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**TRADE POLICY AND LABOUR STANDARDS**

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# INTERNATIONAL TRADE AND INTERNATIONAL LABOUR STANDARDS

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## I. Introduction

The trade-labour linkage has a long history.<sup>1</sup> It has become one of the most contentious contemporary issues in trade and labour policy circles and debates. President Clinton's statement at the Seattle Ministerial meetings of the WTO in December 1999 that trade sanctions should be available under the WTO multilateral system against countries violating international labour standards provoked an intensely hostile reaction from developing countries and was a significant factor in the failure of members of the WTO to agree at that time on the launch of a new multilateral Round. The subsequent Doha Ministerial Declaration launching a new multilateral Round confirms the 1996 Singapore Ministerial Decision to remit all international labour standards issues to the ILO. However, the issue of a trade-labour linkage seems unlikely to go away. Regionally, the potential expansion of NAFTA into a Free Trade Area of the Americas (FTAA) will raise the scope and status of the NAFTA Labour Side Accord in this broader context. Multilaterally, fast-track negotiating authority from the U.S. Congress to the U.S. Administration in the Doha Round may well be conditioned on the inclusion of a trade-labour linkage. And unilateral trade actions by states on account of labour practices prevailing in other states may well provoke trade disputes that will require adjudication by international trade dispute settlement bodies.

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<sup>1</sup> See Steve Charnovitz, "The Influence of International Labour Standards on the World Trading System: An Historical Overview," (1987) 126 *International Labour Review* 565; Virginia Leary, "Workers' Rights and International Trade: The Social Clause," in Jagdish Bhagwati and Robert Hudec (eds.), Fair Trade and Harmonization (MIT Press, 1996); Baatlhodi Molatlhegi, "Trade and Labour Interface in the Context of Economic Integration: The Case of the Southern African Development Community," Doctoral Thesis, University of Toronto Faculty of Law, 2000, Chap. 2.

This paper largely focuses on the potential interface between international trade policy and international labour standards in the WTO multilateral trading system. The paper proceeds by reviewing sequentially the choice of policy objectives, the choice of policy instruments, and the choice of institutional regime in structuring a trade policy-labour standards linkage. On choice of objective, the paper will argue for assimilating core labour standards (CLS) with universal human rights, but not privileging CLS over other universal human rights. It rejects fair trade and race-to-the-bottom rationales for a trade policy-labour standards linkage. On choice of instrument, it rejects conditioning the linkage of human rights-based trade sanctions on adverse trade effects in the sanctioning country. On choice of institutional arrangement, it favours according a pre-eminent institutional role to the ILO and U.N. Human Rights Committees in making determinations of systematic and persistent violations of relevant universal human rights, leaving the Dispute Settlement Body of the WTO with the determination of whether trade sanctions for violators have been applied in a non-discriminatory and consistent fashion and meet some basic standard of proportionality.

## **II. The Choice of Policy Objective**

Reviewing both contemporary and historical debates about the case for a trade policy-labour standards linkage, several normative rationales for a trade policy-labour standards linkage emerge and are often largely elided in debates, which then greatly complicates the task of evaluating the appropriate choice of instrument and the choice of institutional arrangement for vindicating the chosen policy objectives.<sup>2</sup>

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<sup>2</sup> See Michael Trebilcock and Robert Howse, The Regulation of International Trade (London and New York: Routledge, 1999, 2<sup>nd</sup> ed.,) Chap. 16 (Trade and Labour Rights).

## **A. Unfair Competition**

It is often argued that countries that sell goods into export markets that are produced by processes that fail to respect or comply with internationally recognized labour standards are engaging in an unfair form of competition that deprives domestic producers in importing countries and producers and exporters in third country markets who comply with these standards of legitimate market share. The conduct of governments in countries where internationally recognized labour standards are not complied with are often accused of “social dumping” or indirect or implicit and illicit subsidization. These economic activities, entailing either lax labour laws or ineffective enforcement of nominally compliant laws (or both), are analogized to economic dumping and direct subsidization that may attract anti-dumping duties or countervailing duties under Article VI of the GATT and current WTO Agreements on anti-dumping and subsidization and countervailing duties.<sup>3</sup>

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

However, it is crucial not to overstate the significance of this source of comparative advantage. Data show almost a one-to-one relationship between labour productivity and labour costs in manufacturing in a wide range of developed and developing countries.<sup>4</sup> Labour productivity, or total factor productivity, is a function of many factors, including public investments in education and training, health care, infrastructure and law and order. Thus, it is a fallacy to assume that low wages are the principal driving force behind today's global trade or foreign direct investment flows. This relationship between labour productivity and labour costs explains why internationally most firms are not seeking to relocate to e.g. Bangladesh despite its low wages, and why most international trade and foreign direct investment flows are still dominated by developed countries as countries of origin and countries of destination.

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

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<sup>3</sup> See Dani Rodrik, "Labour Standards in International Trade: Do They Matter and What to do About Them" (Overseas Development Council, 1996); Adelle Blackett., "Whither Social Clause? Human Rights, Trade Theory and Treaty Interpretation," (1999) 31 *Columbia Human Rights Law Review* 1.

<sup>4</sup> Dani Rodrik, Has Globalization Gone Too Far? (Washington, D.C.: Institute for International Economics, 1997).

the unfair competition argument focuses principally on the welfare implications of non-compliance with international labour standards for citizens or interests in importing countries.

## **B. The Race to the Bottom**

Historically, a major motivation for promoting international labour standards in the first place and then subsequently a trade policy-labour standards linkage (as, for example, reflected in the preambles to the ILO Constitution and Havana Charter) is that low labour standards (including low wages) in exporting countries may undermine higher labour standards in importing countries and precipitate a so-called “race to the bottom” – a form of prisoner’s dilemma – that can only be pre-empted by international agreement on and enforcement of minimum labour standards.<sup>5</sup>

This argument is a variant on the unfair competition argument reviewed above but instead of assuming that importing countries will maintain the *status quo* with respect to their more stringent labour standards and accept a loss of market share assumes that such countries will in fact progressively dilute them in order to avoid losing market share to imports from countries where these standards are not adhered to, resulting in a low level equilibrium trap where all countries relax their labour standards to what many regard as suboptimal levels, yet all countries simply retain their pre-existing share of trade or investment after the race to the bottom has run its course.

Despite the durability of this concern, for reasons given above, most notably that differences in conditions of employment largely reflect differences in productivity, there is little reason to suppose that liberal trade and investment regimes will precipitate a race to the bottom. Moreover, the empirical evidence provides no support for the claim that liberal international

trade and investment regimes are leading developed countries to relax their CLS or labour standards generally or that foreign direct investors are investing in countries with weak CLS. Indeed, the evidence suggests that with the notable exception of China, countries with weak CLS attract very little FDI either in general or specifically in the sectors where CLS are weak. It is important to emphasize that race-to-the-bottom concerns, like unfair competition concerns, largely emanate from the perceived welfare implications of non-compliance with international labour standards for citizens and interests in importing countries.

### **C. Core Labour Standards as Human Rights**

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

As Amartya Sen argues in his recent book, Development as Freedom,<sup>6</sup> the basic goals of development can be conceived of in universalistic terms where individual well-being can plausibly be viewed as entailing certain basic freedoms irrespective of cultural context: freedom to engage in political criticism and association, freedom to engage in market transactions,

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<sup>5</sup> See Elissa Alben, "GATT and the Fair Wage: A Historical Perspective," (2001) 101 *Columbia Law Review* 1410.

<sup>6</sup> Amartya Sen, Development as Freedom (NY: Alfred A. Knopf, 1999).

freedom from the ravages of preventable or curable disease, freedom from the disabling effects of illiteracy and lack of basic education, freedom from extreme material privation. According to Sen, these freedoms have both intrinsic and instrumental value. Importantly, in contrast to the unfair competition and race-to-the-bottom rationales for linking international trade policy and international labour standards, the human rights perspective focuses primarily on the citizens in exporting, not importing countries. The assumption underlying this concern with basic or universal human rights is that failure to respect them in any country either does not reflect the will of the citizens but rather decisions of unrepresentative or repressive governments, or alternatively majoritarian oppression of minorities, e.g. children, women, racial or religious minorities, or alternatively again paternalistic concerns that citizens in other countries have made informed or ill-advised choices to forego these basic rights.

In my view, the linkage of international trade policy, including trade or other economic sanctions, with core labour standards that reflect basic or universal human rights, is a cogent one. When citizens in some countries observe gross or systematic abuses of human rights in other countries, the possible range of reactions open to them include diplomatic protests, withdrawal of ambassadors, cancellation of air landing rights, trade sanctions or more comprehensive economic boycotts, or at the limit military intervention. Arguing that doing nothing is always or often the most appropriate response is inconsistent with the very notion of universal human rights. In extreme cases, such as war crimes, apartheid, the threat of chemical warfare in the case of Iraq, genocide in the case of Serbia, or the Holocaust in the case of Nazi Germany, excluding *a priori* economic sanctions from the menu of possible options seems indefensible. Whether it is the most appropriate option may, of course, be context-specific and depend both on the seriousness of the abuses and the likely efficacy of the response—choice of instrument issues to which I turn next.

But it is sufficient for present purposes to restate the point that to the extent that core labour standards are appropriately characterized as basic or universal human rights, a linkage between trade policy and such labour standards is not only defensible but arguably imperative, in contrast to the other two rationales for such a linkage which, despite their much longer historical lineage, seem to me to be largely spurious and inconsistent with the central predicates of a liberal trading system. However, core labour standards viewed as basic or universal human rights, by promoting human freedom of choice, are entirely consistent with a liberal trading regime that seeks to ensure other human freedoms, in particular the right of individuals to engage in market transactions with other individuals without discrimination on the basis of country of location.<sup>7</sup>

Having said this, the scope and definition of the class of human rights viewed as sufficiently universal as to warrant potentially the imposition of trade sanctions for their violation is problematic in various respects. Even CLS are not susceptible to uncontentious understandings of their scope. Should child labour be defined only in terms of a minimum working age or should some subset of exploitative child labour practices be targeted? What practices exactly constitute discrimination in the workplace? What constitutes forced labour beyond slavery? When is freedom of association and the right to engage in collective bargaining fully respected, given that most countries deny or limit the right to strike in various contexts? Beyond CLS, while civil rights, e.g. to be free from genocide, apartheid, torture, detention without trial, etc., may be reasonably well-understood and commonly subscribed to (at least in principle), political rights, eg. to engage in political association, criticism or dissent or even to

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<sup>7</sup> See Baathodi Molatlhegi, *op. cit.*, Chap. 3; Christopher McCrudden and Anne Davies, "A Perspective on Trade and Labour Rights," (2000) 3 *Journal of International Economic Law* 43.

vote, are much less widely recognized.<sup>8</sup> Economic, social and cultural rights, are even less universally accepted.<sup>9</sup> These issues have major implications for the choice of instrument and choice of institutional arrangements for structuring the trade policy-labour standards linkage, to which I turn below.

### **III. The Choice of Instrument**

#### **A. Soft Law Instruments**

The ILO's promulgation and promotion of Conventions on minimum international labour standards are the most prominent form of soft law in this context, in that they depend on ratification by individual member states and are subject only to investigation and reporting by ILO organs and the provision of technical assistance to enable countries to build capacity to implement them. Thus, compliance with ILO norms depends on a combination of public identification, embarrassment and shaming (a mild stick), and technical assistance to promote compliance (a mild carrot). The ILO has been widely criticized by proponents of a trade-labour linkage for ineffective enforcement of its norms and indeed variable ratification of its Conventions by many countries, including major developed countries such as the U.S. (which has, of course, been a prominent proponent of a trade-labour linkage). Many of the soft law, market-driven mechanisms described below have emerged in part out of frustration by NGOs and other interest groups with the ineffectiveness of the ILO.

One class of soft law instruments entails a range of certification, labelling, and voluntary code of conduct mechanisms that purport to identify firms or products that conform to core international labour standards and hence are responsive to information market failures if

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<sup>8</sup> Patricia Stirling, "The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: Proposal for Additions at the World Trade Organization," (1996) 11 *American University Journal of International Law and Policy* 1

consumers in importing countries derive private disutility from consuming goods produced in violation of CLS.<sup>10</sup> The efficacy of these mechanisms turn largely on market reactions to the signals that they entail, principally by consumers and to a lesser extent by investors. These instruments are attractive in some respects in their focus on consumer (not producer) welfare in importing or consumer countries in that they depend on consumer preferences and a willingness to pay to vindicate those preferences and hence are consistent with the normative predicate of liberal trade theory, which largely focuses on the potential for free trade to enhance consumer welfare. Typically, such mechanisms are either self-initiated by firms or industry associations or are initiated by non-governmental organizations of various kinds, who negotiate them with firms or trade associations. The most ambitious initiative of this kind to date is the Global Compact, launched by U.N. Secretary-General Kofi Annan in 1999 and entailing voluntary corporate endorsements of nine principles, including CLS.

However, these mechanisms suffer from a number of limitations. Currently, they apparently apply to a small percentage of exports in a number of sectors where non-compliance with core labour standards is thought to be common e.g. about five per cent of exports in the textile and clothing industries, and they vary widely in various dimensions e.g. i) which core labour standards are recognized, ii) how these core labour standards are defined, if at all; iii) and how effectively adherence to these standards is monitored, if at all .<sup>11</sup>

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<sup>9</sup> Economist magazine, August 18, 2001, "The Politics of Human Rights, p. 9; "Human Rights", pp. 18-20; Michael Ignatieff, Human Rights as Politics and Idolatry (Princeton University Press, 2001).

<sup>10</sup> Richard Freeman, "A Hard-Headed Look at Labour Standards," in International Labour Standards and Global Economic Integration; Proceedings of a Symposium , U.S. Dept. of Labour, Bureau of International Labour Affairs, Washington, D.C., 1994.

<sup>11</sup> Janelle Diller, "A Social Conscience in the Global Marketplace? Labour Dimensions of Codes of Conduct, Social Labelling and Investor Initiatives," (1999) 138 *International Labour Review* 99; Adelle Blackett, "Global Governance, Legal Pluralism and the Decentered State: A Labour Law Critique of Codes of Corporate Conduct," (2001) 8 *Indiana Journal of Global Legal Studies* 401; Drusilla Brown, "Can Consumer Product Labels Deter Foreign Child Labour Exploitation?" Discussion Paper 99-19, Dept. of Economics, Tufts University.

In explaining the low, inconsistent, and often ineffective application of these mechanisms, a number of explanations suggest themselves which in turn raise serious questions about attaching primacy to consumer preferences in importing countries in this context, despite the initial appeal of mechanisms that depend on consumer welfare as their reference point and the compatibility of this reference point with the predicates of free trade.<sup>12</sup> First, consumers, even if fully informed about conditions under which imports are being produced and violations of core international labour standards that particular modes of production may entail, in fact do not care enough about the intrinsic values reflected in these core labour standards (viewed as basic or universal human rights) to put their money where their mouth is. However, even if this were to be the case, the fact that the process of production and exchange may entail production or consumption externalities for other citizens in exporting or importing countries, as is largely inherent in the notion of universal human rights, suggests that consumer preferences cannot be decisive in a human rights context.

A second explanation is that consumers in importing countries do care about these human rights values but are poorly informed about the conditions under which the goods they are consuming are produced in exporting countries. The cost of acquiring this information exceeds the value that they place on this information. In this respect, the voluntary and decentralized nature of the soft law mechanisms currently employed in this context almost certainly exacerbates the information problems faced by consumers in importing countries.

Yet a further explanation for the low, inconsistent and often ineffective application of these mechanisms is that consumers in importing countries do care about these intrinsic human rights values but confront serious collective action problems in that individual consumers who may be prepared to pay a premium for goods produced in conditions that meet core labour

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<sup>12</sup> See Debate, New Democracy Forum: Stepping Up Labour Standards, Boston Review, February/March 2001.

standards will be concerned that other consumers who share their concerns may opportunistically purchase lower-priced goods relying on other consumers to bear the financial costs of vindicating their collective preferences. However, if every consumer suspects every other consumer of being likely to behave opportunistically, i.e. to free ride on their sacrifices, an effective voluntary collective response may not emerge.

Beyond these reasons for not according primacy to consumer preferences in this context, a further serious limitation is associated with soft law mechanisms that link consumer responses to imports of offending goods, e.g. goods made with child or forced labour, conflict diamonds, etc. These mechanisms are unresponsive to violations of either core labour standards viewed as universal human rights or universal human rights defined more broadly that are occurring in non-traded goods sectors. For example, it is widely agreed that most child labour is not employed in export sectors (between 5 and 10 per cent) but in domestic agriculture, services, retail and the informal sector generally.<sup>13</sup> Many abuses of civil and political human rights are not related in any direct way to traded goods sectors, e.g. civil rights abuses in Sudan and Burma, to take two current examples.

## **B. Hard Law Options**

The first and most fundamental issue that arises in choosing hard law instruments is the scope of the trade policy-labour standards linkage. If we conceptualize at least core labour standards as universal human rights, how can we justify privileging these particular human rights over at least some subset of universally proclaimed universal human rights (subject to the definitional issues noted above)? Surely genocide, torture, detention without trial, etc. warrant at least as serious concern from the international community, and at least as serious a set of legal

sanctions, as violations of core international labour standards. To privilege core labour standards over these other human rights is quite overtly to elide the various normative rationales for intervention reviewed earlier in this paper and to risk a protectionist rationale for trade or other economic sanctions.

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

It follows from these two points that in my view trade or other economic sanctions should not be confined to core labour standards, but should extend to at least some subset of universally accepted rights more generally, and that such sanctions should not be limited to imports of goods directly produced by the offending practices. This in fact suggests a very broad domain for linking trade and other economic sanctions with universal human rights. However, it also suggests some significant constraints on their invocation. In particular, both the substantive rules governing their invocation and the procedures by which they may be invoked should be consistent with the human rights rationale for intervention and should exclude the unfair competition and race to the bottom rationales for intervention.

In terms of substantive rules, this requirement assigns considerable significance to rules of non-discrimination and consistency. For example, suppose hypothetically that it is the case that the U.S. has no textile sector but a significant clothing sector and that child labour is

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<sup>13</sup> See Drusilla K. Brown, "International Trade and Core Labour Standards: A Survey of the Recent Literature," OECD Occasional Papers No. 43 (2000); Peter Morici, "Labour Standards in the Global Trading System,"

employed in producing exports for the U.S. market in India in both sectors but the U.S. seeks to impose trade sanctions only against clothing imports from India and not textile imports. Alternatively, even if the U.S. seeks to apply trade sanctions against both clothing and textile imports from India, it does not seek to do so against similar imports from Pakistan made with child labour for geopolitical or other reasons. The Appellate Body's decisions in Shrimp/Turtles, Beef Hormones, and Australian Salmon<sup>14</sup> in other contexts, in my view, rightly emphasize the importance of non-discriminatory and consistent treatment of imports reflecting the ostensible rationale (in the present context a human rights rationale) for the intervention, and not disguised protectionism. Unless a non-discrimination/consistency requirement is applied rigorously, hard law based trade sanctions carry a high risk of constituting a disguised form of protectionism with the human rights rationale only a mere pretext or cover for protectionist measures not motivated by human rights concerns but in fact the other two illegitimate rationales for intervention discussed earlier in this paper. This is why we should resist arguments that differences in production and processing methods (PPM's) should render products unlike products for purposes of Article III of the GATT (National Treatment) and instead adopt an economic definition of like products as the Appellate Body did in Asbestos,<sup>15</sup> focussing on substitutability by well-informed consumers, and remit justifications for inferior treatment of competitive imports to Article XX (perhaps amended to include a universal human rights exception but subject to the non-discrimination conditions in the chapeau).

In defining the elements of a non-discrimination test, we need to be clear on what purpose it is designed to serve: in my view, it should be designed to screen out cases of disguised protectionism in cases where trade sanctions have been unilaterally invoked, ostensibly on

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Economic Strategy Institute, 2001.

<sup>14</sup> Appellate Body decisions, Shrimp/Turtles (1998); Beef Hormones (1998); Australian Salmon (1998).

human rights grounds. But it should not require sanctioning countries either to apply sanctions to all countries in violation of CLS (or human rights), or none – an all-or-nothing requirement that is likely to make the perfect the enemy of the good. In other words, as a matter of international trade law there should be a negative duty not to discriminate for protectionist reasons, but there should be no positive duty to take affirmative action. While a sanctioning country may choose not to sanction all violations of CLS (or human rights) everywhere in the world, this form of trade sanction “under-reach” should surely not be a legitimate concern of an international trade body, which cannot plausibly be transformed into a global human rights crusader. In contrast, the problem of sanction “under-reach” may be a legitimate concern of other international organizations (such as the ILO, or U.N. Human Rights Committees), but this calls for action on their part (e.g. by adopting a CITES-like regime, requiring multilateral sanctions by members in particular cases). For the WTO, the principal concern is sanction “over-reach,” where the sanctioning country’s actions in targeting some imports and not others seems principally explicable on the basis that in the former case it has a domestic industry to protect and in the latter case it does not. Where it imposes trade sanctions in the latter case they entail no costs to the domestic producers of competitive products (who are non-existent), but costs to domestic consumers and thus can be viewed as an action against material interest that can only be explained by the sanctioning country’s genuine concern with CLS (or human rights) violations in exporting countries (similarly in the case of bans on exports or foreign direct investment), where the government of the sanctioning state, by taking action, is seeking to solve collective action problems among its own consumers or citizens. On this approach, in the hypothetical example above, the differential treatment of clothing and textile imports from India would be suspect, but the failure to sanction similar imports from Pakistan, for non-trade related reasons, would not be.

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<sup>15</sup> Appellate Body decision, Asbestos, (2000).

In terms of procedural requirements for the invocation of trade or other economic sanction against violations of universal human rights in other countries, a number of options present themselves. First, a basic choice has to be made (although often overlooked in debates over the trade-labour standards linkage) between sticks and carrots. Rather like the European Community's GSP regime, it is not difficult to imagine developed countries offering developing countries significant trade concessions (e.g. accelerated implementation of the phase out of the Multifibre Arrangement) if they commit themselves to an accelerated phase out of offending labour or other human rights abuses. Unlike the Uruguay Round Agreements, which entailed for the most part a single undertaking by Member States, such an arrangement in this context might more appropriately take the form of a plurilateral agreement (like the Uruguay Round Government Procurement Code) where this is an option offered to developing countries and for those who choose it developed countries would bind their trade concessions (unlike GSP treatment). The commitments made by countries to observe core international labour standards and other universal human rights would have to be reasonably precisely defined in terms of ILO or UN Conventions or Covenants, so that violations of these commitments could be rendered reasonably justiciable through an appropriate international dispute settlement process (perhaps vested in the WTO, but not necessarily or exclusively so as I explore further below). However, one of the limitations of the carrot option, as pointed out by Howard Chang,<sup>16</sup> is that it creates moral hazard problems in that countries may persist in violations or engage in more egregious violations in order to attract larger concessions (or carrots).

A second option would be to require all countries that are parties to either a regional or multilateral arrangement like the WTO to commit themselves to effectively enforcing their own

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<sup>16</sup> Howard Chang, "Carrots, Sticks, and International Externalities," (1997) 17 *International Review of Law and Economics* 309.

existing labour laws (as under the NAFTA Labour Side Accord), with enforcement provided through supranational or international dispute settlement processes and penalties. The limitations of this option are obvious enough: first, it addresses only violations of core international labour standards and not other universal human rights; second, it assumes that member countries have already enacted substantive laws that reflect these standards and that the only problem is ineffective enforcement, which in many cases may not be the central problem.

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

A fourth option would be to allow unilateral state action against imports from offending countries (perhaps by amending Article XX of the GATT to include a core international labour standards and universal human rights exception, or by expansive interpretation of the public morals exception already contained within Article XX),<sup>17</sup> subject to such measures satisfying the conditions contained in the chapeau of Article XX prohibiting arbitrary or unjustifiable discrimination between countries where the same conditions prevail or disguised restrictions on trade in the application of such measures, rigorously enforced as argued above. This option is obviously more appealing than expanding the scope of current private contingent protection mechanisms, but risks the capture of states imposing such measures by domestic producer interests. Moreover, this option casts the burden of proof in important respects on the targeted country after such a measure has been imposed to initiate a formal complaint and make out a *prima facie* case that the measure in question does not comply with the requirements of Article

XX. Similarly, in the absence of an attempt to link a core labour standards/human rights exception under Article XX to relevant background international conventions or covenants, issues of justiciability in international dispute settlement in this context are likely to be acute and place more of a burden on such a dispute settlement process than it can reasonably bear. Moreover, in the absence of a horizontal linkage with other international organizations with central mandates in the labour standards or human rights domains (discussed below), the “necessity” test that attaches to most of the exceptions currently enumerated under Article XX is likely to prove intractable in evaluating the justification for trade sanctions.<sup>18</sup>

A fifth option would be for all member states who are parties to either regional or multilateral trading arrangements to negotiate a comprehensive set of rules setting out commitments to observe core international labour standards and other universal human rights (perhaps incorporating by reference relevant international documents). On this approach, which is analogous in some respects to that entailed in the Uruguay Round TRIPS Agreement (which incorporates by reference the Berne, Paris and Rome Conventions), trade sanctions would come at the end of the dispute settlement process and not at the beginning. In other words, the country complaining that another country was in violation of its core labour standards or other human rights commitment would have to demonstrate a breach of these commitments and would carry the burden of initiating and proving, at least *prima facie*, such violations, and only if the complaint is upheld by the dispute settlement body could retaliatory trade sanctions be authorized in the event that non-compliance continued. This approach has several virtues: first, trade sanctions cannot be imposed until there has been a multilateral judgment that a violation of

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<sup>17</sup> See Steve Charnovitz, “The Morals Exception in Trade Policy,” (1998) 38*Journal of International Law* 68..

<sup>18</sup> See Brown *op. cit.*, (2000); Keith E. Maskus, “Should Core Labour Standards Be Improved Through International Trade Policy?” (Policy Research Working Paper 1817, World Bank, Washington, D.C. 1997); Frieder Roessler, The

relevant core international labour standards or other human rights has occurred, and the country seeking to impose such sanctions bears the initial burden of initiating a complaint and proving a *prima facie* case. Second, it has the virtue of any rule-based system of laying out the substantive ground rules with some precision in advance and thus minimizes the potential for protectionist abuse of the regime. Third, and relatedly, it renders problems of justiciability more tractable.

#### **IV. The Choice of Institutional Regime**

Having discussed the choice of objectives and the choice of instruments in the light of those objectives in shaping a trade-labour standards linkage, the remaining question is the choice of institutions to administer this linkage in the light of choice of objectives and choice of instruments. Two important and related considerations are relevant here: First, institutional specialization, as in many other domains, has many virtues in vindicating desired policy objectives;<sup>19</sup> second, because human rights, not trade effects, motivate the trade-labour linkage that I advocate, vesting exclusive or even primary jurisdiction in an international trade body risks compromising the normative rationale for the linkage, e.g. by giving primacy to adverse trade effects in either importing or exporting countries.

In cases of the most egregious abuses of universal civil human rights, e.g. apartheid or genocide, it is difficult to imagine as plausible the vesting of this function in a trade organization (like the WTO). Rather, following current international practices, one would imagine that the appropriate international organ for authorizing or perhaps requiring such sanctions is the UN

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Legal Structure and Limits of the World Trade Order, “Diverging Domestic Policies and Multilateral Trade Integration,” (Chap. 6) (Cameron May, 2000).

Security Council. In other less egregious cases, there will still obviously be questions of institutional legitimacy and competence in vesting the administration of such a regime in a trade organization. One option here entails a sharp and exclusive institutional division of labour. For example, with respect to core labour standards, the authorization or requirement for the imposition of a trade or other economic sanctions could be vested in the ILO by way of elaboration of its sanctioning power under article 33 of the ILO Constitution. This would follow, by way of analogy, the example of regimes such as the Convention on International Trade in Endangered Species (CITES), which requires signatory states to ban imports of endangered species or products there from. However, critics of the ILO are sceptical of the willingness or capacity of the ILO to implement and administer effectively such a regime. Defenders of the ILO, on the other hand, may worry that the attachment of economic sanctions to the powers of the ILO may destabilize the organization, causing states to withdraw from membership or to withhold ratification of its Conventions to an even greater extent than is the case at present.

Another option is to imagine some form of horizontal coordination among international agencies, whereby e.g. the ILO would be wholly or largely responsible for determinations of systematic and persistent violations of core labour standards, or UN Committees on Human Rights systematic and persistent violations of other universal human rights (other than the most egregious abuses), and the WTO would be responsible for overseeing the implementation of sanctions and ensuring that arbitrary and unjustifiable forms of discrimination and disguised protectionism are avoided, as well as proportionality in the scale of the trade sanctions imposed.

A variant on this option would be to have international organizations such as the ILO or UN Human Rights Committees nominate members to dispute settlement panels or the Appellate

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<sup>19</sup> See T.N. Srinivasan, "International Trade and Labour Standards from an Economic Perspective," in Pitou van Dijk and Gerrit Faber (eds.), The Challenge to the New World Trade Organization (Kluwer-Law International

Body of the WTO in cases involving complaints of violations of core labour standards or other universal human rights, and at the same time take steps to render WTO dispute settlement process both more transparent and more inclusive in terms of admissibility of *amicus curiae* briefs from interested members of civil society.<sup>20</sup>

My preference would be for some form of horizontal co-ordination with specialized international agencies with expertise and legitimacy in the labour standards or human rights fields who would make determinations of systematic and persistent violations of relevant norms despite whatever carrots and sticks (assisting and shaming) that the agency typically first brings to bear on violators. Thus, the “necessity” test would largely fall within these agencies’ domains, although such determinations may be precipitated by unilateral state trade action under one of the options reviewed in the previous section, a complaint by the targeted country, and a reference under the DSU (Article 13) by the WTO panel seized with the complaint to a relevant specialized international agency for findings on violations of relevant international norms, which the WTO panel should accept as presumptively dispositive of the referenced issues. Indeed this option becomes much more attractive with this form of horizontal co-ordination. Such determination may also go some distance toward meeting the non-discrimination/disguised discrimination conditions in the chapeau to Article XX of the GATT. With respect to the proportionality of the proposed trade response, the WTO for its part should again be influenced by the nature of the horizontal agency’s findings as to the seriousness and persistence of violations. Because adverse trade effects are irrelevant in my proposed framework of analysis, trade sanctions cannot be quantified in these terms. Here more imaginative fashioning of trade remedies is called for. For example, the NAFTA Labour Side Accord provides for a system of fines, ultimately enforceable

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1996).

<sup>20</sup> See Trebilcock and Howse, *op. cit.*, Chap. 3 (Dispute Settlement).

by trade sanctions, if a member state is found by a specialized panel to have engaged in a systematic and persistent practice of not enforcing its own labour laws with the fine payable to the offending country to enhance its labour law enforcement.<sup>21</sup> This form of sanction suggests one option. Another option may entail denial of access to the dispute settlement process of the WTO as a complainant for so long as a member state is non-compliant. A yet further option is suspension of voting rights in the WTO while non-compliance persists. Crippling a non-compliant country economically (particularly a poor developing country) with trade sanctions should be reserved as the remedy of last resort.

## **V. Conclusions**

Much of my thinking on the appropriate linkage between trade policy and labour standards flows out of critical questions that must be answered at the outset of any such analysis relating to the normative rationale for any such linkage at all. As I have attempted to argue in this paper, the unfair competition and race to the bottom rationales for such a linkage are unconvincing, even incoherent, and provide a thinly disguised cover for protectionism, particularly on the part of developed countries vis-à-vis imports from developing countries, and rightly arouse the antagonism and cynicism of developing countries, who already labour under enough disadvantages in trade and other domains without sustaining yet one more encumbrance on their ability to develop. On the other hand, the human rights rationale for a trade/labour standards linkage is much more compelling and has important implications for the scope of the trade/labour standards linkage, as well as the choice of instrument and the choice of institutional regime. While the issues that arise under this rationale with respect to choice of instrument and

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<sup>21</sup> Under Annex 39 of NAFTA, any monetary enforcement assessment shall be no greater than \$1 million (U.S.) for the first year of the Agreement and thereafter no greater than .007 percent of total trade between the Parties during the most recent year for which data are available and must be paid into a fund to improve or enhance labour law enforcement in the Party complained against.

choice of institutional regime are far from straightforward or uncontentious, resolving these questions is rendered vastly more difficult if we are not clear (as many historical and contemporary debates on the trade-labour linkage have not been) on the foundational normative rationale for a linkage in the first place.