to induce a country to engage with the international community concerning its labour rights practices have failed. A second version of the “necessity” test applies where the measure in question cannot be shown to be indispensable, but nevertheless has a close relationship to the given objective, here protection of public morals. In this latter instance, a further requirement is imposed, namely to show that the trade restricting effect of the measure is not out of all proportion to the achievement of its objective.

With respect to the third type of measure, voluntary labelling or other code of conduct based approaches to achieving CLS compliance through consumer action, generally the GATT itself does not apply where there is no element of mandatory government action (albeit GATT norms may extend to indirect mandatory action, such as “informal guidance” by governments to industry that they implicitly may face various kinds of informal sanctions for not complying with).¹⁰⁰

These approaches, however, may be disciplined under the TBT (Technical Barriers to Trade Agreement)¹⁰¹; the Agreement requires WTO Members to ensure that voluntary standard setting exercises comply with a Code of Good Practice. This code,

⁹⁹ Citation needed.

¹⁰⁰ See *Japan-Semiconductor*, *Canada-FIRA* and *Japan-Film (Kodak/Fuji)* panels).[cites]

inter alia, entails that voluntary standards be based on relevant international standards, and that setting of standards and monitoring of compliance in voluntary systems not constitute protectionism, and be undertaken so as to avoid unnecessary obstacles to trade. While no clear definition of international standards is given in the TBT Agreement, an international standards setting body is defined as an organization open to all WTO Members.¹⁰² Based on this definition, both ILO Conventions and the Declaration on Core Labour Standards would constitute “international standards” within the meaning of TBT, as would the recently proclaimed UN norms of corporate responsibility, discussed above.

The fourth kind of measure, GSP preferences conditioned on labour rights performance, is already used extensively by both the US and the EU. Recently, India challenged a relatively new aspect of the EU scheme, namely a provision that gave a further additional margin of preference to those developing countries able to certify that CLS were being effectively implemented in their domestic law and regulations.¹⁰³ India also challenged a related scheme for environmental performance, and drug enforcement. In the end, India dropped the claims about the labour (and environmental) preferences, limiting its argument to drug preferences. The Panel ultimately ruled that under Art. I:1 of the GATT, and also under the Enabling Clause, which provides an exception from Art. I:1 for GSP, developed countries must, with a few narrow exceptions, treat *all* developing countries the same in respect of GSP preferences (except for least-developed, which may be offered a larger margin of preference).¹⁰⁴ The Appellate Body reversed the panel in part, holding that the concept of non-discrimination in the Enabling Clause permitted the treatment of different developing countries differently, where such different treatment was based on the individual development needs of the countries in question, and the scheme was operated on the basis of transparent and objective criteria that were related to such needs. The Appellate Body based this notion of non-discrimination on another provision in the Enabling Clause, 3c, which refers to the requirement that GSP measures “be designed and, if necessary, modified, to respond positively to the development,

¹⁰¹ Citation needed.

¹⁰² Citation needed.

¹⁰³ Citation needed.

¹⁰⁴ Citation needed.

financial and trade needs of developing countries.” The Appellate Body noted: “the existence of a “development, financial [or] trade need” must be assessed according to an *objective* standard. Broad-based recognition of a particular need, set out in the *WTO Agreement* or in multilateral instruments adopted by international organizations, could serve as such a standard. In our view, the expectation that developed countries will “respond positively” to the “needs of developing countries” suggests that a sufficient nexus should exist between, on the one hand, the preferential treatment provided under the respective measure authorized by paragraph 2, and, on the other hand, the likelihood of alleviating the relevant “development, financial [or] trade need”. In the context of a GSP scheme, the particular need at issue must, by its nature, be such that it can be effectively addressed through tariff preferences.”(Paragraphs 163-164). Notably, in finding that the EC drug preferences did not survive such a test, the Appellate Body contrasted the drug preferences with the additional preferences that addressed themselves to compliance with core labour standards: the latter scheme, the AB noted, had “detailed provisions setting out the procedure and substantive criteria” that would allow all *similarly-situated* developing countries to take advantage of the preferences.(Paragraphs 182-183).

It is to be noted, however, that the AB confined its ruling in *EC-GSP* to the kind of GSP measure at issue in that case, namely the granting of an additional margin of preference to a developing country that meets the criteria in question. In the case of labour rights, the US and EC GSP schemes also provide for the possibility of withdrawal of GSP treatment entirely, in the case of certain kinds of violations. The AB went to some length to indicate that its reasoning in this case did not apply to that kind of GSP conditionality: “in this Report, we do not rule on whether the Enabling Clause permits *ab initio* exclusions from GSP schemes of countries claiming developing country status, or the partial or total withdrawal of GSP benefits from certain developing countries under certain conditions.”(Paragraph 129).¹⁰⁵

¹⁰⁵ For a discussion among trade lawyers and academics about the broader implications of the AB ruling in *EC-GSP*, see “Roundtable”, *World Trade Review*, July 2004.

B. INTERNAL TRADE LAW OF THE UNITED STATES AND THE EUROPEAN UNION

U.S. trade law provides for withdrawal of trade concessions with respect to countries that fail to respect international workers' rights. For example, Section 301 of the U.S. Trade and Tariff Act of 1974 as amended in 1988, provides the United States Trade Representative (USTR) with discretionary authority to recommend a wide variety of trade sanctions against countries which, *inter alia*, engage in acts, policies, and practices that 'constitute a persistent pattern of conduct denying internationally recognized worker rights'.¹⁰⁶ As already noted, the Burma Freedom and Democracy Act of 2003 bans all trade between the United States and Burma on, *inter alia*, grounds of egregious violations of core labour rights.¹⁰⁷

In addition, with respect to developing countries in particular, trade preferences granted under the GSP are denied to a country that is determined not to be 'taking steps' to implement internationally recognized workers' rights.¹⁰⁸ These rights are defined as: the right of association; the right to organize and bargain collectively; freedom from any kind of forced or compulsory labour; a minimum age for the employment of children; and acceptable conditions of employment with respect to minimum wages, hours of work, and occupational safety and health.¹⁰⁹ Although application of trade sanctions against unfair labour practices involves a unilateral judgment by the U.S. authorities about the domestic policies of other countries, the language of the U.S. statute does suggest as a reference point, certain widely accepted international norms, as reflected in the Conventions of the International Labour Organization. In other words, although the process is unilateral, it refers to rights recognized in international instruments. Section 301 measures, however, could include withdrawal of trade concessions bound in WTO schedules, and would therefore result in a conflict with WTO obligations as they currently stand.¹¹⁰

¹⁰⁶ Citation needed.

¹⁰⁷ *Supra* note x.

¹⁰⁸ Citation needed.

¹⁰⁹ Citation needed.

¹¹⁰ (subject to justification under Article XX(a), which as discussed above would entail the claim that the measures are necessary to protect 'public morals').

In fact, while GSP preferences have been withdrawn numerous times, S. 301 action has yet to be taken on the basis of consistent non-compliance with international labour rights. The relevant legislation with respect to GSP preferences allows interested parties to bring a petition before the GSP Subcommittee, an inter-agency group of US trade officials, requesting review of the labour rights performance of a country with, or seeking, GSP status. The review may result in a recommendation to the President that a country's GSP status be withdrawn. The OECD notes:

In reviewing workers' rights petitions, the GSP Subcommittee undertakes a thorough investigation in order to obtain a balanced view using information from a variety of sources. The Subcommittee looks in particular for evidence of progress in the country's legislation and in its practices, and relies on ILO Conventions and Recommendations as benchmarks for interpreting progress.

The OECD further notes that the pressure created by public exposure and scrutiny of labour practices in such reviews may have an impact on performance, even apart from the threat of actual sanctions through GSP withdrawal. According to the OECD as well, '[from] 1984 through 1995, 40 countries have been named in petitions citing labour rights abuses according to GSP law', with fewer than half these cases being pursued by the Subcommittee to the stage of a formal review. According to Dufour, among the countries that have had their GSP status withdrawn by virtue of a recommendation of the Subcommittee are: the Central African Republic, Chile, Liberia, Myanmar, Nicaragua, Paraguay, Romania and the Sudan. A later study of the effects of labour conditionality in US GSP preferences, by Elliot came to the conclusion that "The US experience in applying workers rights conditionality to trade benefits under the GSP suggests that external pressure can be helpful in improving treatment of workers in developing countries and that linkage of trade and worker rights need not devolve into simple protectionism."¹¹¹

¹¹¹ Kimberly Elliot, "Preferences for Workers? Worker's Rights and the U.S. Generalized System of Preferences, Institute for International Economics, Washington, D.C. May 8 2000 at ; see also Lance Compa and [full name]J.S. Vogt, "Labor Regulation and Trade: Labor Rights in the Generalized System of Preferences: A 20-Year Review", (2001) 22. Comparative Labor Law and Policy Journal 199.

In 1995, the European Union amended its GSP programme so as to condition the granting of a margin of preferentiality in excess of a base rate upon, *inter alia*, respect for certain core labour rights; the relevant EU regulations refer explicitly to the ILO Conventions concerning freedom of association and collective bargaining, as well as child labour.¹¹² This provision came into force in 1998. In addition, GSP status may be withdrawn altogether where a country permits any form of slavery or the exportation of products made with prison labour.¹¹³

C. NAFTA AND THE NORTH AMERICAN AGREEMENT ON LABOR COOPERATION (NAALC)

In the context of NAFTA, U.S. concerns in particular about Mexican labour practices led to the negotiation of a parallel accord on labour standards. Mexican labour laws do provide for most of the workers rights contained in the ILO Conventions, but are widely believed to be un- or under-enforced.¹¹⁴ Some proponents of NAFTA attribute this un- or under-enforcement to a shortage of labour inspectors.¹¹⁵ The problem, however, is likely much more deeply rooted reflecting widespread corruption of politicians or public officials (especially at the regional or local level), and the use of intimidation and violence to keep workers from organizing in some parts of Mexico, such as the economically important *Maquiladora* zone.¹¹⁶ Furthermore, as Morici suggests, [cite needed] there may be collusion between the Mexican government and the official Mexican trade union movement to keep workers unorganized in the *Maquiladoras* so as to attract more foreign investment into Mexico.

The North American Agreement on Labor Cooperation, usually referred to as the NAFTA Labor Side Agreement has two major components. The first is a hard legal obligation on the part of NAFTA Parties to enforce adequately their own domestic labour laws, particularly with respect to occupational safety and health, child labour and

¹¹² Citation needed.

¹¹³ Citation needed.

¹¹⁴ Citation needed.

¹¹⁵ Citation needed.

minimum wage standards (Articles 3, 27).¹¹⁷ This obligation may be described as hard, in that a binding dispute settlement process may, where there is ‘persistent failure’ to enforce these labour laws, lead to a monetary judgment against the offending Party. In the case of a successful action against Canada, the monetary judgment can be enforced through an order of a Canadian domestic court; in the case of the US and Mexico, it may be enforced through withdrawal of concessions under NAFTA.¹¹⁸ Another substantive obligation of the Side-Agreement is that ‘each Party shall ensure that its labor laws and regulations provide for high labor standards consistent with high quality and productivity workforces, and shall continue to strive to improve those standards in that light’ (Article 2)¹¹⁹. This obligation, however, is hedged by the qualifying language that it is subject to ‘the right of each Party to establish its own domestic labor standards’, and – unlike the Article 3 obligation – no means of legal enforcement is contemplated for this obligation.¹²⁰

A Commission for Labor Cooperation is provided for, comprised of a Council and a Secretariat (Article 8), charged with, *inter alia*, promoting the collection and dissemination of data on labour issues, the production and publication of reports and studies, and the facilitation of consultation between the Parties on labour matters (Article 10).¹²¹ Article 11 provides a list of specific matters regarding which the Council ‘shall promote cooperative activities between the Parties, as appropriate’. NAALC Annex 1 states that the Parties are ‘committed to promote’ a range of labour principles, including freedom of association and the right to organize, prohibition of forced labour, ‘labor protections for children and young persons’, and elimination of employment discrimination.¹²²

The primary avenue for complaints by interested Parties that a NAFTA Party is not enforcing its labour laws, is through the National Administrative Office of one of the

¹¹⁶ Explanation needed.

¹¹⁷ (Articles 3, 27). Citation needed.

¹¹⁸ Citation needed.

¹¹⁹ Citation needed.

¹²⁰ Citation needed.

¹²¹ Citation needed.

¹²² (the commitment to these and the other principles is subject to the important qualification that no minimum standards are being set for domestic law).

other two NAFTA Parties.¹²³ Thus, the U.S. National Administrative Office (NAO) typically receives complaints about under-enforcement, or non-enforcement of Mexican labour law. The NAO may accept or reject the complaint for review, and in the case of rejection must furnish written reasons to the complainant.¹²⁴ Such a review produces a report, which may or may not recommend ministerial consultations. The sole avenue through which enforcement action may eventually be taken against a NAFTA Party is, however, through panel dispute settlement, and two of the three NAFTA Parties must consent to the striking of a panel. To date, a variety of complaints have been accepted for review by NAOs, with Mexico named as the offending Party in all but one.¹²⁵ Several of the submissions have resulted in Ministerial Consultations. In almost all cases, the complaints have concerned failure to enforce the right of free association and the right to organize.¹²⁶ An important exception is a recent complaint concerning pregnancy-based discrimination by Maquiladora employers. It has been claimed that the publicity effects of these complaints, and the reports and consultations in which they have resulted, have led to some positive adjustments in labour law enforcement; however, the Mexican and in one case the United States authorities have not surprisingly left unacknowledged the role of the NAALC in altering their dispositions on the matters at issue.¹²⁷ Many of the cases have involved anti-union activity by major multinational corporations or their local affiliates, including General Electric, Honeywell and Sprint: in these kinds of cases, it has been difficult to ascertain whether the NAO report had a positive impact on the practices of the corporation, even if it does not result in the government itself improving its enforcement of labour laws. In no case has a matter been taken to an arbitral panel.

In the ITSPSA case, workers in Mexico were subject to various kinds of intimidation and harassment surrounding a vote on the certification of an independent union.¹²⁸ The Ministerial Consultations actually resulted in a Ministerial Agreement between the United States and Mexico, that Mexico would promote secret ballots and

¹²³ Citation needed.

¹²⁴ Citation needed.

¹²⁵ (which complained of US practices). Citation needed.

¹²⁶ Citation needed.

¹²⁷ Citation needed.

¹²⁸ (i.e. a different union than the official state union). Citation needed.

“neutral” voting places.¹²⁹ Mexico, however, does not appear to have honoured this Agreement, and a complaint by U.S. unions to the U.S. Department of Labor concerning Mexico’s failure to comply with the Agreement was dismissed in 2001.¹³⁰ Based on these and other developments from the inception of NAFTA up to 2003, Compa presents a pessimistic overall assessment of the results from the NAFTA labour side agreement: The NAALC has failed to achieve its high purpose. Apparently more eager to maintain diplomatic niceties rather than tackle and solve worker rights violations, the three governments have demonstrated a lack of will to hold one another to their NAALC commitments. Some investigations and reports have led to significant findings and recommendations, but they have not produced change. Ministerial consultations resulted only in research projects and trilateral conferences. Although these are often informative, they have not directly addressed or resolved worker rights violations documented and proven in NAALC proceedings.¹³¹ Because of the role of the provinces in labour matters under the Canadian constitution, Canada’s full participation in the NAALC process was subject to a minimum threshold of voluntary provincial involvement. In 1997 the threshold specified in the NAALC was crossed, with the federal government and three provinces (Manitoba, Quebec and Alberta) having decided to participate.¹³² Finally, there is an additional mechanism in the NAALC, as yet unused, which contemplates the striking of Evaluation Committees of Experts, which may be requested by a Party under certain conditions: a Committee may deal with ‘technical standards’ in eight areas, which include, *inter alia*, prohibition of forced labour, labour protection for children and young persons, and elimination of employment discrimination.¹³³

D. BILATERAL AGREEMENTS

¹²⁹ (where workers could not be subject to intimidation as in the workplace itself).

¹³⁰ Citation needed.

¹³¹ Lance Compa, *Justice for All: The Struggle for Worker Rights in Mexico* (Washington D.C.: Solidarity Center, 2003), p. 41.

¹³² Citation needed.

¹³³ Citation needed.

Labour rights provisions have been incorporated into at least two recent bilateral trade agreements, the US-Jordan Free Trade Agreement and the US-Cambodia Textile Trade Agreement. In the case of the US-Jordan Agreement, the provisions (unlike NAFTA) are incorporated in the main treaty text, not a side accord.¹³⁴ Moreover, the obligations in question are subject to the general dispute settlement procedures of the Agreement. Nevertheless, by an exchange of letters the US and Jordan have agreed that disputes concerning the labour provisions of the Agreement shall not result in the imposition of sanctions.¹³⁵ The provisions in question are very similar to those in the NAFTA side agreement. Thus, “a party shall not fail to effectively enforce its labor laws in a manner reflecting trade”.¹³⁶ In addition, “each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from [domestic labor laws] as an encouragement for trade with the other Party.”¹³⁷ The rather odd language “in a manner reflecting trade” appears to be some sort of qualifier, suggesting that labour obligations only apply in sectors or situations where there is actual trade between the US and Jordan.

The relevant provision in the US-Cambodia Agreement is different. It reads as follows: “. . .Cambodia shall support the implementation of a program to improve the working conditions in the textile and apparel sector, including internationally recognized core labor standards, through the application of Cambodian labor law . . . The Government of the United States will make a determination . . . whether working conditions in the Cambodia textile and apparel sector substantially comply with such labor law and standards.” If the US determines that the Cambodian garment industry is in substantial compliance, it could increase Cambodia’s textile quota up to 14% per year, above the stand 6% quota increase.¹³⁸

¹³⁴ Citation needed.

¹³⁵ Citation needed.

¹³⁶ Citation needed.

¹³⁷ Citation needed.

¹³⁸ See Regina Abrami, “Workers Rights and Global Trade: The U.S. – Cambodia Bilateral Textile Trade Agreement”, Harvard Business School Case Study, Cambridge, Mass., August 2003; Kevin Kolben, “Trade, Monitoring and the ILO: Working to Improve Conditions in Cambodia’s Garment Factories”, forthcoming, *Yale Human Rights and Development Law Journal*, 2004).[update cite]

V. CONCLUSION

Increasingly, discussion in the international policy community on the relationship between liberal trade and labour rights has focused on the issue of compliance with core universal rights, which have a close relationship to the rights contained in general international human rights instruments such as the UN Declaration and the UN Covenant on Civil and Political Rights. Competitiveness-based claims about ‘social dumping’ have become less prominent, and the notion that the objective should be to achieve some kind of ‘level playing field’ between developed and developing countries is now less and less heard, even from labour rights advocates on the left of the political spectrum. In sum, contrary to the picture still painted by some free traders, the claim for a trade and labour rights link is not some fanatical or protectionist adventure to attempt harmonization of conditions of work across the world, regardless of different economic and cultural conditions. but rather an attempt to ensure respect for core labour standards conceived of as universal human rights. (If possible, please extend into a more detailed conclusion section.)