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**Trade, investment and labour: interactions in international law**  
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**Citation**

Zandvliet, R. (2019, February 21). *Trade, investment and labour: interactions in international law*. *Meijers-reeks*. Retrieved from <https://hdl.handle.net/1887/68881>

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**Title:** Trade, investment and labour: interactions in international law

**Issue Date:** 2019-02-21

## 3 | Multilateral Trade Law and Labour

### 3.1 INTRODUCTION

When looking at the work of the World Trade Organization (WTO), one may get the impression that trade-labour linkage has never progressed beyond the ivory towers of academia. Its only official statement on the subject is the Ministerial Declaration of 1996, in which the WTO member states declared that the ILO is the sole competent body to deal with labour standards.<sup>1</sup> The dichotomy between trade and labour that the Singapore Declaration embraced is remarkable. As was discussed in chapter 2, both legal regimes were historically linked and mutually supportive of each other's purposes. International labour law was intended to reap the benefits of international trade without compromising the efficacy of domestic social legislation. And trade policy has been concerned with labour issues since the abolition of the slave trade in the early 19<sup>th</sup> century and was actively used to induce low-standard trade partners to improve their domestic labour legislation.<sup>2</sup>

Part 3.2 of this chapter examines the conceptual relationship between trade and labour from the perspective of trade law, and will map the history of attempts to link the two in multilateral trade law. Importantly, the debate on the role of labour standards in multilateral trade law does not depend on the existence of specific labour provisions. States can, and sometimes do adopt trade-restrictive measures that respond to concerns with foreign labour standards irrespective of an explicit provision in multilateral trade law that mandates such actions. They could adopt import bans against products made by child workers, award social labels to products that are not made by child workers, or implement comprehensive economic sanctions against countries that violate international labour standards on a systematic and widespread scale. The question is, however, whether such measures are compliant with WTO law. As a preliminary matter, part 3.3 examines whether it is possible to perceive low labour standards as unfair trade practices, and consequently as actionable under WTO law. Part 3.4 is concerned with the legality of unilateral labour-related trade measures under WTO law. Part 3.5 describes the

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1 World Trade Organization, 'Singapore Ministerial Declaration' (18 December 1996) WT/MIN(96)/DEC. This statement was renewed at the Doha Conference in 2001.

2 Steve Charnovitz, 'The Influence of International Labour Standards on the World Trading Regime: A Historical Overview' (1987) 126 *International Labour Review* 565.

operation and legality of labour rights conditionality in the Generalized System of Preferences, by which the United States and the European Union unilaterally grant trade benefits to developing countries.

## 3.2 INTRODUCTION TO MULTILATERAL TRADE-LABOUR LINKAGE

### 3.2.1 Introduction

This part chronicles the attempts to link the multilateral trade regime that was erected after the Second World War to the observance of some minimum level of labour standards. Section 3.2.2 discusses the 1947 Havana Charter for an International Trade Organization (ITO). As the Charter never entered into force, the trade regime developed on the basis of the General Agreement on Tariffs and Trade (GATT), which was intended as a provisional arrangement. Unlike the ITO, neither the GATT nor its successor, the World Trade Organization (WTO), contains labour-related provisions. Section 3.2.3 examines the debate on trade-labour linkage during the GATT (1948-1994) and WTO (1995-present) eras. After a mapping of some of the historic milestones in this debate, it compares the characteristics of treaty-based labour provisions with the justification of unilateral labour-related trade measures under a legal framework that lacks any explicit guidance.

### 3.2.2 Labour and employment in the Havana Charter

After the IMF and the World Bank were founded in 1944, attention shifted towards the establishment of an international organisation that would focus on the liberalization of global trade. Negotiations were held between 1946 and 1948, leading to the adoption of the 'Havana Charter for an International Trade Organization'.<sup>3</sup> A significant part of the Charter is devoted to employment and labour policies. Already in the 1941 Atlantic Charter, in which the United States and the United Kingdom provided a blueprint for the post-war economic order, both states expressed their "desire to bring about the fullest collaboration between all nations in the economic field with the object of securing, for all, improved labor standards, economic advancement and social security."<sup>4</sup> The inclusion of express provisions concerning employment was not controversial. Also at the domestic level, trade unions were generally supportive of international trade, provided that domestic labour regulation and social arrange-

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3 United Nations Conference on Trade and Employment, 'Final Act – Havana Charter for an International Trade Organization' (signed 24 March 1948) UN Doc E/CONF.2/78.

4 Atlantic Charter (14 August 1941).

ments were maintained and expanded.<sup>5</sup> The inclusion of an employment chapter in the Havana Charter casted this compromise in international legal commitments.<sup>6</sup>

Translating general goals into concrete and feasible obligations proved to be more difficult. This was especially the case with the issue of employment. The United Kingdom advocated for “positive measures of international cooperation” without specifying what these might entail.<sup>7</sup> The final text of the Havana Charter is of a similar general character. Apart from the obligation to “take action designed to achieve and maintain full and productive employment” it does not prescribe any specific policies and contains weak provisions on international coordination.

The employment provisions were discussed separately from a clause on ‘fair labour standards,’ which was included following a proposal by Cuba. The *travaux préparatoires* of the committee that prepared the final text shows little controversy. Two concerns were raised. First, a “single comprehensive standard” would harm the interests of developing countries, so a labour clause should take differences in productivity into account. Second, it warned that the International Trade Organization should not duplicate the work of the ILO.<sup>8</sup> Representatives of the ILO attended meetings of the committee and suggested textual amendments.<sup>9</sup> A proposal by South Africa that all labour-related complaints should be referred to the ILO was dismissed. Instead, arrangements were made for cooperation and consultation between both organizations.<sup>10</sup>

The labour clause was eventually inserted at the end of the employment chapter. Article 7 of the Havana Charter provided:

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- 5 Elissa Alben, ‘GATT and the Fair Wage: A Historical Perspective on the Labor-Trade Link’ (2001) 101 *Columbia Law Review* 1401, 1429. During the war US trade unions were already developing proposals on trade-labour linkage in international agreements. Steve Charnovitz, ‘The Influence of International Labour Standards on the World Trading Regime: A Historical Overview’ (1987) 126 *International Labour Review* 565, 575.
  - 6 See chapter 2 on ‘Employment and Economic Activity,’ which includes the clause on fair labour standards.
  - 7 Richard Gardner, *Sterling-Dollar Diplomacy in Current Perspective: The Origins and Prospects of Our International Economic Order* (Columbia University Press 1969), 274 and 278.
  - 8 United Nations Economic and Social Council, ‘Report of the First Session of the Preparatory Committee of the International Conference on Trade and Employment’ (31 October 1946) E/PC/T/33, 5. See also: Philip Alston, ‘International Trade as an Instrument of Positive Human Rights Policy’ (1982) 4 *Human Rights Quarterly* 155, 171.
  - 9 United Nations Conference on Trade and Employment, ‘Reports of Committees and Principal Sub-committees’ (September 1948) ICITO 1/8.
  - 10 Interim Commission for the International Trade Organization, ‘Relations between the International Labour Organization and the International Trade Organization’ (17 August 1948) Limited A, ICITO/EC.2/2/Add.6, which contains the text of the draft agreement.

*Fair Labour Standards*

1. The Members recognize that measures relating to employment must take fully into account the rights of workers under inter-governmental declarations, conventions and agreements. They recognize that all countries have a common interest in the achievement and maintenance of fair labour standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit. The 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.
2. Members which are also members of the International Labour Organisation shall co-operate with that organization in giving effect to this undertaking.
3. In all matters relating to labour standards that may be referred to the Organization in accordance with the provisions of Articles 94 or 95, it shall consult and co-operate with the International Labour Organisation.

The last sentence of the first paragraph echoes the premise contained in the preamble of the 1919 ILO Constitution, namely that there is an inherent link between international economic competition and the regulation of labour standards at the domestic level.<sup>11</sup> This link forms an important part of the ILO's *raison d'être*. For the purpose of the Havana Charter it is also indispensable. The preparatory committee dismissed the amendment by Argentina to omit the references to production for export, but stated that: "The principles of the Charter should be applied to all workers, whether or not they were engaged in production for export."<sup>12</sup> Due to the inclusion of the word 'particularly', "any unfair labour conditions which create difficulties in international trade" fall under the scope of Article 7.<sup>13</sup> Consequently, maintaining unfair labour conditions in a sector that competes with imports from other states in order to substitute these with domestic products would also be actionable.<sup>14</sup>

More problematic is the determination of what constitutes 'unfair' labour conditions. At the time, this was not a major point of contention. Rather, Article 7 is deliberately indeterminate. As the Turkish delegate in the preparatory committee noted: "fair labour standards should not be defined or dealt with in the Charter but should be left to international conventions under the ILO. Overlapping and duplication should be avoided. Articles 89 and 90,

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11 "Whereas also 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."

12 United Nations Conference on Trade and Employment, 'First Committee: Employment and Economic Activity – Summary Record of the Fifth Meeting' (5 December 1947) E/CONF.2/C.1/SR.5, 1.

13 United Nations Conference on Trade and Employment 'First Committee: Employment and Economic Activity – Report of Sub-Committee A – "Fair Labour Standards"' (16 December 1947) E/CONF.2/C.1/9, 3.

14 Elissa Alben, 'GATT and the Fair Wage: A Historical Perspective on the Labor- Trade Link' (2001) 101 Columbia Law Review 1401, 1431.

together with consultation with the ILO were sufficient to provide for all contingencies.”<sup>15</sup> The only clarification made by the committee confirmed that the phrase ‘fair labour standards’ was sufficiently broad to encompass social security, hence there was no need for an amendment to this effect.<sup>16</sup> The open wording also enabled linkage with future ILO conventions. At the time the ILO had not yet adopted conventions or recommendations concerning non-discrimination, for example. This prompted detailed amendments by Mexico and Haiti to expressly prohibit discrimination based on nationality, origin, race, religion or sex, including equal pay for equal work, and to oblige states to impose penalties on employers who acted in contravention to non-discrimination rules.<sup>17</sup> The majority of the committee members:

felt that the question of non-discrimination in respect of the employment of labour could not be dealt with appropriately or adequately in a charter of an international trade organization. To the extent, however, that provisions concerning non-discriminatory treatment of labour may have been, or may in the future be, incorporated in other ‘international declarations, conventions and agreements’ to which Members may subscribe the present language of the Article recognizes that measures relating to employment must take fully into account of such provisions.<sup>18</sup>

Notably, in defining its material scope Article 7 does not refer to the ILO, but to “inter-governmental declarations, conventions and agreements.” On the issue of non-discrimination for example, it was recognised that “other bodies such as the Commission on Human Rights” were also involved and could play a role in future standard-setting.<sup>19</sup>

The quoted passage also appears to indicate that whether a member of the International Trade Organization has ‘subscribed’ to an international instrument containing labour standards is relevant. However, this is not supported by the full drafting history. Indeed, the reference to ‘declarations’ was primarily included in recognition of the ILO’s 1944 Declaration of Philadelphia, which was adopted by the International Labour Conference just a

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15 United Nations Conference on Trade and Employment, ‘First Committee: Employment and Economic Activity – Summary Record of the Sixth Meeting’ (8 December 1947) E/CONF.2/C.1/SR.6, 3. Articles 89 and 90 became Articles 94 and 95 in the final draft, dealing with the reference of disputes to the Executive Board and the Conference, respectively.

16 United Nations Conference on Trade and Employment, ‘First Committee: Employment and Economic Activity – Report of Sub-Committee A – “Fair Labour Standards”’ (16 December 1947) E/CONF.2/C.1/9, 2-3.

17 United Nations Conference on Trade and Employment, ‘First Committee: Employment and Economic Activity – Annotated Agenda for Chapter II – Employment and Economic Activity’ (8 December 1947) E/CONF.2/C.1/7, 6.

18 United Nations Conference on Trade and Employment, ‘Sub-committee A of the First Committee – Report of the Drafting Group on Article 4’ (13 December 1947) E/CONF.2/C.1/A/W.1, 5.

19 Ibid 4.

few years earlier.<sup>20</sup> Furthermore, paragraph 7(2) imposes a specific obligation to co-operate with the ILO if a state is a member of that organization. This implies that paragraph 7.1 equally applies to members of the International Trade Organization that are not a member of the ILO, and consequently have not ratified any labour conventions.

Complaints under Article 7 were subjected to the regular dispute settlement provisions, contained in Articles 92 to 97. An amendment by Uruguay to expressly allow unilateral economic measures was not adopted. It provided that: "Nothing in this Charter shall be construed as preventing the adoption by a Member or reasonable and equitable measures to protect its industries from the competition of like products under sub-standard conditions of labour and pay."<sup>21</sup> Instead, the Committee decided that: "The taking of counter-action in respect of any labour condition coming within the Article and causing injury to a Member should be subject to the approval of the Organization."<sup>22</sup> Article 92.2 of the Havana Charter thus provided that members "undertake, without prejudice to any other international agreement, that they will not have recourse to unilateral economic measures of any kind contrary to the provisions of this Charter."<sup>23</sup>

The procedure for dispute settlement under the ITO consisted of three prongs. Members were firstly called upon to resolve a matter through consultations or arbitration.<sup>24</sup> If this was unsuccessful, the Executive Board of the ITO would conduct an investigation and was authorized to recommend compliance measures or allow the suspension of benefits vis-à-vis the member or members that acted in contravention to the Charter.<sup>25</sup> Upon the request of a member state involved in the dispute, the Executive Board could refer the matter to the ITO's Conference, which could "confirm, modify or reverse" the decision of the Executive Board.<sup>26</sup> Consequently, the imposition of economic measures in response to unfair labour conditions was thus possible, but always subjected

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20 United Nations Conference on Trade and Employment, 'First Committee: Employment and Economic Activity – Report of Sub-Committee A – "Fair Labour Standards"' (16 December 1947) E/CONF.2/C.1/9, 2.

21 United Nations Conference on Trade and Employment, 'First Committee: Employment and Economic Activity – Annotated Agenda for Chapter II – Employment and Economic Activity' (8 December 1947) E/CONF.2/C.1/7, 5.

22 United Nations Conference on Trade and Employment 'Sub-committee A of the First Committee – Report of the Drafting Group on Article 4' (13 December 1947) E/CONF.2/C.1/A/W.1, 2.

23 At the time the Havana Charter was drafted, Article 33 of the ILO Constitution still expressly allowed for the authorization of economic sanctions when a member failed to comply with the recommendations of a Commission of Inquiry or the International Court of Justice. As the Havana Charter was without prejudice to such measures, unilateral economic sanctions pursuant to an Article 33 resolution by the ILC would not breach the Havana Charter.

24 Art 93 Havana Charter.

25 Art 94 Havana Charter.

26 Art 95.1 Havana Charter.



to prior approval of the organization. Furthermore, the countermeasures that were foreseen could not go beyond compensatory measures to offset “the benefit which has been nullified or impaired.”<sup>27</sup> The rationale of economic measures authorised by the ITO was thus narrower than the ILO Article 33 procedure, which leaves open the possibility for punitive rather than restorative measures.

The emergency action procedure in Article 40 of the Havana Charter formed the only exception to the rule that trade measures had to be authorised by the organization. Article 40 allowed for temporary suspension or modification of concessions when a sudden and unexpected increase in imports that causes or threatens “serious injury to domestic producers in that territory of like or directly competitive products.”<sup>28</sup> The potential causes of the import surge are not specified. Depression of labour costs could be amongst the reasons why a state obtains a sudden and unexpected competitive advantage. Indeed, the preparatory committee saw Article 40 as a short-term means to prevent social dumping, while Article 7 could be applied against more persistent cases.<sup>29</sup>

The Havana Charter never entered into force, mainly because of opposition in the US Senate.<sup>30</sup> The General Agreement on Tariffs and Trade, which was negotiated as an interim agreement on trade in goods, subsequently developed into the *de facto* multilateral trade framework.<sup>31</sup> Article XXIX(1) GATT provides that “[t]he contracting parties undertake to observe to the fullest extent ... the general principles of” the Havana Charter. The WTO Panel in *Mexico–Telecommunications* used the Havana Charter to interpret the meaning of the term “anti-competitive practices.”<sup>32</sup> The applicability of Article XXIX GATT to the Havana Charter’s labour clause has occasionally been raised.<sup>33</sup> As no case concerning trade restrictive measures in response to foreign ‘unfair labour standards’ has even reached a GATT panel or the WTO Dispute Settlement Body this has never been tested in practice. Arguably, however, Article 7 will

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27 Art 94.3 Havana Charter.

28 Art 40.1(a) Havana Charter.

29 United Nations Conference on Trade and Employment, ‘Third Committee: Commercial Policy – Report of Sub-Committee D on Articles 40, 41 and 43 (28 January 1948) E/CONF.2/C.3/37, para 20.

30 For a detailed discussion of the reasons, see: William Diebold, ‘The End of the I.T.O.’ (Princeton University Essays in International Finance No 16, October 1952).

31 Protocol of Provisional Application (adopted 30 October 1947, entered into force 1 January 1948) 55 UNTS 308.

32 WTO, *Mexico: Measures Affecting Telecommunications Services – Report of the Panel* (2 April 2004) WT/DS204/R, para 7.236. John Jackson, *World Trade and the Law of GATT* (The Michie Company 1969) 46-49 on when the Havana Charter is relevant for the interpretation of GATT.

33 General Agreement on Tariffs and Trade, ‘Relationship of Internationally-Recognized Worker Rights to International Trade – Request for the establishment of a working party – Communication from the United States’ (28 October 1987) L/6243.

not be relevant in situations in which a state aims to justify trade restrictions based on their trading partners' level of labour standards. The provision would have established a framework and a dispute settlement procedure to determine (un)fairness of labour standards, thus preventing states from taking unilateral measures in the first place.

### 3.2.3 Labour and employment in the GATT and WTO era

#### 3.2.3.1 *The quest for a labour clause*

As the GATT was supposed to be a temporary agreement on trade in goods, to be subsumed by the International Trade Organization,<sup>34</sup> it does not contain references to employment and fair labour standards, apart from a preambular reference that the contracting parties strive to ensure full employment, and Article XX(e) which allows trade restrictions relating to products of prison labour. This does not mean that labour was not discussed. To the contrary, since the start of the GATT there has been a debate whether the agreement should be amended to include provisions describing the obligations of the participating states.

The debate started when Japan sought accession to the GATT in the early 1950s. The United States and the United Kingdom had severe concerns regarding low wages, hours of work and restrictive freedom of association laws in Japan.<sup>35</sup> The 1952 session of the GATT contracting parties conducted a formal review of Japanese labour standards. Negotiators were not only concerned with the low level of wages and labour conditions, but also with the question whether Japan could ensure that it would not derogate, either through amending its labour laws, lack of public enforcement or lack of effective countervailing trade union power. The rationale behind the criticism was not that Japan failed to guarantee certain basic rights to its workers, but the potential impact of low Japanese wages on the competitiveness of the US and UK.<sup>36</sup> This was especially pertinent for the UK, whose labour-intensive textile industry was in direct competition with its Japanese counterpart. To find a permanent solution for the accession of low-wage countries to the GATT, officials from

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34 Susan Ariel Aaronson, *Trade and the American Dream: A Social History of Postwar Trade Policy* (The University Press of Kentucky 1996) 62.

35 Elissa Alben, 'GATT and the Fair Wage: A Historical Perspective on the Labor-Trade Link' (2001) 101 *Columbia Law Review* 1401, 1434. Indeed, other countries had concerns about the integration of Japan into the GATT as well, and fifteen contracting parties invoked Article XXXV GATT in order to prevent application of the GATT *inter se*. See: John Jackson, *The Jurisprudence of the GATT and the WTO: Insights on treaty law and economic relations* (Cambridge University Press 2000) 62.

36 Elissa Alben, 'GATT and the Fair Wage: A Historical Perspective on the Labor-Trade Link' (2001) 101 *Columbia Law Review* 1401, 1435.

the US State Department suggested for the first time to amend the GATT with “a fair labor standards provision of multilateral application which is derived from the Havana ITO Charter.”<sup>37</sup> The rationale was that an amendment could prevent *ad hoc* (and thus potentially discriminatory) invocation of labour concerns in future accession negotiations.<sup>38</sup> The amendment to the GATT that was informally suggested read:

The Contracting Parties recognize (1) that all countries have a common interest in the achievement and maintenance of fair labor standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit, and (2) that unfair labor conditions (i.e., the maintenance of labor conditions below those which the productivity of the industry and the economy at large would justify), particularly in production for export, may create difficulties in international trade which nullify or impair benefits under this Agreement. In matters relating to labor standards that may be referred to the Contracting Parties under Article XXIII they shall consult with the International Labour Organization.<sup>39</sup>

During the official meetings on the accession of Japan, however, the US did not seek an amendment but merely asserted that “the provisions of Article XXIII were broad enough to cover cases involving competition on the basis of unfair labour conditions.”<sup>40</sup> Article XXIII GATT is concerned with nullification and impairment. It provides for procedure that allows states to complain against conduct that, as such, is not GATT incompliant but nevertheless impairs the negotiated commitments.

In 1953 the nullification and impairment procedure was thus at the core of the trade-labour debate, but it was unclear whether an additional interpretative declaration was necessary in order to clarify that “the existence of unfair labour conditions, particularly in production for export, would be a situation justifying recourse to Article XXIII.”<sup>41</sup> Although other states were reportedly indifferent on whether to support or oppose a declaration,<sup>42</sup> the General Session of the GATT contracting parties did not consider any labour-related amendments or declarations. In 1955 Japan acceded to the GATT without the

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37 US Department of States, ‘Internal Memorandum Regarding Japanese Membership in GATT’ (31 December 31 1952), cited in *ibid.*

38 *Ibid.*

39 US Commission on Foreign Economic Policy, ‘Staff Papers’ (Washington, 1954) 437-438

40 General Agreement on Tariffs and Trade, ‘Summary Record of the Sixth Meeting’ (29 September 1953) SR.8/6.

41 General Agreement on Tariffs and Trade, ‘Ad Hoc Committee on Agenda and Intersessional Business – Report on the Accession of Japan’ (13 February 1953) L/76, 5. Steve Charnovitz, ‘The Influence of International Labour Standards on the World Trading Regime: A Historical Overview’ (1987) 126 *International Labour Review* 565, 574-575.

42 Elissa Alben, ‘GATT and the Fair Wage: A Historical Perspective on the Labor-Trade Link’ (2001) 101 *Columbia Law Review* 1401, 1437, citing a telegram from the US Consulate in Geneva to the Secretary of State.

other members taking any action to address the initial concerns regarding wages and labour conditions. Arguably however, part of the reason why Japan eventually acceded to GATT was related to the fact that during the accession negotiations (1952-1956) it ratified ten ILO conventions.<sup>43</sup> This included the 1949 Right to Organise and Collective Bargaining Convention (No 98) and the 1947 Labour Inspection Convention (No 81). The Japanese accession also accelerated discussions within the GATT about a special arrangement that would allow selective safeguard measures against textile imports from low-wage economies.<sup>44</sup> This was eventually adopted in 1961 and continued to exist until the World Trade Organization was established in 1995.<sup>45</sup>

The first attempt to amend the GATT was tabled during the 1979 Tokyo Round. During the final stages of the negotiations, the United States submitted a two-page paper containing suggestions for a GATT working group on 'minimum international labour standards'.<sup>46</sup> During the discussion of the US memorandum, other states indicated that labour was not an "immediate task" of the GATT or was simply irrelevant.<sup>47</sup> Consequently, this first concrete proposal for trade-labour linkage since 1953 died in vain. During the subsequent Uruguay Round of trade negotiations, which ran between 1986 and 1994, the United States narrowed its ambitions. In 1986,<sup>48</sup> 1987<sup>49</sup> and 1990<sup>50</sup> attempts were made to discuss labour issues in the GATT through studies or working groups. On the other side of the Atlantic, the European Parliament was the most vocal actor. Since the 1980s it adopted various resolutions on the role of labour standards in the multilateral trade regime, although the specific

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43 Ibid 1438-1439.

44 Niels Blokker, 'International Regulation of World Trade in Textiles' (PhD Thesis University of Leiden 1989) 68-69.

45 Niels Blokker and Jan Deelstra, 'Towards a Termination of the Multi-Fibre Arrangement?' (1994) 28 *Journal of World Trade* 97.

46 General Agreement on Tariffs and Trade, 'Minimum International Labour Standards' (11 October 1979) CG.18/W/34.

47 General Agreement on Tariffs and Trade, 'Note on the Tenth Meeting of the Consultative Group of Eighteen' (23 November 1979) CG.18/10 5-6.

48 General Agreement on Tariffs and Trade, 'Worker Rights – Prep Com' (25 June 1986) (86)W/43.

49 General Agreement on Tariffs and Trade, 'Relationship of Internationally-Recognized Worker Rights to International Trade – Communication from the United States' (3 July 1987) L/6196; General Agreement on Tariffs and Trade, 'Relationship of Internationally-Recognized Worker Rights to International Trade – Request for the establishment of a working party – Communication from the United States' (28 October 1987) L/6243.

50 General Agreement on Tariffs and Trade, 'Communication for the United States Concerning the Relationship of Internationally-Recognized Labour Standards to International Trade' (21 September 1990) L/6729. For the discussion of the US proposal, see: General Agreement on Tariffs and Trade, 'Minutes of Meeting' (1 November 1990) C/M.245, 23-28.

demands of the European Parliament differ per resolution.<sup>51</sup> Nonetheless, even modest attempts to create a working group on trade-labour linkage were rejected by the GATT contracting parties.<sup>52</sup>

The Uruguay Round resulted in the creation of the World Trade Organization. The inaugural Ministerial Conference of the WTO was held in Singapore in 1996. Labour was once again on the agenda. In the final document the ministers were able to formulate a consensus on labour. This has been the only political statement on labour standards in the post-war multilateral trade regime.<sup>53</sup> The Declaration states that:

We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes,

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51 In 1988, it supported a “consultative committee to be set up jointly by GATT and the ILO,” that would be concerned with a broad set of ILO standards. European Parliament, ‘Resolution of 18 November 1988 on the stage reached in the multilateral trade negotiations within the Uruguay round of GATT’ (19 December 1988) OJ C 326/315, para 77. The Parliament envisioned that the joint committee would review compliance with ILO standards “relating to freedom of association, the right to negotiate collective agreements, working time, minimum age of employment, protection of workers’ jobs, discrimination, forced labour, and work inspection, together with all standards failure to comply with which is liable to disrupt trade and distort competition.” Two resolutions that were adopted two years later no longer envisioned a joint committee, but called on the European Commission for “social provisions” in the Multifibre Arrangement, which was the special regime for textile products, and for the inclusion of “social clauses” in the GATT. European Parliament, ‘Resolution of 11 October 1990 on the possible renewal of the Multifibre Arrangement or the subsequent regime after 1991’ (12 November 1990) OJ C 284/152, para 30; European Parliament, ‘Resolution of 11 October 1990 on the possible renewal of the Multifibre Arrangement or the subsequent regime after 1991’ (12 November 1990) OJ C 284/152, para 152.

52 Developing countries were fiercely opposed. Support amongst the member states and institutions of the European Communities was fragmented. While France, Belgium, the Netherlands, Denmark and the European Parliament were in favour of a social clause, Germany, the United Kingdom and the Council of the European Communities were less enthusiastic. See: Jan Orbie and Lisa Tortell, ‘From the social clause to the social dimension of globalization’ in Jan Orbie and Lisa Tortell (eds) *The European Union and the Social Dimension of Globalization* (Routledge 2009) 6-7. Rafael Peels and Marialaura Fino, ‘Pushed out the Door, Back in through the Window: The Role of the ILO in EU and US Trade Agreements in Facilitating the Decent Work Agenda’ (2015) 6 *Global Labour Journal* 189, 191-192.

53 The Singapore Declaration did not end the political debate at the WTO. At the 1999 Ministerial Conference in Seattle, US President Clinton again advocated the idea of a WTO working group on trade and labour which would eventually lead to a sanction mechanism. The idea was supported by many of the 30.000 to 40.000 protesters present at the Conference. Developing countries, however, had not changed their position and threatened to veto any deal that would include reference to labour standards.

and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.<sup>54</sup>

Since the 1996 Singapore Declaration the issue of trade-labour linkage has continued to be raised at various Ministerial Conferences but states never reached agreement on even the most minimal proposals.<sup>55</sup> Meanwhile, scholars have considered the legal implications of the Singapore Declaration. According to Guzman, it shows that the WTO is “determined to keep labor issues at a distance.”<sup>56</sup> Other scholars have argued that mentioning labour standards is already a large step,<sup>57</sup> that the Declaration, while dismissing the option of an amendment to the WTO Agreements, does nothing to prevent the Appellate Body from an expansive interpretation of existing provisions,<sup>58</sup> or even that the Appellate Body could use the Singapore Declaration as a “justification” to take labour standards into account when interpreting the WTO Agreements.<sup>59</sup>

### 3.2.3.2 *The difference between labour clauses and labour-related trade measures*

The failure to amend the legal framework of the GATT and the WTO has shifted attention to the interpretation of the current rules. Before turning to these rules, this section will reflect upon the purpose of the measures that are at the heart of that analysis. There are important operational and conceptual differences between labour clauses, like Article 7 of the Havana Charter, and the trade measures that could potentially be justified under WTO law. As a consequence, they should not be seen as substitutes.

The first difference concerns the sequence of events. Article 7 of the Havana Charter would have obliged states to “take whatever action may be appropriate and feasible to eliminate [unfair labour conditions] within its territory.” In case of non-compliance, another state party could have submitted the case

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54 Singapore WTO Ministerial 1996, ‘Ministerial Declaration’ (18 December 1996) WT/MIN(96)/DEC.

55 Arne Van Daele, *International Labour Rights and the Social Clause: Friends of Foes* (Cameron May 2004) 398-404.

56 Andrew Guzman, ‘Trade, Labor, Legitimacy’ (2003) 91 *California Law Review* 885.

57 Thomas Cottier and Alexandra Caplazi, ‘Labour Standards and World Trade Law: Interfacing Legitimate Concerns’ in Thomas Cottier (ed) *The Challenge of WTO Law: Collected Essays* (Cameron May 2007). 10; Virginia Leary, ‘The WTO and the Social Clause: Post-Singapore’ (1997) 1 *European Journal of International Law* 118, 119; George Tsogas, *Labor regulation in a Global Economy* (M.E. Sharpe 2001) 45.

58 Cf. Robert Howse, ‘The World Trade Organization and the Protection of Workers’ Rights’ (1999) 3 *Journal of Small and Emerging Business Law* 131, 168.

59 Hendrik Andersen, ‘Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions’ (2015) 18 *Journal of International Economic Law* 383, 404-405.

to arbitration and, in case no satisfactory solution was reached, to the Executive Board and eventually the ITO's Conference. In this process, the state that allegedly breached Article 7 had ample time to remedy the situation. Only after a lengthy process and under strict conditions could the Executive Board allow the complainant to "release the Member ... affected from obligations or the grant of concessions".<sup>60</sup> As was already mentioned, the ILO would be involved in this process, and the respondent state could appeal the decision before the Conference.

Justifying trade-restrictive measures through interpretation of the GATT and the other WTO agreements takes the reverse approach. First, a member state would take a trade-restrictive measure in response to a labour-related situation in another member state, for example the US Burmese Freedom and Democracy Act of 2003 that was mentioned above. The member state that is affected by this measure may then request consultations. If the dispute cannot be settled within sixty days, it can request the establishment of a panel, the decision of which can be appealed before the Appellate Body (AB). The panel or the AB can order that the measure is inconsistent with the provisions of the WTO agreements and order its withdrawal. There is no compensation for damages, except if the state fails to bring the measure into compliance.

Secondly, a case under Article 7 Havana Charter would have focused on the question whether the labour conditions in the respondent state were indeed 'unfair' and whether appropriate and feasible actions were taken to eliminate these concerns. Arguably, this allows for differentiation between developed and developing countries, requires an assessment of possible perverse effects when countermeasures are permitted, and furthers understanding the notion of 'fair labour standards' in international trade law. Interpretative questions under the current legal framework would not focus on the conduct of the state in which the alleged unfair labour conditions took place, but on the compatibility with WTO law of the trade measure that was taken in response. For example, a determination that t-shirts made by children and t-shirts made by adults are not 'like products' would further an understanding of the concept of likeness in Articles I and III GATT, and would allow states to discriminate between the two types of t-shirts. T-shirts made by children would no longer be sold on the markets of states that do not accept them, without requiring a judgment of why – and to whom – this would be unfair. For the legal analysis, it is immaterial whether the children were in direct competition with the domestic textiles industry in the importing country, or whether they would lose their jobs and end up in worse conditions as a result of the WTO compliant measures that restrict the sale of their t-shirts in international commerce. The observation that the other member state's labour standards are low – or lowered – would suffice.

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60 Art 94.3 Havana Charter.

### 3.2.3.3 Defining 'fair labour standards' in trade law

During the drafting of the Havana Charter the indeterminacy of terms like 'fair labour standards' and 'sub-standard conditions of labour' had already been flagged.<sup>61</sup> In a series of 'Staff Papers' prepared for the Randall Commission, which was mandated by the US Congress in the early 1950s to examine *inter alia* the "[effects] on international trade of factors such as [...] labor practices and standards,"<sup>62</sup> three different benchmarks were distinguished: (1) domestic differentiation, (2) depression relative to productivity, and (3) violations of international standards. In the first, unfair competition occurs when in export-oriented production "wages are depressed relative to wages paid in other lines (of production) in that country."<sup>63</sup> Export processing zones which are exempt from (parts of) a state's labour legislation is one of the most salient example of domestic differentiation. Second, it is possible that in the country as a whole, wages "are depressed in all lines relative to that country's productivity."<sup>64</sup> It is noted, however, that this is difficult to observe, as: "The actual determination of wages in an economy ... is influenced by many factors in addition to productivity, such as the institutional fabric of the country, tradition, and the general attitudes of the people."<sup>65</sup> The third option equates 'fairness' with 'compliance with international standards'. As the Staff Papers note, "there has been great advance in the extent to which certain practices have been ruled to be "unfair" by common international agreement."<sup>66</sup>

The former two grounds, which are economic rather than legal benchmarks, were considered to be most suitable in international trade law as they do not require a normative assessment of another state's domestic labour legislation.<sup>67</sup> By itself, a normative inquiry could never be sufficient to determine unfairness, as – in the words of ILO Director-General Jenks in 1973 – "disruptive competition may come from producers whose labour standards are not low, and

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61 United Nations Conference on Trade and Employment, 'First Committee: Employment and Economic Activity' (5 December 1947) E/CONF.2/C.1/5, 1.

62 Section 309(b)(7) Trade Agreements Extension Act of 1953, Public Law 215, 83rd Congress (67 Stat 475).

63 US Commission on Foreign Economic Policy, 'Staff Papers' (Washington, 1954) 433.

64 *Ibid* 434 (emphasis omitted).

65 *Ibid* 435.

66 *Ibid* 437. Cf. Friedl Weiss, who opposes the interchangeable use of 'international' and 'fair' labour standards. "The former concept refers to international agreements and instruments based on values widely shared in the international community" while the latter "are considered 'fair' by particular countries only which seek to use their own 'fair' standard as the socially correct yardstick for unilateral coercive action in an attempt to raise their competitors' production costs." Friedl Weiss, 'Internationally recognized labour standards and trade' in Friedl Weiss, Erik Denters and Paul de Waart (eds) *International Economic Law with a Human Face* (Kluwer Law International 1998) 81.

67 US Commission on Foreign Economic Policy, 'Staff Papers' (Washington, 1954) 436. "It is obvious that it would be difficult, if not impossible, to take any action telling other countries *how* we think they ought to improve their labor standards."



labour standards may be low without giving rise to international competitive difficulties."<sup>68</sup> The Staff Papers thus note that with respect to the possibilities for enforcement: "Protective remedies will be more palatable to most governments than the entering of complaints against their labor standards."<sup>69</sup>

What is not considered is that these protective remedies may have consequences that can be considered even more problematic than the initial 'unfair' situation. This can be illustrated by the introduction of the Child Labor Deterrence Act in 1993 by US Senator Harkin. In its 1997 annual report, UNICEF commented on the effect of the proposed legislation in Bangladesh. It notes that:

when Senator Harkin reintroduced the Bill the following year, the impact was far more devastating: garment employers dismissed an estimated 50,000 children from their factories, approximately 75 per cent of all children in the industry. The consequences for the dismissed children and their parents were not anticipated. The children may have been freed, but at the same time they were trapped in a harsh environment with no skills, little or no education, and precious few alternatives.<sup>70</sup>

Even when the effects of trade measures in response to foreign 'unfair' labour conditions are less direct, economists argue that restricting trade will only aggravate problems, perpetuate poverty and hinder economic growth that eventually would allow the country to raise its labour standards.<sup>71</sup> Some have asserted moral arguments on this basis. Bhagwati, for example, who is one of the most vocal opponents of trade-labour linkage, has argued that "central to American thinking on the question of a Social Clause is the notion that competitive advantage can sometimes be morally 'illegitimate'. In particular, it is argued that if labour standards elsewhere are different and unacceptable morally, then the resulting competition is morally illegitimate and 'unfair'."<sup>72</sup> Other authors support striking a balance, noting that labour clauses may be

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68 International Labour Conference (58th Session) Report of the Director-General Part 1: Prosperity for Welfare: Social Purpose in Economic Growth and Change – The ILO Contribution (Geneva 1973) 38. Nonetheless, Jenks argued that a determination of the exporting state's compliance could be an important element of the inquiry, pointing specifically to the conventions on freedom of association, discrimination, child labour, minimum wages, weekly rest and labour inspections.

69 US Commission on Foreign Economic Policy, 'Staff Papers' (Washington, 1954) 438.

70 UNICEF, 'The State of the World's Children 1997' (Oxford University Press 1997) 60.

71 See e.g. Bernard Hoekman and Michel Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond* (3rd edn, Oxford University Press 2009) 627; Stanley Engerman, 'The History and Political Economy of International Labor Standards' in Kaushik Basu and others (eds), *International Labor Standards: History, Theory and Policy Options* (Blackwell Publishing 2003) 60.

72 Jagdish Bhagwati, 'Free Trade, 'Fairness' and the New Protectionism: Reflections on an agenda for the World Trade Organisation' (The Institute of Economic Affairs, IEA Occasional Papers 96, 1995) 27.

acceptable when factors like trade dependence and the level of economic development of a country alleged of 'low labour standards' are accounted for.<sup>73</sup>

As the aim of this study is to provide a legal analysis of the linkages between international trade and investment law and labour, it will not attempt to provide its own assessment of the meaning of fair labour standards. As David Kennedy argues there is no "objective intellectual instrument" to make such determinations.<sup>74</sup> However, as the example of the difference between labour clauses and labour-related trade measures shows, different legal mechanisms will provide different answers, either explicitly or implicitly.

### 3.3 LABOUR-RELATED TRADE MEASURES UNDER WTO LAW

#### 3.3.1 Introduction

The purpose of this part is twofold. It will first discuss whether derogations from existing labour standards may be actionable under WTO law. Section 3.3.2 will examine the social dumping and subsidies regimes. Section 3.3.3 then looks at the GATT provisions on nullification and impairment, which protect against the negation of negotiated market access commitments through actions that do not violate WTO obligations as such. Subsequently, section 3.3.4 examines the legality of unilateral labour-related trade measures, such as import bans and mandatory labelling requirements.

#### 3.3.2 Foreign labour conditions as unfair trade practices

##### 3.3.2.1 *Social dumping*

The issue of 'dumping' is regulated in Article VI(1) GATT and the Agreement on Implementation of Article VI, which is commonly referred to as the WTO Anti-Dumping Agreement. It refers to a practice "by which products of one country are introduced into the commerce of another country at less than the normal value of the products." This may be beneficial to consumers in that country but, according to Article VI(1) "is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry." To determine the 'normal value', a comparison is made between the export

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73 Friedl Weiss, 'Internationally Recognized Labour Standards and Trade' (1996) 23 *Legal Issues of European Integration* 161, 177-178.

74 David Kennedy, 'A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy' (Princeton University Press 2016) 117-118

price of the product and its price when destined for consumption in the exporting state itself.<sup>75</sup> Dumping could occur through the sale of products below their costs, or when prices are differentiated between different countries.<sup>76</sup>

During the interbellum, various countries imposed duties against 'social dumping' in order to offset the comparative advantage of foreign goods that were produced by workers who worked excessive hours, prison workers or other violations of international labour standards.<sup>77</sup> Also today, social dumping is an often-heard term in commentaries on the impact of economic globalization. The question has thus been raised how the concept of social dumping relates to the anti-dumping rules in multilateral trade law. Ayoub, for example, argues that "child labor, for example, may be found to violate the antidumping provisions ... because employment of children artificially lowers production costs, thus giving the manufacturer an economic advantage for engaging in child employment."<sup>78</sup> Also the ILO and the OECD have discussed this issue in various reports, although without providing a sound legal analysis of the WTO framework.<sup>79</sup>

Article VI GATT is based upon Article 34 of the Havana Charter. The preparatory works of the Havana Charter reveal that states felt "that there was ... a need of clarification of definition in view of the variety of circumstances

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75 Art 2.2(1) Anti-Dumping Agreement.

76 Mitsuo Matsushita et al, *The World Trade Organization: Law, Practice, and Policy* (3rd edn, Oxford University Press 2015) 376-8.

77 Steve Charnovitz, 'The Influence of International Labour Standards on the World Trading Regime: A Historical Overview' (1987) 126 *International Labour Review* 565, 576-577, discussing examples from Austria, Argentina, Spain and Cuba.

78 Lena Ayoub, '*Nike Just Does It* – and Why the United States Shouldn't: The United States' International Obligation to Hold MNCs Accountable for Their Labor Rights Violations' (1999) 11 *DePaul Business Law Journal* 395, 436. See also: Daniel Ehrenberg, 'The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor' (1995) 20 *Yale Journal of International Law* 361, 416; Laura Ho, Catherine Powell and Leti Volpp, '(Dis)assembling Rights of Women Workers Along the Global Assembly Line: Human Rights and the Garment Industry' (1996) 31 *Harvard Civil Rights-Civil Liberties Law Review* 383, 398; Anjali Garg, 'A Child Labor Social Clause: Analysis and Proposal for Action' (1999) 31 *New York University Journal of International Law and Politics* 473, 486; and Elissa Alben, 'GATT and the Fair Wage: A Historical Perspective on the Labor-Trade Link' (2001) 101 *Columbia Law Review* 1401, 1418, who takes a more cautious approach, stating that: "to the extent that labor standards are correlated to a country's level of development, they should not be included in antidumping calculations."

79 For example: Governing Body (261st Session) *The social dimensions of the liberalization of world trade*, GB.261/WP/SLD/1 (Geneva, November 1994) 7-11; OECD, 'Trade Employment and Labour Standards: A Study of Core Workers' Rights and International Trade' (1996) 170-171.

in which dumping may occur, such as social dumping.<sup>80</sup> The delegate from the United States had stated earlier that:

“Social dumping” in the form of prison or sweated labour, or different standards of living might also be included in the term “dumping” but social dumping was very difficult to define. It might be well, for practical purposes, to limit consideration to the general concept, and leave the more nebulous problems for later development... . The prohibition by the United States of imports made by convict labour was one slight recognition of the problem of “social dumping”.<sup>81</sup>

Although social dumping was thus expressly discussed, it was considered too vague to be included in the Havana Charter.<sup>82</sup> Consequently, the Havana Charter and the GATT retained only a reference to ‘dumping’. This term was not considered to be generic, however, as already during the drafting of the Havana Charter there was broad agreement that Article 34 “should be restricted to price dumping.”<sup>83</sup> This was confirmed in a 1957 legal opinion from the GATT secretariat.<sup>84</sup>

In addition to the narrow focus on price dumping that emerges from the preparatory works, the term social dumping poses conceptual problems. There is no commonly accepted definition. Charnovitz describes social dumping as “the export of products that owe their competitiveness to low labour standards.”<sup>85</sup> Siroën *et al* speak of “an impingement of workers’ rights applied for the purposes of boosting competitiveness, in both the import and export market alike.”<sup>86</sup> While Charnovitz thus uses a threshold that is not necessarily related to international obligations or domestic law, Siroën *et al* restrict social dumping to situations in which workers have already attained certain rights, but these are deliberately violated. A third definition, used by Grossman and Koopman, holds that: “Social dumping refers to costs that are for their part depressed

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80 United Nations Economic and Social Council, ‘Preparatory Committee of the International Conference on Trade and Employment: Committee II – Draft Report of the Technical Sub-Committee’ (16 November 1946) E/FC/T/C.II/54, 12.

81 United Nations Economic and Social Council, ‘Preparatory Committee of the International Conference on Trade and Employment: Committee II – Technical Sub-Committee, Sixth Meeting’ (8 November 1946) E/PC/T/C.II/46, 13.

82 United Nations Conference on Trade and Employment, ‘First Committee: Employment and Economic Activity – Summary Record of the Fifth Meeting’ (5 December 1947) E/CONF.2/C.1/SR.5, 6.

83 United Nations Conference on Trade and Employment, ‘Trade Committee – Commercial Policy – Notes on Nineteenth Meeting’ (29 January 1948) E/CONF.2/C.3/C/W.20, 3.

84 General Agreement on Tariffs and Trade, ‘Anti-Dumping and Countervailing Duties – Secretariat Analysis of Legislation’ (23 October 1957) L/712, 5.

85 Steve Charnovitz, ‘The Influence of International Labour Standards on the World Trading Regime: A Historical Overview’ (1987) 126 *International Labour Review* 565, 566.

86 Jean-Marc Siroën *et al*, ‘The Use, Scope and Effectiveness of Labour and Social Aspects and Sustainable Development Provisions in Bilateral and Regional Free Trade Agreements’ (Final Report for the European Commission 15 September 2008) VC/2007/0638, 36.

below a natural level by means of 'social oppression' facilitating unfair pricing strategies against foreign competitors."<sup>87</sup>

The three definitions have in common that they do not distinguish between the price of goods in the import and export markets, which is at the core of the determination of the normal value of a good. Siroën *et al* explicitly refer to the import effects, meaning that a lowering of labour standards may displace imports by domestic production. Charnovitz focuses only on exports, but does not mention a possible discrepancy between domestic prices and export prices. The same is true for Maupain, who dismisses the term social dumping as a "misleading analogy." He argues that: "The transposition of this concept [normal value, RZ] to the field of worker protection ... supposes that products from a country not respecting what are supposedly 'normal' labour standards have an unfair price advantage compared to those produced under working conditions meeting the relevant standard."<sup>88</sup>

Maupain does note that in the case of export processing zones it would be possible to identify 'abnormal' labour standards.<sup>89</sup> But the juxtaposition of 'normal' and 'abnormal' labour standards only matters when this creates a difference between domestic and export prices. The transposition of the concept of normal value to the field of worker protection would thus hinge on the existence of a dumping margin that is caused by discrepancies between labour standards for domestic production and labour standards for exports; for example when a country's labour law does not apply in its export processing zones.<sup>90</sup> There are many examples of restrictions of trade unionism, collective bargaining or discriminatory treatment of female workers in export processing zones (EPZs). For the purpose of the social dumping analogy, what is 'abnormal' is not that these practices exist or that they violate international standards, but the disparity they cause in domestic and export prices.

The corollary is that the WTO anti-dumping regime is designed to protect industries, not workers. Assume that there is a discrepancy in state A's labour standards applying to export processing zones and the rest of the country, and that this causes a price difference that can be qualified as dumping under the WTO rules. For WTO purposes, it is immaterial whether this is resolved by improving labour standards in the EPZ or by lowering them in the rest of the country. Apart from the practical problems that have been raised in the literature, such as the question whether it is possible to assess 'material injury'

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87 Harald Grossman and Georg Koopman, 'Social Standards in International Trade: A New Protectionist Wave?' in Harald Sander and András Inotai (eds) *World Trade After the Uruguay Round: Prospects and Policy Options for the Twenty-first Century* (Routledge 1996) 116.

88 Francis Maupain, *The Future of the International Labour Organization in the Global Economy* (Hart Publishing 2013) 137.

89 *Ibid.*

90 Maupain mentions export processing zones but only in determination of 'normal' working conditions.

in the case of social dumping,<sup>91</sup> the term as such should be decoupled from the WTO anti-dumping regime. Indeed, it is mainly used for its strong normative connotation. In this sense, it is the antagonist of ‘decent work’, a concept which also lacks specific legal meaning but articulates a general desire for social justice.<sup>92</sup>

### 3.3.2.2 Subsidies

Related to the concept of social dumping is the proposition that low labour standards constitute a subsidy, and are thus a possible violation of Article XVI GATT and the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement). Article 1 of the SCM Agreement defines a subsidy as “a financial contribution by a government or any public body within the territory of a Member”.<sup>93</sup> It subsequently provides a list of possible financial contributions, including grants, loans, fiscal incentives and the provision of non-infrastructure goods or services. Furthermore, the subsidy has to confer a benefit and it has to be “specific to an enterprise or industry or group of enterprises or industries.”<sup>94</sup>

Subsidies are not necessarily prohibited. Rather, the SCM Agreement distinguishes between prohibited, actionable and non-actionable subsidies. The former covers *inter alia* export subsidies, as these have a clear trade distorting effect. Actionable subsidies are those that cause injury to the domestic industry of a WTO member.<sup>95</sup> The residual category of non-actionable subsidies includes all subsidies that are not specific or are excluded due to their purpose, such as research grants. The SCM Agreement provides two avenues for affected states: filing a complaint before the WTO dispute settlement body, or unilaterally imposing ‘countervailing’ measures to offset the economic injury caused by the subsidies.

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91 Maryke Dessing, ‘The Social Clause and Sustainable Development’ (Sustainable Development and Trade Issues, ICTSD Resource Paper No 1, October 2001) 29.

92 Cf. Francis Maupain, *The Future of the International Labour Organization in the Global Economy* (Hart Publishing 2013) 136. The social dumping analogy is also rejected by other scholars, see for example: Janelle Diller and David Levy, ‘Child Labor, Trade and Investment: Towards the Harmonization of International Law’ (1997) 91 *American Journal of International Law* 663, 680; David Leebron, ‘Linkages’ (2002) 96 *American Journal of International Law* 5, 23, fn 61 on problems with the concept of social dumping.

93 Art 1.1(a)(1) Agreement on Subsidies and Countervailing Measures.

94 Art 2.1(a) Agreement on Subsidies and Countervailing Measures

95 Art 5 Agreement on Subsidies and Countervailing Measures

Similar to the social dumping discussion, the argument has been advanced that low labour standards may constitute a subsidy.<sup>96</sup> Tsogas, for example, argues that:

Although proponents of a social clause generally recognize that partners to a free-trade agreement cannot be expected to have identical social conditions, it is also considered unacceptable for any country deliberately to maintain poor conditions in order to gain a trade advantage .... Such an approach could be considered as a form of government subsidy.<sup>97</sup>

It is unpersuasive that 'maintaining poor labour conditions' is covered by the definition of subsidies under the SCM Agreement.<sup>98</sup> Unlike the subsidies that are listed in Article 1, they are the result of an omission to legislate or enforce. More importantly, it is difficult to maintain that low standards are a financial contribution, and that there is a causal relationship with material damage to foreign producers.<sup>99</sup> There may be certain labour market policies that confer specific benefits to domestic producers. This includes exemptions to minimum wage or collective bargaining legislation in export processing zones, and investment contracts that contain stabilization clauses.<sup>100</sup> But to consider these 'tailored' labour market policies as subsidies is precluded by the fact that the SCM Agreement only covers financial benefits. Trade unions thus advocate amending Article 1 of the SCM Agreement to include non-financial subsidies,

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96 The origins of this argument can be traced back to the early 1900s. Steve Charnovitz, 'The Influence of International Labour Standards on the World Trading Regime: A Historical Overview' (1987) 126 *International Labour Review* 565, 577, referring to: Sydney and Beatrice Webb, *Industrial democracy* (Longmans, Green and Company 1902) at 868.

97 George Tsogas, *Labor regulation in a Global Economy* (M.E. Sharpe 2001) 35; see also Anjali Garg, 'A Child Labor Social Clause: Analysis and Proposal for Action' (1999) 31 *New York University Journal of International Law and Politics* 473, 486; Raj Bhala, 'Clarifying the Trade-Labor Link' (1998) 37 *Columbia Journal of Transnational Law* 11, 19; Daniel Ehrenberg, 'The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor' (1995) 20 *Yale Journal of International Law* 361, 403.

98 Other academic contributions on the interpretation of the SCM Agreement refer to similar concepts, such as "labour standards," Arne vanDaele, *International Labour Rights and the Social Clause: Friends or Foes* (Cameron May, 2005) 412, "poor labour conditions," Sean Turnell, 'Core Labour Standards and the WTO' (2002) *Economic and Labour Relations Review* 13, 16. "non-enforcement of labour standards," Steve Charnovitz, 'Promoting higher labor standards' in Brad Roberts (ed), *New Forces in the World Economy* (MIT Press 1996) 74 or "wages and working standards that depress the cost of production." Drusilla Brown, 'International Labor Standards in the World Trade Organization and the International Labor Organization' (2000) 82 *Federal Reserve Bank of St. Louis Review* 106.

99 Sean Turnell, 'Core Labour Standards and the WTO' (2002) *Economic and Labour Relations Review* 13, 17.

100 Stabilization clauses are provisions in contracts between host states and foreign investors which intend to freeze the applicability of host state legislation vis-à-vis the investor at a certain date, or provide compensation to the investor when the host state changes its domestic legislation.

including “violations of labour rights.”<sup>101</sup> Indeed, only when the Agreement would be amended accordingly, the possibility to adopt countervailing measures in response to low labour standards may arise.

### 3.3.3 Foreign labour conditions as nullification and impairment of benefits

A third possibility is to argue that labour standards as such do not constitute a breach of WTO law, but that they nonetheless nullify or impair benefits that states have attained. Article XXIII.1 GATT contains a procedure to bring ‘non-violation complaints’ (NVC). This procedure may be invoked when:

... any benefit accruing to [any contracting party] directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of ... (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or (c) the existence of any other situation.

The rationale of non-violation complaints is based on the possible substitution of tariff protection by other – WTO-compliant or non-compliant – policies that nullify or impair the effect of negotiated concessions. There are many areas that affect trade, but that are not regulated by the WTO. The NVC procedure thus gives substance to the general rule in the law of treaties that obligations must be performed in good faith.<sup>102</sup>

During the GATT-era all NVC cases concerned the payment of subsidies to allegedly offset the benefits of negotiated concessions.<sup>103</sup> However, the wording of Article XXIII is generic. In *EC–Asbestos* the Appellate Body confirmed that: “The use of the word ‘any’ suggests that measures of all types may give rise to such cause of action.”<sup>104</sup> According to Mavroidis, Berman and Wu, this “leaves the door open to challenge any GATT-consistent behaviour.”<sup>105</sup> Since it was raised in the accession negotiations with Japan in 1953, the possibility of applying the nullification or impairment procedure in the context of labour standards has not been discussed within GATT or WTO fora, nor tested in practice.<sup>106</sup> The idea was reinvigorated in the literature some fifty years

101 International Trade Union Confederation, ‘The WTO and Export Processing Zones’ (undated) <[www.ituc-csi.org/IMG/pdf/WTO\\_and\\_EPZs.pdf](http://www.ituc-csi.org/IMG/pdf/WTO_and_EPZs.pdf)> accessed 24 June 2018.

102 Art 26 VCLT.

103 Petros Mavroidis, George Bermann and Mark Wu, *The Law of the World Trade Organization (WTO): Documents Cases & Analysis* (West 2010) 895.

104 WTO, *European Communities: Measures Affecting Asbestos and Asbestos-Containing Products – Report of the Appellate Body* (12 March 2001) WT/DS135/AB/R, para 188.

105 Petros Mavroidis, George Bermann and Mark Wu, *The Law of the World Trade Organization (WTO): Documents Cases & Analysis* (West 2010) 895.

106 General Agreement on Tariffs and Trade, ‘Ad Hoc Committee on Agenda and Intersessional Business – Report on the Accession of Japan’ (13 February 1953) L/76, para 12.



later. Bagwell and Staiger noted that the modifications in a state's labour market policies can have the same effect as the payment of subsidies:

With its unilateral tariff options restricted, this government might be tempted to offer unilateral import relief to its producers by another route, namely, by eliminating costly environmental health and safety regulations, much as those concerned with the race-to-the bottom possibility would fear. [By] offering import relief with a reduction in labor or environmental standards, the government would in effect be unilaterally "withdrawing" market access concessions that it had previously negotiated, and in altering the balance of market access concessions it would thereby shift some of the costs of its import relief decision on to foreign exporters.<sup>107</sup>

Indeed, the basic logic of NVCs applies similarly to the various types of WTO-consistent measures that states can take to alter the distributive effect of trade negotiations. Bagwell and Staiger argue that an important benefit of NVCs compared to the insertion of labour provisions in the WTO Agreements is that the former are not static. They would not introduce a 'normative floor' below which no competition is allowed, such as compliance with the fundamental labour standards. As such a minimum level is static, states that are currently above this level may lower their domestic labour standards without violating the labour clause. However, states that are currently at or below the level of labour standards prescribed by the labour clause may be non-compliant with ILO norms on child labour, but as long as they do not downgrade their standards they do not cause a nullification or impairment.<sup>108</sup>

The problem of labour-related NVCs is threefold. First, practice shows considerable restraint by WTO members to bring NVCs at all, especially in the context of politically sensitive areas of domestic regulation such as labour law.<sup>109</sup> Second, to satisfy the burden of proof the complainant will have a hard time demonstrating that (1) the change in labour standards could not have been reasonably anticipated and (2) that these changes impaired the benefits accruing to the complaining party.<sup>110</sup> And third, as the exporting state's change in labour legislation is not a violation of the WTO Agreements, but merely nullifies or impairs the benefits of the importing state under those

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107 Kyle Bagwell and Robert Staiger, 'The WTO as a Mechanism for Securing Market Access Property Rights: Implications for Global Labor and Environmental Issues' (2001) 15 *Journal of Economic Perspectives* 69, 81.

108 *Ibid* 83-84.

109 Petros Mavroidis, George Bermann and Mark Wu, *The Law of the World Trade Organization (WTO): Documents Cases & Analysis* (West 2010) 895.

110 *Ibid* 895-896. Janelle Diller and David Levy, 'Child Labor, Trade and Investment: Towards the Harmonization of International Law' (1997) 91 *American Journal of International Law* 663, 685.

agreements, a panel or the Appellate Body may only make non-binding recommendations.<sup>111</sup>

The argument that the NVC procedure may be used to address derogations from labour standards that were in force at the time the concessions were negotiated, implies that states can take their trading partners' labour standards into account during the negotiations. If state A knows that state B has a statutory minimum wage of 12 years for work in the textiles sector, it cannot bring a NVC after it has agreed to lower state B's tariffs in textiles. Indeed, as early as 1933, James Shotwell, who had been involved in the foundation of the ILO, argued that:

labor conditions should be made one of the basic factors in tariff bargaining; that products made under specific labor conditions – internationally agreed upon – should be given preferential treatment, while articles made under oppressive or exploitative conditions should be subjected to higher duties and impositions.<sup>112</sup>

In 1953, the idea was included in the report of the Randall Commission in the United States, stating that "our negotiators should simply make clear that no tariff concessions will be granted on products made by workers receiving wages which are substandard in the exporting country."<sup>113</sup> One year later, the US Government expressed support for this position, although there is no evidence that this was put into practice.<sup>114</sup>

In reality, states face severe constraints when they would want to take their trading partners' labour standards into account during tariff negotiations. The most favoured nation (MFN) principle laid down in Article I GATT prohibits state A to levy a 50% tariff on child labour t-shirts from state B, while allowing exporters from state C – where there is no child labour – to pay a lower percentage. The more states are party to a trade agreement containing an MFN clause, the more difficult it is to impose high tariffs on goods that are produced under poor labour conditions in one of the member states.

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111 Art 26 Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2 of the WTO Agreements).

112 Harold Josephson, *James T. Shotwell and the Rise of Internationalism in America* (Associated University Presses 1975) 206.

113 Report of the Commission on Foreign Economic Policy (23 January 1954) 62.

114 Steve Charnovitz, 'The Influence of International Labour Standards on the World Trading Regime: A Historical Overview' (1987) 126 *International Labour Review* 565, 579, citing President of the United States, 'Special message to the Congress on Foreign Economic Policy' (30 March 1954).

### 3.3.4 Trade measures in response to foreign labour conditions

#### 3.3.4.1 PPMs and a typology of labour-related measures

While the MFN principle clearly precludes differentiation between WTO member states, it is less clear whether it prevents measures that distinguish between goods based on the labour conditions under which they are produced. In this context, labour conditions are commonly referred to as process and production methods (PPMs). More specifically, there are considered 'non-incorporated', or 'non-product-related' PPMs.<sup>115</sup> This allows for a distinction with process and production methods that do affect the end-product, such as the organic production of vegetables which leaves no residue of pesticides, as opposed to non-organically grown vegetables. The range of non-product-related PPMs (hereinafter simply referred to as PPMs) is limitless, from the catch of shrimp using turtle friendly devices to the production of textiles by adults who earn a living wage. The central question is thus to what extent trade measures that distinguish between products based on certain non-product-related PPMs are legal under WTO law.

The answer to this question first of all depends on the particular trade measure that is based on a PPM. At least four different options can be distinguished:

1. A ban on goods from a country or region due to non-compliance with certain labour standards, either in the production of those goods or in general. An example of this is the US Burmese Freedom and Democracy Act of 2003 that responded to the country's forced labour violations, which stipulated that: "the President shall ban the importation of any article that is a product of Burma."<sup>116</sup>

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115 Steve Charnovitz, 'The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality' (2002) 27 *Yale Journal of International Law* 59, 65.

116 Section 3(a)(1) Burmese Freedom and Democracy Act of 2003, Public Law 108-61, 108th Congress (117 Stat 865). Section 301 of the US Trade Act contains a more general provision, authorizing the President to take economic measures in case of, *inter alia*, "unreasonable" policies "which burden or restrict United States commerce." Section 301 (a)(1) Trade Act of 1974, Public Law 93-618, 93rd Congress (88 Stat 2041). In the 1988 Omnibus Trade and Competitiveness Act, the definition of unreasonableness has been broadened to include: "any act, policy, or practice, or any combination of acts, policies, or practices, which - ... (iii) constitutes a persistent pattern of conduct that - (I) denies workers the right of association, (II) denies workers the right to organize and bargain collectively, (III) permits any form of forced or compulsory labor, (IV) fails to provide a minimum age for the employment of children, or (IV) fails to provide standards for minimum wages, hours of work, and occupational safety and health of workers." Omnibus Trade and Competitiveness Act of 1988, Public Law 100-418, 100th Congress (102 Stat 1167). The 2015 Trade Facilitation and Trade Enforcement Act also amended Section 301, adding an additional ground for unreasonable policies against which the President may authorize trade measures, namely: "any act, policy, or practice, or any combination of acts, policies, or practices, which - ... (iv) constitutes a persistent pattern of conduct by the government of a foreign country under

2. A requirement that imported goods comply with certain PPMs. An example of this can be found in Section 307 of the US Tariff Act of 1930 (19 U.S.C. §1307), which prohibits the importation of “[a]ll goods, wares, articles, and merchandise mined, produced or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions.” The definition of forced labour was copied almost verbatim from the ILO Forced Labour Convention No 29 that was adopted the same year. In 2000, the definition was expanded to also include “forced and indentured child labor.”<sup>117</sup>
3. A requirement that importers exercise ‘due diligence’ when importing goods to verify that these have been produced in compliance with certain PPMs. An example is the European Regulation which imposes a range of specific requirements for supply chain due diligence on importers of the so-called ‘conflict minerals’ from conflict-affected and high-risk areas.<sup>118</sup> Although there are no similar arrangements that specifically address labour standards, the EU Regulation does note that child labour is a common human rights abuse in resource-rich, conflict-affected areas.<sup>119</sup>
4. A label attesting that goods have been produced in compliance with certain PPMs. An example is the Belgian ‘Act for the Promotion of Socially Responsible Production,’ which was adopted in 2002.<sup>120</sup> This law created a non-mandatory government-sponsored social labelling scheme that domestic and foreign producers could apply for, in order to demonstrate that their

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which that government fails to effectively enforce commitments under agreements to which the foreign country and the United States are parties, including with respect to ... labor”. Sec 307 Trade Facilitation and Trade Enforcement Act of 2015, Public Law 114-125, 114th Congress (130 Stat 189). ‘Agreements with respect to labour’ arguably include the fourteen ILO Conventions that the United States has ratified, as well as the ICCPR and possibly the thirteen Free Trade Agreements and two Bilateral Investment Treaties that contain labour commitments. As Section 301 does not prescribe the type of measures that the President may take, they could be targeted at a country as a whole, or at the specific goods that have not been produced in accordance with the prescribed PPM.

- 117 Section 411(a) Trade and Development Act of 2000, Public Law 106-200, 106th Congress (114 Stat 298). The 2006 Decent Working Conditions and Fair Competition Act would have amended Section 307 to prohibit the importation of any “sweatshop good,” which it defined as “any good, ware, article, or merchandise mined, produced, or manufactured wholly or in part in violation of core labor standards” but the bill was not adopted. See Section 201(b) Decent Working Conditions and Fair Competition Act, S. 3485, 109th Congress (text of 8 June 2006, not entered into force).
- 118 Regulation (EU) 2017/821 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas [2017] OJ L 130/1.
- 119 For an analysis of WTO compatibility of this regulation, see: Enrico Partiti and Steffen van der Velde, ‘Curbing Supply-Chain Human Rights Violations Through Trade and Due Diligence. Possible WTO Concerns Raised by the EU Conflict Minerals Resolution’ (2017) 51 *Journal of World Trade* 1043.
- 120 Wet van 27 februari 2002 ter bevordering van sociaal verantwoorde productie, *Belgisch Staatsblad* 26 maart 2002. (Law for the Promotion of Socially Responsible Production).

products were made in compliance with the eight fundamental ILO Conventions.

These four options differ in many ways. As such, they are to be assessed under different provisions of the GATT and the TBT Agreement. The analysis below does not give a definite answer on the legality of these four examples. Rather, they illustrate the diverse types of labour-related trade measures that states could take and the difficulties of reconciling them with multilateral trade law.

#### *3.3.4.2 Labour-related trade measures under the GATT*

The legality of trade measures responding to labour-related PPMS is to be assessed against Articles I, III:4 and XI GATT, and Article 2 TBT Agreement. Whether the GATT or TBT applies to a measure depends on the concrete design of the trade restrictions that an importing state imposes in response to an exporting state's labour practices. In case these restrictions violate one of the GATT articles, recourse may be had to the general exceptions clause found in Article XX GATT. The TBT Agreement does not have a general exceptions clause.

Article I GATT contains obligations concerning MFN treatment, which prohibits differentiation between 'like' products originating in different countries. If the European Union, for example, imposes a 6.5% import tariff on 'articles of apparel and clothing accessories' this applies to clothing accessories produced in all WTO member states. Due to its broad scope the MFN obligation prohibits not only differentiation in applied tariffs, but covers "any advantage, favour, privilege or immunity." The prohibition to discriminate between foreign exporters at the border is complemented by Article XI, which prohibits quantitative import and export restrictions. It provides that:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

Internal taxes and regulations, as opposed to border measures, are governed by the National Treatment (NT) obligation in Article III:2 and III:4 GATT respectively. These provisions prohibit discrimination between domestic and foreign producers. Paragraph 4, which is most relevant to assess labour-related trade measures, provides that:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

States may thus impose regulatory requirements on imported goods, but only if it applies these requirements equally to domestic like products. The distinction between internal regulations (Article III:4) or quantitative restrictions (Article XI) is not always clear as the enforcement of non-tariff measures also occurs at the moment of importation. In an interpretative note, it is clarified that:

Any internal ... law, regulation or requirement ... which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal ... law, regulation or requirement ... and is accordingly subject to the provisions of Article III.

The scope of article III:4 GATT is thus rather broad. This is significant, as quantitative restrictions are by definition prohibited. General import bans such as the 2003 Burmese Freedom and Democracy Act are thus inconsistent with the GATT, unless they can be justified under the general exceptions clause found in Article XX. With regard to the adoption of internal fiscal and non-fiscal measures that are covered by Article III, the prescriptive jurisdiction of states is indefinite provided that these measures are not discriminatory in their design or effect. Before turning to the interpretation of the term 'like product', however, the relationship between Article III GATT and the TBT Agreement requires some further clarification, in order to determine whether the legality of product specific trade measures, for example based on Section 307 of the US Tariff Act of 1930, would have to be examined on the basis of the GATT or the TBT Agreement.

#### 3.3.4.3 *Labour-related trade measures under the TBT Agreement*

The TBT Agreement contains rules on 'technical regulations' and 'standards'.<sup>121</sup> Its purpose is to enable states to adopt technical regulations regarding "product characteristics or their related processes and production methods" as long as these are not discriminatory or unduly restrict international trade. Unlike the GATT, PPMs are thus central to the TBT Agreement. Most obligations in the TBT Agreement are concerned with technical regulations, which are:

Document[s] which [lay] down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

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121 WTO, *European Communities: Measures Affecting Asbestos and Asbestos Containing Products* – Report of the Appellate Body (12 March 2001) WT/DS135/AB/R, para 80.

The term ‘standards’, on the other hand, refers to technical regulations that are not mandatory, but which are nonetheless “approved by a recognized body.”<sup>122</sup> This includes governmental actors and non-governmental bodies that have “legal power to enforce a technical regulation.”<sup>123</sup> Standards are subjected to significantly less stringent obligations.<sup>124</sup>

The first question that arises in the context of labour-related trade measures is thus whether it “lays down product characteristics or their related processes and production methods”. The Panel in the *EC–Seal Products* case, which concerned the European ban on the importation of seal products, held that this ban constituted a technical regulation, as it “lays down product characteristics in the negative form by requiring that all products not contain seal.”<sup>125</sup> The Appellate Body disagreed, and found that the ban was imposed subject to conditions based on criteria “relating to the identity of the hunter or the type or purpose of the hunt from which the product is derived.”<sup>126</sup> Subsequently, it considered that there was no support in the text of the TBT Agreement or the case law “to suggest that the identity of the hunter, the type of hunt, or the purpose of the hunt could be viewed as product characteristics.”<sup>127</sup>

Trade measures based on non-product-related PPMs, such as labour standards, are therefore outside the scope of the TBT Agreement and have to be examined under Article III:4 GATT. This does not apply to the Belgian social label, however, as ‘mandatory’ labelling schemes are explicitly covered by the definition of technical regulations.<sup>128</sup> Strictly non-governmental labels, which,

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122 Art 2, Annex 1 TBT Agreement.

123 Annex 1.8 TBT.

124 Standards are subjected to the ‘Code of Good Practice for the Preparation, Adoption and Application of Standards’ (Code of Good Practice) which is found in Annex 3 of the TBT Agreement. It reiterates the MFN and NT obligations, and obliges standardizing bodies to “ensure that standards are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.” Article E, Annex 3 TBT Agreement. Furthermore, it holds that “[where] international standards exist or their completion is imminent, the standardizing body shall use them, or the relevant parts of them, as a basis for the standards it develops [...]” Art F, Annex 3 TBT Agreement. The remainder of this section will focus on technical regulations and internal regulations that are covered by Article III:4 GATT.

125 WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products – Reports of the Panel* (25 November 2013) WT/DS400/R and WT/DS401/R, para 7.106.

126 WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products – Reports of the Appellate Body* (22 May 2014) WT/DS400/AB/R and WT/DS401/AB/R, para 5.41 (emphasis added).

127 *Ibid*, para 5.45.

128 Joost Pauwelyn, ‘Non-Traditional Patterns of Global Regulation: Is the WTO ‘Missing the Boat?’ in Christian Joerges and Ernst-Ulrich Petersmann (eds) *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Hart Publishing 2006) 222. The 2012 Appellate Body report in *US-Tuna II* interpreted the meaning of the phrase ‘with which compliance is mandatory’. The United States argued that its legislation concerning claims on dolphin-safe tuna was not mandatory because it did not restrict market access to products that had obtained the label. The Appellate Body disagreed, and held that the measure was mandatory

according to Locke, “emerged as the dominant approach that global corporations and labor rights NGOs alike embrace to promote labor standards in global supply chains”<sup>129</sup> are not covered by the TBT Agreement.<sup>130</sup>

The main substantive obligations concerning technical regulations are set out in Articles 2.1 and 2.2 of the TBT Agreement. The former lays down an MFN and NT obligation. Like GATT Articles I and III, ‘like products’ are used as the benchmark to determine whether a technical regulation is discriminatory. Article 2.2 adds certain minimum requirements, providing that:

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment.

Importantly, the ‘legitimate objective’ criterion resembles the GATT’s general exception clause. Unlike Article XX GATT, however, the list provided here is not limitative. Joseph has argued that: “Presumably, the protection of human

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for producers because they “must comply with the measure at issue in order to make any ‘dolphin-safe’ claim.” WTO, *United States: Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Report of the Appellate Body* (16 May 2012) WT/DS381/AB/R, para 196.

129 Richard Locke, *The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy* (Cambridge University Press 2013) 11.

130 WTO law only disciplines market access restrictions that are attributable to public entities. The TBT Agreement does not contain any substantive obligations regarding private sector standards. Article 4.1 of the TBT Agreement obliges member states to ensure that non-governmental standardizing bodies accept and comply with the Code of Good Practice, but this only covers “non-governmental bodies which have legal power to enforce a technical regulation.” Article 10.1.1 Annex 1 TBT Agreement For private standardizing bodies compliance with the Code of Good Practice is voluntary. Denkers also refers to the fact that an attempt by Canada “to extent the coverage of the TBT Agreement to voluntary eco-labelling schemes” failed to gain political support in the TBT Committee, see Jeroen Denkers, *The World Trade Organization and Import Bans in Response to Violations of Fundamental Labour Rights* (Intersentia 2008) 56. However, as Kudryavtsev argues, “[voluntary] private-sector standards may accrue more of less mandatory character through certain governmental involvement or incentives for their development or application.” Arkady Kudryavtsev, ‘Private Standardization and International Trade in Goods: Any WTO Law Implications for Domestic Regulation?’ (Society of International Economic Law Working Paper No 2012/02, 2012) 5. If these hybrid forms of regulation are not covered by WTO disciplines, States could hide behind a “private veil.” *ibid* 27. The WTO Panel in *Japan-Film* noted that: “past GATT cases demonstrate that the fact that an action is taken by private parties does not rule out the possibility that it may be deemed to be governmental if there is sufficient government involvement with it.” WTO, *Japan: Measures Affecting Consumer Photographic Film and Paper – Report of the Panel* (31 March 1998) WT/DS44/R, para 10.56. Thus far, however, the involvement of States in the field of social labeling appears to be limited.



rights would suffice as a legitimate purpose.<sup>131</sup> While the near universal support for some human rights and labour rights norms certainly supports this contention, it is unclear whether an objective which is essentially extraterritorial will be considered legitimate. Arguably, a social label would stand a better chance when it is framed as a means to prevent deceptive practices. In the WTO *US–Tuna II* case, the Panel noted that: “The objective of preventing consumers of tuna products from being deceived by false dolphin-safe allegations falls within the broader goal of preventing deceptive practices.”<sup>132</sup> Although the Appellate Body’s analysis was focused on the objective of dolphin protection, and the question whether this coerced Mexico into adopting certain standards, the prevention of deceptive practices ground appears to allow for a broad spectrum of labelling measures. The same argument could be used to uphold a social label under the TBT.<sup>133</sup>

In addition to the legitimacy of the objective, a technical regulation cannot be “more trade restrictive than necessary” and must be applied in a non-discriminatory way. The next sector will examine the definition of ‘like products’ which is the benchmark to determine discrimination.

#### 3.3.4.4 The definition of ‘like’ products in WTO law

The non-discrimination obligations of Articles I and III:4 GATT and 2.1 TBT Agreement apply only between two products that are ‘like’. Hence, if the proposition is accepted that two t-shirts are not ‘like’ products when one is produced under working conditions that are in compliance with ILO standards, and one is produced by 8-year old children, there might be no obligation to treat those products equally. If these products are ‘like’, however, measures that disadvantage child labour products are *prima facie* non-compliant with the GATT.

There is no single definition of likeness in WTO law. In fact, the Appellate Body has explicitly held that its meaning in does not have to be consistent.<sup>134</sup>

131 Sarah Joseph, *Blame it on the WTO? A Human Rights Critique* (Oxford University Press 2011) 127.

132 WTO, *United States: Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Report of the Panel* (15 September 2011) WT/DS381/R, para 7.437.

133 The Belgian measure has never been challenged, although various countries have expressed their concerns with the Belgian measure in the WTO Committee on Technical Barriers to Trade (TBT Committee). Criticism ranged from the potential impact on international trade and general denunciations of trade-labour linkage to alleged inconsistency with WTO rules and risks of discriminatory application. See: World Trade Organization: Committee on Technical Barriers to Trade, ‘Minutes of the Meeting Held on 30 March 2001’ (8 May 2001) G/TBT/M/23, paras 9-18; and World Trade Organization: Committee on Technical Barriers to Trade, ‘Minutes of the Meeting Held on 29 June 2001’ (14 August 2001) G/TBT/M/24, paras 16-26.

134 WTO, *Japan: Taxes on Alcoholic Beverages – Report of the Appellate Body*, (4 October 1996) WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, 20-21.

In relation to Article III:4 GATT and 2.1 TBT Agreement, however, the AB has put the existence of a ‘competitive relationship’ at centre stage. Four criteria are used to determine whether such a relationship exists: (1) the product’s characteristics, (2) its end-use, (3) consumers’ tastes and preferences and (4) the tariff classification.<sup>135</sup> This list is not limitative *per se* as it is not directly derived from any of the WTO Agreements.

Distinctive process and production methods, such as the labour conditions under which a product is made, are thus not taken into account when determining the likeness of products. A number of GATT Panels have explicitly dismissed PPMs as a valid basis to determine the likeness of products.<sup>136</sup> The exclusion of labour conditions as a relevant factor in determining likeness is supported by the drafting history of the Havana Charter. In 1947, Uruguay unsuccessfully tabled an amendment to add to Article 7 that: “Nothing in this Charter shall be construed as preventing the adoption by a Member of reasonable and equitable measures to protect its industry from the competition of like products produced under sub-standard conditions of labour and pay.”<sup>137</sup> The assumption appears to have been that the conditions of labour did not factor into the definition of likeness, and therefore a separate provision was necessary.

The argument that is typically advanced in the context of non-product-related PPMs is that they may influence the competitive relationship through the consumers’ tastes and preferences, whilst not being reflected in the physical characteristics of the product. In *Philippines–Distilled Spirits*, a case that concerned likeness under Article III:2 GATT, the Appellate Body remarked *in dicta* that the element of consumer perception: “may reach beyond the products’ properties, nature, and qualities, which concern the objective physical characteristics of the products. Indeed, consumer perception of products may be more concerned with consumers’ tastes and habits than with physical character-

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135 The former three criteria originate in a working party report in 1970, see General Agreement on Tariffs and Trade, ‘Report by the Working Party on Border Tax Adjustments’ (20 November 1970) L/3464, para 18. The latter was first applied in the 1981 GATT report *Spain: Tariff Treatment of Unroasted Coffee* (27 April 1981, adopted 11 June 1981) GATT BISD 28S/102, paras 4.6-4.8.

136 GATT, *United States: Restrictions on Imports of Tuna – Report of the Panel* (3 September 1991, unadopted) GATT BISD 39S/155, para 5.15. See also: Peter Van den Bossche, Nico Schrijver and Gerrit Faber, *Unilateral Measures Addressing Non-Trade Concerns: A Study on WTO Consistency, Relevance of other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures concerning Non-Product-Related Process and Production Methods* (Ministry of Foreign Affairs of The Netherlands 2007) 63 contains a list of GATT panels in which the relevance of PPMs in the determination of likeness was also rejected.

137 United Nations Conference on Trade and Employment, ‘First Committee: Employment and Economic Activity – Draft Chapter – Uruguay: Proposed Amendment’ (4 December 1947) E/CONF.2/C.1/3/Add. 2. It is unclear why the amendment was rejected.

istics.<sup>138</sup> Accepting that a t-shirt produced by an adult is ‘unlike’ a t-shirt produced by a child would require a demonstration that consumer preference in favour of the former is so strong that a competitive relationship is almost non-existent.<sup>139</sup> This market-based approach has various disadvantages, such as the fact that reliance on consumer behaviour may lead to different definitions of likeness in developed countries (where consumers are able and willing to pay child labour free products) and developing countries.<sup>140</sup> The main problem with respect to this market-based approach is that there often is no market. Non-product related PPMs are by definition not visible in the end product. Without additional information consumers cannot make an informed decision, and data indicating the substitutability of the two types of t-shirts cannot be collected.

The exclusion of PPMs from the definition of likeness has been discussed extensively in the literature. Howse and Regan propose that ‘like’ ought to be defined as “not differing in any respect relevant to an actual non-protectionist policy”<sup>141</sup> based on the ordinary meaning of the term and the stated rationale of the NT obligation that measures “should not be applied ... so as to afford protection to domestic production.”<sup>142</sup> This could be done by paying closer attention to the subjective intent and the practical effect of trade measures.<sup>143</sup> Also Van den Bossche, Schrijver and Faber have argued that increased consumer awareness on, and concern about labour conditions could potentially lead to a broader definition of like products.<sup>144</sup> Jackson, however, has argued that there is a textual basis for the exclusion of PPMs, as the WTO

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138 WTO, *Philippines: Taxes on Distilled Spirits – Reports of the Appellate Body* (21 December 2011) WT/DS396/AB/R and WT/DS396/AB/R, para 132.

139 See in the context of environmental non-product-related PPMs, Barbara Cooreman, *Global Environmental Protection through Trade: A Systematic Approach to Extraterritoriality* (Edward Elgar Publishing 2017) 33-5.

140 Christiane R. Conrad, *Processes and Production Methods (PPMs) in WTO Law: Interfacing Trade and Social Goals* (Cambridge University Press 2011) 233-234.

141 Robert Howse and Donald Regan, ‘The Product/Process Distinction – An Illusory Basis for Disciplining ‘Unilateralism’ in Trade Policy’ (2000) 11 *European Journal of International Law* 249, 260.

142 Art III:1 GATT.

143 Robert Howse and Donald Regan, ‘The Product/Process Distinction – An Illusory Basis for Disciplining ‘Unilateralism’ in Trade Policy’ (2000) 11 *European Journal of International Law* 249, 265-268. In *US-Clove Cigarettes*, however, the AB dismissed an interpretation of likeness “that focused on the legitimate objectives and purposes of the technical regulation, rather than on the competitive relationship between and among the parties.” WTO, *United States, Measures Affecting the Production and Sale of Clove Cigarettes – Report of the Appellate Body* (4 April 2012) WT/DS406/AB/R, para 112.

144 Peter Van den Bossche, Nico Schrijver and Gerrit Faber, *Unilateral Measures Addressing Non-Trade Concerns: A Study on WTO Consistency, Relevance of other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures concerning Non-Product-Related Process and Production Methods* (Ministry of Foreign Affairs of The Netherlands 2007) 63.

Agreements, including Article III GATT, use the term ‘product’.<sup>145</sup> Furthermore, he warns that: “With respect to the product/process problem, the issue is not so much whether this distinction can be justified in all contexts ... but rather how to develop some constraints on the potential *misuse* of process-oriented trade barriers (i.e. the ‘slippery slope’).”<sup>146</sup> Although a definite answer would depend on the structure of a specific trade measure, it can generally be concluded that it will likely be found in violation of Articles I, III:4 and XI GATT or Article 2 TBT Agreement.

### 3.4 JUSTIFICATIONS UNDER THE GATT GENERAL EXCEPTIONS CLAUSE

#### 3.4.1 Introduction

Given the Appellate Body’s rejection of the PPM concept to determine the (un)likeness of products and the *ipso facto* breach of WTO law in the case of quantitative import restrictions, legal scholars have devoted considerable attention to the general exception clause found in Article XX GATT.<sup>147</sup> Charnovitz, for example, argues that “[f]or ... PPMs, the most important WTO law is found in GATT Article XX.”<sup>148</sup> This is a notable shift from the early days of the GATT, as there is “no evidence that negotiators viewed Article XX as a solution to the labor standards problem.”<sup>149</sup>

The test to determine whether an otherwise inconsistent restriction of international trade can be justified under the general exceptions clauses is done in two parts. First, the objective of the measure has to align with one of the policy areas listed in paragraphs (a) – (j) of Article XX GATT. In the context of labour, paragraphs (a), (b), (d) and (e) GATT can potentially be relied upon. These paragraphs deal with the protection of public morals, the protection of human life or health, compliance with non-inconsistent laws and regulations and the products of prison labour, respectively. Although the list of policy

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145 John Jackson, ‘Comments on Shrimp/Turtle and the Product/Process Distinction’ (2000) 11 *European Journal of International Law* 303.

146 *Ibid* 304.

147 The GATS contains a similar provision in Article XIV. Labour-related restrictions on trade in services are not discussed in this chapter, but as the Appellate Body has used earlier case law on Article XIV GATS in interpretation Article XX GATT reference will be made to these cases.

148 Steve Charnovitz, ‘The Law of Environmental ‘PPMs’ in the WTO: Debunking the Myth of Illegality’ (2002) 27 *Yale Journal of International Law* 59, 101. Although Charnovitz commented on environmental PPMs, his statement rings true for labour PPMs as well. This is also true for country-based sanctions that are incompatible with Article XI GATT, such as those that were instituted against Myanmar in response to its forced labour practices.

149 Elissa Alben, ‘GATT and the Fair Wage: A Historical Perspective on the Labor-Trade Link’ (2001) 101 *Columbia Law Review* 1401, 1438.

areas is exhaustive,<sup>150</sup> the scope of the various exceptions is open to interpretation.

Sections 3.4.2 to 3.4.5 will examine these four policy grounds. Section 3.4.6 examines the obligations contained in the *chapeau* of Article XX, which aims to prevent (1) arbitrary and unjustifiable discrimination and (2) disguised restrictions on trade.<sup>151</sup>

### 3.4.2 Article XX(a): The protection of public morals

#### 3.4.2.1 International labour standards as public morals

Article XX (a) permits GATT-inconsistent measures that are “necessary to protect public morals.”<sup>152</sup> Like other elements of the general exception clause, this ground had been included in various trade agreements that were concluded before World War II.<sup>153</sup> The scope of some of these early treaties, such as the 1936 Commercial Agreement between the United States and Switzerland, was broader and allowed “prohibitions or restrictions (I) imposed on moral or humanitarian grounds.”<sup>154</sup> The latter element has disappeared from contemporary trade agreements.<sup>155</sup>

In the context of the WTO, the public morals exception has been invoked in a handful of cases. In *us–Gambling*, which dealt with the public morals exception in the similar Article XIV(a) GATS, the panel held that “the term public morals denotes standards of right and wrong conduct by or on behalf of a community or nation.”<sup>156</sup> It added that:

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150 WTO, *United States: Standards for Reformulated and Conventional Gasoline – Report of the Appellate Body* (29 April 1996) WT/DS2/AB/R, 22.

151 Article XX GATT. The wording in Article XIV GATS is only marginally different, replacing “the same” with “like”.

152 Christopher Feddersen, ‘Focussing on Substantive Law in International Economic Relations: The Public Morals of GATT’s Article XX(a) and “Conventional” Rules of Interpretation’ (1998) 7 *Minnesota Journal of Global Trade* 75, 76, and Steve Charnovitz, ‘The Moral Exception in GATT’ (1998) 38 *Virginia Journal of International Law* 689, 742–43.

153 John Jackson, *World Trade and the Law of GATT: A Legal Analysis of the General Agreement on Tariffs and Trade* (The Michie Company 1969) 741.

154 Art XIV Commercial Agreement between the United States and Switzerland (signed 9 January 1936, ratified 7 May 1936) 1936 LNTS 232 (emphasis added).

155 Only the general exception clause in the Economic Partnership Agreement between the European Communities and the CARIFORUM states contains a footnote stating that: “The Parties agree that, in accordance with [the labour chapter], measures necessary to combat child labour shall be deemed to be included within the meaning of measures necessary to protect public morals or measures necessary for the protection of health.” Art 224.1(a) EU-CARIFORUM EPA.

156 WTO, *United States: Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Report of the Panel* (10 November 2004) WT/DS285/R, para 6.465 (internal quotation omitted).

The content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values. [...] Members should be given some scope to define and apply for themselves the concepts of “public morals” and “public order” in their respective territories, according to their own systems and scales of values.<sup>157</sup>

This interpretation was confirmed in all subsequent panel and Appellate Body reports. While in *US–Gambling* the Panel also examined whether other jurisdictions motivated gambling restrictions on the basis of moral concerns,<sup>158</sup> this comparative approach was not followed in subsequent cases. The strong emphasis on moral preferences at the domestic level implies that international consensus, expressed through international law or comparative practices, is not required. Indeed, there are no international conventions that prohibit gambling services or set standards for censorship in audio-visual products. To the contrary, the *China–Audiovisuals* shows that import restrictions that are justified based on the protection of public morals may even conflict with the human right to freedom of expression.<sup>159</sup>

Nonetheless, the dominant perception amongst scholars who argue that trade sanctions in response to human rights violations can be justified under Article XX(a) is that this follows from the recognition of human rights in international law. Human rights as such are grounded in moral philosophy. Despite ongoing debates about moral relativism, different generations of rights and the relative value of legal entitlements, the post-World War II codification of international human rights law has been praised as establishing “a truly global morality.”<sup>160</sup> A report published by the Office of the UN High Commissioner for Human Rights thus argues that “the term ‘public morals’ could arguably include human rights (recognized in international human rights treaties with broad membership [sic] and reflecting fundamental values) within its scope.”<sup>161</sup>

This reasoning is easily extended to international labour rights.<sup>162</sup> Since the adoption of the 1998 Declaration, the concept of ‘fundamental’ or ‘core’ labour rights has become the main focal point.<sup>163</sup> Following the definition

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157 Ibid, para 6.461.

158 Ibid, para 6.471.

159 Hendrik Andersen, ‘Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions’ (2015) 18 *Journal of International Economic Law* 383, 393-394.

160 Michael J. Perry, ‘The Morality of Human Rights’ (2013) 50 *San Diego Law Review* 775.

161 OHCHR, ‘Human Rights and World Trade Agreements: Using general exception clauses to protect human rights’ (HR/PUB/05/5, United Nations 2005) 9

162 Salman Bal, ‘International Free Trade Agreements and Human Rights: reinterpreting Article XX of the GATT’ (2001) 10 *Minnesota Journal of Global Trade* 62, 77.

163 See e.g.: Uyen P. Le, ‘Online and Linked In: “Public Morals” in the Human Rights and Trade Networks’ (2012) 38 *North Carolina Journal of International Law and Commercial Regulation* 107; Gabrielle Marceau, ‘Trade and Labour’ in Daniel Bethlehem and others

set in *US-Gambling*, assertions that within the body of ILO norms, the four fundamental labour rights are most likely to “be issues of public morals”<sup>164</sup> seek an objective determination based on international standards of morality that is not required by sub (a). So far, none of the issues that have been found to fall under public morals exception are governed by international law. The distinction between fundamental and technical ILO conventions does not affect the interpretation of Article XX, nor does it matter whether an issue is regulated at the international level at all. Accordingly, ‘living wage’ might as well be an issue of public morality as forced labour. Indeed, in a 2017 report, a WTO panel accepted the argument that the objective of “bridging the digital divide and promoting social inclusion” was accepted under Article XX(a).<sup>165</sup>

However, reliance on universal moral values mitigates the risk that Article XX(a) becomes a *carte blanche*.<sup>166</sup> States have a wide discretion to determine the scope of ‘public morals’, but the Appellate Body may consider the “importance of the interests at issue” in the necessity-test.<sup>167</sup> This test is part of Article XX(a), (b) and (d) and applies similarly to each paragraph.<sup>168</sup> It further examines the measure’s contribution to the achievement of its objective, the trade restrictiveness of the measure and possible alternatives that are less trade

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(eds) *The Oxford Handbook of International Trade Law* (Oxford University Press 2009) 550; Jeroen Denkers, *The World Trade Organization and Import Bans in Response to Violations of Fundamental Labour Rights* (Intersentia 2008) 181; Virginia Leary, ‘Workers’ Rights and International Trade’ in Jagdish Bhagwati and Robert Hudec (eds) *Fair Trade and Harmonization: Prerequisites for Free Trade Vol II – Legal Analysis* (MIT Press 1996) 221; Stefan Zleptnig, *Non-Economic Objectives in WTO Law: Justification Provisions of GATT, GATS, SPS and TBT Agreements* (Martinus Nijhoff Publishers 2010) 207-208.

164 Gabrielle Marceau, ‘Trade and Labour’ in Daniel Bethlehem and others (eds) *The Oxford Handbook of International Trade Law* (Oxford University Press 2009) 550.

165 A broad range of non-binding international documents was submitted as evidence on the importance of access to information, including the 2015 Millennium Development Goals report. Eventually the argument failed on the necessity test. WTO, *Brazil: Certain Measures Concerning Taxation and Charges – Reports of the Panel* (30 August 2017) WT/DS472/R and WT/DS497/R, paras 7.561-7.568.

166 Christopher Feddersen, ‘Focussing on Substantive Law in International Economic Relations: The Public Morals of GATT’s Article XX(a) and “Conventional” Rules of Interpretation’ (1998) 7 *Minnesota Journal of Global Trade* 75, 105-106; and Jeremy Marwell, ‘Trade and Morality: The WTO Public Morals Exception after Gambling’ (2006) 81 *New York University Law Review* 802, 815.

167 WTO, *United States: Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Report of the Appellate Body* (7 April 2005) WT/DS285/AB/R, para 307. For example, in WTO, *Brazil: Measures Affecting Imports of Retreaded Tyres – Report of the Appellate Body* (3 December 2007) WT/DS332/AB/R, para 179 in which the AB agrees with the Panel that the protection of human life and health against dengue fever and malaria “is both vital and important in the highest degree” and that environmental protection is merely “important”.

168 GATT, *Thailand: Restrictions on Importation of and Internal Taxes on Cigarettes* (5 October 1990, adopted 7 November 1990) GATT BISD 37S/200, para 74.

restrictive but make an equivalent contribution to the achievement of the objective.<sup>169</sup> In *Korea–Various Measures on Beef*, the Appellate Body held that:

In sum, determination of whether a measure, which is not “indispensable”, may nevertheless be “necessary” ... involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.<sup>170</sup>

Whether Article XX(a) can justify trade-restrictive measures in response to labour rights violations thus depends on the stated objective and the design of the measures, but it is unclear what the criteria are to determine the importance of the interests that are protected by a trade-restrictive measure.<sup>171</sup> Arguably, the importance of an ‘interest’ that is the subject of international conventions may be more easily assumed than interests which have no such basis.

#### 3.4.2.2 Addressing foreign labour conditions through domestic consumer concerns

The interest that is protected by an import ban on goods produced with forced labour, for example, would be based on a norm that is expressed in a nearly universally ratified convention. However, if the ultimate purpose of the import ban is to abolish forced labour in the exporting state, this is an extraterritorial policy objective. Whether measures with extraterritorial effect are allowed under Article XX is a fiercely debated issue since the 1991 GATT report in *US–Tuna I*. The Panel found that if the US measure would be upheld, “each contracting party could unilaterally determine the life and health protection policies [and conservation policies] from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement.”<sup>172</sup> It rejected the “extrajurisdictional application” of Article XX and held that the embargo could not be justified.<sup>173</sup>

During the WTO era Panels and the Appellate Body have carefully side-stepped the issue of extraterritoriality. In *US–Shrimp Turtle* the AB resolved the issue by observing that: “sea turtles are highly migratory animals, passing

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169 WTO, *Brazil: Measures Affecting Imports of Retreaded Tyres – Report of the Appellate Body* (3 December 2007) WT/DS332/AB/R, para 178.

170 WTO, *Korea: Measures Affecting Imports of Fresh, Chilled and Frozen Beef – Reports of the Appellate Body* (11 December 2000) WT/DS161/AB/R and WT/DS169/AB/R, para 164.

171 Hendrik Andersen, ‘Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions’ (2015) 18 *Journal of International Economic Law* 383, 397.

172 GATT, *United States: Restrictions on Imports of Tuna – Report of the Panel* (3 September 1991, unadopted) GATT BISD 39S/155, paras 5.27 and 5.32.

173 *Ibid.*, para 5.32.



in and out of waters subject to the rights of jurisdiction of various coastal states and the high seas.”<sup>174</sup> As the species at stake also occurred in US waters, the issue of extraterritoriality did not occur. In *EC–Seal Products* the disputing parties did not make submissions on the territorial nexus on appeal. The AB merely noted two possible grounds, namely the fact that the EU Seal Regime was also applicable to seal hunting activities inside the EU and that it addressed “seal welfare concerns of ‘citizens and consumers’ in EU member States.” It also remarked, however, that it “[recognized] the systemic importance of the question of whether there is an implied jurisdictional limitation in Article XX(a), and, if so, the nature and extent of that limitation”.<sup>175</sup>

The Panel report considered the validity of the ‘consumer concern’ argument as a sufficient territorial nexus in more detail. Arguably, the circumvention of the extraterritoriality problem and the way the necessity of the measure was justified are the most striking elements of the case. As a result, *EC–Seal Products* has provoked much debate on its possible implications for the justification of labour-related trade measures.<sup>176</sup> According to the Panel, the moral objections of the European Union were twofold, namely “(a) the incidence of inhumane killing of seals; and (b) EU citizens’ individual and collective participation as consumers in, and their exposure to, the economic activity which sustains the market for seal products derived from inhumane hunts.”<sup>177</sup> Importantly, these two objectives have opposite strengths and weaknesses with respect to necessity and extraterritoriality. With regard to the former, the disputed EU Regulation states that: “Since the concerns of citizens and consumers extend to the killing and skinning of seals as such, it is also necessary to take action to reduce the demand leading to the marketing of seal products and, hence, the economic demand driving the commercial hunting of seals.”<sup>178</sup> The necessity test did not pose a problem.<sup>179</sup> Alternatives that were proposed such as labelling were not regarded as feasible to

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174 WTO, *United States, Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body* (12 October 1998) WT/DS58/AB/R, para 133.

175 WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products – Reports of the Appellate Body* (22 May 2014) WT/DS400/AB/R and WT/DS401/AB/R, para 5.173.

176 See e.g. Ingo Venzke, ‘What if? Counterfactual (Hi)Stories of International Law’ (ACIL Research Paper 2016-21) 13; Thomas Cottier, ‘The Implications of *EC –Seal Products* for the Protection of Core Labour Standards in WTO Law,’ in Henner Gött (ed) *Labour Standards in International Economic Law* (Springer 2018) 69.

177 WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products – Reports of the Panel* (25 November 2013) WT/DS400/R and WT/DS401/R, para 7.274.

178 Council Regulation (EC) 1007/2009 on trade in seal products (Seal Regulation) [2009] OJ L 286/36, para 10.

179 WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products – Reports of the Panel* (25 November 2013) WT/DS400/R and WT/DS401/R, para 7.639; WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products – Reports of the Appellate Body* (22 May 2014) WT/DS400/AB/R and WT/DS401/AB/R, para 5.290.

reduce demand as: “the reopening of the EU market could stimulate global demand so as to incentivize the killing of more seals.”<sup>180</sup>

The second objective of the EU, to protect European citizens’ from participating in, and being exposed to the market for seal products, is inward-looking. However, whereas the territorial nexus is clear, there are alternatives available that make it more difficult to satisfy the necessity requirement in relation to consumer protection. The EU Regulation which provides the legal basis for the import ban is somewhat ambiguous whether the problem is a lack of information or exposure to the immoral products as such. It specifically mentions Omega-3 capsules and garments as products that are difficult for consumers to identify as being derived from seals.<sup>181</sup> This could be resolved through labels: the public would still be exposed to seal Omega-3 on the pharmacy shelves, but could express their individual moral preference as consumers by opting for fish oil instead. Yet in assessing whether any less trade-restrictive measures were available that could make an equivalent or greater contribution, the alternatives proposed by Norway and Canada all focused on the possibility to conduct the seal hunt in a more humane way, and certify and label products accordingly.<sup>182</sup> The Panel held, however, that these alternatives risked the non-fulfilment of the objectives of the EU Seal Ban, to the extent that consumers remained ‘exposed’.<sup>183</sup> The Panel and AB did not define this term, nor did they elaborate on how exposure could otherwise be mitigated.<sup>184</sup>

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180 WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products – Reports of the Panel* (25 November 2013) WT/DS400/R and WT/DS401/R, para 7.503.

181 Council Regulation (EC) 1007/2009 on trade in seal products (Seal Regulation) [2009] OJ L 286/36, paras 3 and 7.

182 Canada’s first written submission, paras. 557-560; Norway’s first written submission, para 793. Cited in WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products – Reports of the Panel* (25 November 2013) WT/DS400/R and WT/DS401/R, para 7.468 and WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products – Reports of the Appellate Body* (22 May 2014) WT/DS400/AB/R and WT/DS401/AB/R, para 5.262.

183 WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products – Reports of the Panel* (25 November 2013) WT/DS400/R and WT/DS401/R, para 7.503.

184 In a noteworthy court case in the United States, it was held that Section 307 of the US Tariff Act of 1930 was not intended to “shield the psyche of domestic consumers against foreign products produced through human rights violations.” The reason was the consumptive demand exception, which allowed imports of prison and forced labour goods when domestic production did not meet the US’ consumptive demands. It was thus held that the purpose of the law is “to protect domestic producers, production, and workers from the unfair competition which would result from the importation of foreign products produced by forced labor.” *McKinney v U.S. Department of Treasury*, 799 F.2d 1544 (Fed. Cir. 1986) para 26 and 29. The 2015 Trade Facilitation and Trade Enforcement Act repealed the consumptive demand exception, thus increasing the prospects for successful reliance on Article XX(a) GATT if an import ban in response to forced labour practices would be challenged before the WTO. Sec 910 Trade Facilitation and Trade Enforcement Act of 2015, Public Law 114-125, 114th Congress (130 Stat 239-240).

The terms 'citizens' and 'consumers' are used in tandem throughout the EU Regulations and the Panel and AB reports. Based on the language of paragraph (a) it seems unnecessary to refer to consumers as a sub-group of citizens whose moral concerns are specifically at stake. In fact, a full trade ban and reliance on the prevention of exposure rather than the improvement of information pre-empts the expression of individual moral choices. When consumers know whether a product is made from seals (or by children), they can balance the product characteristics and prize against their moral preferences. Seal Omega-3 is advertised as healthier, better tasting and sometimes cheaper than fish products. However trivial this might be for a morally concerned consumer, by banning seal products from the market altogether the state forces consumers who do not share these strong moral preferences to spend their money differently than they would have done if they were fully informed about the content of the product.

It has been argued that the *EC–Seal Products* case does not provide a precedent for labour-related trade measures because in the labour context products are not 'inherently immoral'.<sup>185</sup> While there may be no reasonable alternatives to the methods of seal hunting, carpets and shoes are not always made by children. However, neither the party submissions nor the Panel and AB reports suggest that seal products are inherently immoral. The European Union did not dispute that humane methods of seal hunting exist. The problem was rather that these could not be applied effectively and consistently in the commercial seal hunt.<sup>186</sup> In fact, the impracticality of alternative hunting methods and the difficulty in differentiating between humanely and inhumanely killed seals was precisely the reason why the important ban was considered necessary, despite its severe trade restrictiveness.<sup>187</sup>

The real problem with regard to the necessity test in the labour context is that mere demand reduction does not alter the practice as such. The UNICEF report on Bangladesh cited above illustrates this point. This is not to say that trade measure can never contribute to the reduction of child labour. When a positive effect can be observed, however, this is by definition indirect. A trade ban does not improve labour conditions by itself, but at best creates

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185 Francis Maupain, *The Future of the International Labour Organization in the Global Economy* (Hart Publishing 2013) 165.

186 WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products – Reports of the Panel* (25 November 2013) WT/DS400/R and WT/DS401/R, para 7.182.

187 *Ibid*, paras. 7.496-7.467; WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products – Reports of the Appellate Body* (22 May 2014) WT/DS400/AB/R and WT/DS401/AB/R, para 5.270. I wish to thank Robert Wardle for our discussions on this point. Other forms of trade-restrictive measures that the EU has undertaken out of animal welfare concerns also support this conclusion. In 2013 the EU imposed a ban on the marketing and importation of animal-tested cosmetics. As there is nothing inherently immoral about cosmetics, the justification for the trade measure is solely based on its production method. So far the EU Cosmetics Directive has not been challenged by a WTO member state.

economic pressure on the industry and the state to improve (or better enforce) its regulations.

However, when the stated purpose of the trade ban is to protect domestic consumers' moral concerns of (unknowingly) becoming an accomplice in child labour practices, the necessity of the measure has to be assessed against this domestic purpose. Whether the measure mitigates the practice as such is immaterial to this analysis. It has thus been argued that "there is a real risk that a ban might assuage consumer conscience without significantly impacting on the scale of the reprehensible practice, because it might simply allow production that involves the impugned practice to consolidate and expand toward internal markets."<sup>188</sup> Perverse effects are not accounted for when a ban is justified on the basis of consumer protection only. Consequently, there is a real possibility that the AB would uphold a measure that bans child labour or forced labour products, without requiring any evidence whether it affected the situation in the exporting state.

### 3.4.3 Article XX (b): The protection of human life or health

Whereas the purpose of paragraph (a) is to protect the moral standards of domestic citizens, paragraph (b) can be used to justify GATT-incompliant trade measures which are "necessary to protect human, animal or plant life or health." This raises the question to what extent this exception applies to measures that aim to protect the life or health of workers.<sup>189</sup> Similar to paragraph (a), there is uncertainty with regard to measures which are aimed at improving the life or health of people in other jurisdictions.

Arguably, the necessity requirement and the issue of extraterritoriality, which are closely connected, pose a bigger problem here than they do for the application of Article XX(a). If it would be accepted that Article XX(b) could be used to justify trade measures in response to working conditions that pose a risk to the life or health of foreign workers, it would first be necessary to establish the level of protection that is considered appropriate. When concern-

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<sup>188</sup> Francis Maupain, *The Future of the International Labour Organization in the Global Economy* (Hart Publishing 2013) 165.

<sup>189</sup> Numerous studies have examined the health risks of labour rights violations. The ILO has adopted twenty Conventions, one Protocol and twenty-seven Recommendations concerning occupational health and safety. In addition, health risks may emanate from violations of other labour standards, ranging from child labour to working time. Indeed, the Worst Forms of Child Labour Convention (No. 182) notes that "the term the worst forms of child labour comprises ... (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children." (Emphasis omitted). See for an argument in favour of the application of Article XX(b): Paul Cook, 'Law of Trade in Human Rights: A Legal Analysis of the Intersection of the General Agreement on Tariffs and Trade's Article XX(b) and Labor Rights of Children' (2013) 3 Labor & Employment Law Forum 461.

ing domestic workers, this level is set by the state whose nationals incur the health risks. When these risks are borne by foreign workers, there are three possible benchmarks: (1) the importing state determines the level of protection it deems appropriate for foreign workers, (2) the level is derived from international standards, such as the relevant ILO conventions, or (3) the importing state determines whether the exporting state effectively enforces the level of occupational health and safety standards set by the exporting state.

The jurisdictional limitations of paragraph (b) have been explored in various cases concerning animal welfare. According to the GATT Panel in the *US–Tuna Dolphin II* case: “[...] measures taken so as to *force other countries to change their policies*, and that were effective only if such changes occurred, could not be considered “necessary” for the protection of animal life or health in the sense of Article XX (b).”<sup>190</sup> One could argue that this would not apply when the importing state uses international standards as a benchmark to assess the health and safety standards in the exporting state. However, treaties such as the 1981 Occupational Safety and Health Convention do not prescribe a certain level of standards. Instead, it requires states to “formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment.”<sup>191</sup> The convention is therefore too indeterminate to be used as a benchmark that the WTO Dispute Settlement Body can rely on. Furthermore, reliance on ILO conventions that the exporting state has ratified provides a perverse incentive not to ratify, as this increases the chance of trade restrictions when the convention is not complied with. An alternative would be that the importing state merely assesses whether the exporting state adheres to its own health and safety regulations. Assuming the effective implementation and enforcement of these regulations, the exporting state would not be required to “change their policies.” This approach resembles the obligation contained in many preferential trade and investment agreements that requires states to effectively enforce their domestic labour standards.

In addition to the problem of finding an adequate benchmark to determine the level of protection that the importing state deems adequate for workers in the exporting state without impeding the latter’s regulatory sovereignty, the import restriction has to be ‘necessary’. Here, the same problem applies that was discussed in connection to the public morals exception, namely that if the trade measure has an effect, this effect is by definition indirect. One can thus conclude that even if the importing state takes trade measures because the exporting state fails to comply with its own occupational health and safety regulations, the aim of the measure is still coercive and therefore unlikely to be accepted under Article XX(b) GATT.

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190 GATT, *United States: Restrictions on Imports of Tuna – Report of the Panel* (16 June 1994, unadopted) DS29/R, para 5.39 (emphasis added).

191 Art 4.1 1981 Occupational Safety and Health Convention (No. 155).

This is not to say that paragraph (b) cannot be used in labour-related cases. To the contrary, in the *EC–Asbestos* case, the AB upheld a French prohibition of the use of asbestos and products containing asbestos.<sup>192</sup> This ban was to a large extent motivated by the carcinogenic risk posed to construction workers in France. Despite the fact that it concerned an inward-oriented measure, ILO instruments played an important role in this case. The organization had long been concerned with the occupational health risks of asbestos. In 1984, it had published Code of Practice on Safety in the Use of Asbestos, followed in 1986 by a Convention and a Recommendation concerning Safety in the Use of Asbestos. Canada argued that the measure constituted a “technical regulation” under the TBT Agreement, as this agreement provides that technical regulations have to be based on international standards when these exist.<sup>193</sup> If the ILO instruments could be qualified as ‘international standards’ within the meaning of the TBT Agreement, France could not opt for more stringent requirements “except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued [...]”.<sup>194</sup> While the AB agreed that the ban constituted a technical regulation, it did not address the status of the ILO instruments.

In addition, Canada argued that the French ban could not be deemed ‘necessary’ as the controlled use of asbestos was a reasonably available alternative in light of the perceived health risks.<sup>195</sup> The ILO Asbestos Convention called for the prohibition of crocidolite fibres, but not the various other types. As such the international instruments as such provided for alternative measures that were less trade restrictive than the French ban.<sup>196</sup> The AB did not accept the argument. Importantly, WTO member states “have the right to determine the level of protection of health that they consider appropriate in a given situation.”<sup>197</sup> This means that insofar as the purpose of an internationally agreed rule is more limited, this rule is not a reasonably available alternative. The European Communities thus pointed out that the aim of the French Decree was “consistent with the WTO and ILO recommendations”<sup>198</sup> but that the exist-

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192 WTO, *European Communities: Measures Affecting Asbestos and Asbestos Containing Products – Report of the Appellate Body* (12 March 2001) WT/DS135/AB/R.

193 Art 2.4 TBT Agreement.

194 Also 2.4 TBT Agreement. Canada’s argument is cited in WTO, *European Communities: Measures Affecting Asbestos and Asbestos Containing Products – Report of the Panel* (18 September 2000) WT/DS135/R, para 5.520, see also WTO, *European Communities: Measures Affecting Asbestos and Asbestos Containing Products – Report of the Appellate Body* (12 March 2001) WT/DS135/AB/R, para 17.

195 WTO, *European Communities: Measures Affecting Asbestos and Asbestos Containing Products – Report of the Panel* (18 September 2000) WT/DS135/R, para 3.496.

196 *Ibid.*, para 3.125.

197 WTO, *European Communities: Measures Affecting Asbestos and Asbestos Containing Products – Report of the Appellate Body* (12 March 2001) WT/DS135/AB/R, para 168.

198 WTO, *European Communities: Measures Affecting Asbestos and Asbestos Containing Products – Report of the Panel* (18 September 2000) WT/DS135/R, para 3.113.

ence of international rules did not preclude states from seeking higher protection.

In conclusion, therefore, paragraph (b) may allow states to ban the import of certain *goods* that pose health risks to *their* workers, but is unlikely to justify GATT-inconsistent measures with extraterritorial effect.

#### 3.4.4 Article XX(d): Securing compliance with non-inconsistent laws or regulations

The next paragraph of Article XX that could potentially be considered in the context of international labour standards allows WTO members to take measures “necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement [...]”. It further provides a non-exhaustive list of covered policies, which include customs enforcement, state trading enterprises, intellectual property rights and the prevention of deceptive practices. During the drafting of the Havana Charter, Cuba had proposed an amendment to expand the latter ground by adding “the prevention of deceptive or disloyal practices in commerce, harmful to normal production and labour”<sup>199</sup> It is unclear what kind of measures it intended to exempt from the scope of the Charter, but the negotiating parties decided that Cuba’s “objective was covered for short-term purposes by paragraph 1 of Article 40 and for long-term purposes by Article ... [7] in combination with Articles ... [93, 94 and 95]”,<sup>200</sup> referring to the emergency actions clause and the labour clause, respectively.

Article XX(d) has been invoked in several cases. In *Mexico–Taxes on Soft Drinks*, Mexico had imposed taxes on soft drinks that were sweetened by additives other than cane sugar. Mexico argued that the taxes were a countermeasure, imposed to secure compliance by the United States of its obligations under the North American Free Trade Agreement (NAFTA). According to the Appellate Body:

the central issue raised in this appeal is whether the terms “to secure compliance with laws or regulations” in Article XX(d) of the GATT 1994 encompass WTO-inconsistent measures applied by a WTO Member to secure compliance with another WTO Member’s obligations under an international agreement.<sup>201</sup>

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199 United Nations Conference on Trade and Employment, ‘Third Committee: Commercial Policy – Revised Annotated Agenda for Chapter IV’ (8 December 1947) E/CONF.2/C.3/11, 5.

200 United Nations Conference on Trade and Employment, ‘Third Committee: Commercial Policy – Report of Sub-Committee D on Articles 40, 41 and 43 (28 January 1948) E/CONF.2/C.3/37, para 20.

201 WTO, *Mexico: Tax Measures on Soft Drinks and other Beverages – Report of the Appellate Body* (6 March 2006) WT/DS308/AB/R, para 68.

If this question would be answered affirmatively, paragraph (d) could arguably be used to exempt trade measures (such as import restrictions in response to child- or forced labour) from the scope of the GATT when they are taken (1) pursuant a resolution on the basis of Article 33 of the ILO Constitution, or (2) as countermeasures to enforce obligations *erga omnes*.<sup>202</sup> Arguably, both are *as such* not inconsistent with the GATT.

The central question in *Mexico–Taxes on Soft Drinks* concerned the scope of the terms “laws and regulations.” The AB report stated that these:

cover rules that form part of the domestic legal system of a WTO Member, including rules deriving from international agreements that have been incorporated into the domestic legal system of a WTO Member or have direct effect according to that WTO Member’s legal system.<sup>203</sup>

While the AB thus leaves some room for trade measures based on international labour law, it does impose the additional hurdle that the labour obligations need to have been incorporated in domestic law or have direct effect. The AB reached this conclusion on the basis of textual interpretation,<sup>204</sup> the observation that the illustrative list in paragraph (d) are almost exclusively issues that are not regulated by international law,<sup>205</sup> and the fact that other GATT provisions explicitly distinguish between ‘laws and regulations’ and ‘international agreements’.<sup>206</sup> The decision has been criticised as being “illustrative of the attitude of WTO adjudicating bodies towards non-WTO law” and argued that it is “highly implausible that this is the last word of the AB on this score.”<sup>207</sup>

In the 2016 *India–Solar Cells* case, the claimant argued that the UN ‘The Future We Want’ Resolution, which contains the outcomes of the Rio+20 summit held in 2012 imposed certain “international law obligations” that it sought to comply with.<sup>208</sup> Notably, the discussion did not focus on the question whether a UN Security Council resolution can indeed contain such obligations, but on the question whether the international legal obligations invoked by India had direct effect in its domestic legal order. Eventually the Panel and

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202 Jeroen Denkers, *The World Trade Organization and Import Bans in Response to Violations of Fundamental Labour Rights* (Intersentia 2008) 109.

203 WTO, *Mexico: Tax Measures on Soft Drinks and other Beverages – Report of the Appellate Body* (6 March 2006) WT/DS308/AB/R, para 79.

204 *Ibid*, para 69: “We agree with the United States that one does not immediately think about international law when confronted with the term “laws” in the plural.”

205 *Ibid*, para 70.

206 *Ibid*, para 71.

207 Petros Mavroidis, *Trade in goods: the GATT and the other WTO agreements regulating trade in goods* (2nd edn, Oxford University Press 2012) 342.

208 WTO, *India: Certain Measures Relating to Solar Cells and Solar Modules – Report of the Panel* (24 February 2016) WT/DS456/ R, para 7.269



the Appellate Body decided they did not, following the line of argument set out in *Mexico–Taxes on Soft Drinks*.<sup>209</sup>

Arguably, if the ILO Article 33 Resolution on Myanmar had explicitly called for trade sanctions, WTO member states that would give direct effect to such resolutions in their domestic legal system could justify trade sanctions under Article XX(d) GATT. In general, however, the exclusion of international legal obligations under the realm of “laws or regulations” means that in most cases Article XX(d) GATT cannot be used to justify WTO-inconsistent trade measures, even if these are based upon a mandate by the ILO or in response to obligations *erga omnes*.<sup>210</sup> Also, the question is whether such measures survive the necessity test under Article XX(d).

### 3.4.5 Article XX(e): Products of prison labour

Paragraph (e) allows member states to take trade restrictive measures “relating to the products of prison labour.” This is the only explicit reference to labour conditions in the WTO legal framework. So far, no WTO member state has relied on the exception before a Panel or the Appellate Body.<sup>211</sup> The reason for this might be that Article XX(e) is rather straightforward: it allows qualitative or quantitative restrictions on imports of foreign prison labour. This is premised upon the idea that prison labour leads to unfair competition with free labour, as prisoners are often required to work and minimum wage legislation is not applicable. It has also been argued that states have “a social preference ... not to transact with goods made in prison,”<sup>212</sup> which resembles the consumer-based rationale under paragraph (a) advocated by the European Union in the *Seals* case.

A state can thus legally impose additional tariffs or issue a full ban on prison labour goods, but they have no obligation to do so. A proposal by the United States to include a provision in the 1919 Paris Peace Treaty, stating

209 WTO, *India: Certain Measures Relating to Solar Cells and Solar Modules – Report of the Appellate Body* (16 September 2016) WT/DS456/AB/R, para 5.149.

210 Salman Bal, ‘International Free Trade Agreements and Human Rights: reinterpreting Article XX of the GATT’ (2001) 10 *Minnesota Journal of Global Trade* 62, 87-97; and Jeroen Denkers, *The World Trade Organization and Import Bans in Response to Violations of Fundamental Labour Rights* (Intersentia 2008) 189-191.

211 Only one Panel made an *in dicta* remark that Article XX(e) “does not permit a Member to make entry of imported goods into its territory conditional upon the exporting Member’s policy on prison labour. This paragraph only refers to the products of prison labour.” WTO, *United States, Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body* (12 October 1998) WT/DS58/AB/R, para 7.45 fn 649.

212 Petros Mavroidis, *Trade in goods: the GATT and the other WTO agreements regulating trade in goods* (2nd edn, Oxford University Press 2012) 344. In practice, there are brands such as ‘Prison Blues,’ which use their origin to market their products and are in the same price-range as some established brands.

that “[n]o article or commodity shall be shipped or delivered in international commerce in the production of which convict labor has been employed or permitted”, was not accepted.<sup>213</sup> Notably, Article XIV GATS does not contain a similar provision, although prison labour increasingly includes the provision of services such as call-center work.<sup>214</sup>

Paragraph (e) is the only provision in Article XX GATT with clear extraterritorial implications.<sup>215</sup> Determining the scope of Article XX(e) consists of two parts. First, measures have to ‘relate to’ the products of prison labour. This is a lower threshold than the necessity-test of paragraphs (a), (b) and (d).<sup>216</sup> The Appellate Body clarified in several cases that the measure must be “primarily aimed at” the purported policy goal.<sup>217</sup>

The interpretation of the term ‘products of prison labour’ has attracted most attention. Regarding the products that may be prohibited, the term “can be understood either in a narrow (products wholly originating in prisons) or in a wide sense (products with inputs produced in prisons and other detention establishments).”<sup>218</sup> The fact that states dismissed replacing the term ‘products of prison labour’ by ‘prison-made goods’ supports the latter interpretation.<sup>219</sup>

More importantly, the question has been raised whether ‘prison labour’ should be interpreted to also include other forms of involuntary labour. According to Lenzerini, “one may reasonably sustain the extension of its scope

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213 Memorandum: Prohibition of Prison Made Goods in International Commerce, Submitted by the National Committee on Prisons and Prison Labor (22 March 1919) in James Shotwell (ed) *The Origins of the International Labor Organization Vol II* (Columbia University Press 1934) 365.

214 Jason Burke, ‘Chained to their desks: prisoners will staff call centre within Indian jail’ *The Guardian* (1 February 2011) < <https://www.theguardian.com/world/2011/feb/01/call-centre-inside-indian-jail> > 13 Feb 2018.

215 While in theory the provision could also be used to justify export restrictions on products from domestic convict labour, this has no economic rationale.

216 WTO, *United States: Standards for Reformulated and Conventional Gasoline – Report of the Appellate Body* (29 April 1996) WT/DS2/AB/R, 17-18. “It does not seem reasonable to suppose that the WTO Members intended to require, in respect of each and every category, the same kind or degree of connection or relationship between the measure under appraisal and the state interests or policy sought to be promoted or realized.”

217 WTO, *United States, Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body* (12 October 1998) WT/DS58/AB/R, paras. 135-137; WTO, *United States: Standards for Reformulated and Conventional Gasoline – Report of the Appellate Body* (29 April 1996) WT/DS2/AB/R, para 19.

218 Petros Mavroidis, *Trade in goods: the GATT and the other WTO agreements regulating trade in goods* (2nd edn, Oxford University Press 2012) 344.

219 United Nations Economic and Social Council, ‘Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, Report of the Technical Sub-Committee’ (11 February 1947) E/PC/T/C.6/55/Rev.1, 47. Although the amendment suggested here was concerned with the general exceptions clause in the draft Havana Charter, the narrower formulation was considered and could have been extended to the GATT negotiations. The term ‘prison-made goods’ had been included in the Commercial Agreement between the United States and Switzerland (signed 9 January 1936, ratified 7 May 1936) 1936 LNTS 232.

to forms of work analogous to prison labour, such as forced labour or work carried out under conditions of slavery, and those forms of child labour which imply the substantial withdrawal of the victim's capacity of choice and self-determination."<sup>220</sup> Support for this position is far from univocal, however.<sup>221</sup> There have been no attempts by the GATT contracting parties, or later the WTO members, to clarify the meaning of the term. Only the 1987 Leutwiler Report states that "there is no disagreement that countries do not have to accept the products of *slave or prison* labour. A specific GATT rule allows countries to prohibit imports of such products."<sup>222</sup> While the report was commissioned by GATT Director-General Dunkel, it did not purport to be an official interpretation of the agreement. At best, it reflects a tacit understanding of states' that there was or there ought to be a legal basis to prohibit the importation of products of slave labour.

The preparatory works of the GATT are clearer. Article XX(e) originates from the 1927 International Convention for the Abolition of Import and Export Restrictions.<sup>223</sup> On the occasion of its ratification, the United States maintained that "the provision [...] excepting from the scope of the Convention prohibitions or restrictions applying to prison-made goods, includes goods the product of forced or slave labor however employed."<sup>224</sup> When the GATT was negotiated twenty years later the United States proposed a separate provision, however, which would have laid down a general obligation to eliminate

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220 Federico Lenzerini, 'International Trade and Child Labour Standards' in Francesco Francioni (ed) *Environment, Human Rights & International Trade* (Hart Publishing 2001) 301. See also: Patricia Stirling, 'The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization' (1996) 11 *American University Journal of International Law & Policy* 1, 36-39, who, referring to paragraph (e), argues that "human rights were a driving force in its inclusion." See also: Virginia Leary, 'Workers' Rights and International Trade: the Social Clause' in Jagdish Bhagwati and Robert Hudec (eds) *Fair Trade and Harmonization: Prerequisites for Free Trade Vol II – Legal Analysis* (MIT Press 1996) 204; and Janelle Diller and David Levy, 'Child Labor, Trade and Investment: Towards the Harmonization of International Law' (1997) 91 *American Journal of International Law* 663, 684, 688-689 who add the argument that US practice in treaties predating the GATT also supported the understanding that prison labour should be understood as forced labour.

221 Steve Charnovitz, 'The Influence of International Labour Standards on the World Trading Regime: A Historical Overview' (1987) 126 *International Labour Review* 565, 571; and Jeroen Denkers, *The World Trade Organization and Import Bans in Response to Violations of Fundamental Labour Rights* (Intersentia 2008) 194.

222 *Trade Policies for a Better Future: The 'Leutwiler Report', the GATT and the Uruguay Round* (Martinus Nijhoff Publishers 1987) 36 (emphasis added.)

223 International Convention for the Abolition of Import and Export Restrictions (signed 8 November 1927, not in force) 97 LNTS 393.

224 Letter of Ratification from President Hebert Hoover to the League of Nations, 20 September 1929, quoted by Janelle Diller and David Levy, 'Child Labor, Trade and Investment: Towards the Harmonization of International Law' (1997) 91 *American Journal of International Law* 663, 684.

“involuntary ... forms or conditions of employment” in the Havana Charter.<sup>225</sup> The amendment was not accepted.

In contemporary human rights law, there is a clear separation between prison labour and forced labour. Most countries allow prison labour. It raises complicated moral and economic questions, such as the applicability of minimum wage legislation or human rights guarantees in privatized prisons. But the international agreements that prohibit forced labour carefully distinguish it from other forms of unfree labour. ILO Convention No 29 explicitly excludes “any work or service exacted from any person as a consequence of a conviction in a court of law” from the definition of forced labour, “provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations.”<sup>226</sup> The ICCPR also excludes from the definition of forced or compulsory labour: “Any work or service (...) normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention.”<sup>227</sup> Similar definitions can be found in the European Convention on Human Rights and the American Convention on Human Rights.<sup>228</sup>

Unlike the ICCPR and ECHR, ILO Convention 29 and the ACHR differentiate between prison labour under the supervision of public and private authorities. This gives the ILO Committee of Experts limited jurisdiction to scrutinize prison labour in privatized prisons, or in situations where prisoners are set to work for a private company.<sup>229</sup> In this context the Committee has reiterated the logic of Article XX(e) GATT, when it warned that “there is the need to avoid unfair competition’ between the captive workforce and the free labour market.”<sup>230</sup> The Committee has not, however, warned for unfair competition

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225 United Nations Conference on Trade and Employment, ‘First Committee: Employment and Economic Activity: Draft Charter – United States: Proposed Amendment’ (8 December 1947) E/CONF.2/C.1/7/Add.1.

226 Art 2.2(c) ILO Forced Labour Convention. In its 1990 GATT Trade Policy Review, New Zealand noted that the purpose of its import prohibition of “[g]oods manufactured or produced by prison labour” was to “implement the provisions of the International Labour Organisation Convention No. 29.” This statement thus appears to be misguided, as Convention No. 29 is not concerned with prison labour and does not require States to introduce import bans. General Agreement on Tariffs and Trade, ‘Trade Policy Review Mechanism – New Zealand, Report by the Secretariat’ (5 July 1999) C/RM/S/9B, 12.

227 Art 8.3(c)(i) ICCPR.

228 Art 4.3(a) European Convention on Human Rights; Article 6.3(a) American Convention on Human Rights.

229 Antenor Hallo de Wolf, *Reconciling Privatization with Human Rights* (Intersentia 2011) 424-429.

230 International Labour Conference (96th Session) Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1B) General Survey concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105) (Geneva 2007) para 122; International Labour Conference (89th Session) Report of the Director General: Stopping Forced Labour – Global Report under the Follow-up to the ILO Declaration on Fundamental Rights at Work (Geneva 2001) para

as the result of forced labour. The state of international law is thus paradoxical: on the one hand, international law prohibits forced labour, but not prison labour. On the other hand, import restrictions on prison labour products are explicitly allowed while import restrictions on forced labour products can only be justified on the basis of the general public morals exception.

### 3.4.6 The *chapeau*-test

If it is accepted that labour-related trade measures are covered by one of the substantive paragraphs of Article XX, the next step is to assess whether these measures comply with the requirements set forth in its introductory paragraph. The *chapeau* of Article XX requires that “measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail” and that they do not constitute “a disguised restriction on international trade.” Its purpose is to prevent abusive invocations of Article XX.<sup>231</sup>

#### 3.4.6.1 *Arbitrary or unjustifiable discrimination*

The prohibition to discriminate between countries where the same conditions prevail entails both a comparison between the importing and the exporting states as well as between various exporting states.<sup>232</sup> In the context of labour-related trade measures, this requires the importing state to show that different labour conditions prevail between countries whose exports have been subject to the measures and countries that have not been affected. Arguably, two types of arguments can be advanced.

The first concerns factual differences in labour conditions. However, factual comparisons invoke a plethora of questions. For example, Myanmar has been the only country that has faced comprehensive economic sanctions due to violations of the ILO Forced Labour Convention No 29. But are there no countries where similar conditions prevail(ed)? It is possible to distinguish three factors that make this case unique: (1) the duration of the violations, (2) the gravity of the violations and (3) the active role of the government.<sup>233</sup> But there are other well-reported cases of government sponsored forced and child labour in the world, which have been on the agenda of the ILO and UN human rights mechanisms for years. In Uzbekistan, every year about one million

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231 Petros Mavroidis, *Trade in goods: the GATT and the other WTO agreements regulating trade in goods* (2nd edn, Oxford University Press 2012) 359.

232 WTO, *United States: Standards for Reformulated and Conventional Gasoline – Report of the Appellate Body* (29 April 1996) WT/DS2/AB/R, 23-24.

233 Richard Horsey, *Ending Forced Labour in Myanmar: Engaging a pariah regime* (London and New York 2011) 6.

people are sent out to the country's cotton fields to participate in the harvest. The government effectively oversees this operation. It sets quota for the number of family members that have to participate, and made it a mandatory part of school curricula for children.<sup>234</sup> There are many different factors that may determine the gravity of forced labour violations, ranging from the number of workers to the type of work.<sup>235</sup> Comparing labour rights violations in the targeted state with other situations on the basis of factual differences will invoke severe criticism, irrespective of the outcome.

The second possibility is to emphasise 'legal' differences. An undisputed and important difference between Myanmar and Uzbekistan is that only the former has been the subject of an ILO Article 33 Resolution. This does not depart from the text of the *chapeau*, but merely 'outsources' the factual comparison of conditions within different countries to the ILO. The main difficulty here is where the line should be drawn. During the last 100 years, only one Article 33 Resolution has been adopted. There are alternative yardsticks, however, such as the findings of Commissions of Inquiry, the Committee of Experts on the Application of Conventions and Recommendations (CEACR) or the Committee on Freedom of Association (CFA).

In its analysis of unjustifiable discrimination, the Appellate Body in *US-Shrimp* stated that measures must be sufficiently flexible to allow for differences in exporting states. It held that:

it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to require other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, without taking into consideration different conditions which may occur in the territories of those other Members.<sup>236</sup>

In this case, the United States only allowed the importation of shrimp caught with a particular fishing method. It subsequently modified its measure to allow other fishing methods with equivalent effect, but which were cheaper than the method initially prescribed.<sup>237</sup> While this criterion is arguably not relevant

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234 International Labour Conference (93th Session) Report of the Director-General: A Global Alliance Against Forced Labour – Global Report under the Follow-up to the ILO Declaration on Fundamental Rights at Work (Geneva 2005) 25; and 'In the land of cotton' *The Economist* (16 October 2013).

235 Other factors could include: (1) the number of people involved in forced labour, (2) the age of people involved in forced labour, (3) the type of work, (4) the type of penalties that were imposed in case of refusal to work, (5) remuneration, (6) working conditions, (7) involvement of state actors, (8) international obligations of the state, and (9) condemnation by the ILO or UN.

236 WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products* – Report of the Appellate Body (12 October 1998) para 164.

237 Petros Mavroidis, George Bermann and Mark Wu, *The Law of the World Trade Organization (WTO): Documents Cases & Analysis* (West 2010) 713.

in the case of forced labour, differences in economic development could play a role in the evaluation of trade measures that respond to other types of labour concerns.

#### 3.4.6.2 *Disguised restriction on international trade*

The second prong of the *chapeau* holds that a measure may not be a disguised restriction on international trade. 'Restriction' is to be understood broadly as it also includes situations of disguised discrimination.<sup>238</sup> According to the AB: "The fundamental theme [of the *chapeau*, RZ] is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX."<sup>239</sup> While panels and the Appellate Body consider the discrimination and disguised restriction elements of the *chapeau* separately they do "impart meaning to one another."<sup>240</sup> While the other requirements of Article XX are mostly concerned with the concrete application of trade measures, and ignore their political motives, the panel in *EC-Asbestos* held that:

In accordance with the approach defined in Article 31 of the Vienna Convention, we note that, as ordinarily understood, the verb "to disguise" implies an intention... Accordingly, a restriction which formally meets the requirements of Article XX(b) will constitute an abuse if such compliance is in fact only a disguise to conceal the pursuit of trade-restrictive objectives... Nevertheless, we note that, in the same case, the Appellate Body suggested that the protective application of a measure can most often be discerned from its design, architecture and revealing structure.<sup>241</sup>

The *chapeau* of Article XX thus provides a test to assess whether labour-related trade measures have a (disguised) protectionist purpose. According to the Appellate Body the *chapeau* expresses the principle of good faith, which it considers to be both a general principle of law and a customary rule of international law that prevents the abusive exercise of states' rights.<sup>242</sup>

An *abus de droit* problem could arguably arise when the invocation of an exception listed in Article XX breaches the object and purpose of another treaty to which the disputing states are a party. The Appellate Body in *US-Shrimp Turtle* noted that: "The Inter-American Convention [for the Protection and

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238 WTO, *United States: Standards for Reformulated and Conventional Gasoline – Report of the Appellate Body* (29 April 1996) WT/DS2/AB/R, 25.

239 *Ibid.*, 25.

240 *Ibid.*, 25.

241 WTO, *European Communities: Measures Affecting Asbestos and Asbestos Containing Products – Report of the Panel* (18 September 2000) WT/DS135/R, para 8.236.

242 WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body* (12 October 1998) para 158.

Conservation of Sea Turtles] demonstrates the conviction of its signatories, including the United States, that consensual and multilateral procedures are available and feasible for the establishment of programs for the conservation of sea turtles.”<sup>243</sup> It continued to argue that:

The Inter-American Convention thus provides convincing demonstration that an alternative course of action was reasonably open to the United States for securing the legitimate policy goal of its measure, a course of action other than the unilateral and non-consensual procedures of the import prohibition .... Finally, the record also does not show that the appellant, the United States, attempted to have recourse to such international mechanisms as exist to achieve cooperative efforts to protect and conserve sea turtles before imposing the import ban.<sup>244</sup>

This statement builds upon the findings in the *US–Gasoline* case, in which the AB lamented the United States for failing to enter into “cooperative arrangements” with exporting states.<sup>245</sup>

However, it is unlikely that ILO conventions would be regarded as ‘an alternative course of action’ to secure the same policy goal as a trade measure. In the *US–Tuna II* case, which was decided thirteen years after *US–Shrimp*, Mexico argued that compliance with the Agreement on International Dolphin Conservation Program would have the same material effect as the US labelling scheme, but would be less trade restrictive.<sup>246</sup> Although these claims were made under the TBT Agreement, they concerned similar requirements as the *chapeau* of Article XX GATT. The Appellate Body, however, noted that the US was allowed to set a higher degree of protection than under the relevant international agreement.<sup>247</sup> In other words: in the presence of international agreements on the same subject-matter, the legitimacy of states’ objectives does not depend on the level of protection established in that agreement, or to the means of implementation foreseen in the agreement. Instead, the importing state’s definition of the purpose of the measure in terms of the level of protection it seeks to establish is decisive.

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243 Ibid, para 170.

244 Ibid, para 171.

245 WTO, *United States: Standards for Reformulated and Conventional Gasoline – Report of the Appellate Body* (29 April 1996) WT/DS2/AB/R, 25

246 WTO, *United States: Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Report of the Panel* (15 September 2011) WT/DS381/R, para 7.612.

247 WTO, *United States: Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Report of the Appellate Body* (16 May 2012) WT/DS381/AB/R, para 330.



### 3.5 LABOUR CONDITIONALITY IN THE GENERALIZED SYSTEM OF PREFERENCES

#### 3.5.1 Introduction

This part examines the only domain in multilateral trade law in which trade-labour linkage is systematically put into practice: the Generalized System of Preferences (GSP). Section 3.5.2 looks at the legal basis for the GSP in the multilateral trade system and the debate about the permissibility of labour conditionality. Sections 3.5.3 and 3.5.4 explore the systems of labour conditionality in the preferential trade legislation of the United States and the European Union, respectively.

#### 3.5.2 The Generalized System of Preferences

##### 3.5.2.1 Article I GATT and the Enabling Clause

In the 1950s and 1960s, developing countries started to express their discontent with the GATT. They felt that it did not serve their interest, and argued for lower tariffs on primary commodities and some more fundamental changes to the GATT's legal system. This culminated in the adoption of a new Part IV on 'Trade and Development' that entered into force in 1966.<sup>248</sup> It laid down 'best efforts' commitments for the developed states,<sup>249</sup> and stated that tariff concessions that would be inconsistent with development objectives were not expected. Another priority of the developing countries was to obtain an exception to the MFN obligation of Article I GATT based on development status.<sup>250</sup> This debate took place within the United Nations Conference on Trade and Development (UNCTAD), which had also been involved in the preparations of Part IV.<sup>251</sup>

In 1968 the UNCTAD member states agreed on the necessity of a "generalized non-reciprocal, non-discriminatory system of preferences in favour of the developing countries, including special measures in favour of the least

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248 Protocol amending the General Agreement on Tariffs and Trade to introduce a Part IV on Trade and Development and to amend Annex I (8 February 1965) 572 UNTS 320.

249 At the time, such provisions were not considered to have any legal effect, see Sonia Rolland, 'Development at the WTO' (Oxford University Press 2012) 70.

250 MFN was a main feature of bilateral commercial treaties before World War II. At the same time, however, many states granted preferential tariffs to their former colonies after World War II. This is reflected in Article I(2) GATT, which is known as the 'grandfathering clause'. It exempts preferences that were in place before 1 January 1948 from the scope of the MFN obligation.

251 David Pollock, Joseph Love and David Kerner, 'Prebisch at UNCTAD' in Edgar Dosman (ed) Raúl Prebisch, *Power, Principles and the Ethics of Development* (Inter-American Development Bank 2006) 41.

advanced among the developed countries.”<sup>252</sup> The UNCTAD resolution did not affect the interpretation of the GATT, however. If a member would thus adopt a generalized system of preferences (GSP) and lower tariffs for developing countries while maintaining them for the developed GATT-members, it would breach its MFN obligation. To overcome this problem, the GATT Ministerial Conference adopted a temporary waiver in 1971 that expressly allowed member states to deviate from their obligations under Article I for the purpose of establishing a GSP.<sup>253</sup> Eight years later the waiver was extended indefinitely through the adoption of the so-called ‘Enabling Clause’.<sup>254</sup> It states that “notwithstanding [Article I GATT] contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties.” The subsequent articles provide some additional rules. Importantly, Article 3(c) provides that:

Any differential and more favorable treatment provided under this clause shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.

At the establishment of the WTO in 1995 the Enabling Clause was made an integral part of the WTO framework. Having a GSP is voluntary, but if a state adopts one it must comply with the terms set by the Enabling Clause.<sup>255</sup> Both the European Union and the United States have a GSP in place which grant access to developing countries on the fulfilment of certain labour standards. The question arises whether such conditionalities comply with the requirement in Article 3(c). In other words: does the Enabling Clause only allow discrimination between developed and developing countries, or is it possible to distinguish between developing countries that have and that have not ratified certain ILO conventions, for example?

### 3.5.2.2 *The EC–Tariff Preferences case and the notion of ‘development needs’*

In 2002 India challenged the European drug trafficking conditionalities before the WTO Dispute Settlement Body. Apart from their general GSP scheme, the

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252 UNCTAD, Resolution 21(II): Preferential or free entry of exports of manufactures and semi-manufactures of developing countries to the developed countries, adopted at the 78th plenary meeting (27 March 1968).

253 Generalized System of Preferences, Decision of 25 June 1971, BISD 18S/24.

254 General Agreement on Tariffs and Trade, ‘Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries’ (28 November 1979) L/4903.

255 Lorand Bartels, ‘The Appellate Body Report in European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries and Its Implications for Conditionality in GSP Programmes’ in Thomas Cottier, Joost Pauwelyn and Elisabeth Bürgi (eds) *Human Rights and International Trade* (Oxford University Press 2005) 469.

European Communities operated three 'special incentive arrangements' that provided additional tariff cuts to developing countries that committed to the implementation of (1) labour standards, (2) environmental standards, or (3) anti-drug trafficking programmes.<sup>256</sup> The latter included eleven Latin-American countries and Pakistan, much to the dislike of India, which argued that the Enabling Clause solely allows discrimination between developed and developing countries, but no further differentiation on the basis of conditionalities.

The 2004 Appellate Body report ruled the drug arrangement in breach of the Enabling Clause and constrained the types of conditionalities that GSP granting states can impose.<sup>257</sup> Unlike the panel however, the Appellate Body did not consider all forms of differentiation to be impermissible. Instead, it held that the requirement of Article 3(c) Enabling Clause that GSPs "shall be designed ... to respond positively to the development, financial and trade needs" allows to differentiate between developing countries. These development needs must be objectively identified and effectively addressed by the tariff preference.<sup>258</sup> The European conditions on drug trafficking were found to be non-compliant with this requirement, as its list of beneficiary countries was closed. Without clear criteria to determine whether countries could qualify for the special incentives, the European Communities could not substantiate that it responded to an objectively defined development need. Notably, however, the AB did not clarify the concept of 'development needs'.<sup>259</sup>

Arguably, the interpretation of this term hinges on one's conceptualization of 'development'. The Appellate Body emphasised that the purpose of the Enabling Clause is to foster "economic development,"<sup>260</sup> rather than 'sustainable development', which is the term that features in the preamble of the WTO Agreement. In the literature, it has thus been suggested that the term 'development needs' should be defined as "an undertaking, process, input, objective or policy that is required to achieve one or several goals of economic development."<sup>261</sup> Under this definition of development needs, the protection of trade union rights *as such* should be a driver to achieve economic development, for example. Commenting upon the diverse range of conditionalities that the United States and the European Union apply, the

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256 Council Regulation (EC) 2501/2001 applying a scheme of generalized tariff preferences for the period from 1 January 2002 to 31 December 2004 (GSP Regulation 2002-2004) [2001] OJ L346/1.

257 WTO, *European Communities: Conditions for the granting of tariff preferences to developing countries – Report of the Appellate Body* (7 April 2004) WT/DS246/AB/R.

258 *Ibid*, para 173.

259 *Ibid*, paras 187-188.

260 *Ibid*, para 92.

261 Suyash Paliwal, 'Strengthening the Link in Linkage: Defining "Development Needs" in WTO Law' (2012) 27 *American University International Law Review* 37, 73. See also: Vichithri Jayasinghe, 'The Legality of the European Union's Special Incentive Arrangement' (2015) 18 *Journal of International Economic Law* 555, 567.

author warns that: “[a]dvocates of human rights protections and good governance as development needs within the WTO’s contemplation face the uphill battle of relating these goals back to some driver of economic development.”<sup>262</sup>

Arguably however, the Appellate Body does not require a causal link between (compliance with) the condition and economic development. It did not suggest that the development need itself should be a ‘driver’ of economic development, but merely authorizes “preference granting countries to respond positively to the needs.”<sup>263</sup> In another passage the Appellate Body notes that: “[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*.”<sup>264</sup> This confirms that there does not need to be a causal link between the ‘need’ and economic development, but between the tariff preference and the development need. The range of development needs is thus much broader than ‘undertakings, processes, inputs, objectives or policies’ that enable states to achieve economic development.<sup>265</sup>

The AB’s assertion that the overall purpose of the Enabling Clause to foster ‘economic development’ does therefore not prejudice the types of development *needs* that may be addressed through tariff differentiation. For this purpose, recourse may be sought to more holistic conceptualizations, such as sustainable development, which is said to consist of three “interdependent and mutually reinforcing pillars”: economic development, social development and environmental protection.<sup>266</sup> Arguably, ILO conventions themselves could also be used to determine the existence of a development need, as the AB recognizes *in dicta* that “multilateral instruments adopted by international organizations” could perform this role.<sup>267</sup>

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262 Suyash Paliwal, ‘Strengthening the Link in Linkage: Defining “Development Needs” in WTO Law’ (2012) 27 *American University International Law Review* 37, 89.

263 WTO, *European Communities: Conditions for the granting of tariff preferences to developing countries – Report of the Appellate Body* (7 April 2004) WT/DS246/AB/R, para 162 (international quotation marks omitted).

264 *Ibid*, para 164 (emphasis added).

265 Indeed, the AB did not rebut a remark by the Panel that recognized “different types of development needs, whether they are caused by drug production and trafficking, or by poverty, natural disasters, political turmoil, poor education, the spread of epidemics, the magnitude of the population, or by other problems.” WTO, *European Communities: Conditions for the granting of tariff preferences to developing countries – Report of the Panel* (1 December 2003) WT/DS246/R, para 7.103.

266 United Nations, ‘Johannesburg Declaration on Sustainable Development’ (4 September 2002) UN Doc A/CONF.199/20, 1. See also: Brynn O’Brien and Ruben Zandvliet, ‘Defining Development in WTO Law: The Legality and Parameters of Labour Rights Conditionality in the Generalised System of Preferences’ (Society of International Economic Law Working Paper No 2012/30, 2012) 18-19.

267 WTO, *European Communities: Conditions for the granting of tariff preferences to developing countries – Report of the Appellate Body* (7 April 2004) WT/DS246/AB/R, para 163.

Three months after the AB report in *EC-Tariff Preferences* the European Commission published a communication on the future of the EU's GSP.<sup>268</sup> The communication noted that “[d]evelopment is now measured in terms of the environment, improved social conditions, anti-corruption measures, governance and so on.”<sup>269</sup> The subsequent sections will explore in more detail how the labour conditions of the US and EU GSP schemes operate.

### 3.5.3 Labour conditionality in the United States' GSP

The United States adopted its first GSP legislation in 1976. In 1984 Congress included labour standards in the list of designation criteria. It was provided that GSP status could be withheld if the beneficiary country “has not taken or is not taking steps to afford internationally recognised worker rights to workers in the country (including any designated zone in that country).”<sup>270</sup> The term ‘internationally recognized worker rights’ included: (1) the right of association, (2) the right to organize and bargain collectively, (3) a prohibition on the use of any form of forced or compulsory labour, (4) a minimum age for the employment of children, and (5) acceptable conditions of work with respect to minimum wages, hours of work, and occupational health and safety.<sup>271</sup> A provision concerning non-discrimination was not included, as this would jeopardize amicable trade relations with the oil-producing countries and Israel, as a non-discrimination clause could have led to petitions concerning treatment of women and Palestinian workers, respectively.<sup>272</sup>

Aside from the substantive labour provision, the 1984 Trade and Tariff Act obliged the President to “submit an annual report to the Congress on the status of internationally recognized worker rights within each beneficiary developing country.”<sup>273</sup> It did not explicitly provide for *ex ante* reviews of labour legislation in prospective beneficiary countries. Such reviews were carried out in the context of the Caribbean Basin Initiative (CBI), a region-specific preference programme adopted a year earlier. The designation criteria included “the degree to which workers in such country are afforded reasonable workplace conditions and enjoy the right to organize and bargain collective-

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268 Commission of the European Communities, ‘Developing countries, international trade and sustainable development: the function of the Community’s generalised system of preferences (GSP)’ (7 July 2004) COM(2004) 461 final.

269 Ibid 3.

270 Section 503(b) Trade and Tariff Act of 1984, Public Law 98-573, 98th Congress (98 Stat 3019).

271 Section 503(a) Trade and Tariff Act of 1984, Public Law 98-573, 98th Congress (98 Stat 3019).

272 Lance Compa and Jeffrey Vogt, ‘Labor Rights in the Generalized System of Preferences: A 20-Year Review’ (2001) 22 Comparative Labour Law & Policy Journal 199, 203.

273 Section 506 Trade and Tariff Act of 1984, Public Law 98-573, 98th Congress (98 Stat 3023).

ly.”<sup>274</sup> The phrase ‘reasonable workplace conditions’ is the precursor of ‘acceptable conditions of work with respect to minimum wages, hours of work, and occupational health and safety’ which later featured in tariff legislation and free trade agreements. Notably, the House of Representatives rejected a proposal to require full harmonization of occupational health and safety laws with US standards.<sup>275</sup> The limited number of states that were eligible for CBI benefits made it possible to conduct a comprehensive *ex ante* review and, if necessary, negotiations to overcome discrepancies between domestic labour legislation and the CBI standard. Subsequently designation letters were drafted in which the eligible states listed their intended reforms. These vary considerably, ranging from a Haitian promise to use a weekly radio show to inform workers about their rights, to commitments by the Dominican Republic that government inspectors will oversee the weighing of sugar cane, which determined piece wages.<sup>276</sup> On some issues, the ILO was called upon to provide technical assistance.<sup>277</sup>

In addition to the CBI, the US introduced region-specific programmes for the Andean region (1991-2013) and the African continent (2000-present).<sup>278</sup> The 1984 GSP social clause has been amended once, after the adoption of the ILO’s Worst Forms of Child Labour Convention (No 182).<sup>279</sup> The prohibition on the worst forms of child labour was included in the definition of internationally recognised worker rights, and a separate section was added that makes a country ineligible when it does not implement its commitments to eliminate the worst forms of child labour. Non-discrimination has not been included in the US definition, despite its status as a fundamental labour right.

Active engagement of US trade unions and NGOs is the cornerstone in the enforcement of US GSP legislation.<sup>280</sup> The US Trade Representative regularly receives NGO and trade union submissions alleging non-compliance of a beneficiary state with the labour conditionalities.<sup>281</sup> After a petition for review is accepted the USTR conducts an investigation and holds public hearings.

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274 Section 212(c)(8) Caribbean Basin Economic Recovery Act of 1983, Public Law 98-67, 98th Congress, (97 Stat 387).

275 Steve Charnovitz, ‘Caribbean Basin Initiative: Setting labor standards’ (1984) *Monthly Labor Review* 54, 55.

276 *Ibid.*

277 *Ibid.*

278 The former expired in 2013, after the US negotiated FTAs with Peru and Columbia, and Bolivia and Ecuador became ineligible.

279 Section 412, Trade and Development Act of 2000, Public Law 106-200, 106th Congress, (114 Stat 298).

280 Regulations of the U.S. Trade Representative Pertaining to Eligibility of Articles and Countries for the Generalized System of Preference Program, 15 C.F.R. § 2007 et seq (2002).

281 The USTR may also conduct *proprio motu* reviews but it has rarely done so. In October 2017, it announced that it would conduct such reviews for all GSP beneficiaries on a triennial basis.

Revoking GSP status is a discretionary power of the President.<sup>282</sup> This way, the President retains the flexibility to maintain GSP status for countries that violated the labour clause if this would serve larger economic or geopolitical interests.<sup>283</sup> Nonetheless, more than one hundred reviews have been conducted and multiple states have lost GSP status due to non-compliance with the labour clause.<sup>284</sup> Review procedures often take years. The suspension of Bangladesh' GSP benefits in June 2013 followed only two months after the Rana Plaza industrial accident, but was based on a petition filed in June 2007 by the AFL-CIO, the largest American trade union federation. The scope of this petition was much broader than structural integrity of garment factories.<sup>285</sup> During the lengthy review procedures the US may indicate desired changes to a beneficiaries' domestic labour standards, and set a timeframe for implementation. The United States never responded to the *EC-Tariff Preferences* report. Its inconsistent application and lack of transparency about the standards by which it determines (non-)compliance make it's scheme vulnerable to a legal challenge before the WTO Dispute Settlement Mechanism. That said, having a GSP is voluntary, which means that a legal challenge on the substantive aspects of the US' GSP may well lead to its abrogation.<sup>286</sup>

### 3.5.4 Labour conditionality in the European Union's GSP

Whereas the labour conditionality in the US GSP remained largely unchanged since its introduction in 1984, the European Union has renewed its regulations various times.<sup>287</sup> It first introduced labour conditions in 1994. It was provided that preferential entitlements could be temporarily withdrawn due to "practice

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282 *International Labor Rights Education & Research Fund v Bush*, 752 F. Supp. 495 (D.D.C. 1990) 497-499 "Given this apparent total lack of standards, coupled with the discretion preserved by the terms of the GSP statute itself and implicit in the President's special and separate authority in the areas of foreign policy there is obviously no statutory direction which provides any basis for the Court to act. The Court cannot interfere with the President's discretionary judgment because there is no law to apply." The Court further classified GSP labour conditionality as an "unstructured area of foreign policy."

283 Lance Compa and Jeffrey Vogt, 'Labor Rights in the Generalized System of Preferences: A 20-Year Review' (2001) 22 *Comparative Labour Law & Policy Journal* 199, 203.

284 Romania (1987), Nicaragua (1987), Paraguay (1987), Chile (1987), Myanmar (1989), Central African Republic (1989), Liberia (1990), Sudan (1991), Syria (1992), Mauritania (1993), Maldives (1995), Pakistan (1996), Belarus (2000), Bangladesh (2013) and Swaziland (2015).

285 AFL-CIO, 'Petition to remove Bangladesh from the list of the eligible beneficiary developing countries pursuant to 19 USC 2462(d) of the Generalized System of Preferences (GSP)' (22 June 2007).

286 International Corporate Accountability Roundtable, 'Tools of Trade: The Use of U.S. Generalized System of Preferences to Promote Labor Rights for All' (31 January 2018) 11-13.

287 Anthony Cole, 'Labor Standards and the Generalized System of Preferences: The European Labor Incentives' (2003) 25, 193-196 for an overview of legislative developments before the *EC-Tariff Preferences* case.

of any form of forced labour as defined in the Geneva Conventions of 25 September 1926 and 7 September 1956 and International Labour Organization Conventions Nos. 29 and 105 [or] export of goods made by prison labour.”<sup>288</sup> The Regulation also anticipated the introduction of a special incentive arrangement for labour standards in 1998. Beneficiaries of this arrangement would be granted additional tariff cuts on top of the regular GSP. In order to qualify, states did not have to become a party to ILO conventions, but they should nonetheless:

provide proof that they have adopted and actually apply domestic legal provisions incorporating the substance of the standards laid down in International Labour Organization Conventions Nos 87 and 98 concerning freedom of association and protection of the right to organize and the application of the principles of the right to organize and to bargain collectively and Convention No 138 concerning minimum age for admission to employment.<sup>289</sup>

Simultaneously with the labour arrangement the EU also introduced an environmental programme. These programmes complemented an already existing special incentive arrangement for countries that faced a drug trafficking problem.

The 1994 Regulation was still open with regard to the “intensity of the special incentive arrangements ... and the modalities for implementing them.”<sup>290</sup> Eventually the European Communities opted for a sector-specific approach. When, for example, it would find violations of trade union rights in a country’s textile industry but not in its electronics sector, it could adjust the GSP benefits accordingly.

When the Regulation was renewed in 2001, the labour arrangement was extended to the eight fundamental ILO conventions.<sup>291</sup> Although ratification was still not mandatory, developing countries would have to incorporate the substance of the conventions in their domestic legislation and ensure enforcement in order to be eligible. The grounds for temporary withdrawal of the preferential arrangements were also broadened. Whereas under the 1994 and 1998 Regulations preferences could only be withdrawn in the case of slavery,

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288 Art 9 Council Regulation (EC) 3281/94 applying a four-year scheme of generalized tariff preferences (1995 to 1998) in respect of certain industrial products originating in developing countries (GSP Regulation 1995-1998) [1994] OJ L 348/1.

289 Art 7 Council Regulation (EC) 3281/94 applying a four-year scheme of generalized tariff preferences (1995 to 1998) in respect of certain industrial products originating in developing countries (GSP Regulation 1995-1998) [1994] OJ L 348/1.

290 Art 7.3 Council Regulation (EC) 3281/94 applying a four-year scheme of generalized tariff preferences (1995 to 1998) in respect of certain industrial products originating in developing countries (GSP Regulation 1995-1998) [1994] OJ L 348/1.

291 Art 14 Council Regulation (EC) 2501/2001 applying a scheme of generalized tariff preferences for the period from 1 January 2002 to 31 December 2004 (GSP Regulation 2002-2004) [2001] OJ L346/1.



forced labour and prison labour, it was added that this could also result from “serious and systematic violation of the freedom of association, the right to collective bargaining or the principle of non-discrimination in respect of employment and occupation, or use of child labour, as defined in the relevant ILO Conventions”.<sup>292</sup> This also applied to the newly established the Everything But Arms (EBA) arrangement, which eliminated all quota and duties for the least developed countries,<sup>293</sup> except for arms and armaments. The 2001 Regulation thus required all states that enjoy GSP and EBA benefits to respect the fundamental labour standards. But whereas access to the special labour regime was conditioned upon a high threshold – namely the “effective application” of these standards which would be assessed *ex ante* – other states would be monitored on possible “serious and systemic violations.” In addition to this material expansion, the 2001 Regulation explicitly noted that in its evaluation of GSP beneficiaries, the European Commission would rely *inter alia* on “[the] available assessments, comments, decisions, recommendations and conclusions of the various supervisory bodies of the ILO, including in particular Article 33 procedures”.<sup>294</sup>

The special incentive arrangements were abandoned in 2005 for two reasons. First, the labour and environmental arrangements were not successful. No country was admitted to the latter. Both Moldova and the Russia applied for the labour arrangement, but only Moldova was accepted as of 2001. Second, the drug trafficking arrangement had been successfully challenged by India in the *EC–Tariff Preferences* dispute. Rather than bringing the procedural aspects of the special arrangements in compliance with the Appellate Body report, the European Commission replaced them with a new “special incentive arrangement for sustainable development and good governance,” commonly known as GSP+<sup>295</sup> Until today, the European system of tariff preferences consists of three programs: (1) GSP for developing countries, (2) GSP+ for ‘vulnerable’ countries and (3) the EBA for the least developed countries.

This GSP+ programme is open to vulnerable countries that have ratified and “effectively applied” twenty-seven treaties relating to human rights, labour standards, environmental issues and good governance.<sup>296</sup> Vulnerability is determined by three criteria: (1) it has not been classified by the World Bank

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292 Art 26.1b Council Regulation (EC) 2501/2001 applying a scheme of generalized tariff preferences for the period from 1 January 2002 to 31 December 2004 (GSP Regulation 2002-2004) [2001] OJ L346/1.

293 While the term ‘developing country’ lacks a legal definition, the status of ‘least developed country’ is determined by the United Nations’ Committee for Development Policy.

294 Preamble Recital 19 Council Regulation (EC) 2501/2001 applying a scheme of generalized tariff preferences for the period from 1 January 2002 to 31 December 2004 (GSP Regulation 2002-2004) [2001] OJ L346/1.

295 Council Regulation (EC) 980/2005 applying a scheme of generalised tariff preferences (GSP Regulation 2006-2008) [2005] OJ L169/1.

296 This included the eight core ILO Conventions, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

as high income during three consecutive years, (2) it has a lack of economic diversification, and (3) the share of GSP-covered imports to the EU represents less than 1% of the EU's total GSP imports.<sup>297</sup> According to the EU Regulation's preamble:

developing countries which ... are vulnerable while assuming special burdens and responsibilities due to the ratification and effective implementation of core international conventions on human and labour rights, environmental protection and good governance should benefit from additional tariff preferences. These preferences are designed to promote further economic growth and thereby to respond positively to the need for sustainable development.<sup>298</sup>

The list of treaties that had to be implemented consisted *inter alia* of the eight fundamental ILO conventions and the main international human rights instruments. To qualify for GSP+ these treaties must be "ratified and effectively implemented" and the beneficiary country must give "an undertaking to maintain the ratification of the conventions and their implementing legislation and measures and ... accepts regular monitoring and review of its implementation record in accordance with the implementation provisions of the conventions".<sup>299</sup> Although beneficiaries of the regular GSP and EBA arrangements did not have to ratify the listed treaties, "serious and systemic violations of principles laid down in the conventions (including the eight fundamental ILO conventions, RZ) on the basis of the conclusions of the relevant monitoring bodies"<sup>300</sup> and "export of goods made by prison labour"<sup>301</sup> could lead to the temporal withdrawal of benefits.

The 2009 Regulation contained only minor changes to the GSP+ arrangement and the general provisions on temporary withdrawal of GSP benefits.<sup>302</sup> Whereas previous regulations would automatically expire after two years, the 2012 EU Regulation (which went into effect in January 2014) renewed its GSP legislation indefinitely.<sup>303</sup> The labour-related conditions for regular GSP and

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297 Art 9.3 Council Regulation (EC) 980/2005 applying a scheme of generalised tariff preferences (GSP Regulation 2006-2008) [2005] OJ L169/1. This included for example

298 Preamble Recital 7 Council Regulation (EC) 980/2005 applying a scheme of generalised tariff preferences (GSP Regulation 2006-2008) [2005] OJ L169/1.

299 Art 9.1(a) and 9.1(d) Council Regulation (EC) 980/2005 applying a scheme of generalised tariff preferences (GSP Regulation 2006-2008) [2005] OJ L169/1.

300 Art 16.1(a) Council Regulation (EC) 980/2005 applying a scheme of generalised tariff preferences (GSP Regulation 2006-2008) [2005] OJ L169/1.

301 Art 16.1(b) Council Regulation (EC) 980/2005 applying a scheme of generalised tariff preferences (GSP Regulation 2006-2008) [2005] OJ L169/1.

302 Council Regulation (EC) 732/2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No 552/97, (EC) No 1933/2006 and Commission Regulations (EC) No 1100/2006 and (EC) No 964/2007 (GSP Regulation 2009-2011) [2008] OJ L 211/1.

303 Council Regulation (EU) 978/2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 (GSP Regulation 2012) [2012] OJ L 303/1.

EBA beneficiaries remained the same; there is no *ex ante* assessment but benefits may be suspended in the case of serious and systemic violations, or when it exports prison labour goods.<sup>304</sup> For GSP+ beneficiaries the assessment procedure was significantly expanded. In addition to the requirement that a country must be economically vulnerable,<sup>305</sup> the Regulation contains five elements that have to be fulfilled in relation to the twenty-seven labour, human rights, environmental and good governance conventions.<sup>306</sup> Beneficiary countries (1) must ratify all conventions and no “serious failure” concerning the “effective implementation” may be identified in “the most recent available conclusions of the monitoring bodies under those conventions,” (2) may not formulate reservations when these are expressly prohibited or incompatible with the convention’s object and purpose, (3) must provide “a binding undertaking to maintain ratification of the relevant conventions and to ensure the effective implementation thereof,” (4) must accept “without reservation the reporting requirements imposed by each convention and gives a binding undertaking to accept regular monitoring and review of its implementation record in accordance with the provisions of the relevant conventions,” and (5) must give “a binding undertaking to participate in and cooperate with” the monitoring activities of the European Commission.<sup>307</sup>

Although the EU appears to equate compliance with ILO conventions and compliance with its GSP labour conditions, it has been argued that:

the EU’s granting of GSP+ incentives is less clearly consistent with a reading of the ILO committees’ reports. The system has been successful in ensuring the full ratification of the eight fundamental labour standards among the beneficiary countries, as exemplified by the case of El Salvador. However, several countries have received GSP+ trade preferences despite being seriously criticized by the authoritative ILO committees for their *implementation* of the relevant conventions.<sup>308</sup>

According to Vogt this has not changed with the adoption of the 2012 Regulation. He firstly argues that “the European Commission has an institutional

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304 Art 19.1 Council Regulation (EU) 978/2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 (GSP Regulation 2012) [2012] OJ L 303/1.

305 Art 9.1(a) Council Regulation (EU) 978/2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 (GSP Regulation 2012) [2012] OJ L 303/1.

306 See for the full list Annex VIII, Council Regulation (EU) 978/2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 (GSP Regulation 2012) [2012] OJ L 303/1.

307 Art 9.1(b-f) Council Regulation (EU) 978/2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 (GSP Regulation 2012) [2012] OJ L 303/1.

308 Jan Orbie and Lisa Tortell, ‘The New GSP+ Beneficiaries: Ticking the Box or Truly Consistent with ILO Findings’ (2009) 14 European Foreign Affairs Review 663, 679.

predisposition favouring social dialogue and cooperative mechanisms over enforcement actions.<sup>309</sup> GSP preferences have been suspended on only three occasions, two of which (Myanmar, 1997-2013 and Belarus, 2007-present) were related to labour rights.

In principle, the alignment of the European GSP with the legal framework of the ILO is laudable for its aim to achieve normative coherence. Scholars affiliated with the ILO continue to stress that the ILO is the “competent body” to deal with labour standards, and linkages, if acceptable at all, should therefore align with the ILO system.<sup>310</sup> The United States’ use of the term “internationally recognized worker rights” led to the accusation that it uses “the rhetoric but not the substance” of the ILO.<sup>311</sup> Alston further argued that “the legislation ‘mirrors’ the issues dealt with in the principal ILO human rights conventions without specifically endorsing the actual formulations used therein.”<sup>312</sup> In the case of Myanmar, however, the European Commission did not await the ILO investigations. Furthermore, Vogt has argued that the EU’s characterization and appreciation of the ILO supervisory procedures is problematic.<sup>313</sup> The central concern is that the EU’s understanding of when a country fails to comply with its ILO obligations is too narrow. In a Commission document, it is noted that the term “serious failure,” which serves as the threshold to determine whether preferences should be suspended, is derived from the ILO.<sup>314</sup> In a footnote, the Commission then states that:

for the purposes of GSP, a serious failure to effectively implement ILO conventions occurs when the Committee of Application of Standards, in the context of the yearly meetings of the International Labour Conference, notes the existence of a serious failure to implement a convention and introduces a “special paragraph” to that effect in its Report.<sup>315</sup>

However, as the European Commission acknowledged elsewhere, the selection of the cases that reach the Committee on the Application of Standards (CAS)

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309 Jeffrey Vogt, ‘A Little Less Conversation: The EU and the (Non) Application of Labour Conditionality in the Generalized System of Preferences (GSP)’ (2015) 31 *The International Journal of Comparative Labour Law and Industrial Relations* 285, 286.

310 Rafael Peels and Marialaura Fino, ‘Pushed out the Door, Back in through the Window: The Role of the ILO in EU and US Trade Agreements in Facilitating the Decent Work Agenda’ (2015) 6 *Global Labour Journal* 189, 189.

311 Philip Alston, ‘Labor Rights Provisions in US Trade Law: “Aggressive Unilateralism”?’ (1993) 15 *Human Rights Quarterly* 1, 2.

312 *Ibid* 7 (internal reference omitted).

313 Jeffrey Vogt, ‘A Little Less Conversation: The EU and the (Non) Application of Labour Conditionality in the Generalized System of Preferences (GSP)’ (2015) 31 *The International Journal of Comparative Labour Law and Industrial Relations* 285, 292.

314 European Commission, ‘The EU Special Incentive Arrangement for Sustainable Development and Good Governance (‘GSP+’) covering the period 2014-2015’ (28 January 2016) SWD (2016) 8 final, 3.

315 *Ibid*.

is done “through negotiations between social partners.”<sup>316</sup> In 2012 the CAS did not consider any cases after discussions between employers’ organizations and trade unions broke down over a dispute about the right to strike. The European Union’s approach thus ignores most of the work done by the ILO’s Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the Committee on Freedom of Association (CFA). Their findings are included in the biannual review of GSP+ recipients’ compliance with the twenty-seven conventions, but play no role in determining whether GSP+ status should be withdrawn. Instead, these reports are merely descriptive and reiterate recent CEACR comments on GSP+ countries, as well as information from civil society and other sources that the European Commission considers relevant.<sup>317</sup>

However, the narrow focus of the European Commission attests to the fact that it is difficult to distil information from the ILO supervisory bodies in a way that enables it to flesh out the meaning of “effective implementation.” The ILO’s CEACR itself only uses this term to frame its expectations, but it does not give a definite assessment. There is a discord between the working methods of the ILO’s supervisory bodies which are, to a large degree, based on suasion and progressive implementation, and the use of these bodies pronouncements in a more punitive context, i.e. whether or not to revoke GSP preferences.

In some cases, the benevolent attitude of the European Union contrasts sharply not only with the ILO but also with other the approach of the United States. In December 2013, the European Commission decided that Guatemala met the eligibility criteria of the GSP+ arrangement and could thus be admitted.<sup>318</sup> Meanwhile, however, the United States was pursuing an arbitral claim against the country for failure to comply with the labour clause in the free trade agreement between the United States and several Central-American countries. Although the arbitration concerned Guatemala’s failure to comply with its own domestic labour legislation, the United States has used reports from the ILO Committee of Experts to substantiate its claims. It cited, for example, the 2014 report’s passage on violence against trade unionists, in which: “The Committee again ... notes with deep concern that the allegations are extremely serious and include numerous murders (58 murders have been examined so far by the CFA since 2004) and acts of violence against trade union leaders and members, in a climate of persistent impunity.”<sup>319</sup> In the 2016

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316 Ibid 11.

317 Article 14 Council Regulation (EU) 978/2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 (GSP Regulation 2012) [2012] OJ L 303/1.

318 Commission Delegated Regulation (EU) 182/2014 amending Annex III to Regulation (EU) No. 978/2012 of the European Parliament and of the Council applying a scheme of generalised tariff preferences [2013] OJ L 57/1.

319 *In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.1.1(a) of the CAFTA-DR*, Rebuttal Submission of the United States (16 March 2015) para 14, fn 11.

biannual review by the European Commission's, it is also recognized that there are severe problems with freedom of association in Guatemala. It concludes that:

several shortcomings need to be urgently addressed, including the need for further action to combat violence and impunity, in order to ensure that adopted plans and roadmaps translate into solid results. Guatemala should also effectively implement legal reforms and improve the coverage and functioning of collective bargaining and address anti-union discrimination.<sup>320</sup>

However, these shortcomings were not enough for the European Commission to conclude that Guatemala failed to “effectively implement” the ILO Conventions on freedom of association and collective bargaining. This is not the first example of divergence between the EU and US in the application of their GSP programmes.<sup>321</sup> So far, the EU has not withdrawn GSP preferences on the basis of the 2012 Regulation.

### 3.6 CONCLUDING REMARKS

When, some thirty years after the establishment of the ILO, states began to negotiate an International Trade Organization, there was broad support for the inclusion of an obligation to maintain fair labour standards. However, with the decay of the Havana Charter, the lack of success in amending the GATT and WTO with a ‘fair labour standards clause’, and the growing perception that the ILO could not effectively persuade states to ratify and implement international labour standards, attention turned to the interpretation of the rules of international trade law. Could derogations from existing labour standards by trade partners be characterised as a form of ‘social dumping’? Is it possible to ban products made under conditions of forced labour? And can granting trade benefits to developing countries be used to demand ratification of certain ILO conventions?

Resorting to the interpretation of GATT provisions that do not provide an explicit framework to realize ‘fair labour standards’ means that the justifications for these linkages have to be adapted to this system. The legality of labour-related trade measures hinges on the interpretation of provisions in

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<sup>320</sup> European Commission, ‘The EU Special Incentive Arrangement for Sustainable Development and Good Governance (‘GSP+’) covering the period 2014-2015’ (28 January 2016) SWD (2016) 8 final, 162-163.

<sup>321</sup> See Chapter 1 on the difference between the response from the European Union and the United States in the aftermath of the Rana Plaza disaster.

the GATT on the protection of public morals, national security,<sup>322</sup> the protection of negotiated market access concessions, and the understanding of the term 'development' in the Enabling Clause. Except for the latter, these are inward-looking rationales. As such, they aim to protect workers or consumers in importing states with high labour standards rather than improving the lot of sweatshop workers in exporting states. This is not to say that consumers cannot be genuinely concerned about sweatshop labour, or that their interest should be ignored in international trade law, only that currently the WTO legal framework cannot accommodate possible trade-offs between the interests of consumers and child workers, for example.

Both international labour law and trade-labour linkages (whether through unilateral measures or labour obligations in PTIAs) are based on the premise that free trade enables the circumvention of protective labour law, and that states may be inclined not to improve domestic labour standards, or even to deregulate labour, in order to remain competitive. This poses a problem for (importing) higher-standard countries that may be inclined to apply domestic trade measures in order to offset the economic effects of this behaviour, or to induce the (exporting) low-standard country to adopt more stringent labour legislation. Except for GSP conditionalities, the multilateral trade regime imposes significant constraints on the regulatory possibilities of importing states when they are concerned with another state's labour standards. The next chapter will examine whether international investment law imposes constraints on the ability of states to realize higher labour standards within its own jurisdiction.

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322 Whether labour-related trade measures can be justified on this ground was not discussed in this chapter, but this is discussed *inter alia* in: Sarah Cleveland, 'Human Rights Sanctions and International Trade: A Theory of Compatibility', (2002) 5 *Journal of International Economic Law* 133, 181-186.