# COMMON BUT DIFFERENTIATED DEBATES: ENVIRONMENT, LABOUR AND THE WORLD TRADE ORGANIZATION

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## I. INTRODUCTION

IN June 1992 the UN Conference on Environment and Development (UNCED) took place in Rio de Janeiro; 1993 was the year of the World Conference on Human Rights, 1994 the year of the Cairo International Conference on Population and Development, and in March 1995 it was the turn of the World Summit for Social Development in Copenhagen.

The significance of these conferences should not be underestimated. Together they have been described as "early experiments in global democracy".[1] One of their striking features is a concern for the human dimensions of development and economic growth—including its social and environmental dimensions.

These conferences stand alongside another major international process of the late 1980s and early 1990s. In March 1994 the seven-year-old Uruguay Round culminated in the signing, at Marrakech, of the Uruguay Round Final Act[2]—an ambitious document that substantially extends the reach[3] of the disciplines previously found in the General Agreement on Tariffs and Trade (GATT) and its associated agreements and codes. Yet despite this extension, and in contrast to the international processes mentioned above, the Uruguay Round was concerned with the social and environmental impact of international trade to only a limited extent.

The GATT developed out of post-Second World War proposals to create an International Trade Organization (ITO). The ITO proposals failed, leaving only a portion of its substantive code—the GATT. The GATT

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1. Source: statement by Ambassador Ismat Kittani, *Report of the Working Party on the World Summit for Social Development*, Doc.GB.261/10/21, ILO, Nov. 1994.

2. Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, reproduced in part at (1994) 33 I.L.M. 1125.

3. For the first time, the multilateral trade framework extends to trade-related aspects of intellectual property rights, trade in services, and trade-related investment measures.

operated, from 1947 until January 1995, via a Protocol of Provisional Application. Since then, the post-Uruguay Round international trade disciplines have been administered through the newly created World Trade Organization (WTO).

This article is about two challenges facing the multilateral trading system. The first is posed by the trade and environment debate. It is about making trade and environment policies "mutually supportive in favour of sustainable development".[4] This challenge has emerged against a background of increasing concern about anthropogenic environmental damage. There is concern that effective environmental policy options should not be cut off because international trade rules do not deliver the necessary flexibility.

The second challenge is posed by an older debate.[5] It seeks, in essence, to make international trade rules supportive of social justice in the workplace. This is the trade and labour debate.[6] In a narrower form, as a "social clause"[7] debate, it has led to proposals for changes to be made to the WTO disciplines through the incorporation of some form of "social clause". A social clause would provide a mechanism for ensuring that members of the WTO implemented certain minimum workers' rights. Its enforcement mechanism would include trade penalties.

The trade and environment debate had two substantive outcomes during the Uruguay Round. A reference to sustainable development was inserted into the Preamble to the Agreement Establishing the WTO[8] (WTO Agreement). Second, a commitment was made to create a Trade and Environment Committee as a temporary home for certain aspects of the debate within the WTO.[9]

One event in particular occurred during the Uruguay Round that fuelled the trade and environment debate: a dispute between Mexico and the United States. The dispute led to a GATT dispute settlement panel

4. Agenda 21, Chap.2, Section B, UN Doc.A/CONF.151/26 (1992).

5. For the history see Hansson, *Social Clauses and International Trade* (1983), chap.1, and Charnovitz, "The Influence of International Labour Standards on the World Trading Regime: An Overview" (1987) 126 I.L.R. 565.

6. In this article "trade and labour debate" is used as a generic phrase, referring both to discussions on whether there should be a social clause in the WTO and to the broader impact of existing WTO disciplines on the pursuit of labour goals through instruments with trade effects.

7. Labour provisions in trade agreements other than the GATT have also been defined as "social clauses". Here, the term "social clause" is confined to the incorporation of social conditionality within the WTO disciplines.

8. Final Act, *supra* n.2, at p.1144. The reference reads: "*Recognising* that their relations in the field of trade and economic endeavour should ... [allow] for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development."

9. See the Decision on Trade and Environment, *idem*, p.1267.

issuing a report[10] which was both a catalyst for subsequent lobbying and the subject of sustained criticism in the year before UNCED and beyond.

It was not possible to reach agreement, during the Uruguay Round, on the creation of any WTO trade and labour work programme,[11] and there has so far been no formal discussion of the trade/labour nexus within the WTO.[12]

The trade-related work of some non-governmental organisations (NGOs) expresses a recognition of the conceptual links between the trade and environment and trade and labour debates,[13] but they have rarely been considered in tandem by academic writers[14] or intergovernmental processes.[15] This article aims to lay foundations for filling that gap.

The article focuses on the use of instruments with trade effects to achieve environmental and labour goals. From this perspective it analyses the relationship between the trade and environment and trade and labour debates and WTO disciplines, identifying key areas of legal and conceptual congruence and conflict. A basic knowledge of GATT disciplines is assumed.

## II. SUSTAINABLE DEVELOPMENT AND TRADE LIBERALISATION

THE theoretical foundations of the GATT system lie in the doctrine of comparative advantage,[16] and in the idea that there are economic (and

10. *United States—Restrictions on Imports of Tuna*, DS21/R, 3 Sept. 1991.

11. For the background in the period leading up to the signing of the Final Act, see *ICFTU Campaign for a Social Clause in GATT: Media Coverage*, ICFTU, Brussels, Mar. 1994.

12. Although the conclusions of the Chairman of the Trade Negotiations Committee of the Uruguay Round contain a reference to the importance attached by certain delegations to the relationship between the trade order and internationally recognised labour standards. And it appears that the run-up to the WTO's first Ministerial Conference in Singapore in December 1996 will see renewed pressure for the establishment of a WTO working party to look into the question of the links between international trade and working conditions. See e.g. *The Global Challenge of International Trade: a Market Access Strategy for the European Union*, communication to the Commission from Sir Leon Brittan and Messrs Marin, Bangemann, van den Broek and Pinheiro, 8 Feb. 1996, p.18.

13. See e.g. FNV and INZET, *Sustainable Trade: Towards Environmental and Labour Standards in International Agreements* (May 1994); Webb, *After GATT: Development and Labour Rights in the Global Economy*, War on Want, 1994, and Trade Working Group of the German NGO Forum on Environment and Development, *Trade, the Environment and Development*, German NGO Secretariat on Environment and Development, Bonn, July 1994.

14. The only academic studies of which the author is aware are Steve Charnovitz's pieces "The World Trade Organisation and Social Issues" (1994) 28 J.W.T. 17 and "Environmental and Labour Standards in Trade" (1992) World Economy 335.

15. Although see UNCTAD Secretariat, *New and Emerging Issues on the International Trade Agenda*, TD/B/EX(10)/CRP.1, 2 Mar. 1995, which argues, at para.33, that "it would seem appropriate ... to examine the new issues in an integrated manner". However, trade and environment issues are not discussed in the report since they are dealt with separately by an UNCTAD Ad Hoc Working Group.

16. For an introduction see Jackson, *The World Trading System: Law and Policy of International Economic Relations* (1989).

consequently social) gains from international trade and the cultivation of comparative advantage that go beyond those that can be provided by autarky.

These theoretical foundations say little about how the economic benefits of trade liberalisation should be distributed. Neither do they concern themselves greatly with any negative social or environmental effects. The GATT system encourages a "trickle down" approach to both social justice and environmental protection. The dogma is "first secure trade liberalisation, and the creation of wealth with which to protect the environment and pursue social justice will follow". But trade liberalisation is not and should not be treated as an end in itself; it is a means to an end.

This article views the trade and environment and trade and labour debates as aspects of broader endeavours to ensure that trade liberalisation supports sustainable development. Sustainable development, for these purposes, is understood as an ideal towards which the multilateral trade liberalisation framework should be directed.[17] To this end, trade liberalisation should be supportive both of social progress and of environmental protection.[18] Brief consideration of the main policy principles associated with sustainable development confirms its significance to the pursuit of both environmental and labour goals.

Sustainable development is concerned with the nature of democracy and with securing wide rights of access to information and of public participation in decision-making processes.[19] It is also concerned with equity. This involves concern and respect for future generations (intergenerational equity). But intergenerational equity cannot be achieved without concern and respect for present generations[20] through intragenerational equity. Both these aspects of equity go beyond utilitarian economic concerns for human welfare. They militate towards special and differential treatment of developing countries in the trade liberalisation framework,

17. This is not to suggest that sustainability is a supreme ideal. It is better understood as a prerequisite for the achievement of other human goals. See e.g. Elder, "Sustainability" (1991) 36 McGill L.J. 831. The classic working definition is found in World Commission on Environment and Development, *Our Common Future* (1987), p.8, which defines sustainable development as development that "meets the needs of the present without compromising the ability of future generations to meet their own needs".

18. The article is not concerned with the support of environmental or labour policies for trade liberalisation, except in so far as it is necessary if sustainable development is to result.

19. See e.g. Principle 10 of the Rio Declaration on Environment and Development (Rio Declaration), reproduced in Sands, Tarasofsky and Weiss (Eds), *Documents in International Environmental Law*, Vol.IIA (1994), p.49, and World Commission, *op. cit. supra* n.17, at chap.2.

20. Brown Weiss, "Our Rights and Obligations to Future Generations for the Environment" (1990) 84 A.J.I.L. 198 argues that intragenerational equity flows from intergenerational equity since "were it otherwise, members of one generation could allocate the benefits of the world's resources to some communities and the burdens of caring for it to others and still potentially claim on balance to have satisfied principles of equity among generations".

and the minimisation and elimination of inequalities that are the result of, or perpetuated by, that framework. Finally, sustainable development carries with it the idea that environmental, social and economic considerations be integrated in the formulation and execution of policies.[21]

International instruments addressing both environmental and social issues have adopted sustainable development as an overarching goal. The formal products of UNCED make sustainable development the goal of a new global partnership.[22] And the results of the World Summit for Social Development confirm the significance of sustainable development as a framework for the pursuit of a higher quality of life for all people.[23]

These remarks serve to demonstrate that the notion of sustainable development itself provides a justification for consideration of the links between international trade, environment and labour. If the contribution of each debate to the attainment of sustainable development is to be maximised, it is desirable that the arguments of both environment and labour advocates for reform of the WTO be mutually supportive.

## III. LINKS BETWEEN INTERNATIONAL TRADE INSTRUMENTS, ENVIRONMENT AND LABOUR

THE incorporation of environmental and labour concerns in international economic instruments is not new. The Treaty of Rome evolved to take on an integrated environmental and social dimension.[24] Both the social and environmental dimensions of international trade were also addressed in the North American Free Trade Agreement, particularly through side agreements on labour[25] and environmental[26] co-operation. Environmental and labour provisions have been incorporated within multilateral com-

21. Integration of economic and environmental considerations is reflected in Principle 4 of the Rio Declaration, *supra* n.19. Para.6 of the Copenhagen Declaration and Programme of Action (advance unedited text, 20 Mar. 1995, on file with the author) provides: "We are deeply convinced that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development, which is the framework for our efforts to achieve a higher quality of life for all people."

22. Preamble, Rio Declaration, *ibid*, and Preamble, Agenda 21, UN Doc.A/CONF.151/26 (1992).

23. E.g. para.6 of the Copenhagen Declaration, *supra* n.21. See also UNDP, "Towards Sustainable Human Development", *Human Development Report 1994*, pp.13–21, for a "human welfare" focused vision of sustainable development.

24. On social aspects of European integration, see Mosley, "The Social Dimension of European Integration" (1990) 129 I.L.R. 147. On environmental aspects, see Wilkinson, "Maastricht and the Environment" (1992) 4 J.E.L. 221.

25. North American Agreement on Labor Cooperation (1993) 32 I.L.M. 1499. For an analysis of the labour side agreement in the context of the wider trade and social clause debate, see Van Dijk, "NAFTA and the North American Agreement on Labor Cooperation", paper presented at a seminar on Trade Aid and Social Clauses at the Free University of Amsterdam, 19–20 May 1994 (on file with the author).

26. North American Agreement on Environmental Cooperation (1993) 32 I.L.M. 1480. For an analysis of the environmental side agreement in the context of the broader trade and environment debate, see Esty, "Making Trade and Environmental Policies Work Together:

modity agreements. Several contain aspirational references to fair labour standards.[27] And the 1994 International Tropical Timber Agreement[28] integrates international trade and sustainable development concerns to some extent. Its objectives include contributing "to the process of sustainable development".[29]

Limited integration of environment and labour concerns has also taken place within the WTO.[30] The preambular reference to sustainable development has already been mentioned. The Preamble to the WTO Agreement[31] is also relevant to social concerns, referring to "raising standards of living" and "ensuring full employment".

Article XX of the GATT 1994 contains exceptions to its disciplines. Three parts of Article XX are particularly relevant to environment and labour concerns. These permit members of the WTO to adopt measures which would otherwise be incompatible with the GATT, if they are "not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade" and which are, in the case of Article XX(b), "necessary to protect human, animal or plant life or health" or, in the case of Article XX(g),[32] those "relating to the conservation of natural resources if ... made effective in conjunction with restrictions on domestic production or consumption" or, in the case of Article XX(e), measures "relating to the products of prison labour".[33] Clearly, environment and labour concerns overlap at Article XX(b), in relation to workplace health and safety. And the operation of this Article is "elaborated" in the Final Act's Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).[34]

Lessons from NAFTA", in Cameron, Demaret and Geradin (Eds), *Trade and Environment: the Search for Balance* (1994).

27. For a critical survey of labour provisions in international commodity agreements see Kullman, " 'Fair Labour Standards' in International Commodity Agreements" (1980) 14 J.W.T. 527, who argues that they are the outcome of protectionism, and do little to benefit exploited workers. See also Van Liemt, "Minimum Labour Standards and International Trade: Would a Social Clause Work?" (1989) 128 I.L.R. 433, 438, and Servais, "The Social Clause in Trade Agreements: Wishful Thinking or an Instrument of Social Progress?" (1989) 128 I.L.R. 423.

28. (1994) 33 I.L.M. 1014.

29. *Idem*, Art.1(c).

30. For an overview of the environmental features of the Final Act, see Charnovitz, "The World Trade Organisation and Environmental Supervision", *International Environmental Reporter*, 26 Jan. 1994, p.89.

31. *Supra* n.2.

32. For a history of the "environmental" exceptions of Art.XX see Charnovitz, "Exploring the Environmental Exceptions in GATT Article XX" (1991) 25 J.W.T. 5, 37.

33. For an account of the history of Art.XX(e), see Charnovitz, *op. cit. supra* n.5. Apparently it exists because when GATT 1947 was being negotiated many countries maintained legislation restricting imports of the products of prison labour in order to protect domestic industry from unfair competition.

34. Final Act, p.69.

The Final Act also contains an Agreement on Technical Barriers to Trade (TBT Agreement).[35] Its disciplines are designed to ensure that technical regulations do not create unnecessary obstacles to international trade. The Agreement provides that technical regulations must not be more trade-restrictive than necessary to fulfil a legitimate objective. Legitimate objectives include protection of human health or safety, animal or plant life or health, or the environment.

Further environmental provisions, not considered here, are found in the Final Act's Agreement on Subsidies and Countervailing Measures,[36] and in the General Agreement on Trade in Services.[37]

## IV. THE IMPACT OF ENVIRONMENT AND LABOUR CONCERNS ON THE WTO

THE implications of the WTO for the trade and environment, trade and labour and social clause debates go far beyond these provisions. Clearly, the WTO is implicated when its disciplines affect the ways in which links between international trade and environmental and social goals can be effected. Environmental or labour measures that have trade effects, or use trade restrictions to achieve their goals, are of particular concern here.

Second, the WTO is implicated when it provides the multilateral framework through which sanctions for failure to comply with certain human rights are authorised. This is of particular concern in the social clause debate.

Third, the WTO is also implicated when its disciplines create or support an economic environment that makes it difficult, whether practically or politically, for State or non-State actors to achieve social and environmental goals. (This issue is not considered in detail here.)

Fourth, the WTO is implicated in an overarching set of concerns relating to democracy. One aspect of these concerns relates to "global democracy", focusing on the WTO's institutional and processual characteristics. Thus one might question the effect of economic power imbalances among States on exchanges and negotiations within the WTO. Or one might wish to consider the role of non-State actors in the WTO's processes.

The WTO is also implicated in concerns for "democracy" because questions have begun to be asked about the extent to which the WTO should become actively involved in encouraging the adoption and effective

35. *Idem*, p.117.
36. *Idem*, p.229, Art.8.b.2(c).
37. *Idem*, p.283, Art.XIV(b), and the Decision on Trade in Services and the Environment, *supra* n.2, at p.1255.

implementation of basic democratic rights. Rights of freedom of association or of collective bargaining, of access to environmental information and of participation in environmental decision-making processes promote democracy. Would trade liberalisation be more likely to lead to social justice and sustainable development if the WTO became involved in the promotion of rights?

## V. THE WTO'S COMPETENCE AND ISSUES OF "APPROPRIATENESS"

THE significance of the trade and environment and trade and labour debates is underestimated if they are divorced from their human rights and non-economic value content.[38] Environment and labour advocates share an interest in considering the extent of the WTO's competence to consider issues relating to the non-economically motivated use of trade policy tools, or even to support such use of trade measures in certain circumstances. And, quite apart from its competence, one might question whether it is appropriate for the WTO to do so.[39] Here too, one finds a theme common to both trade and environment and trade and labour debates.

Whilst the WTO currently provides a framework for the conduct of trade relations,[40] not labour or environmental relations, this should not hinder the emergence of new or amended international trade disciplines to ensure that the WTO is supportive of the adoption and implementation of appropriate policy tools for environmental or labour purposes.

The precise boundaries of an international organisation's competence are often the result of political consensus rather than explicit legal discourse. But formally, determination of the WTO's competence depends upon interpretation of its constituent instrument and its covered agreements.[41] The Ministerial Conference and the General Council of the WTO are charged with carrying out its functions,[42] one of which is to "further the objectives of" the WTO Agreement and its covered agreements.[43] Those objectives include "allowing for the optimal use of the world's resources in accordance with the objective of sustainable development", "raising standards of living" and "ensuring full employment".[44]

These are not simply economic objectives. Albeit expressed through preambular language, they provide a marker for ensuring that the WTO is

38. Indeed, *The Economist* ("A New Case for Greenery", 3 June 1995) argues that environmentalists should not use economic justifications for "greenery".

39. The distinction between questions of "competence" and "appropriateness" is also made by Roessler, in "The Competence of GATT" (1995) 29 J.W.T. 72, 83.

40. WTO Agreement, Art.II:1.

41. I.e. the WTO Agreement and the remaining instruments contained within the Final Act.

42. WTO Agreement, Art.VI:1 and 2.

43. *Idem*, Art.III:1.

44. *Idem*, Preamble.

sensitive to appropriate uses of trade policy tools for the pursuit of environmental and labour goals. However, the current competence of the WTO could prove more limiting in the context of the trade and labour debate (understood to include the social clause debate) than the trade and environment debate. It is at best debatable whether preambular markers, and the other functions of the WTO as presently constituted, provide a sufficiently solid constitutional foundation for appropriating the WTO to the task of administering economic sanctions.[45] Similarly, it is questionable whether, without far-reaching reforms, the WTO could become an "appropriate" institution from which to authorise trade-related enforcement measures for a social clause. Furthermore, for the short term at least, continued willingness at intergovernmental level seriously to consider the circumstances in which trade policy may be legitimately applied in pursuit of environmental goals might be enhanced if environmentalists were able to develop and maintain clear conceptual distinctions between the "sanctioning" and "non-sanctioning" uses of trade tools: not necessarily an easy task.

This said, restrictive interpretations of "competence" and "appropriateness" that limit the ability of the WTO to respond sensitively to legitimate environment and labour policy concerns should be worrying to both environment and labour advocates. For example, the practice of GATT contracting parties and WTO members in relation to trade and environment evidences a restrictive interpretation of the WTO's environmental competence. The Decision on Trade and Environment[46] limits it to "trade policies and those trade-related aspects of environmental policies which may result in significant trade effects for its members". The lines are being implicitly drawn for the trade and labour debate, too.

The principal disciplines of the GATT system restrict the possibility of governments using trade restrictions (or measures with trade effects) to achieve their domestic policy goals.[47] From this perspective, it is at first sight "inappropriate" for the GATT to be amended so as to allow new trade restrictions. However, this need not prevent the WTO from absorbing the relevance of effective and appropriate use of trade policy tools to pursue environment and labour objectives. Existing GATT exceptions might provide a basis for reform. And in any event, the WTO now administers agreements whose disciplines go beyond those traditionally associated with a GATT concerned only with disciplining the use of trade restrictions. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is a case in point.[48]

45. Although the GATT disciplines recognise the authority of sanctions applied externally, pursuant to UN structures and processes. See Art.XXI(c), GATT 1994.

46. *Supra* n.9.

47. Charnovitz (1992), *op. cit. supra* n.14, at p.348.

48. Final Act, Annex 1C. It goes a long way towards requiring harmonised intellectual

Another major area of shared concern among environmentalists and labour advocates in relation to "appropriateness" concerns the WTO's existing decision-making and dispute-settlement processes. For example, environmentalists have long been criticising the "appropriateness" of the WTO's dispute-settlement system as a forum for processing disputes relating to the pursuit of environmental or labour policy through measures with trade effects.[49] This would be a particular problem in the event that the WTO were asked to deal with a dispute arising out of implementation of trade-related commitments accepted in a multilateral environmental agreement.

A connected issue is the GATT's reputation for secrecy and exclusivity—both among governments and between governments and NGOs—and the fact that it is perceived to be relatively isolated from the rest of the UN system.[50] Proposals from environment and development NGOs have sought to effect institutional reform in order to make the WTO a more "appropriate" organisation for the administration of rules that help to ensure that trade and environment policies are mutually supportive in favour of sustainable development. For example, proposals have been made for the WTO's dispute-settlement system to allow a measure of participation by non-State actors,[51] and for links to be established with NGOs in WTO decision-making processes and committees.[52] There is room for co-operation among the environment and labour communities here.

## VI. TRADE AND ENVIRONMENT—GATT PANEL REPORTS

### *A. Background*

Three GATT dispute-settlement panel reports, and one WTO dispute-settlement panel report (known as Tuna I, Tuna II, the CAFE panel report and the Gasoline Standards report) provide an overview of some of the most important legal and policy issues within the trade and environment debate. They also enable a number of key differences between the trade and environment and trade and labour debates to be identified.

Starting in 1991, the United States imposed a series of "primary embargoes" on yellowfin tuna and its products originating in States involved in

property protection along the lines of a number of existing intellectual property conventions referred to in the Agreement. It has been suggested that the TRIPs Agreement is the "obvious model" for a social clause. See Grey, "The International Labour System and 'Labour Standards' ", UNCTAD/MTN/RAS/CB.11, 5 Apr. 1994, para.34.

49. See e.g. FIELD, "Sustainable Development and Integrated Dispute Settlement in GATT 1994", WWF International, June 1994.

50. See e.g. *Trade, the Environment and Development*, *supra* n.13.

51. See e.g. FIELD, *op. cit. supra* n.49, and for a discussion of the issue within the Trade and Environment Committee, see WTO Secretariat, "The WTO Trade and Environment Committee Takes up Transparency and Dispute Settlement", in *Trade and The Environment*, PRESS/TE 003, 22 May 1995.

52. See e.g. FIELD/NRDC, *Environmental Priorities for the World Trading System* (1995) and *ICDA Update on Trade Related Issues*, No.18, Mar.–May 1995, ICDA, Brussels.

harvesting yellowfin tuna in the Eastern Tropical Pacific Ocean with purse seine nets. This method of catching yellowfin tuna can drown dolphins, because in the Eastern Tropical Pacific Ocean dolphins and yellowfin tuna often swim together.

Import restrictions were also extended to yellowfin tuna and yellowfin tuna products from certain "intermediary nations" which failed to show, within 90 days of the primary embargoes, that they too had taken action to prevent imports of relevant tuna. There were no restrictions on sales of US-produced yellowfin tuna. Instead, the United States regulated the circumstances in which vessels or persons within its jurisdiction could catch marine mammals incidental to commercial fishing operations.

In January 1991 Mexico requested the GATT contracting parties to establish a dispute-settlement panel to consider, *inter alia*, the compatibility of the primary embargoes with certain provisions of the GATT. A second dispute-settlement panel was established in July 1992, at the request of the European Community, to consider legal issues raised by the "intermediary nations" import restrictions.

The first dispute-settlement panel (Tuna I) reported in September 1991.[53] It found that both the primary nations embargoes and the intermediary nations import restrictions contravened the GATT. The second dispute-settlement panel (Tuna II) followed in June 1994.[54] It also found that the intermediary nations embargoes contravened the GATT, although it used different reasoning to reach this conclusion.

A third dispute-settlement panel (the CAFE panel) reported in September 1994[55] on a complaint brought by the European Community against the United States in relation to car taxes applied by the latter. The three taxes were the luxury tax as applied to cars, the so-called "gas guzzler" tax and the corporate average fuel efficiency (CAFE) payment. The Community argued that the effect of the taxes was to discriminate against the EC car industry. The panel upheld only the first two taxes.

The fourth dispute-settlement panel (the Gasoline Standards panel) reported in January 1996[56] in a complaint brought by Brazil and Venezuela against the United States. This time, the measures complained of concerned gasoline quality standards. Venezuela and Brazil argued that the standards were discriminatory because they subjected imported gasoline to more demanding quality requirements than gasoline of US origin. The panel agreed, and found that the standards contravened GATT 1994.

53. *Supra* n.10.
54. *United States—Restrictions on Imports of Tuna*, DS29/R, June 1994.
55. *United States—Taxes on Automobiles*, DS31/R, 29 Sept. 1994.
56. *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, 29 Jan. 1996.

These reports do not authoritatively interpret "GATT law", since they were not adopted by the GATT Council or (in the case of the Gasoline Standards report) the WTO Dispute Settlement Body.[57] And there is no formal system of precedent within either the old GATT or new WTO dispute-settlement system. Nevertheless, the four panel reports raise important questions of principle. Three interrelated issues of particular concern arise:

(1) The extent to which the GATT disciplines should acknowledge that the extra-jurisdictional environmental impact of production and processing methods makes otherwise similar products different from one another, justifying the application of different regulatory regimes to them.[58] The question to which this issue gives rise is: Under what circumstances is it legitimate for importing countries to use trade-related regulation to express concern about the environmental differences between a product whose production has caused pollution and a product that has been produced according to relatively clean production methods? The equivalent question is of fundamental importance to the trade and labour debate, too.

(2) Whether the GATT system should permit its members, acting unilaterally, to adopt and enforce regulations which have the effect of forcing other countries to change their own environmental regulatory framework or else lose a market. This concern overlaps with (1), but is expressed, in the GATT, through different provisions. It is relevant in the broader trade and labour debate, since there is concern that there may be a rise in unilateral trade restrictions apparently adopted in pursuit of broad social or labour goals.[59]

(3) The GATT compatibility of measures adopted pursuant to trade provisions found in certain international environmental agreements.

Each issue is considered briefly. The four panel reports also provide indications of how trade restrictions apparently imposed in pursuit of social goals related to workers' rights might be treated in the GATT 1994.

57. This is because, on 21 Feb. 1996, the US appealed to the new Appellate Body established within the WTO.

58. See further *Report on Trade and Environment to the OECD Council at Ministerial Level*, COM/ENV/TD(95)48/FINAL, OECD, 9 May 1995, paras.57–59, which distinguishes between three motivations for non-product-related production and processing method distinctions: environmental, competitiveness-based and value-based.

59. The US Child Deterrence Bill, which would ban US imports of products made by children under 15, is a case in point. See also "How to Make Lots of Money and Save the Planet too", *The Economist*, 3 June 1995, p.75, and Alston, "Labor Rights Provisions in US Trade Law: 'Aggressive Unilateralism'?" (1993) 15 H.R.Q. 1.

Different Article XX exceptions are relevant to each debate (with an overlap at Article XX(b)) but, these exceptions apart, the same basic GATT Articles are relevant to both environmental and labour trade-related measures.[60]

### *B. Production and Processing Methods*

The production and processing methods issue is legally contentious because certain GATT provisions call for an examination of how regulatory regimes treat "like products".[61] When there is discrimination between "like products", relevant national measures are GATT incompatible, unless saved by one of its exceptions.

In the tuna cases the United States argued that, for the purposes of Article III of the GATT,[62] the differential, directly discriminatory treatment of domestic and foreign yellowfin tuna was justified on the grounds that different fishing (production) methods from those enforced by the United States might have been applied to the foreign tuna. Unacceptable numbers of dolphins might have been caught together with the tuna.

Tuna I held that "Article III:4 calls for a comparison of the treatment of imported tuna *as a product* with that of domestic tuna *as a product*. Regulations governing the taking of dolphins incidental to the taking of tuna could not possibly affect tuna as a product."[63] So yellowfin tuna caught according to US standards was the same product as that caught according to Mexican standards, regardless of the numbers of dolphins that were incidentally caught. By implication, a carpet made by young children is "like" a carpet produced by adults.

The CAFE panel determined that, when deciding whether products were "alike" for the purposes of Articles III:2 and III:4, it was important to consider whether regulatory distinctions operated so as to afford protection to domestic production, i.e. whether either their *aim* or *effect* was to afford such protection.[64] The purpose of Article III was "not to prohibit fiscal and regulatory distinctions applied so as to achieve other policy goals".[65] Moreover, when considering the gas guzzler tax, the panel held

60. In the WTO the boundaries of the areas of overlap may prove to be affected by the operation of the TBT and SPS Agreements. However, whilst it might appear that in areas of overlap WTO dispute-settlement panels should apply the more detailed TBT and SPS Agreement disciplines in preference to the basic Arts. of GATT 1994, this approach was not taken in the Gasoline Standards case. There, the panel concluded that the measures complained of were incompatible with relevant Arts. of GATT 1994, and that it was therefore not necessary to decide on issues raised under the TBT Agreement.

61. E.g. Arts.I and III of the GATT, and Art.2.1 of the TBT Agreement.

62. It should be noted, however, that the panel considered that in reality the import restrictions were quantitative restrictions under Art.XI, not internal regulations under Art.III.

63. Para.5.15.

64. Paras.5.7 and 5.10.

65. Para.5.7.

that the economic efficiency of the measure was not of itself a relevant consideration in applying the provisions of Article III.[66]

It is tempting to conclude that the CAFE panel report represents a sea change in GATT treatment of the production and processing methods issue. However, the extra-jurisdictional environmental impacts of the vehicles considered in the CAFE panel did not provide the basis for the regulatory distinctions under consideration, and only indirect discrimination was an issue.

The likely future interpretation of the phrase "like products" in Article III was scarcely clarified by the Gasoline Standards panel. The panel did not apply the "aim or effect" test, favouring a case-by-case approach to the interpretation of "like products" (in accordance with the ordinary meaning of the term) under which the "likeness" of various products is determined by consideration of, *inter alia*, similarities among their physical properties and end-uses.

Whilst the CAFE and Gasoline Standards panel reports take a different interpretative approach to the "like products" issue from that of Tuna I and Tuna II, extreme care should be taken in concluding that regulatory distinctions based on production and processing methods and considered under Article III are *prima facie* GATT compatible. Considerable legal uncertainty remains.

### *C. Unilateral Trade Restrictions*

In the tuna panels, the US import restrictions were directed at contracting parties that had not implemented regulations equivalent to the United States' own. The two tuna panel reports suggest that such measures are incompatible with the GATT where the environmental damage that is the target of the regulation does not occur within the jurisdiction of the importing country.[67]

In Tuna I the US import restrictions failed to pass muster even when tested against the "environmental" exceptions of Article XX. According to the panel report "the record indicates that the concerns of the drafters of Article XX(b) focused on the use of sanitary measures to safeguard life or health of humans, animals or plants within the jurisdiction of the importing country".[68] A consequence of extra-jurisdictional interpretation of Article XX(b) would be that the GATT would "no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations".[69] Paral-

66. Para.5.33.
67. Where the damage occurs following import, contentious issues of extra-jurisdictionality do not occur and, in principle, relevant Art.XX exceptions will be available.
68. Para.5.26.
69. Para.5.27.

lel reasoning was used to reject an extra-jurisdictional interpretation of Article XX(g).

The Tuna II report reached the same conclusion, for different reasons. It considered that measures "taken so as to force other countries to change their policies, and that were effective only if such changes occurred", could not fall within either Article XX(b) or (g), even if in other respects they fell within the range of policies that could be considered under them.[70] The means chosen by the United States to pursue its policy of conserving dolphins in the Eastern Tropical Pacific Ocean were unacceptable.

### *D. Multilateral Environmental Agreements*

There is an important qualitative distinction between trade barriers that are imposed unilaterally, and those that result from commitments accepted under multilateral environmental agreements.

There has been much debate about the potential for certain national measures adopted pursuant to international environmental commitments to conflict with GATT disciplines. A number of multilateral environmental agreements (notably the Montreal Protocol,[71] the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal[72] and the Convention on International Trade in Endangered Species[73] (CITES)) make use of trade restrictions to pursue their goals. The potential for GATT incompatibility arises principally because it seems following the two tuna panel reports that relevant Article XX exceptions cannot be applied successfully to measures making access to domestic markets conditional upon a change of legislation (or policy) in the exporting country.[74]

70. Paras.5.26 and 5.39.

71. 1987, reproduced as amended at Copenhagen and London in Sands *et al.*, *op. cit. supra* n.19, at p.189.

72. 1989, reproduced in *idem*, p.1075.

73. Washington, 1973, reproduced in *idem*, p.766.

74. Indeed, the concluding observations of the panel in Tuna II, at para.5.42, contain the following passage: "The Panel... had to resolve whether the contracting parties, by agreeing to give each other in Article XX the right to take trade measures necessary to protect the health and life of plants, animals and persons aimed at the conservation of exhaustible natural resources, had agreed to accord each other the right to impose trade embargoes for such purposes. The Panel had examined this issue in the light of the recognised methods of interpretation and had found that none of them lent any support to the view that such an agreement was reflected in Article XX." However, strong arguments have been made that dispute-settlement panels could avail themselves of interpretative techniques which would not threaten measures adopted pursuant to multilateral environmental agreements. See e.g. Temple Lang, "The Problem Was Already Solved: GATT Panels and Public International Law", Remarks of Co-Chairperson at an International Bar Association Conference on Trade and the Environment, Dublin, Nov. 1994.

Trade restrictions have shown themselves to be effective tools of international environmental protection. For example, the objective of the Montreal Protocol is to protect the ozone layer from depletion. Restrictions on trade with non-parties[75] protect its parties from competition with "free riders" who could otherwise enjoy the benefits of both protection of the ozone layer and international trade in ozone-depleting products and substances. They also help to reduce global demand for those products and substances. Financial incentives[76] were introduced in 1990 to encourage developing countries to participate in the regime.[77]

An example of an international labour instrument that uses trade policy tools is the 1906 Berne Convention on white phosphorous.[78] The Convention is not controversial within the WTO because it bans import *and* production of matches made with white and yellow phosphorous (toxic chemicals posing an unacceptable risk to the health and safety of workers). The Convention is non-discriminatory, and therefore does not offend against fundamental WTO disciplines. However, if new international labour instruments were negotiated that did make use of discriminatory trade restrictions (an option that is discussed further below), they too might potentially be subject to censure within the WTO.

## VII. INTERNATIONAL TRADE, ENVIRONMENT AND LABOUR: INTERNATIONAL AND DOMESTIC ISSUES

### *A. Introduction*

Controversy surrounding the impact of WTO disciplines on efforts to pursue environmental and labour goals through trade-restrictive measures can be traced to a lack of consensus over where and how to draw a dividing line between labour and environmental issues of international concern, and those of exclusively domestic concern.

A further dividing line is a distinction between international issues justifying unilateral action with trade effects, and those justifying only international action with trade effects, or action without trade effects.

Three main categories of environmental "spillovers" justifying international action have been identified—"physical spillovers", "economic spillovers" and "psychological"[79] (or "psychic")[80] spillovers. These cate-

75. Art.4.

76. Art.10.

77. For a comprehensive analysis of the Montreal Protocol's trade-related provisions see Brack, *International Trade and the Montreal Protocol*, RIIA/Earthscan Report, 1996.

78. Discussed in Charnovitz (1992), *op. cit. supra* n.14, and in Hansson, *op. cit. supra* n.5, at pp.17–18.

79. See Blackhurst and Subramanian, "Promoting Multilateral Cooperation on the Environment", in Anderson and Blackhurst (Eds), *The Greening of World Trade Issues* (1992), p.247. The distinction is also applied by Charnovitz (1994), *op. cit. supra* n.14.

80. See Wils, "Subsidiarity and EC Environmental Policy: Taking People's Concerns Seriously" (1994) 6 J.E.L. 85.

gories are helpful in drawing distinctions between policy concerns in the trade and environment and trade and labour debates. Each is considered in turn.

### *B. Physical Spillovers*

"Physical spillovers" involve physical transboundary environmental damage affecting States. International agreements that deal with air pollution, or climate change, are responses to physical spillovers.

Where production and processing methods cause transboundary environmental damage (for example when a steel works causes severe transboundary environmental damage), a big issue is whether it should be legitimate for an importing State that suffers that damage to keep out imports of the offending products. According to the two tuna panel reports, the answer would seem to be an unqualified negative.

Yet a strong moral case can be made in favour of trade restrictions on products whose production is responsible for causing transboundary environmental damage to the importing country. And an environmental case can be made for the carefully controlled use of such trade restrictions where it can be proved that they are likely to be effective in forcing the exporting country to change its domestic regulations or otherwise take steps to prevent the transboundary damage.

Physical spillovers affecting the global commons (and through the global commons, States) pose distinct regulatory challenges.[81] The global commons lie beyond the reach of traditionally conceived notions of sovereignty. They include the atmosphere, the high seas, climate and possibly also Antarctica. Each individual nation has an interest in ensuring that the global commons are protected, for the benefit of all.

If it is accepted that each nation has an interest in the protection of the global commons, the legitimacy of unilateral trade restrictions as a tool with which to assert that interest becomes a matter for serious debate; at least whilst no comprehensive multilateral framework has been designed for the protection of the global commons.

However, defining the circumstances in which unilateral trade restrictions should be permissible for protecting the global commons is difficult. Using trade restrictions to force other countries to change their laws can legitimately be perceived as interference with sovereignty. And if

81. See further Stone, "Defending the Global Commons", in Sands (Ed.), *Greening International Law* (1993).

developing countries might expect differential and more favourable treatment in international agreements to protect the global commons (in accordance with the principle of common but differentiated responsibility), why not also in respect of unilaterally imposed trade restrictions for the protection of the global commons? Furthermore, the effectiveness of unilateral trade restrictions in achieving change, for example by prompting international treaty negotiations, is by no means clearly established.[82]

Multilateral responses to physical spillovers affecting the global commons are to be preferred. Trade restrictions (for example those mandated by the Montreal Protocol) have proved effective in designing such responses. This said, there may be circumstances where unilateral trade restrictions are also appropriate. Meaningful consultations and possibly also offers of financial and technical assistance should precede such measures.

Abuses of workers never have physical spillovers.[83] The concept is therefore unavailable to justify connections between international labour agreements and trade policy tools, or between abuses of workers and unilateral trade restrictions.

### C. *Economic Spillovers*

#### 1. *Deregulation and competitiveness*

"Economic spillovers" occur when competitiveness is affected by the existence of differing standards in different jurisdictions. The idea of an "economic spillover" has a vital explanatory role in the trade and environment, trade and labour and social clause debates. Placed alongside physical and psychological spillovers (considered next), it provides a tool with which to understand the significance of the distinctions between concerns about *protection* (of workers and the environment) and *protectionism*.

The argument is often made that strict, or high, national standards of environmental and labour protection can add to the costs of production—potentially discouraging inward investment and making products less competitive.

The impact of differing environmental and labour standards on competitiveness is unclear.[84] But the suggestion is often made that in some cases it is so great that it leads businesses to relocate to countries where

82. See generally Esty, *Greening the GATT* (1994), pp.142–145 and 105–108.

83. This undoubtedly correct point is made in Charnovitz (1994), *op. cit. supra* n.14, at p.21.

84. See e.g. *Report on Trade and Environment*, *supra* n.58 at paras.20–24, and the draft OECD report *Trade and Labour Standards*, COM/DEELSA/TD(96)8, 16 Jan. 1996, paras.115–121.

they can maintain the lowest standards consistent with the levels of productivity that they seek.[85] One response is deregulation.[86] This has come to be known by critics as the "race to the bottom" or the "downward spiral".

There are genuine human rights and environmental concerns that the nadir of deregulation in a globalised economy could threaten human life or health, or remove the possibility of workers negotiating for their share of the fruits of trade liberalisation, or irreparably damage ecosystems.

### 2. *Environmental and social dumping*

"Environmental dumping" describes what happens when imported goods that are cheap or cheaper than otherwise identical products produced domestically are able to outcompete domestic products *because* they were produced to low environmental standards. The margin of dumping is the difference between the price of a product produced to the higher standard and that produced to the lower standard: it is a measurement of economic spillover.[87] "Social dumping"[88] is a similar term used in the trade and labour context in relation to differing labour standards.[89]

These terms become particularly resonant when countries deliberately use low labour and environmental standards to increase the competitive-

85. Esty, *op. cit. supra* n.82, at p.162, calls this a "political spillover".

86. An example of this link between competitiveness and deregulation can be found in *Deregulation Now*, a Mar. 1995 report from the Anglo-German Deregulation Group (available from the DTI in London). The group, composed of leading industrialists, was formed at the request of John Major and Helmut Kohl in Apr. 1994. The report contains recommendations for labour and environmental deregulation in the EU.

87. Alternatively, the margin of dumping can be described as the difference between the price of the product when all (externalised) environmental costs are taken into account and its actual price. This focuses more on environmental valuation techniques than comparisons of domestic and imported products.

88. An ILO report (*The Social Dimensions of the Liberalisation of World Trade*, Doc.GP.261/WP/SLD/1, Nov. 1994, para.22) considers the debate about social dumping to be pointless because "in different ways and on both sides it is based on false premises, in particular on the idea of equalising social costs".

89. The GATT system contains "anti-dumping" rules in Art.VI of the GATT, and the WTO's Agreement on Implementation of Article VI of the GATT 1994. These disciplines provide for importing countries to impose otherwise GATT-incompatible "anti-dumping duties" equal to the margin of dumping. The use of the term "dumping" in social and environmental dumping is misleading in the context of the GATT rules. A product has been "dumped" for GATT purposes if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, and if it causes or threatens material injury to an established industry in the territory of a WTO member or materially retards the establishment of a domestic industry. In most cases (with the exception of some export processing zones) low environmental and labour standards apply equally to goods produced for domestic and export markets, so that no dumping is possible, as GATT defines the concept.

ness of their products in export markets. There is strong evidence that there are parts of the world where low labour standards are a direct result of concerns for global competitiveness in export markets. Export processing zones which exist in order to promote exports are a case in point. Foreign investors are frequently offered attractive tax and other incentives to site operations within these zones, and labour rights can be worse in them than in the remainder of the country in which they are situated.[90]

There is less evidence of environmental standards being deliberately maintained at low levels so as to lead to the production of cheaper goods expressly for export markets. However, during the NAFTA negotiations much concern was expressed about the existence of foreign-owned polluting "maquiladora" plants in Mexico on the United States–Mexico border. Formally, the environmental laws applicable to the plants were the same as for the rest of Mexico, but enforcement along the border was lax, and pollution severe.[91]

### 3. *International standards as a response to economic spillovers*

Low national environmental or labour standards need not be the result of a deliberate attempt by governments to gain competitive advantage by damaging the environment or injuring workers. They can often be associated with local circumstances that make the costs associated with maintaining higher standards prohibitive in the light of the country's level of economic development, or because those standards are difficult to enforce.[92]

International action through the development of international standards is one response to economic spillovers. Where international standards are a response to economic spillovers they might have trade effects, but they are unlikely to make direct use of trade policy instruments. The development of international standards can also be understood as a response to the threat of a downward spiral of environmental and labour regulation. It can be seen as an expression of solidarity between countries (and workers[93]) in their efforts to achieve social and environmental goals.

The International Labour Organisation (ILO) has always recognised the links between trade liberalisation and human rights. It was established

90. See further ILO, *World Employment 1995*, p.73, and OECD, *op. cit. supra* n.84, at paras.128–134.

91. See French, "Pollution Havens", in *Costly Tradeoffs: Reconciling Trade and the Environment*, Worldwatch Paper 113, 1993.

92. See further GATT Secretariat, "Trade and the Environment", *International Trade 90–91*, p.29; *Report on Trade and Environment*, *supra* n.58, at para.48. For an analysis of the causes of non-compliance with ILO conventions, see Landy, *The Effectiveness of International Supervision: Thirty Years of ILO Experience* (1966). OECD, *op. cit. supra* n.84, at paras.87–95, sets out a range of economic arguments for non-observation of "core labour standards".

93. Hansson, *op. cit. supra* n.5, at pp.167–171.

in 1919 to improve working conditions and promote the economic and social welfare of workers by building up a code of labour standards. The Preamble to its Constitution[94] states that "the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries". The Philadelphia Declaration, adopted in 1944, is the modern charter of the ILO's aims and principles.[95] It provides that one of the fundamental principles upon which the ILO is based is that "labour is not a commodity",[96] recognising, moreover, that economic and financial policies and measures must be considered simply as a means to an end, not as ideals in their own right.[97]

The impact of economic considerations on efforts to increase levels of labour protection was also recognised in Article 7 of the failed Havana Charter,[98] which would have established the ITO. Article 7 was entitled "Fair Labour Standards". It provided:

> The Members recognise 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 the territory.

The WTO contains no similar provisions, although it has become involved in encouraging the adoption of international standards. The TBT and SPS Agreements both contain a strong emphasis on the adoption of international standards.[99] At first sight this is puzzling; unless subsidies are involved, the WTO's disciplines have little difficulty in principle with the idea that governments should be able to use environmental and

94. *Constitution of the International Labour Organisation and Standing Orders of the International Labour Conference*, ILO, Geneva, Dec. 1994.

95. See generally Ghebali, *The International Labour Organisation: A Case Study on the Evolution of UN Specialised Agencies* (1989), chap. III.

96. *Supra* n.94, at s.I(a).

97. *Idem*, s.II. See Lee, "The Declaration of Philadelphia: Retrospect and Prospect" (1994) 133 I.L.R. 466 for an analysis of the Declaration in relation to economic policy. Ghebali, *op. cit. supra* n.95, at p.63, notes: "For the first time, an organisation was proclaiming the impossibility of separating social and economic objectives, and indeed affirming the pre-eminence of the social dimension in economic planning." If full integration of economic and labour concerns is to be achieved in the interests of sustainable development, however, the constitution of the ILO should be revisited. Section IV of the Philadelphia Declaration says that "the fuller and broader utilisation of the world's productive resources necessary for the achievement of the objectives set forth in this Declaration can be secured by effective international and national action, including measures to expand production and consumption". Even the Preamble to the WTO Agreement is, on its face, more directly supportive of sustainable development.

98. UN Doc.E/Conf.2/78 (1948).

99. E.g. TBT Agreement, Arts.2.4 and 2.6, SPS Agreement, Arts.3.2 and 5.

labour regulation to manipulate competitiveness on world markets. However, an alternative to either deregulation or international standardisation as a response to economic spillovers is for importing countries to put up trade barriers to imports of cheaper products produced to lower environmental or labour standards. The emphasis upon international standards in the WTO can thus be understood as a response to the increased chances of protectionist trade barriers (incompatible with the WTO disciplines) resulting from economic spillovers. In short, it is more likely to be motivated by a concern to "harmonise" standards so as to reduce economic spillovers than by a concern to reduce economic spillovers so as to increase standards of environmental or worker protection.

### *4. The need for flexibility in international standards*

Whenever international action is a response to (or influenced by) economic spillovers, it is vital to consider whether the level of protection set by international norms is appropriate, and the circumstances in which countries should be able, for non-economic (social or environmental) or economic reasons, to adopt different standards. Moreover, some issues are inappropriate subjects for mandatory global harmonisation (bathing water quality standards, for example).

There are good workers' rights and environmental protection grounds for developing international measures in response to the threat of a downward spiral. But it is vital to consider whether the standards of protection required by such measures are such that all countries are able to comply. Technical and/or financial assistance should in appropriate cases be made available to assist countries (particularly developing countries) to maintain labour and environmental standards *at least* at internationally set minimum levels.

A social and environmental perspective on harmonisation (i.e. international measures whose main focus is upon the reduction of economic spillovers) also demands flexibility in the "ceilings" of harmonised standards: subject to a balancing exercise between protection and trade effects, countries should be encouraged to adopt stricter (more protective) standards whenever feasible. This is not contentious in the labour context (yet) but is of concern in the trade and environment debate.

Restraint should be exercised in imposing penalties for non-compliance with mandatory international standards where countries face difficulties that do not stem simply from a desire to maintain a competitive edge. This issue is highly relevant for the social clause debate.

Article 19(3) of the ILO Constitution recognises that a combination of economic and non-economic considerations may mandate flexibility in the text of its conventions and recommendations. In framing conventions

and recommendations, due regard is to be had to countries in which climatic conditions, imperfect development of industrial organisation or other special circumstances make industrial conditions substantially different. And it is important to note that, in contrast with the agreements contained in the Final Act, ILO conventions have been ratified one by one, not as a package.[100]

Article XI:2 of the WTO Agreement recognises the need for flexibility in the application of WTO commitments—but for rather more limited reasons.[101] And the ability of the TBT and SPS Agreements to support the kind of flexibility that is mandated by environmental policy concerns (including the precautionary principle) may be questioned,[102] particularly given restrictions placed on the introduction of stricter measures than those of relevant international standards.

### 5. *Distinguishing between protection and protectionism*

Finally, in considering the relevance of economic spillovers to environmental and labour issues in the WTO, it is important to raise the difficulty of distinguishing between legitimate protection and protectionism. Critics of both environmental and labour-related justifications for reform of the WTO are concerned that the WTO disciplines could be hijacked by protectionist concerns.

For example, in the trade and labour debate the perception that low wages in developing countries threaten countries with high wage levels is a major source of fears that motivations for a social clause, and for unilateral trade restrictions apparently pursuing human rights goals, could be protectionist. There are also suspicions that a social clause may provide foundations for the implementation of a global minimum wage—potentially depriving less developed countries of a major factor of comparative advantage. Government advocates of a social clause are anxious to avoid any suggestion that this is the case.[103]

The "global minimum wage" controversy is related to the problems of unemployment[104] in a rapidly changing economic and technological cli-

100. Although, in the case of complaints alleging infringement of trade union rights related to freedom of association, ILO supervisory procedures may be invoked regardless of whether or not the relevant conventions have been ratified by the member concerned.

101. It provides: "The least-developed countries recognised as such by the United Nations will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capacities."

102. E.g. Ward, "Trade and Environment in the Round—and After" (1994) 6 J.E.L. 263, 281–286.

103. E.g. the comments of the US government delegate in the ILO working party on the Social Dimensions of the Liberalisation of International Trade, ILO Doc.GB.261/WP/SDL/RP, Nov. 1994, pp.37–38.

104. See generally Emmerij, "The Employment Problem and the International Economy" (1994) 133 I.L.R. 449.

mate.[105] Martin Khor has expressly used the developed world's concern for unemployment, and in particular the "jobless growth" phenomenon,[106] as a source of arguments against the incorporation of any social clause in the WTO.[107] He suggests that developed country support for a social clause reflects a search for politically popular responses to, and explanations for, the developed world's own unemployment problems.

In the social clause debate, distinguishing between protection and protectionism poses institutional and processual challenges. The task is to devise a clause whose processes make a clear statement that the incorporation of labour concerns within the WTO has no protectionist motivations, and that it cannot be appropriated for the pursuit of protectionist goals. The enforcement mechanism for any social clause will be especially important here.

In the trade and environment debate, concerns about protectionism arise principally out of a fear that a "greened" WTO might permit (or more properly fail to censure) protectionist trade barriers erected outside the WTO's disciplines and masquerading as environmental protection measures.[108] A parallel concern would also arise in the trade and labour context if serious debate emerged about the normative justifications for unilateral trade restrictions imposed to pursue labour-related human rights goals.

The challenge here is to revise or apply WTO disciplines in such a way that the WTO is able to distinguish between "legitimate" protection and protectionism, or at the very least to balance trade barriers against environmental or labour benefits (that is, to apply a proportionality test). This exercise is already mandated by a number of provisions in the Final Act.[109]

105. For a general introduction see Frances Cairncross, "Workshop of the World?", *Analysis*, BBC Radio 4, 8 July 1993 (transcript on file with the author).

106. That is, economic growth or increased productivity that is not accompanied by higher rates of employment.

107. Khor, *Why GATT and the WTO Should not Deal with Labour Standards*, Third World Network, Apr. 1994.

108. Although there is also awareness in the environmental community of the dangers of the "environmentalism threatens jobs" argument. E.g. Friends of the Earth in the US has produced a document entitled *Sustainable Development and Employment Act of 1995: A Working Draft of Model Legislation to Promote Full Employment in an Environmentally Sustainable Economy* (on file with the author).

109. E.g. TBT Agreement, Art.2.2 and SPS Agreement, Art.5.6. So far, these agreements have not been analysed for their ability to support effective labour policy. Labelling schemes that include criteria relating to labour practices during the production of imported products, and possibly also regulations that relate to the impact of overseas production methods on the health of workers, could be subject to scrutiny within the TBT and SPS Agreements. The "necessity" test in GATT Art.XX(b) is also relevant in distinguishing between protection and protectionism. For an account of proportionality and necessity in the GATT, see Charnovitz, "GATT and the Environment—Examining the Issues" (1992) 4(3) Int. Env. Affairs 203. The CAFE panel's interpretation of Art.III:4 also evidenced a concern to distinguish between environmental protection and protectionism.

### D. Psychological Spillovers

In the environmental context, psychological spillovers involve "either a threat to something whose continued existence is important to significant numbers of people worldwide ... or allegations of cruelty to animals".[110] The threat may itself be the product of an economic spillover.

Some responses to environmental issues affecting the global commons are best understood as responses to psychological rather than physical spillovers. Many conservation conventions can be understood as responses to psychological spillovers, as can the concept of "common heritage of mankind", often associated with protection of the global commons.[111] CITES is one example of an international response to psychological spillovers that makes use of trade instruments.

The concept of a psychological spillover can also be helpfully extended to broader concerns about morality, values and human rights. Many international labour agreements can then be understood as responses to psychological spillovers (rather than non-economically motivated responses to economic spillovers).

Values are relevant considerations when consumers draw distinctions between products. For example, as individuals, we intuitively appreciate the difference between tuna whose production involved the death of dolphins and tuna whose production did not have that side-effect.[112] A critical question is the extent to which these differences should be relevant in determining the legitimacy of State-imposed trade barriers.[113] What kinds of values or morals should be relevant? Should it be permissible for States to respond to psychological spillovers with trade barriers when the spillover has only a national or regional effect? Indeed, in what circumstances should universally felt spillovers justify the use of trade restrictions as a unilateral, or even multilateral, response?[114] These questions are relevant to value-based trade restrictions on production and processing methods,

110. Blackhurst and Subramanian, *op. cit. supra* n.79.

111. E.g. as employed in the 1982 UN Convention on the Law of the Sea, Arts.136 and 137 (extracts in Sands *et al.*, *op. cit. supra* n.19, at p.356). In treaties that do not deal with the global commons the term "common concern of humankind" is preferred. See e.g. the Preamble to the Convention on Biological Diversity, in Sands *et al.*, *idem*, p.845.

112. Thus it can be argued that some unilateral trade restrictions support effective implementation of domestic consumer policy goals in relation to labour and the environment.

113. McGee, "The Moral Case for Free Trade" (1995) 29 J.W.T. 69 argues that any kind of trade restriction is morally wrong because it violates rights—specifically the rights of adults to buy "what they want from whomever they want at whatever price they can agree upon". For McGee the right of an individual not to be forced to labour has the same importance as the right of a consumer to shop.

114. See further *Barcelona Traction* I.C.J. Rep. 1970, 3, paras.33–34, where the ICJ identified certain human rights creating obligations *erga omnes*. All States have a legal interest in the protection of these rights. The question that arises is the extent to which it should be permissible for States unilaterally to impose trade restrictions to express this legal interest.

and to the use of trade restrictions to enforce international labour agreements.

Multilaterally mandated trade restrictions whose effect is to control trade in products that are of concern as a result of psychological spillovers may be justified (as in CITES).[115] However, the social clause debate raises a different issue: namely, whether there is a role for the use of trade restrictions as a multilateral *enforcement* tool to respond to psychological spillovers of genuinely international concern. This itself begs the question: Which psychological spillovers *are* of genuinely international concern? Human rights theory is perhaps a useful starting point in providing answers to this question, although, as will be seen shortly, there is currently little consensus on what criteria should determine the scope of any social clause. Moreover, the rise of various forms of relativism (e.g. religious or cultural relativism) could potentially threaten the credibility of even justifications grounded in notions of universal human rights.[116]

Sovereignty arguments and concerns for neo-colonialism by developed countries are an effective counterweight to justifications of unilateralism that are grounded exclusively in national value-led considerations. Where production and processing methods are objectionable to importing countries for moral reasons, because of psychological or economic spillovers that are unconnected with physical spillovers, unilateral trade restrictions should be avoided. This is not to say that there is no scope whatsoever for such use of unilateral trade restrictions but, rather, that extreme care should be taken in identifying and clarifying the philosophical basis of any legal framework that permits them. Again, human rights theory potentially provides one such basis, although it is of limited explanatory scope in relation to unilateral environmental production and processing method-based trade restrictions.

There may be a role for unilateral trade restrictions in relation to protection of endangered species, where the trade restriction is a means to prompt international responses within existing treaty frameworks that link international trade and conservation. Interestingly, this possibility is also recognised, in limited circumstances, by the US Council for International Business.[117]

### *E. A Note on Voluntary Initiatives*

Concerns for the protection of territorial sovereignty do not provide an effective objection to voluntary non-governmental initiatives with trade

115. Although even with CITES doubts are periodically raised about the appropriateness of trade restrictions.

116. See further De la Cruz, "International Labour Law: Renewal or Decline?" (1994) Int. J. Comp. Labour Law and Industrial Relations (Autumn) 201, 217.

117. *Constraints on the Unilateral Use of Trade Measures to Enforce Environmental Policies*, 8 Apr. 1994.

effects; even those that are responses to exclusively domestic consumer values. The phenomenon of globalisation has led to increased examination of the role of businesses, particularly multinational enterprises, as actors in the global marketplace.[118] Already, some multinational enterprises have implemented globally applicable codes of conduct and sourcing guidelines that contain environmental and labour-related ethical standards.[119]

Labour and environment concerns can also be linked with international trade through voluntary labelling schemes. One example is Rugmark,[120] a labelling scheme for exports of Indian carpets. The European Union's Eco-labelling Regulation[121] provides another example.

When governments become involved in promoting voluntary initiatives, the potential arises for conflicts with the TBT Agreement.[122] Suggestions have even been made that consideration be given to the development of some form of code of conduct applicable to voluntary, non-governmental, eco-labelling schemes and administered through the WTO.[123] Labour advocates should keep a careful watch on developments in this area given the potential for their export to labour- or human rights-related labelling schemes.[124]

118. In this regard see the OECD Declaration of 21 June 1976 on International Investment and Multinational Enterprises, as revised, and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 1977. These codes can themselves be seen as encouraging convergence through voluntary action.

119. See e.g. Pennartz, "Looking for Alternatives and Additional Tools: Focus on Transnational Companies and Their Own 'Codes of Conduct': An Instrument for Better Working and Living Conditions for Workers in the North and the South?", contribution to IRENE workshop, Brussels, 1 and 2 Dec. 1994 (on file with the author), and "Human Rights", *The Economist*, 3 June 1995. The UK company B&Q applies environmental global sourcing guidelines. Ideally, sourcing guidelines should be developed through processes in which workers and individuals as well as businesses are accorded a meaningful role.

120. For a background, see Christian Aid, *Pulling the Rug on Poverty: Child Workers in the Indian Carpet Industry* (Nov. 1994).

121. (1992) O.J. L99/1 (11 Apr.).

122. The TBT Agreement applies to technical regulations and standards. In respect of standards (compliance with which is not mandatory and which, for the purposes of the Agreement are produced by "recognised" bodies), Art.4 provides that members "shall take such reasonable measures as may be available to them to ensure that ... non-governmental standardising bodies within their territories ... accept and comply with" the Code of Good Practice for the Preparation, Adoption and Application of Standards in Annex 3 to the Agreement. See also Tietje, "Voluntary Eco-Labelling Programmes and Questions of State Responsibility in the WTO/GATT Legal System" (1995) 29 J.W.T. 123, and *Free Traders Put Pressure on EC Eco-Labelling Scheme*, ENDS Report 237, Oct. 1994.

123. See e.g. European Commission, Communication to the Council and to the Parliament on Trade and Environment, 28 Feb. 1996, p.15, which calls for the development of a WTO transparency regime applicable to both governmental and non-governmental schemes.

124. Dawkins, "Ecolabelling: Consumers' Right to Know or Restrictive Business Practice", Review Draft, Sept. 1995 (on file with the author) recommends that eco-labelling schemes broaden their scope to include social criteria.

Finally, it should be noted that certain kinds of voluntary non-State initiatives could potentially be reviewed within any new comprehensive WTO competition regime. Developments in this regard should be monitored closely in the light of their ability to support effective environment and labour policy.

## VIII. THE SOCIAL CLAUSE

### *A. Which Standards?*

Bonded labour, grossly exploitative child labour and persecution of trade unionists persist today.[125] Disregard for workers' rights is by no means limited to the developing world.[126]

A social clause would link membership of the WTO with respect for certain minimum labour standards, providing, ultimately, for the imposition of trade barriers against non-complying members.

Almost without exception, the standards included in current social clause proposals[127] are inspired by ILO conventions.[128] The effect of the social clause, if it incorporated relevant conventions directly, would be to make compliance with them compulsory, adding trade sanctions imposed through the WTO to existing ILO compliance processes.

The ILO is now home to some 175 conventions and recommendations.[129] There is no consensus on what criteria should determine which conventions to include in a social clause.[130] From a social perspective, economic motivations unrelated to social concerns should not be permitted a role. Neither should justifications related simply to enhancing the

125. See e.g. ILO, *World Labour Report 1992–1993*, and ILO Governing Body, *Record Number of Cases of Violation of Freedom of Association*, ILO Press Release, 19 Oct. 1992. For further examples, see *Upfront*, No.10, Autumn 1994, the journal of War on Want, and Christian Aid, *op. cit. supra* n.120.

126. The UK e.g. contravened Convention No.87 on Freedom of Association and Protection of the Right to Organise when it banned trade unions at the intelligence-gathering unit, Government Communications Headquarters (GCHQ). See ILO Governing Body, 234th Report of the Committee on Freedom of Association, 1984, Case No.1261.

127. A selection of contemporary proposals can be found in: European Parliament Resolution on the introduction of a social clause in the unilateral and multilateral trading system, European Parliament Doc.A3–0007/94, 9 Feb. 1994; Motion for a Resolution on the conclusion of the Uruguay Round and the future activities of the WTO, European Parliament Doc.B4–0464/94, 8 Dec. 1994; *Mémorandum de la Présidence sur la dimension sociale du commerce international*, EU Council Doc.5295/95 SOC 83 COMER 36 GATT 56, Brussels, 22 Mar. 1995; Bell, *GATT and a Social Chapter: Labour's Proposals for the World Trade Organisation*, June 1994 (on file with the author); ICFTU, *The Social Clause: Rationale and Operating Mechanisms* and *International Workers' Rights and Trade: The Need for Dialogue*, Sept. 1994; International Metalworkers' Federation, *Trade and Workers' Rights: Time for a Link*, IMF, 1988.

128. One exception is *Trade, the Environment and Development*, *supra* n.13.

129. For the texts see Blanplain (Ed.), *International Encyclopedia for Labour Law and Industrial Relations*.

130. Van Liemt, *op. cit. supra* n.27, at p.437, surveys eight different proposals for a social clause. All eight refer to Conventions 87, 98 and 138.

effectiveness of relevant ILO conventions if the social clause is to be incorporated within the WTO (a trade liberalisation framework).

In practice, a mixture of practical considerations (such as the number of ratifications of relevant conventions) and human rights-based considerations have been offered.[131] For example, in a sophisticated approach the Netherlands National Advisory Council on Development Cooperation used a combination of social, legal and economic criteria in determining which standards to include in its proposals.[132] The ICFTU proposal refers to ILO standards that are among the most widely ratified, and "principles that governments of all countries regardless of their stage of development should legitimately be expected to observe".[133]

The most appropriate justifications for a social clause within the WTO derive from an approach in which it is seen as part of a broader endeavour to make trade liberalisation supportive of social justice. Then the social clause responds to the question: What (if any) basic conditions, protectable through workers' rights, need to exist if the possibility of social progress resulting from the liberalisation of international trade is to be guaranteed?[134] Considering this issue, an ILO document produced for the Working Party on the Social Dimensions of the Liberalisation of World Trade concluded that "the liberalisation of trade appears naturally and logically to call at the very least for recognition in the social field of conditions enabling workers to negotiate freely, both individually and collectively, their conditions of work".[135]

From domestic workplace democracy other labour standards can follow. From this perspective ILO conventions relating to freedom of association, the right to organise and collective bargaining (Nos.11, 87 and 98), prohibition of forced labour (Nos.29 and 105) and, more controversially, child labour protection (e.g. Nos.5, 10, 59, 90 and 138) become relevant to a social clause.[136] These conventions are sometimes known as "core" conventions.[137] Even here, however, there is some variation among commen-

131. *Ibid.*

132. Discussed in FNV and INZET, *op. cit. supra* n.13, at pp.19–22. The economic criteria do not relate to notions of "dumping" but to development concerns: namely the extent to which the application of a particular convention affects the competitive position of developing countries.

133. ICFTU, *The Social Clause*, *supra* n.127.

134. ILO report, *supra* n.88, at para.24, takes a similar approach. If this question is taken as a starting point the effects that trade liberalisation itself has on social progress can be downplayed. Therefore, it should be accompanied by social impact assessment of trade liberalisation. This already falls within the ILO's mandate. See the Philadelphia Declaration, *supra* n.94, at s.II.

135. ILO report, *supra* n.88, at para.28.

136. *Idem*, para.29.

137. This draws on the analysis in OECD, *op. cit. supra* n.84, at Part I, which not only identifies a number of "core" conventions, but also sets out 14 categories into which the ILO groups existing conventions, concluding that "a hierarchy can be discerned among these Conventions, even though the ILO does not make one". "First-level" conventions, accord-

tators when enumerating the "core" conventions. For example, conventions relating to non-discrimination (e.g. No.111) and even health and safety at work (e.g. No.155) have also been described as "core" on occasion.[138]

It is interesting to note that, quite apart from the concept of "core" conventions, the ILO itself maintains a distinct (although overlapping) category of "basic human rights conventions". Those listed in an International Labour Conference resolution in 1994 were Nos.87 and 98 on freedom of association, Nos.29 and 105 on forced labour, and Nos.100 and 111 on discrimination.[139] If the notion of "basic human rights conventions", as expressed in that resolution, were to provide the basis for the social clause, child labour conventions would be excluded.

There is currently no clear conceptual and philosophical foundation for the selection of particular social clause principles or ILO conventions. As will be seen, this lack of clarity also spills over into the operating mechanisms that are currently being suggested for the social clause. This is regrettable: there should not be a mismatch between the justifications proffered for a social clause and its operative processes.

### *B. Trade Measures as an Enforcement Tool*

Understanding the social clause as a response to the question "What minimum conditions need to exist if social progress is to result from trade liberalisation?" can have far-reaching consequences. If the pursuit of sustainable development were an objective of trade liberalisation and hence of the WTO, members not complying with minimum standards contained in a social clause would be participating in the world trade liberalisation framework as free riders. Consequently, curtailing the access of such government members to the benefits of participation in the system could begin to be justified.[140]

Failure to comply with the standards set out in a social clause would ultimately lead to the imposition of trade-related sanctions, or even *de facto* withdrawal of rights under the WTO. For example, an ICFTU proposal for a social clause provides that:[141]

ing to the report, are those representing minimum norms which should be respected by all, and whose implementation does not rely on other conventions. Second-level conventions establish rules that help improve working conditions, minimum wages, social benefits and workers' participation in the determination of their labour conditions.

138. *Idem*, para.8.

139. See ILO, *Standard-Setting Policy: The Promotion of Basic Human Rights Conventions*, GB.262/LILS/4, Mar.–Apr. 1995.

140. Seeing trade liberalisation in this light could also mean that in extreme cases persistent offenders could be expelled from the WTO. Even multilaterally controlled economic sanctions are preferable.

141. ICFTU, *International Workers' Rights*, *supra* n.127. In *The Social Clause*, *supra* n.127, ICFTU suggests that trade sanctions "should probably be increased tariffs".

> In examining trade measures the WTO should examine a range of options which could be escalated over time if the government continued to fail to meet its obligations. A first step might be to suspend the countries' right of access to the WTO's new binding rules for dispute resolution. Other options might include the application of tariffs on exports from the country concerned. These could be gradually increased until they reached a penalty level.

The ILO already has an elaborate, tripartite supervision procedure for its conventions.[142] But the ILO works through persuasion, and serious doubts have been raised about its competence to impose trade restrictions or use coercion to achieve its goals.[143] In contrast, the teeth of the WTO's disciplines are found in the Final Act's Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU). The emphasis of the WTO's dispute-settlement system is upon conciliation and negotiation, not apportionment of blame and punishment.[144] Nevertheless, a party whose complaint has been upheld is ultimately permitted to seek authorisation to withdraw trade concessions from the other party temporarily and discriminatorily, or to be granted compensation; in either case, equivalent to the level of nullification or impairment of GATT benefits that has resulted from the GATT-incompatible measure.[145]

Such evidence as exists about the effectiveness of trade sanctions in achieving social goals is at best inconclusive.[146] It is by no means certain that erecting trade barriers would help countries to raise their labour standards or improve the lot of workers.[147]

142. For an excellent summary see Van Liemt, *The Multilateral Social Clause in 1994*, ICDA Draft Discussion Paper, Aug. 1994, p.2. For an account of the advantages and shortcomings of the ILO processes see Landy, *op. cit. supra* n.92.

143. Art.19(3) of the ILO constitution is cited to support this. See para.6.1, Delhi Declaration, Fifth Conference of Labour Ministers of Non-Aligned and Other Developing Countries, New Delhi, 19–23 Jan. 1995. The Report of the Director-General to the 81st session of the International Labour Conference in 1994, *Defending Values, Promoting Change*, states that one of the premises upon which the ILO is based in reliance upon co-operation rather than coercion in its efforts to promote social progress (p.58). However, practice apart, Art.33 of the ILO's constitution could provide a theoretical basis for the imposition of trade sanctions in the event of a member failing to carry out recommendations specified in the report of a commission of inquiry or a decision of the ICJ. This is supported by Landy, *idem*, p.179, although he raises the question of whether sanctions should be authorised through the UN Security Council.

144. E.g. DSU, Arts.3, 4 and 5.

145. *Idem*, Art.22.

146. See generally Daoudi and Dajani, *Economic Sanctions* (1983); Alston, "International Trade as an Instrument of Positive Human Rights Policy" (1982) 4 H.R.Q. 155, 168; Kohona, *The Regulation of International Economic Relations Through Law* (1985), chap.7.

147. See e.g. "Suffer the Little Children's Goods", *The Economist*, 14 Aug. 1993, which argues that if a carpet factory employing children can no longer export, the children may go to work in an industry that doesn't produce internationally traded goods, such as brickmak-

When devising the enforcement mechanism for any social clause it is vital to distinguish between social and economic motivations for its inclusion within the WTO.[148] This is difficult, since responses to economic spillovers can be justified on social grounds.

It is essential that a social clause should not be seen primarily as a means for the imposition of trade barriers. Non-implementation or enforcement of ILO conventions does not stem simply from a desire to exploit workers in order to obtain competitive advantage.[149] Rightly, the ICFTU[150] suggests a graduated compliance mechanism, incorporating provision for technical assistance.

If the motivations for a social clause are non-economic, relating to the truly international, even universal, nature of the psychological spillovers with which it deals, its inclusion in a multilateral framework suggests that sanctions should be collectively authorised and applied. The "injury" caused by non-compliance in such circumstances is suffered by the entire international community.[151]

If the motivations for the social clause are economic, it becomes more justifiable for sanctions to be multilaterally authorised, but unilaterally applied,[152] and their intensity determined according to economic criteria. Whenever economic criteria (such as levels of "nullification or impairment of benefits", in the DSU) determine the level of sanctions, there is a danger that the social clause could be open to protectionist abuse. This is of particular concern if the level of increased tariffs is set through a notional cost equalisation exercise (like countervailing duties).

There is also difficulty in determining which products should be the target of increased tariffs. It might appear legitimate to target economic sanctions at products from industries in which non-compliance was a particular problem,[153] so that the threat of sanctions could act as an additional incentive to businesses to comply with ILO conventions once implemented. However, the social clause could then be seen as a step

ing, begging or prostitution. See also *The Economist*, *supra* n.119, and Khor, *op. cit. supra* n.107.

148. See further Berthelot, "Covert and Overt Reasons for a Social Clause" (1995) 2 I.C.D.A. J.

149. Landy, *op. cit. supra* n.92.

150. ICFTU, *The Social Clause*, *supra* n.127.

151. See e.g. *The Social Dimensions of International Trade: Joint Statement by World Trade Union Confederations*, ICFTU, WCL and ETUC, Feb. 1994, which envisages increased tariffs levied by all WTO members.

152. See e.g. Servais, *op. cit. supra* n.27, at pp.431–432, who talks of the consequences of exploitation of labour in exporting industries for "certain industries in an importing country". Servais suggests a mediation and joint investigation procedure for dealing with disputes, and that, as a last resort, "the parties would be free to take whatever unilateral economic measures they considered appropriate".

153. A Misereor Discussion Paper, *Social Clauses in International Trade Law*, 1994 (on file with the author) suggests that trade sanctions be linked to specific products, arguing that this could limit the danger of protectionist misuse of social clauses.

towards direct applicability of ILO conventions. This is a tremendously problematic idea.[154]

In the DSU the imposition of non-tariff trade barriers is not contemplated as an enforcement mechanism. Thus, use of economic sanctions not related to tariff concessions, or to "compensation" equivalent to the level of injury caused by a notional nullification or impairment of benefits, is institutionally problematic for the WTO. Yet the idea of "injury" as determinative of the intensity of economic sanctions is also problematic, if the social clause is understood as a response to genuinely international psychological spillovers.

Any social clause should provide mechanisms that are equally effective in the hands of all WTO members. The threat of multilaterally authorised but unilaterally imposed economic sanctions is unlikely to be an effective deterrent to breaches of the social clause by major trading nations. There are difficulties also in ensuring the effectiveness of multilaterally imposed sanctions. Joint sanctions carry greater authority but are less likely to be resorted to, and are also unlikely to be used against major trading nations. States are reluctant to rise above national interests.[155]

### *C. Institutional Co-operation*

If the WTO were to become involved in enforcing minimum labour standards, co-operation between it and the ILO would be essential. Many social clause proposals have given thought to the need for such co-operation. In some cases[156] it would even apply on an ongoing basis when determining which ILO standards should be relevant.

The ILO is unique among international organisations; one of its fundamental principles is tripartism.[157] Representatives of workers and employers participate alongside government representatives in its processes. In contrast, the WTO is an exclusively intergovernmental club. The WTO should not be the institutional forum for decision-making in relation to any social clause unless, like the ILO, it opens its doors to employers and workers. And the international trade system's history of relative isolation from the UN system suggests that caution may be warranted from another perspective: it could prove difficult to establish appropriate links between the WTO and the ILO in the administration of any social clause in the absence of more far-reaching changes to the WTO's relationship with the UN.

154. See further *Defending Values*, *supra* n.143, at p.63.
155. Daoudi and Dajani, *op. cit. supra* n.146, at p.166.
156. See ICFTU, *The Social Clause*, *supra* n.127.
157. *Supra* n.94, at Art.3.

### *D. An Alternative: Trade-Related International Labour Agreements*

Even if the objective of trade liberalisation is sustainable development, the WTO should not be the institutional setting for the imposition of trade barriers in response to abuses of workers' rights during the production of goods that are not internationally traded: the WTO is a trade liberalisation framework, not an economic growth framework as such. If the objective of the social clause is to ensure that implementation of minimum workers' rights accompanies trade liberalisation, this is not of itself an objection to its inclusion within the WTO. But if the central concern of the social clause is to provide a mechanism for progressing towards social justice, it is anomalous that links should be established only to labour standards applied to products in international trade.[158]

Broader links between trade tools and labour rights could be made *outside* the WTO, and their authority recognised within it. So long as the objective of trade liberalisation were understood to be sustainable development, the incorporation of further exceptions to the most favoured nation clause need not weaken the WTO as an institution.

Rather than considering the use of economic sanctions as an enforcement mechanism, the potential for trade tools to be used as an integral part of multilateral agreements for the protection of workers' rights could be considered further. For the WTO, the focus of the social clause debate would then change. The main issue would become: How should the WTO go about ensuring that its disciplines do not hamper the effective use of trade policy instruments in international agreements to pursue social goals? The social clause debate would then become more like the trade and environment debate.

Multilateral environmental agreements combining trade and environment policy tools could be considered as a model for integrating trade and labour concerns in pursuit of sustainable development.[159] It would be preferable for such agreements to be negotiated within the ILO.[160]

158. See e.g. Edgren, "Fair Labour Standards and Trade Liberalisation" (1979) 118 I.L.R. 523, who points out that the most blatant cases of exploitation and deprivation are usually found in plantations and mines, construction industries and small service firms working entirely for the domestic market.

159. An alternative integrative approach, that sees a role for trade restrictive actions "only as a last resort", is set out in de Castro, *Trade and Labour Standards: Using the Wrong Instruments for the Right Cause*, UNCTAD Discussion Paper No.99, May 1995. De Castro advocates the negotiation of a new global convention on core labour standards of universal value. He sees in global conventions on environmental problems, such as the Biodiversity Convention, examples of how "the sharing of moral concerns on a global scale can be dealt with through a convention encouraging appropriate sharing of the burden to find solutions within a development context".

160. See further *Defending Values*, *supra* n.143, at p.62, where it is suggested that an incentive to ratify a new convention within the ILO would be the pledge of ratifying States not to resort to unilateral trade restrictions. This is cynical indeed when the WTO exists in large measure precisely to prevent protectionist use of unilateral trade restrictions.

The challenge should not be understated. It is to devise a new structure with sufficient incentives to encourage participation; administrative and institutional arrangements that are able to deal with the complexities of administering value- or human rights-based production and processing method distinctions without interfering with sovereignty; and a sufficiently large membership to justify the application of trade restrictions within the ILO and the implementation of appropriate exceptions within the WTO. Obtaining sufficient political will to engage in such a negotiation process would not be an easy task.

Given such will, the Montreal Protocol might be considered as a precedent. It has already been cited as a model in the ILO's work.[161] The combination of positive incentives and trade policy tools in the Montreal Protocol has helped to ensure its success. In principle, it is a model that might be considered in relation both to internationally and domestically consumed products.

Other multilateral environmental agreements that make use of trade provisions provide less appropriate precedents. CITES operates through a system of export permits and import controls. It is a trade convention with conservation objectives. Its objectives are to protect endangered flora and fauna from over-exploitation through international trade.

CITES might appear to provide a model for a convention designed to prevent, for example, the exploitation of child workers in export industries. Its limitations as a model lie principally in its focus upon international trade (it could not protect child workers in domestic industries) and in the intensity of the administrative structures and inspection procedures that accompany its implementation. Products made from endangered species are more readily identifiable (and certifiable) than products produced with child labour.[162]

In the search for appropriate multilateral uses of trade policy instruments in the labour context, care should be taken in relying too generally on trade-related multilateral environmental agreements as precedents. In some cases, the use of trade policy instruments in such agreements flows directly from concerns not transferable to the labour context, notably those related to physical spillovers and protection of the global commons.[163] Whilst the dogma that human rights and trade policy should not

161. ILO report, *supra* n.88, at p.12. The report cites one advantage of such an approach as its multilateral nature, but refers also to its "complexity and uncertainties", stating that "this type of solution would not enable any trade measures undertaken to be applied in a strictly uniform and multilateral manner".

162. The difficulties of establishing verification and certification systems in relation to non-product-related production and processing methods have been considered in the trade and environment context. See *Report on Trade and Environment*, *supra* n.58, at paras.63–65. The difficulties in the trade and labour context may be even greater.

163. E.g. Charnovitz (1994), *op. cit. supra* n.14, at p.23, points out that whilst the failure of a

be mixed is well established,[164] and challenged by the social clause and trade and labour debates, the claim that trade policy and environmental policy should not be entangled is demonstrably inappropriate in some cases.

### *E. A Social Clause for the Environment?*

Most proponents of a social clause would relate it only to ILO conventions, not to a broader range of human rights. The reasons may be institutional (the ILO is searching for new tools with which to enhance the effectiveness of its conventions) and trade related (breaches of workers' rights are more easily linked with international trade than other human rights abuses, and, therefore, more appropriately linked with trade policy tools).

Nevertheless, environmentalists might gain useful insights into the links between international trade and environmental protection by asking a parallel question to that posed in relation to the social clause: What conditions (protectable through environmental rights) are a prerequisite if trade liberalisation is to support sustainable development? Rights of access to information about the environment, and of participation in decision-making structures are inextricably linked with sustainable development. These rights promote democracy at national level.[165] They help to provide conditions that allow all those with an interest in environmental issues to devise and implement environmental policies in pursuit of sustainable development.

Environmental democratic rights can be understood as the environmental equivalent of the ILO's "core" standards. A recent report on human rights and the environment, prepared for the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the UN Commission on Human Rights, sets out draft principles on human rights and the environment.[166] They include:

(1) the right to associate freely for the purposes of protecting the environment;[167]
(2) the right to information concerning the environment;[168] and

nation to cease production of CFCs can make it difficult for other nations to reach their own environmental goals, the failure of a nation to outlaw child labour does not prevent other nations from doing so. Economic spillovers and the threat of a "downward spiral" do not appear to be taken into consideration in this argument.

164. See e.g. Alston, *op. cit. supra* n.146.

165. Cf. Charnovitz (1994), *op. cit. supra* n.14, who argues that labour rights can facilitate democratisation but environmental standards do not, although democratic government may be a prerequisite for attending to the environment.

166. ECOSOC E/CN.4/Sub.2/1994/9, 6 July 1994.

167. *Idem* principle 19.

168. *Idem* principle 15.

(3) the right to participation in planning and decision-making activities and processes that may have an impact on the environment and development.[169]

These principles could provide the basis for a voluntary code, negotiated within the ILO, on workplace environmental rights.[170] This is not to suggest that such a code should be linked with trade-related sanctions, but it is an area that might usefully be considered alongside efforts to ensure that trade liberalisation is supportive of sustainable development.

## IX. ENVIRONMENT AND LABOUR CONDITIONALITY IN THE GATT GENERALISED SYSTEM OF PREFERENCES

AN oft-advocated route to encouraging higher environmental and labour standards is to provide increased market access opportunities to countries with low environmental or labour standards. This argument plays on the dogma that economic growth provides financial resources necessary to achieve higher standards of environmental and labour protection.

The broad notion of "market access" has also been connected with the achievement of environmental and labour goals through links between decision-making affecting access to tariff concessions and environmental and labour considerations.

The GATT's Generalised System of Preferences (GSP) has provided a focus for labour and environment links with tariff concessions. The GSP was established in 1979 in a Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries.[171] It operates as an exception to the most favoured nation clause. Developing countries falling within the GSP are granted additional tariff concessions for their products.

The United States has used the GSP as a tool of negative labour conditionality (that is, by withholding GSP concessions from States that do not comply with certain labour requirements) since 1984.[172] In the Euro-

169. *Idem* principle 18.

170. See also the conclusions of the Report of the Symposium on Workers' Education and the Environment, GB.259/ESP/4/1, ILO, Geneva, Mar. 1994, which notes: "The right of workers to establish and join trade unions, the right to collective bargaining and the right to full participation is essential to effective involvement in environmentally sound development." The conclusions of the symposium also contain a call for workers and their organisations to have certain workplace environmental rights, many of which complement those of the UN Commission on Human Rights draft principles.

171. BISD 25 Supp.203 (1980). See also the Final Act's Decision on Measures in Favour of Least-Developed Countries, *supra* n.2, at p.1248.

172. US Trade and Tariff Act of 1984, Title V. See further "Jakarta Eases Curbs on Workers in Attempt to Avoid US Penalty", *Guardian*, 16 Feb. 1994. The US has also attached labour conditionality to eligibility criteria within the bilateral Caribbean Basin Initiative and in relation to investment insurance provided by the Overseas Private Investment Corporation. See further Charnovitz, *op. cit. supra* n.5, and "US Backs Funds for Green Jobs in Third World", *Financial Times*, 21 Apr. 1994.

pean Community a new Regulation has been concluded, effective from 1 January 1995, for the application of a four-year scheme of generalised tariff preferences.[173] It contains elements of negative labour conditionality combined with labour and environment additionality (that is, the granting of additional tariff preferences to countries that comply with defined environmental and labour standards).

Article 7 of the Regulation contains a special incentive arrangement—in the form of additional preferences. The preferences will apply to qualifying countries, which, *inter alia*, provide proof that they have adopted and apply domestic legal provisions incorporating the substance of certain ILO conventions relating to freedom of association and the right to organise. The level of the preferences and the practical arrangements for their implementation have not been finalised, and are to be proposed in 1997.[174] Special incentive arrangements are to be applied from 1 January 1998.[175]

Parallel arrangements are provided, in relation to the environment, to qualifying countries applying provisions incorporating the substance of the standards laid down by the International Tropical Timber Organisations relating to the sustainable management of forests.[176]

Negative conditionality through temporary withdrawal of tariff preferences may be applied (in accordance with procedures established in the Regulation) to exports of goods made by prison labour and ILO conventions concerning the abolition of forced labour.[177] These parts of the Regulation have been fully effective since 1 January 1995. The history of the GATT Article XX exception on the products of prison labour[178] suggests that it may reflect an economically motivated response to economic spillovers caused by prison labour. A close watch should be kept on the operation of the relevant provisions of the Regulation to ensure that they are not put to protectionist use, and reforms to their procedures suggested if appropriate.

There is some lack of clarity about the compatibility of labour and environment conditionality within the GSP with the GATT.[179] Con-

173. (1994) O.J. L348/1 (31 Dec.).

174. *Idem*, Art.7. Cf. the Commission's draft regulation ((1994) O.J. C333/9 (29 Nov.)), which contained a fully worked system of preferential arrangements, and the European Parliament's amendments ((1994) O.J. C341/243 (5 Dec.)), which sought to extend the special incentive arrangements to other ILO conventions on equal treatment of men and women and to apply them from 1 Jan. 1996.

175. *Supra* n.173, at Arts.7.1 and 8.1.

176. Art.8.

177. Arts.9–14. The first investigation pursuant to these provisions, which relates to alleged forced labour practices in Myanmar, is currently under way. See Notice of Initiation of an Investigation of Forced Labour Practices Being Carried out in Myanmar in View of a Temporary Withdrawal of Benefits from the European Union's Generalised Scheme of Preferences (1996) O.J. C15/3 (20 Jan.).

178. Charnovitz, *op. cit. supra* n.5.

179. Discussions have taken place between the EU Commission and the WTO, as well as

ditionality creates discrimination within a system itself operating as an exception to the most favoured nation clause. Perhaps a "like country" debate could emerge: is a country that tolerates forced labour "like" one that does not, for the purposes of administering the GSP?

A number of non-legal objections can be made to the incorporation of environment and labour conditionalities within the GSP. Access to GSP concessions is unilaterally determined. The "donors" are exclusively developed countries, and the "donees" developing countries. Negative labour and environment conditionality through the GSP is a censuring mechanism available only to developed countries. Even positive GSP conditionality could, unless multilaterally controlled, potentially extend to economically motivated "environment" and "labour" concerns. An extreme example would be the granting of additional preferences to countries that maintained a minimum wage.

Moreover, GSP conditionality can reinforce the suggestion that low environmental and labour standards are essentially a developing country problem. This is not the case. Deregulation is a global phenomenon.

Labour (and much environment) GSP conditionality is essentially extra-jurisdictional in nature. It is open in principle to many of the objections relevant to unilateral production and processing method-based trade restrictions (although certain environmental issues provide critical variables once again). Environment and labour conditionality within the GSP should ultimately be implemented according to multilaterally agreed criteria.[180]

## X. CONCLUSIONS

WHEN the trade and environment, trade and social clause and trade and labour debates are considered within a framework of sustainable development, co-operation is invited between the protagonists in each. There is much to be gained from such co-operation. On the one hand, clear articulation of common interests could strengthen both the environmental and the labour causes. On the other hand, there is a danger that if trade and labour and trade and environment issues are not addressed alongside one another, a lack of clarity about their interrelationship could threaten progress in the trade and environment debate.

with UNCTAD. Source: *ICDA Update on Trade Related Issues*, No.17. Nov. 1994–Feb. 1995, ICDA, Brussels.

180. Abraham Katz, of the US Council for International Business, has made a similar suggestion in relation to labour standards. See the minutes of the ILO working party, *supra* n.103, at p.17.

The onus is upon both environment and labour advocates to demonstrate that "trade and labour" does not constitute proof that "trade and environment" is a slippery slope to renewed protectionism and dangerous overloading of the WTO. Demonstrating this could be to the benefit of progress in both debates.

Conceptual distinctions between the debates affect the range of legal arguments that are relevant in seeking to reform the WTO. This is especially the case when considering the normative permissibility of unilateral trade restrictions to pursue environmental and labour goals. There are environmental arguments in favour of using unilateral trade restrictions to respond to physical and psychological spillovers in certain, limited, circumstances: particularly in relation to transboundary environmental damage affecting importing States, global commons issues and endangered species.

The arguments in favour of using unilateral trade restrictions to respond to labour- and environment-related economic spillovers, and to labour-related psychological spillovers and many environment-related psychological spillovers, are less convincing. Environmentalists should avoid justifying unilateral trade restrictions on grounds that could be extended to the labour context (so as to permit unilateral trade restrictions on imports of products produced under poor working conditions) unless that is what is intended.

Few environmentalists advocate protectionism. Yet domestic employment concerns related to economic spillovers can lead to protectionist arguments—even among trade unionists. Thus, environment and labour arguments for unilateral trade restrictions, whether as responses to economic or psychological spillovers, can be complementary only if workers in importing countries uphold solidarity with workers in exporting countries maintaining low labour standards.

Comparing the trade and environment debate with the social clause debate, it is striking that no single international environmental organisation has the same status in relation to environmental protection as the ILO in relation to worker protection. The social clause debate offers valuable insights to those concerned with enhancing the effectiveness of international organisations with environmental responsibilities.

At one level, a social clause is a means of promoting compliance with conventions negotiated and enforced through an international organisation that is uncomfortable with the idea of using coercion. At another it can be understood as a mechanism for ensuring that implementation of certain workers' rights accompanies trade liberalisation. Institutional deficits currently make the WTO an inappropriate site for a social clause. In any event, unless efforts at attaining some degree of conceptual clarity in the justifications for a social clause within the WTO were to be discarded as irrelevant, a social clause could be used only to respond to

abuses of workers' rights that could be linked with internationally traded goods.

There has been no suggestion of attaching trade sanctions to the enforcement mechanism of any international environmental agreement[181] or environmentally relevant human rights—much less linking them directly with the WTO. However, there has been considerable discussion of the use of trade tools within international environmental agreements. Multilateral environmental agreements that make use of trade restrictions in the pursuit of their goals could be studied further as a model in the social clause debate—particularly those like the Montreal Protocol that contain substantial positive incentives for ongoing co-operation. Whether the ILO is institutionally capable of responding to a call to host such agreements remains to be seen.

Care should be taken that effective responses to environmental policy concerns not transferable to the labour context are not jeopardised by opposition to the further development of links between trade, environment and labour in international agreements. There is a major difference between trade policy instruments used as instruments of coercion and those forming an integral part of international agreements pursuing environmental and labour goals.

There is room for co-operation in institutional reform of the WTO—in both its dispute-settlement and decision-making processes. Both environmentalists and workers are concerned with promoting democracy at national and international level. And there is a more fundamental shared concern—to ensure that legitimate concerns for worker and environmental protection are not obscured by pure economic protectionism.

The outcome of neither the social clause debate nor the trade and environment debate is clear. There are significant differences between them. But in the search for institutions, processes and legal structures that allow the most effective tools to be adopted in pursuit of sustainable development, environmentalists and workers share a common goal.

181. Although the Montreal Protocol's non-confrontational non-compliance procedure gets close. The working group responsible for drawing up the non-compliance regime prepared an indicative list of measures that might be taken by a meeting of the parties in respect of non-compliance with the Protocol, which includes a reference to "[s]uspension, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, of specific rights and privileges under the Protocol, whether or not subject to time limits, including those concerned with ... trade": reproduced in Sands *et al.*, *op. cit. supra* n.19, at p.244. However, the non-compliance procedure itself is silent on the question of enforcement mechanisms.