

CHAPTER 19

TRADE AND LABOUR

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The Members recognize that the avoidance of unemployment or underemployment, through the achievement and maintenance in each country of useful employment opportunities for those able and willing to work and of a large and steadily growing volume of production and effective demand for goods and services, is not of domestic concern alone, but is also a necessary condition for the achievement of the general purpose and the objectives set forth in Article 1, including the expansion of international trade, and thus for the well-being of all other countries.

Article 1 of the Havana Charter for an International Trade Organization, signed at the conclusion of the United Nations Conference on Trade and Employment, Havana, Cuba, 24 March 1948

I. INTRODUCTION

JUST a short while ago the WTO Secretariat was rediscovering old wall paintings dating back to the days when the building was occupied by the International Labour Organization (ILO) Secretariat between 1927 and 1975. When the GATT took over part of the building in 1976,¹ several of those paintings glorifying the respect of work and the need for social justice were simply taken down or covered over—possibly to help forget, or maybe, even to deny, the links between trade and labour. Since then, despite their geographical proximity, the two organizations have sometimes given the impression that they were turning their back to each other.

But some things cannot be forgotten, and it seems that the WTO is destined to remember that social and labour issues are relevant to its overall goal to improve people's standards of living in a sustainable manner. If the GATT/WTO system is responsible for opening markets and favouring economic growth, trade rules alone cannot guarantee that the benefits of increasing trade will translate into tangible benefits for all people, as the WTO does not deal directly with re-distribution and other social issues necessary to ensure social justice. But today, when entering the WTO building, the new magnificent fresco you see dates back from 1931² and reminds us of enduring ILO principles of social justice—as if they could not remain divorced from WTO actions. The recent rediscovery of these paintings may be symbolic of the realization that trade liberalization and the improvement of labour and social conditions are not two solitudes,³ they can find expression and operate coherently and consistently with each other.

¹ The UN High Commission on Refugees occupied part of the Centre William Rappard Building until 1996 when it moved to its current location.

² *La Paix triomphante*, by GL Jaulmes.

³ BA Langille, 'Eight Ways to think about International Labour Standards' 1997 *Journal of World Trade* 31 (4–6) 27.

A. From the ITO to the WTO on Labour Issues

The ancestor to the WTO and GATT 1947 trade rules was the Havana Charter, a multi-lateral treaty setting up the Organization on International Trade (ITO) which was signed at the end of the UN Conference on Trade and Employment held in Havana, Cuba, from 21 November 1947 to 21 March 1948. The first chapter of the ITO Havana Charter was entitled 'Employment and Economic Activities'. Its first provision cited at the start of this chapter, remains remarkably contemporaneous and could be eloquently argued today. But the Havana Charter was never ratified, and only part of its Chapter IV on Commercial Policies was included in the GATT 1947, initially in force on a provisional basis, and remained in place until it was absorbed into the new WTO to become the GATT 1994. The text of the GATT 1947 does not make reference to labour considerations. Today, the Preamble of the WTO Agreement proclaims that 'trade should be conducted with a view to raising standards of living, ensuring full employment... in accordance with the objective of sustainable development'. But for a few indirect references to labour-related considerations in trade provisions, the WTO treaty language does not refer to labour standards or to labour-related trade actions. However, initially, its source and origin—Chapter IV on Commercial Policies—was part of a broader framework that contained social and labour provisions.

B. States Must Comply With Both Their WTO and ILO Obligations

Labour standards and other labour-related issues are rather negotiated in and administered by the ILO and its Secretariat. This does not mean that WTO Members are only obliged to respect their WTO obligations and that they can ignore their ILO rights and obligations or those of other international instruments relating to labour and social considerations. On the contrary, States must comply in good faith with all their international obligations simultaneously while being able to exercise their negotiated rights. This is arguably what WTO Members wanted to confirm in the Singapore Declaration when they stated clearly '[w]e renew our commitment to the observance of internationally recognized core labour standards... and we affirm our support for [the ILO] work in promoting them...'⁴ Such a ministerial political declaration does not create any WTO obligations that can be taken to a WTO dispute panel. Nonetheless, one can argue that, in making this joint declaration, WTO Members reiterated in the WTO that they will observe core labour standards, and support their promotion, while these standards are administered and monitored in another forum, the ILO. But this in turn suggests

⁴ WTO, *Singapore Ministerial Declaration*, WT/MIN(96)/DEC (13 December 1996).

that WTO Members confirmed that they are capable of adopting and enforcing WTO trade regulations while at the same time promoting core labour standards. Otherwise why would WTO Members talk about labour standards in their trade forum? Labour and trade governmental actions can co-exist legally, consistently and harmoniously, but how (closely) can the two sets of policies be inter-linked under WTO disciplines? As discussed below, the WTO system appears to be receptive to good faith and non-protectionist labour considerations within several trade measures.

C. The Legal Relationship Between Trade and Labour

The objective of this chapter is not to pronounce on or prejudge whether there should be a more binding linkage between trade and labour protection in order to produce greater efficiency. Nor is it to assess the extent to which trade liberalization has actually made improvements in the lot of working people in the world—except to note that a recent joint study between the WTO and the ILO provides a concise and interesting summary of the state of knowledge on this subject.⁵ It does not attempt to assess the space left to WTO Members to implement good faith labour and social policies, nor whether those implemented consistently with WTO are also consistent with ILO prescriptions, or effective from a labour and social perspective. The purpose of this chapter is to explore the legal relationship between WTO norms and labour norms and, in particular, whether and how labour considerations can be intertwined with the interpretation and application of the WTO rights and obligations so that WTO Members, as States, can benefit from, and comply with, both the trade and labour international regimes.

This chapter will look at the trade and labour issues from three perspectives. The first one is the extent to which some WTO multilateral and plurilateral trade disciplines refer to labour considerations or provide policy space for labour concerns. Another one is the extent to which Members can agree to make regional/plurilateral arrangements which simultaneously further trade liberalization and pursue labour objectives. The last perspective concerns unilateral trade preferential agreements, where compliance with labour standards is becoming a criterion for (increased) trade preferences.

⁵ M Jansen and E Lee, *Trade and Employment – Challenges for Policy Research* (Geneva: WTO-ILO, 2007), at <http://www.wto.org/english/res_e/booksp_e/ilo_e.pdf> (last visited 21 May 2008).

II. THE WTO AND LABOUR CONSIDERATIONS – THE MULTILATERAL DIMENSION

A. Interpretation of the WTO

As repeatedly noted, WTO provisions cannot be read in ‘clinical isolation’ from the rest of international law.⁶ This means that the WTO is only part of a more global system that includes several sets of rights and obligations contained *inter alia* in multiple treaties. States never agreed to give priority generally to WTO norms over other international norms, including, for example, labour norms. All international norms are *a priori* equal, except *jus cogens* and article 103 UN Charter. When reading and interpreting WTO provisions, the contexts and the general principles of law as well as other relevant international rules applicable between the parties must be taken into account, even if they originate in other fora. Whether and how this includes treaties with smaller or different membership is a matter of debate.⁷

Some terms in the WTO treaty language may indicate a possibility of referring to labour treaties or ILO instruments when interpreting them. The Preamble of the WTO Agreement itself refers to ‘...increasing standards of living, ensuring full employment’ as goals of the WTO. Reference is also made to ‘sustainable development’, a concept that includes three dimensions: economic development, environmental protection, and social justice. Arguably, as it was said with respect to the relative importance of environment since the entry into force of the WTO Agreement, this specific language of the Preamble ‘gives colour, texture and shading to the rights and obligations of Members under the WTO Agreement’ and could lead to an evolutionary interpretation of WTO provisions that would take social or labour-related principles into account in relevant circumstances.⁸ Moreover some labour norms can be considered as human rights, the protection of which may be covered by general principles of law also relevant in interpreting WTO treaty language.⁹

⁶ Appellate Body Report, *US – Gasoline*, at 17.

⁷ See chapter 12 of this Handbook.

⁸ Appellate Body Report, *US – Shrimp*, at paras 153–55 and 130.

⁹ On this issue see also L Bartels, ‘Social Issues: Labour, Environment, and Human Rights’ in S Lester and B Mercurio (eds), *Bilateral and Regional Trade Agreements: Commentary, Analysis and Case Studies* (Cambridge: Cambridge University Press, forthcoming).

B. Several Labour-Related Measures Possible in the WTO

Single Undertaking

It is difficult to discuss how WTO disciplines deal with and take into account labour considerations without a basic understanding of the internal interaction between various provisions of the WTO single undertaking.¹⁰ While the WTO Agreement and its annexes are today a single treaty, its provisions were originally negotiated through 15 different working groups. It was only towards the end of the negotiations that the creation of a 'single undertaking' was agreed and governments decided to annex the resulting text from each working group to the Marrakesh Agreement Establishing the WTO or WTO Agreement. The basic provisions of the GATT 1994 have been supplemented with new WTO agreements. For example, when assessing the WTO consistency of a domestic (technical) regulation that would contain regulatory distinctions based on labour considerations, one must not only examine Article III GATT 1994 prohibiting regulatory discrimination between imported and domestic goods, and the possibility of invoking general exceptions under the GATT 1994 to justify an otherwise inconsistent measure, but also, assess the same domestic regulation pursuant to the TBT Agreement¹¹ that prohibits technical regulations from being prepared, adopted, and applied more restrictively than necessary to fulfil a legitimate objective.¹² Two WTO basic principles are that all WTO provisions are simultaneously applicable and must be interpreted harmoniously so as to ensure the effectiveness of all WTO provisions.

A single trade-labour measure may be intertwined with several trade instruments simultaneously and may eventually be reviewed under several WTO agreements. For example, labour considerations can be linked to market access commitments, either in tariff or government procurement schedules and may also call for the application of the Licensing Agreement and the GATT 1994, while they could also be part of subsidies or investment programmes for which advantages are conditioned on labour considerations. Labour variables—wages, level of employment, etc—can also be invoked in trade remedies disputes, when assessing whether imports are causing injury to the domestic industry of the importing countries. In the area of trade in services, specific scheduled commitments can be made subject to certain types of conditions as well. Regional trade agreements and generalized systems of preferences contain enhanced provisions on labour standards.

¹⁰ G Marceau, 'Balance and Coherence by the WTO Appellate Body: Who Could Do Better?' in G Sacerdoti, A Yanovich, and J Bohanes (eds), *The WTO at 10: The Role of the Dispute Settlement System* (Cambridge: Cambridge University Press, 2006) 326.

¹¹ There is no intention to make a statement here on the order of analysis. It seems more WTO-consistent to examine any such regulation first under the TBT Agreement and subsequently, if need be, under Articles XI, III, and XX GATT 1994.

¹² Arts 2.2 and 2.4 TBT Agreement.

All these situations raise a general question: whether and to what extent WTO Members' trade-related regulations and actions can be conditioned (partly) on labour considerations?¹³ In that context, the first part of this chapter will examine provisions of the GATT 1994 that refer to or permit the use of labour considerations. It will then discuss the provisions of other WTO agreements that may overlap or apply simultaneously with those of the GATT 1994.

C. GATT 1994 and Labour Considerations

The GATT 1994 imposes disciplines on restrictions to trade such as tariffs, quotas, domestic regulations, and subsidies. One such rule is the prohibition against less favourable treatment of any imported 'like products'. The definition and comparison of 'like' products, and the parameters for less favourable treatment are crucial determinations.

Since its inception, the GATT 1994 has recognized that legitimate government policies may justify measures that are contrary to the basic GATT obligations in order to enforce policies other than trade such as the protection of public morals, health, or the environment.¹⁴ The issue for us is whether the same could apply to labour policies. The new Appellate Body jurisprudence has insisted on the need to ensure that the GATT 1994 exceptions are effective and that a balance is maintained between pure trade obligations and the right of Members to give priority to policies other than trade. The GATT 1994 provisions relating to market access broadly defined (market access schedule, disciplines on regulations, and subsidies) and those providing for exceptions will thus be examined together, first. It will thereafter be easier to understand how the new TBT Agreement has transformed the GATT 1994 exceptions into WTO conditional rights and thus reinforced the right of Members to give priority to policies other than trade, so long as they are based on legitimate objectives and implemented without protectionism.

In the GATT 1994, the question of whether labour standards can condition trade-related actions is also closely linked to the issue of whether a trade regulation can make distinctions on the basis of *criteria unrelated to the products themselves*. Known as the process and production method (PPM) debate, this issue permeates the entire 'trade and ...' debate and it is inherent to any trade-and-labour measure as its regulatory criteria are always relating to work and workers conditions and never about the product itself.

¹³ S Charnovitz, *Addressing environmental and labour issues in the World Trade Organization* (Washington DC: Progressive Policy Institute, 1999).

¹⁴ These matters are a selection of the exceptions listed in Art XX GATT 1994.

1. *Non-Discrimination: Most-Favoured-Nation (Article 1) and National Treatment Principles (Article III)*

Labour standards are not negotiated in the WTO, they are negotiated in other specialized fora. In the WTO, Members negotiate tariffs and subsidies reductions but do not generally negotiate the content of domestic regulations or standards *per se*. The main obligations with regard to domestic regulations or domestic standards are that they cannot maintain unjustified discrimination or be more restrictive than necessary to fulfil a legitimate objective. Some of the WTO provisions give legal value to internationally negotiated standards. For example, the SPS Agreement provides that if a Member bases its national standards on a Codex standard, such national standards are presumed to be consistent with the SPS Agreement. A similar provision exists for technical regulations under the TBT Agreement, with respect to relevant international standards that, as further discussed hereafter, may include labour standards.

Generally, the GATT 1994 prohibits ‘less favourable treatment’ between any two ‘like’ products.¹⁵ The most-favoured nation (MFN) obligation requires WTO Members to provide any advantage, favour, privilege, or immunity that they grant to any imports to all like products imported from any WTO Member, immediately and without conditions. The mandatory respect of certain labour considerations could be viewed as such a ‘condition’. In the old GATT *Family Allowance* dispute, the tariff discrimination introduced by the Belgian law against imports from countries that did not maintain a family allowance system, was condemned because this condition was not written in Belgium’s Schedule and not at large.¹⁶

In the context of national treatment, labour considerations can affect ‘likeness’ or/ and the ‘less favourable treatment’ of the imported product.

a. Likeness

Traditionally, a determination of likeness would call for an assessment of criteria relating to the physical characteristics of products.¹⁷ In the context of trade and labour, the question is whether two physically similar products can nonetheless become ‘unlike’ because of the manner in which they are produced—in respect or in non-respect of identified labour considerations relating to conditions of work or of workers. In the trade and environment context many developing countries argue against the consideration of the manner in which goods are produced or processed—this is the so-called ‘PPM-debate’.¹⁸ The PPM-concept is generally understood as a principle that considers that two similar products cannot become unlike on the

¹⁵ With the WTO, this principle was extended to two like services and service suppliers under the GATS and to two like right-holders under the TRIPS Agreement. See also chapters 7 and 8 of this Handbook.

¹⁶ GATT Contracting Parties, *Belgian Family Allowances*.

¹⁷ GATT Working Party Report, *Border Tax Adjustments*.

¹⁸ See chapter 18 of this Handbook.

basis of their method of production or process.¹⁹ The *EC – Asbestos* dispute clarified that the determination of ‘likeness’ is essentially a determination of the competitive relationship between two products,²⁰ which is a broader criterion than physical characteristics because consumer preferences may be affected by a PPM whether it is sound or not. In determining whether this competitive relationship actually exists, the Appellate Body²¹ seemed to focus largely on the physical characteristics of the products, namely their carcinogenicity or toxicity. Although it stated that these four criteria are not a closed set and may suggest conflicting evidence,²² the Appellate Body insisted that all four criteria must be examined each time.²³ It seemed, nonetheless, to give a heavier weight to physical characteristics, or at least differences in physical characteristics, when it wrote:

In such cases [when physically similar], in order to overcome this indication that products are not ‘like’, a higher burden is placed on complaining Members to establish that, despite the pronounced physical differences, there is a competitive relationship between the products such that all of the evidence, taken together, demonstrates that the products are ‘like’ under Article III (4) GATT 1994.²⁴

Accordingly, when goods are physically similar, it will be difficult to prove that they are not competing with each other.²⁵ While consumers may at times distinguish based on production processes, and some competitive effect is quite possible, it is difficult to envision a circumstance where the effect would be great enough to render physically similar products un-like. While it seems that non-product related distinctions would hardly make goods unlike, policy-based criteria may justify different treatments in the context of the exceptions of Article XX, discussed hereafter.²⁶

b. Less Favourable Treatment

Imported products cannot be treated less favourably, but what does it mean? The *EC – Asbestos* report concluded that different treatment of like products may not

¹⁹ G Marceau and JP Trachtman, ‘A Map of the World Trade Organization Law of Domestic Regulation of Goods’ in GA Bermann and PC Mavroidis (eds), *Trade and Human Health and Safety* (Cambridge: Cambridge University Press, 2006) 9.

²⁰ Appellate Body Report, *EC – Asbestos*, at paras 98–100. The four basic criteria derived from the *Border Tax Adjustment* report are: (i) the physical properties of the products in question; (ii) their end-uses; (iii) consumer tastes and habits *vis-à-vis* those products; and (iv) tariff classification. They are to be used as tools in determining this competitive relationship between products.

²¹ Even more so, the dissenting member of the Appellate Body for whom the particularly different physical characteristics—toxicity—of the products at issue was irrefutable evidence against their ‘likeness’. *Ibid* at paras 151–53.

²² *Ibid* at para 120.

²³ *Ibid* at paras 102, 109, 111, 113, 139, and 140.

²⁴ *Ibid* at para 121.

²⁵ *Ibid* at paras 117–18.

²⁶ One the issue of why it is accepted that the TRIPS Agreement deals with a series of intellectual property obligations that do not affect the physical characteristics of the product to which they apply, see F Maupain, ‘Is the ILO Effective in Upholding Workers’ Rights?: Reflections on the Myanmar Experience’ in P Alston (ed), *Labour Rights as Human Rights* (Oxford: Oxford University Press, 2005), at 133–34.

necessarily result in less favourable treatment.²⁷ Then, in *Dominican Republic – Import and Sale of Cigarettes*, the Appellate Body continued this line in stating that ‘the existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favourable treatment to imports *if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product*, such as the market share of the importer in this case’.²⁸ The *EC – Biotech Products* report concluded that discrimination would not create less favourable treatment when the difference is justified by non-protectionist policies based on government/consumers’ perceptions. The Panel concluded that there was no need to determine whether biotech and non-biotech were like products since ‘[i]t is not self evident that the alleged less favourable treatment of imported biotech products is explained by the foreign origin rather than, for instance, a perceived difference between biotech and non-biotech products in terms of their safety . . .’.²⁹ The Panel rejected the claim of violation of national treatment. Can we extend this reasoning to measures imposing different treatment based on the respect of core labour standards by the exporting Members alleging perceived differences affecting the ‘morality limits’ of the importing country?

2. Article II GATT 1994: Labour Conditions in Tariff (Goods) Schedules?

Can Members ‘negotiate’ tariffs levels with conditions that would be labour-related? Recall that the report in *Belgian Family Allowances* seemed to have condemned the social condition because it was not included in Belgium’s Schedule. This issue has not been addressed by the jurisprudence. Yet Article II:1(b) seems to envisage the possibility that ‘terms, conditions or qualifications’ may be set forth in a Member’s Schedule. Do ‘terms, conditions or qualifications’ include labour standards?

We know that conditions cannot include limitations on the origin of a product,³⁰ or qualifications relating to quantitative restrictions as ‘Article II permits contracting parties to incorporate into their Schedules acts yielding rights under the GATT 1994, but not acts diminishing obligations under that Agreement’.³¹ The same criterion was used in *EC – Bananas III* where the Panel concluded that the footnote included in the EC’s Schedule imposed what was considered to be a discriminatory tariff quota in favour of ACP countries, inconsistent with Article XIII GATT 1994. So the legal question to answer in determining whether labour conditions can be

²⁷ Appellate Body Report, *EC – Asbestos*, at para 100 (original emphasis), reads as follows: ‘. . . a Member may draw distinctions between products which have been found to be “like”, without, for this reason alone, according to the group of “like” imported products “less favourable treatment” than that accorded to the group of “like” domestic products’.

²⁸ Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, at para 96 (emphasis added). For a detailed analysis of this question, see chapter 20 of this Handbook.

²⁹ Panel Report, *EC – Biotech Products*, at paras 7.2509–2516.

³⁰ GATT Panel Report, *EEC – Beef*.

³¹ GATT Panel Report, *US – Sugar*, at paras 5.2–7.

negotiated in a Schedule is whether labour considerations are explicitly or implicitly prohibited by a provision of the GATT 1994?

It is difficult to conclude that labour rights considerations are explicitly prohibited by a rule of the GATT 1994, unless one argues that non-product labour related criteria (as PPM) are as such prohibited by the GATT 1994 (but as discussed later they may find application under the exceptions of Article XX), or that labour conditions constitute a *de facto* import restriction prohibited by Article XI GATT 1994—which is not clear because compliance with that condition (like a technical regulation on trade) would permit an unlimited level of imports and does not discriminate on the basis of their origin.

3. *The Exceptions of the GATT 1994: Can Labour Considerations Justify Inconsistencies with Provisions of the GATT?*

Since its inception, the GATT 1994 has always recognized that legitimate government policies may justify measures that are contrary to basic GATT disciplines. Hence, in some circumstances, non-trade values can supersede trade rules, provided that the governmental action relates to, or is necessary, to one of the non-trade policies listed in Article XX and is applied in good faith. The policies listed in Article XX can justify measures inconsistent with any of the other provisions in the GATT 1994.

There is no direct or indirect reference to labour standards in Article XX GATT 1994. However, three sub-paragraphs are sometimes invoked as allowing for some labour standards considerations: paragraph (a) for measures necessary for the protection of public morals; paragraph (b) for measures necessary for the protection of human, animal, or plant life or health; and paragraph (e) for measures relating to the products of prison labour.

The Appellate Body has articulated a two-tier test to determine whether a trade restriction may be justified under Article XX GATT 1994 (or the corresponding Article XIV GATS).³² First, the disputed measure must contribute to the promotion of the underlying policy goal pursued (for example, protection of public morals), the assessment of which requires examination of the nature, object, and structure of the measure; noting that conditioning market access to policies unilaterally prescribed is common to each sub-paragraph of Article XX.³³ The second part of the analysis requires that the measure be applied in *good faith* and that recourse to an exception does not amount to an *abuse* or misuse of treaty rights. Specifically, the application

³² Appellate Body Report, *US – Gambling*, at para 292.

³³ Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, at para 137 (original emphasis): ‘It appears to us, however, that *conditioning access to a Member’s domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX*. Paragraphs (a) to (j) comprise measures that are recognized as *exceptions to substantive obligations* established in the GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character.’

of the measure must not constitute arbitrary or unjustifiable discrimination, or amount to disguised protectionism.

In case of a dispute over the WTO consistency of a labour-related trade regulation where the general exceptions of Article XX would be involved, these questions would be asked. Is respect of (core) labour standards covered by any of the policies and non-trade values mentioned in Article XX? The second question is whether a specific labour measure complies with the exception provision and, thirdly, whether it is 'applied' in good faith under the chapeau of Article XX GATT 1994. There is no agreement among Members on this issue, nor any jurisprudence.

a. Measures Necessary for the Protection of Public Morals

In assuming that an instance of discrimination based on labour-related considerations is *prima facie* inconsistent with basic GATT obligations (Articles I, II, III, V, VIII, XI, XII, XIII, etc.) can it be justified as 'necessary for the protection of public morals'?

In *US – Gambling*, the exception for 'public morals' of GATS (similar to that of Article XX(a) GATT 1994) was defined to include standards of right and wrong conduct maintained by or on behalf of a community or nation, including measures for public order preserving the fundamental interests of a society, as reflected in public policy and law.³⁴ The protection of some labour standards, especially the so-called fundamental labour rights could be argued to be issues of public morals.³⁵ Could a Member suggest that respect of certain labour standards in the exporting country is an issue of such moral importance in its country that those goods cannot circulate in its country?³⁶ As noted, WTO exceptions authorize derogations based on unilateral policies, but the situation would be more straightforward if one were to speak of a determination of public morals made collectively, such as where it is supported by UN Security Council resolutions (as envisaged by Article XXI(c) GATT 1994), or as was actually the case with Myanmar,³⁷ for which such a determination was not only made collectively by the ILO international community in an established legal framework, but which also called for collective action on that basis.

Assuming that some labour issues are issues of public morals in the importing country (avoiding extraterritorial issues), the second question would be whether a specific labour-related measure is 'necessary'. The Appellate Body has developed a test to assess when a measure is 'necessary'. It calls for a weighing and balancing of a series of factors, including: (i) 'the relative importance of the common interests or

³⁴ Appellate Body Report, *US – Gambling*, at paras 286–96.

³⁵ In particular the 4 components of the 1998 ILO Declaration on Fundamental Principles and Rights at Work.

³⁶ If the trade action is a countermeasure, a reaction against alleged illegal actions by the exporting Member, is this measure a unilateral trade countermeasure contrary to *Mexico – Taxes on Soft Drinks* that prohibited panels from considering non-WTO disputes? This issue is further discussed below.

³⁷ *Measures recommended by the Governing Body under Article 33 of the Constitution – Implementation of recommendations contained in the Report of the Commission of Inquiry entitled Forced Labour in Myanmar (Burma)*, International Labour Conference, Provisional Record 6–4, 88th Session, Geneva, 2000.

values' pursued by the measure; (ii) the 'contribution of the measure to the realization of the end pursued'; and (iii) its trade impact.³⁸ It has been noted that '[t]he more vital or important those common interests or values are, the easier it would be to accept the measure as "necessary"'.³⁹ In *Brazil – Retreaded Tyres*, the Appellate Body clarified that in order to be necessary a measure needs to 'contribute' to the achievement of its objective; a contribution exists when there is a genuine relationship of ends and means between the objective and the measure.⁴⁰ This contribution needs to be material after having been weighted against its trade restrictiveness. Once the respondent has made a *prima facie* case that the challenged measure is 'necessary' along this new test, it is for the complainant to raise a WTO-consistent alternative measure that, in its view, the responding party should have taken.⁴¹ This is a very heavy burden on the exporting Member challenging the measure, especially if the importing country's chosen level of risk is *zero*.⁴² Applying this test to a national measure based, for instance, on ILO standards would call for the weighing and balancing of whether the specific measure protects fundamental values and public morals, whether it contributes to the respect of the policy goal and the importance of the trade impact.⁴³

b. Measures Necessary for the Protection of Health of Persons

Does sub-paragraph XX (b) only refer to the physical health of persons and not their mental health? Is this a relative criteria?⁴⁴ Can labour considerations restricting market access be justified in measures contributing to the protection of the health of workers abroad? The latter questions point to the unresolved issue of whether Article XX can be invoked against actions taking place abroad – the

³⁸ Appellate Body Report, *Korea – Various Measures on Beef*, at para 162; Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, at para 70; Appellate Body Report, *US – Gambling*, at paras 304–11.

³⁹ Appellate Body Report, *Korea – Various Measures on Beef*, at para 162.

⁴⁰ Appellate Body Report, *Brazil – Retreaded Tyres*, at para 210.

⁴¹ Appellate Body Report, *US – Gambling*, at paras 308–11.

⁴² Appellate Body Report, *Australia – Salmon*, at para 125, stating that Members can fix the level of risk they want, including a level of zero.

⁴³ In case of a dispute where the defendant invokes ILO Conventions or standards, panels and the Appellate Body should request relevant information from the ILO (pursuant to Article 13 DSU) and discuss it with the parties, and ensure that such information is given its appropriate legal weight. In the absence of a special rule giving ILO decisions and actions specific legal value, relevant ILO instruments would be taken into account in one way or another by panel when determining whether a specific labour-related measure is consistent with the exception provisions of the GATT 1994 itself.

⁴⁴ It seems to be a relative criterion where some countries are expected to have higher and more advanced labour legislation. In *EC – Asbestos*, the Panel was concerned with technical regulations under the French labour law and said: 'We consider that the existence of a reasonably available measure must be assessed in the light of the economic and administrative realities facing the Member concerned but also by taking into account the fact that the State must provide itself with the means of implementing its policies.' Thus, the Panel considers that it is legitimate to expect a country, such as France with advanced labour legislation and specialized administrative services, to deploy administrative resources proportionate to its public health objectives and to be prepared to incur the necessary expenditure. Panel Report, *EC – Asbestos*, at paras 8.208–09.

extraterritorial application of Article XX.⁴⁵ If they cannot, it is difficult to see how an importing Member could justify restricting market access by claiming that it is contributing to protecting foreign workers from the health-related impacts of unsatisfactory working conditions, noting that the rational and effective link between the measure and the policy goal would in any case be difficult to demonstrate. Nonetheless, one of the Article XX exceptions, referring to prison labour, is inherently extraterritorial.

c. Measures Relating to the Product of Prison Labour

As opposed to the previous exceptions, prison labour clearly allows for an extra-territorial application. However, this exception is not based on any philanthropic reasoning, but purely on economic considerations to ensure fair competition. One might wonder, when taking an evolutionary interpretation,⁴⁶ whether 'forced labour' is included in the concept of 'prison labour'? To answer this question, it is of interest to refer to the ILO's standards and supervisory mechanism. Two observations can be made. First of all, ILO Convention No. 29 on Forced Labour (1930) explicitly excludes prison labour from the definition of forced labour.⁴⁷ Second, the Committee of Experts on the Application of Conventions and Recommendations (CEACR) found that this exception does not apply to privatised prison labour if it is not carried out 'under conditions which approximate a free labour relationship'.⁴⁸ The logic of the Committee seems to converge here with that of Article XX when it reasoned that 'there is the need to avoid unfair competition' between the captive workforce and the free labour market.⁴⁹

So in order to benefit from the application of Article XX, the specific labour-related measure would have to comply with the specific provisions of one of the sub-paragraphs above mentioned. In addition, the specific labour measure would also have to comply with the consistency and good faith requirements of the chapeau of Article XX.⁵⁰

d. Consistency with the Chapeau of Article XX GATT 1994

In addition to complying with one of the sub-paragraphs of Article XX, a challenged measure must also respect the provisions of the chapeau of Article XX which

⁴⁵ Appellate Body Report, *US – Shrimp*, at para 133. ⁴⁶ *Ibid.* at para 130.

⁴⁷ Art 2, para 2: 'Nevertheless, for the purposes of this Convention, the term *forced or compulsory labour* shall not include: (c) any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations'.

⁴⁸ ILO, *Eradication of Forced Labour*, General Survey by the Committee of Experts on the Application of Conventions and Recommendations', 96th Session, Geneva, 2007, at paras 54–61 and 98–122.

⁴⁹ *Ibid.* at para 122. ⁵⁰ Marceau and Trachtman, above fn 19, at 9.

has been interpreted as requiring the good faith and non-abusive application of the exceptions, in requiring *inter alia* Members to be consistent and coherent. It establishes three standards in prohibiting 'arbitrary', 'unjustifiable' discrimination between countries where the same conditions prevail, and 'disguised restriction on international trade'. Consistency and coherence in labour policies will be difficult to assess because they reflect social choices often very different among WTO Members. One relevant question is whether the obligation of good faith application of all treaties lead to the conclusion that reliance on international negotiated labour standards provides a *de facto* presumption of good faith or absence of any protectionist device?

4. *The WTO Dispute Settlement Cannot Be Used to Enforce Non-WTO Violations*

The fact that labour is not clearly referred to in the GATT 1994 exceptions is important. In *Mexico – Taxes on Soft Drinks*, the Appellate Body decided that the WTO dispute settlement system does not have jurisdiction to determine whether a trade restriction can be justified as a countermeasure against an alleged violation of NAFTA.⁵¹ The Appellate Body went on to say that:

[E]ven if the terms 'laws or regulations' do not go so far as to encompass the WTO agreements, as Mexico argues, Mexico's interpretation would imply that, in order to resolve the case, WTO panels and the Appellate Body would have to assume that there is a violation of the relevant international agreement (such as the NAFTA) by the complaining party, or they would have to assess whether the relevant international agreement has been violated. WTO panels and the Appellate Body would thus become adjudicators of non-WTO disputes. As we noted earlier, this is not the function of panels and the Appellate Body as intended by the [*Dispute Settlement Understanding*].⁵²

In other words, as a violation of NAFTA by the US would not correspond to any of the policy justifications under Article XX, Mexico's attempt to justify its trade restriction was not accepted.

It seems, therefore, that using trade restrictions exclusively as countermeasures for violation of other treaties, such as labour treaties, would be WTO inconsistent unless the countermeasure can find application in one of the sub-paragraph of Article XX.⁵³

⁵¹ See G Marceau, 'Fragmentation in International law: The Relationship between WTO Law and General International Law' 2008 *Finnish Yearbook of International Law* (XVII), forthcoming.

⁵² Appellate Body Report, *Mexico – Taxes on Soft Drinks*, at para 78.

⁵³ In the environmental context, for example, trade countermeasures against violations of an environment treaty may find justification under Articles XX (g) or XX(b) GATT 1994, especially when an environmental treaty mandates or permits a trade restriction.

D. TBT Agreement

1. WTO Legitimate Objectives

The TBT Agreement contains specific disciplines on ‘technical regulations’.⁵⁴ The TBT Agreement seems to authorize any technical regulation so long as it is ‘not... more trade-restrictive than necessary to fulfil a ‘legitimate objective’.⁵⁵ But there is no definition of a (WTO) legitimate objective. Norms under labour laws can be considered as technical regulation to trade.⁵⁶ But could the respect of ILO provisions, in particular core labour standards and fundamental rights,⁵⁷ be considered a ‘legitimate objective’, in arguing, *inter alia*, that sustainable development and its social components, is an objective of the WTO? For the Appellate Body, ‘the *TBT Agreement* acknowledges the right of every WTO Member to establish for itself the objectives of its technical regulations while affording every other Member adequate opportunities to obtain information about these objectives.’⁵⁸ The Appellate Body did not exclude any such objective.⁵⁹ In the event of a challenge, it is for the Member challenging the regulation to prove that the objective is *not* legitimate and for the WTO panel/Appellate Body to determine whether an alleged objective is indeed ‘legitimate’.

⁵⁴ This section includes excerpts from G Marceau and JP Trachtman, ‘A Map of the WTO law on domestic regulations’ in F Ortino and E-U Petersmann (eds), *The WTO Dispute Settlement 1995–2003* (The Hague: Kluwer, 2004), 275.

⁵⁵ Art 2.2 TBT Agreement.

⁵⁶ In *EC – Asbestos*, the Appellate Body concluded that the measure at issue—a prohibition on the use of asbestos set up pursuant to the French labour law, was a technical regulation pursuant to the TBT Agreement.

⁵⁷ In this respect the 1998 ILO Declaration on Fundamental Principles and Rights at Work is relevant. The Declaration recognizes the ‘special significance’ of the four categories of rights/freedoms; freedom of association and collective bargaining, elimination of forced labour, the effective abolition of child labour, and the elimination of discrimination. Additionally, the Declaration establishes that by virtue of their membership of the organization and their acceptance of the ILO Constitution, States have an obligation to ‘respect, to promote and to realize’ the fundamental rights whether or not they have ratified the relevant Conventions. The last paragraph states that ‘labour standards should not be used for protectionist trade purposes’ and the ‘comparative advantage of any country should not be called into question by this Declaration’, which seems to resemble greatly the text in paragraph 4 of the Singapore Declaration (1996). See the articles by BA Langille, F Maupain, and P Alston in 2005 *European Journal of International Law* 16(3) 437, 465, and 480.

⁵⁸ Appellate Body Report, *EC – Sardines*, at para 276.

⁵⁹ From the *EC – Sardines* Panel and Appellate Body Reports, one concludes that the TBT Agreement acknowledges the right of every WTO Member to establish for itself the objectives of its technical regulations while affording every other Member adequate opportunities to obtain information about these objectives (Appellate Body Report, *EC – Sardines*, at para 262); Article 2.4 TBT Agreement requires an examination and a determination whether the objectives of the measure at issue are ‘legitimate’ (Panel Report, *EC – Sardines*, at para 8.722).

2. *Members' Technical Regulations Based on Existing International Labour Standards?*

The WTO recognizes standards developed in other fora. The SPS agreement, for instance, provides that where a domestic standard complies with standards developed in the Codex Alimentarius Commission (FAO/WHO Food Standards) compliance with the WTO can be presumed.⁶⁰ Are ILO standards relevant international standards within the meaning of Articles 2.4. and 2.5 TBT Agreement, compliance with which would equate to presume compliance with the TBT Agreement? It is worth noting that Article 2.4 only requires that the national standards be based on existing international standards. For the Panel and the Appellate Body in *EC – Sardines*, the words ‘be based on’ meant that the international standard should be ‘the principal constituent or fundamental principle for the purpose of enacting the technical regulation’.⁶¹ Therefore, (if a labour policy were considered to be legitimate), a WTO-consistent technical regulation based on an ILO standard may not be fully consistent with the ILO provisions. As to how a WTO panel should interact with the ILO if its standards were invoked, one can only rely on Article 13 DSU whereby panels are authorized, but not obliged, to consult with all experts and actors relevant to a specific dispute.

3. *Does the TBT Agreement Cover Labour-PPMs?*

As mentioned, all labour standards are forms of PPMs since they operate on criteria concerned with the conditions of work and workers, not with the products themselves.⁶² Many developing countries have argued that the TBT Agreement does not ‘cover’ regulations based on criteria not having any physical impact on the product traded. For example, PPM labelling requirements based on social considerations and on timber processes have been politically challenged in the TBT Committee.

But to remove PPM-type regulations from the coverage of the TBT Agreement would exempt them from the other requirements of the same TBT Agreement. It would be curious if non-PPM technical regulations were subject to the more stringent requirements of the TBT Agreement, while the less transparent PPM-type technical regulations were not.⁶³ It would be even more curious since PPM labels appear to be covered by the TBT Agreement. Moreover, the non-application of the TBT Agreement to PPM-type regulations would not make such PPM regulations

⁶⁰ See Art 3.2 SPS Agreement.

⁶¹ Panel Report, *EC – Sardines*, at para 7.110; Appellate Body Report, *EC – Sardines*, at para 243. In that dispute, the international standards and the national regulation were in absolute conflict.

⁶² There is an important literature on the so-called PPMs, see R Howse and D Regan, ‘The Product/Process Distinction – An Illusory Basis for Disciplining “Unilateralism” in Trade Policy’ 2000 *European Journal International Law* 11(2) 249; JH Jackson, ‘Comments on Shrimp/Turtle and the Product/Process Distinction’ 2000 *European Journal International Law* 11(2) 303.

⁶³ See also chapter 9 of this Handbook.

necessarily inconsistent with WTO law. If the TBT Agreement covers or applies only to product-related criteria, when challenged a labour-PPM regulation would be examined under Articles III and XI GATT 1994 and the exceptions of Article XX, and may, as discussed, be found WTO-consistent.

4. *Labels*

Under the TBT Agreement, technical regulations include 'packaging, marking, or labelling requirements as they apply to a product, process or production method'.⁶⁴ Even those who argue that PPMs are not covered generally by the TBT Agreement, agree that the TBT notification obligations cover all labels independently of the kind of information contained in the label:

In conformity with Article 2.9 of the Agreement, Members are obliged to notify all mandatory labelling requirements that are not based substantially on a relevant international standard and that may have a significant effect on the trade of other Members. That obligation is not dependent upon the kind of information which is provided on the label, whether it is in the nature of a technical specification or not.⁶⁵

It would however seem useless for Members to notify the TBT Committee of a label regulation that the same Committee would not have the jurisdiction to examine, since the TBT substantive rules would not cover the notified PPM-label.

The TBT-compatibility of a social label has been politically tested to a certain extent in the past, principally when Belgium notified the Committee of its draft law that set up a voluntary social labelling scheme on the basis of the core ILO Conventions.⁶⁶ During the discussion in the TBT Committee of that Belgian law in question, many delegations expressed their concern about bringing labour issues into the scope of the WTO system and considered the Belgian law an unnecessary obstacle to trade. Belgium never enforced its regulation,⁶⁷ but legally the issue is still open. If we accept that labour-related labels are covered by the TBT disciplines, such labels cannot be more restrictive than necessary to fulfil their legitimate objective. There is no jurisprudence on the TBT necessity test; but, as noted, the unilateral determination of legitimate objective seems to be WTO-consistent so long as it is not protectionist.

⁶⁴ On the issue of social labelling, see C Lopez-Hurtado, 'Social Labelling and WTO Law' 2002 *Journal of International Economic Law* 5(3) 719.

⁶⁵ TBT Committee, *Decisions and Recommendations Adopted by the Committee Since 1 January 1995 – Note by the Secretariat*, G/TBT/1/Rev.7 (28 November 2000), section III:10.

⁶⁶ I on February 2002, the Belgian legislature enacted a government bill aiming to promote socially responsible production and notified it to the TBT Committee. TBT Committee, *Notification*, G/TBT/N/BEL/2 (16 January 2001).

⁶⁷ Discussions in the TBT Committee took place from March 2001 until March 2002 (G/TBT/M/23 (8 May 2001), at paras 9–18; G/TBT/M/24 (14 August 2001), at paras 16–26; G/TBT/M/25 (21 November 2001), at paras 49–54; G/TBT/M/26 (6 May 2002), at paras 50–53).

5. *Voluntary and Private Standards*

Calls to include labour concerns in global trade lead to a spreading phenomenon to develop voluntary and private standards. These standards have taken on a range of forms and have notably included corporate codes of conduct sponsored by NGOs or by multinational corporations themselves. The majority of such codes have included ILO standards.⁶⁸ Private standards are now raising important concerns among developing countries. They would create discriminatory advantages and constitute *de facto* restrictions. It transpires from the text of the TBT Agreement and its Code of Good Practice that some of these voluntary and private standards could fall under its remit,⁶⁹ but they have so far never been subject to litigation.

E. Agreements on Trade Remedies

The WTO contains three agreements on trade remedies: the Anti-Dumping Agreement, the SCM Agreement, and the Safeguards Agreement. These agreements contain disciplines on Members' actions taken against imports for the protection of their injured domestic industry in specific circumstances. They call for an assessment of the injury caused to the domestic industry and list criteria that must be examined by national administrations before imposing trade remedies, and by panels when assessing the WTO compatibility of national determinations. It is noteworthy that Article 3.4 Anti-Dumping Agreement and Article 15 SCM Agreement refer to 'employment, wages, utilization of capacity and productivity' among the mandatory criteria to be evaluated when assessing 'injury to the domestic industry'. The Safeguards Agreement refers in Article 3 to 'productivity, capacity utilization and employment' among the mandatory criteria to be assessed when determining whether serious injury exists.

Moreover, the reference to the possibility of extending safeguard measures to 'facilitate adjustments'⁷⁰ calls into question whether 'sustainable development' and 'full employment' principles of the Preamble could be used in interpreting such terms so as to include trade adjustments that would be defined along the ILO prescriptions. These are the only explicit references to labour considerations contained in the WTO Agreement that may call for the use of relevant international labour standards in their interpretation.

⁶⁸ See also *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises*, 9 February 2007, A/HRC/4/035, at paras 63–85.

⁶⁹ Arts 3, 4, and 14 TBT Agreement as well as its Code on Good Practices.

⁷⁰ The Preamble of the Safeguards Agreement states 'Recognizing the importance of structural adjustment...' and Articles 5.1 and 7.1 state that 'A Member shall apply safeguard measures only to the extent necessary... and only for such period of time as may be necessary to prevent or remedy serious injury and to "facilitate adjustment"'. Article 7.4 states 'in order to facilitate adjustment in a situation...'

F. The GATS and Its Schedules

1. *Same Issues as With the GATT 1994*

The GATS contains general obligations applicable to all trade in services and obligations on market access and national treatment are applicable to specific services listed in Members' schedules.⁷¹ The labour-related issues raised in the context of non-discrimination principles for trade in goods are also relevant for the GATS MFN and national treatment principles. However, the jurisprudence on like services and like producers is not very informative in terms of the criteria to be used for the determination of likeness,⁷² including whether social and labour policy considerations could serve as criteria for likeness. Otherwise, GATS exceptions are largely parallel to those of the GATT 1994,⁷³ referring to measures necessary for the protection of public morals, for the protection of the health of people, animals and plants, but not to imports relating to prison labour. Also, Article Vbis regulates explicitly regional trade agreements providing for full integration of labour markets. Article VI GATS was inspired by the TBT disciplines for goods. Although issues relevant to the GATT 1994 and the GATS can be similar, the very character of trade actions involving services and services suppliers brings doubt on the relevance of the GATT PPM-debate (how services are produced or delivered) into the GATS and seems rather to call for further integration of policy considerations in determining likeness.

2. *GATS Schedules*

Can WTO Members include labour considerations in their GATS schedule as a condition modifying their national treatment obligation, restricting market access, or as an additional commitment? In its footnote to Horizontal Commitment, Mode 4, the GATS Schedule of the EC refers to obligations on service suppliers to conform to '[a]ll other requirements of Community and Member States' laws and regulations regarding entry, stay, work and social security measures... including regulations concerning period of stay, minimum wages as well as collective wage agreements'.⁷⁴ So far this entry has not been challenged, but there is no time constraint for making such a challenge.⁷⁵ Since the benefits of social security programmes are usually only available to those who contributed for periods longer than the duration of the Mode

⁷¹ See also chapter 7 of this Handbook.

⁷² M Cossy, 'Determining "Likeness" under the GATS: Squaring the Circle?' *WTO Staff Working Paper* ERSD-2006-08 (September 2006), at <http://www.wto.org/english/res_e/reser_e/ersd200608_e.pdf> (last visited 22 May 2008); M Cossy, 'Some Thoughts On the Concept of "Likeness" in the GATS' in M Panizzon, N Pohl, and P Sauvé (eds), *GATS and the Regulation of International Trade in Services* (Cambridge: Cambridge University Press, 2008), Chapter 14.

⁷³ Appellate Body Report, *US - Gambling*, at para 295.

⁷⁴ See *EC's GATS Schedule*, GATS/SC/31 (15 April 1994), at 7.

⁷⁵ Panel Report, *EC - Export Subsidies on Sugar*, at para 7.69.

4 contract, some Members argue that the payment of such benefits might constitute a *de facto* national treatment discrimination. More generally, in the ongoing services negotiations, Members like Brazil and India have expressed the view that services suppliers should not be obliged to respect minimum salaries in place in the destination Member, an issue now being discussed in the Mode 4 Doha negotiations. But what they seem to challenge is the *level* of social protection, not the reference *per se* to social considerations.

G. The Agreement on Government Procurement and Its Schedules

1. *The WTO Agreement on Government Procurement (GPA)*

The GPA, signed by most of the world's industrialized countries at the conclusion of the Uruguay Round of multilateral trade negotiations in 1994, provides an international legal framework for the liberalization and governance of public procurement markets.⁷⁶ The GPA binds only those WTO Members that have become Parties to it. It imposes non-discrimination obligations on Parties' measures relating to the procurement of covered goods, services, and construction services as set out in each Party's schedules, and subject to various exceptions and exclusions; it also imposes minimum standards regarding procurement processes that are intended to ensure that the Parties' procurements are carried out in a transparent and competitive manner that does not nullify their non-discrimination commitments. The GPA also contains transparency obligations regarding procurement-related information. Currently, the Agreement, including its text and coverage (market access) commitments, is in the process of being renegotiated. The revised GPA, when it is adopted, is expected to represent a substantial improvement over the existing GPA.⁷⁷

The scope for accommodation of labour-related concerns under the GPA has not been discussed either in the Committee on Government Procurement (GPA Committee), which administers the GPA, or in jurisprudence under the Agreement. It has, however, been argued that there are a number of ways in which such concerns might be accommodated.⁷⁸ For example, it has been suggested that in some cases it may be possible to structure labour-related conditions in ways that do not violate the basic requirements of the Agreement regarding national treatment and

⁷⁶ See, generally, S Arrowsmith, *Government Procurement in the WTO* (The Hague: Kluwer, 2003).

⁷⁷ RD Anderson, 'Renewing the WTO Agreement on Government Procurement: Progress to Date and Ongoing Negotiations' 2007 *Public Procurement Law Review* 16(4) 255.

⁷⁸ See C McCrudden, *Buying Social Justice, Equality, Government Procurement and Legal Change* (Oxford: Oxford University Press, 2007).

non-discrimination.⁷⁹ It has also been argued that the GPA requirements regarding tender award criteria, which permit contract awards to be based on the ‘most advantageous tender’, thereby also permit consideration of ‘secondary criteria’ such as employment considerations.⁸⁰ Certainly, the GPA Committee can, at the time that a developing country accedes to the Agreement, authorize such a country to use ‘offsets’.⁸¹ These are defined to include ‘domestic content, licensing of technology, investment requirements, counter-trade and similar requirements’.⁸² Training and local employment measures might be argued to fall within this definition. Also, the list of exceptions contained in Article XXIII GPA refers to measures necessary to protect public morals, order or safety and human, animal or plant life, or health; or relating to the products or services of handicapped persons, of philanthropic institutions, or of prison labour (corresponding exclusions are also set out in various Parties’ schedules).

2. *GPA Schedules*

Apart from the above-outlined possibilities for accommodating labour-related concerns based on general provisions of the GPA, some Parties have sought to cover such concerns through flexibilities that are written into their coverage commitments under the Agreement. These include the well-known set-asides for small and minority and/or small and medium-sized enterprises which are written into the schedules of the US, Canada and Korea; the provision that is made in Japan’s GPA schedules for non-application of the Agreement to contracts involving cooperatives; and exclusions that many Parties have adopted relating to procurement of agricultural products in furtherance of agricultural support or human feeding programmes. Finally, it may be noted that in many cases procurements by labour or other ministries concerned with employment or human welfare are specifically covered in the respective schedules of various GPA Parties.

H. Trade Policy Review Mechanism (TPRM)

According to the Mandate of the TPRM laid down in Annex 3 of the Marrakesh Agreement, trade and related policies are reviewed against the economic background of a Member. The TPRM reports, however, have on occasion touched upon labour issues, not only in analyzing peripheral issues relevant to the trade policy review (TPR) of the country in question, but also explicitly upon the request of Members who are free to raise concerns on ‘other issues’ at TPR meetings. This language implies that the mechanism is not precluded from also investigating the costs and adjustments of trade policies. There are labour implications of trade policies

⁷⁹ Arrowsmith, above fn 76, at 330. ⁸⁰ Ibid. at 342–43.

⁸¹ Art XVI GPA. ⁸² Art XVI:1 GPA, footnote.

and the Secretariat's TPR Division (TPRD) has not shied away from addressing such issues in cases where labour considerations are considered relevant for economic growth. This can be illustrated by the review of Mauritius where the TPRD noted its growing concern about the link between fiscal and social protection caused by the dual economy in the country consisting of, on the one hand, a highly-protected economy and, on the other hand, very open export zones. The TPRD noted that the tensions among labour unions originated in the differences in the labour legislation applied in the two parts of the economy.⁸³ In addition, in its review of China, the TPRD extensively referred to labour issues especially those relating to labour market reforms, income inequality, and labour migration.⁸⁴

Members themselves have also on occasion insisted on the inclusion of labour standards in the TPRM. In discussions over TPRM reports, the EU and, to a lesser extent, the US have asked labour-related questions. Yet the country under review hardly ever answers such questions and the non-answers have never been challenged.

Therefore, in the context of the WTO multilateral system, Members' WTO legal framework allows Members to intertwine some labour considerations with trade measures.

III. REGIONAL TRADE AGREEMENTS AND LABOUR CONSIDERATIONS

The GATT 1947 and now the WTO explicitly authorize WTO Members to conclude regional trade agreements (RTAs) that include free-trade agreements (FTAs) and customs unions whereby they exchange reciprocal preferences subject to some conditions.⁸⁵ There has recently been significant growth both in the number of FTA negotiations and their scope. By 2010, around 400 of such agreements could be active. As noted by the WTO DG,⁸⁶ there are several reasons why Members may appear to favour FTAs. First, they seem quicker to conclude. Secondly, many of the recent FTAs contain political or geopolitical considerations. For developing countries negotiating with more powerful developed countries, there is usually the expectation of

⁸³ TPRD, *Trade Policy Review Mauritius – Report by the Secretariat*, WT/TPR/S/90 (5 October 2001), Part 2, Economic Environment, at paras 1–24.

⁸⁴ TPRD, *Trade Policy Review People's Republic of China – Report by the Secretariat*, WT/TPR/S/161 (28 February 2006), Part 2, Economic Environment, at paras 1–57.

⁸⁵ See also chapter 10 of this Handbook.

⁸⁶ P Lamy, 'Regional agreements: the "pepper" in the multilateral "curry"', Speech delivered at the Confederation of Indian Industries Partnership Summit 2007 – 'Emergent India: New Roles and Responsibilities' (17 January 2007), at <http://www.wto.org/english/news_e/sppl_e/sppl53_e.htm> (last visited 22 May 2008).

exclusive preferential benefits, as well as expectations of development assistance and other non-trade rewards. Thirdly, because of similarities in interests and often more common values, regional trade agreements can go into new areas such as investment, competition, technical standards, environment provisions, or labour standards where there is no consensus among WTO Members. But FTAs cannot address a series of sensitive issues such as agriculture subsidies⁸⁷ and other issues operating in world markets. In that sense, they can only complement the multilateral approach. Yet, FTAs seem to have been used as laboratories to cover new sectors and the way some of these FTAs tackle the labour standards is informative.

NAFTA was the first FTA to introduce provisions on labour standards, but only in a Side Agreement on Labour Cooperation where non-compliance is primarily subject to fines. Since 1994, the US has concluded several FTAs with references to labour standards included in the main text of the agreement. The EU is negotiating Economic Partnership Agreements (EPAs), which are essentially FTAs, the drafts of which include a commitment to the relevant ILO conventions on core labour standards. Canada has also included labour concerns in free trade agreements.

The remainder of this section recalls the main conditions for WTO-consistent RTAs and then discusses—through questions—whether and how internal labour standards may affect the WTO-consistency of FTAs.

A. Conditions for a WTO-Consistent RTA

Article XXIV GATT 1994 and Article V GATS lay down the legal framework that authorizes WTO Members to enter into RTAs. The WTO imposes three types of substantive conditions for RTAs to be WTO-consistent.⁸⁸ First, with respect to the *overall impact* of the RTA vis-à-vis other Members: there is the obligation not to raise barriers to trade with third parties (Article XXIV:5). This is quantifiable in terms of tariffs, but less easy to measure in terms of other trade regulations such as standards or rules of origin. Second, there is a so-called ‘external requirement’ that an FTA cannot lead to higher MFN import duties for its members, while a customs union must harmonize the external trade policies of its members and compensate affected non-members accordingly (Article XXIV:8). Third, the ‘internal requirement’ means that tariffs and other restrictive regulations of commerce must be

⁸⁷ ‘There is not such a thing as a bilateral subsidy and a multilateral subsidy’, P Lamy, ‘Multilateral and bilateral trade agreements: friends or foes?’, Annual Memorial Silver Lecture, Columbia University, New York (31 October 2006), at <http://www.wto.org/english/news_e/sppl_e/sppl46_e.htm> (last visited 22 May 2008).

⁸⁸ See G Marceau and C Reiman, ‘When are Regional Trade Agreements Compatible with the WTO?’ 2001 *Legal Issues of Regional Integration* 28(3) 297; N Lockhart and A Mitchell, ‘Regional Trade Agreements under GATT 1994: An Exception and Its Limits’ in A Mitchell (ed), *Challenges and Prospects for the WTO* (London: Cameron May, 2005) 217.

phased out on ‘substantially’ all trade (Article XXIV:8). Again, the tariff component can be quantified, but it is harder to determine in the case of other restrictive trade regulations as there is no agreed definition of the term. It is therefore clear that the WTO authorizes RTAs, the operation of which should not lead to situations where the non-party would ‘pay the price’ of internal preferences.⁸⁹ The jurisprudence has also determined that it is for the Member invoking Article XXIV as a defense to a claim of violation (for example, violation of the MFN principle)⁹⁰ to prove, first, that the RTA is WTO-consistent before arguing that the challenged measure is necessary and inherent to the RTA. This is a very heavy burden that no Member has ever succeeded in discharging.

B. An Example: The US – Peru FTA

The US–Peru FTA and its new provisions on labour provide an interesting example.⁹¹ In that new FTA, parties reaffirm their obligations as members of the ILO and also agree to adopt and maintain in their laws and practice the core internationally-recognized labour rights, as stated in the 1998 ILO Declaration on Fundamental Principles and Rights at Work, and including a prohibition on the worst forms of child labour. The labour obligations are subject to the same dispute settlement procedures and enforcement mechanisms as the trade obligations. The FTA includes a cooperative mechanism to promote respect for the principles embodied in the 1998 ILO Declaration, and compliance with the ILO Convention 182 on the Worst Forms of Child Labour.⁹² But there is no provision on any role of the ILO as an organization.

The questions to address before assessing whether labour-related regulations can take place within a WTO-consistent RTA are: (i) whether such labour requirements would be increasing trade restrictions overall, contrary to Article XXIV:5 and/or would constitute ‘other restrictive regulations of commerce’ that ought to be eliminated pursuant to Article XXIV(8) GATT 1994; (ii) another institutional

⁸⁹ See the case law on the need to maintain parallelism when applying of safeguards in the context of FTAs; for example, Appellate Body Report, *US – Steel Safeguards*, at paras 433–56.

⁹⁰ In *Turkey – Textiles*, the Appellate Body explicitly noted that Article XXIV may justify violations of provisions additional to Article I on MFN.

⁹¹ *Final Text of the United States – Peru Trade Promotion Agreement*, signed on 12 April 2006, at <http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html> (last visited 22 May 2008).

⁹² Cooperative activities include: law and practice related to the principles and rights of the ILO Declaration; compliance with the ILO Convention 182 on the Worst Forms of Child Labour; methods to improve labour administration and enforcement of labour laws; social dialogue and alternative dispute resolution; occupational safety, and health compliance; mechanisms and best practices to protect and promote the rights of migrant workers.

question is whether an RTA party can impose WTO consistent trade restrictions against another RTA party when called upon to do so under the terms of its RTA for violations of the RTA labour provisions.

1. *Are Labour Standards Internal or External Restrictions That Would Be WTO-(In)Consistent (Art XXIV: 5 and :8)?*

There is no agreed definition or jurisprudence on the types of RTA internal restrictions which ought to be eliminated and what types of overall restrictions are prohibited,⁹³ nor is there any agreed criteria to assess the overall trade impact of an RTA other than those included in the GATT 1994 Understanding on Article XXIV.

Internally, the ‘duties and other restrictive regulation on commerce’ that should be eliminated on substantially all the trade (Article XXIV:8) should not, in all logic, be interpreted as to include WTO-consistent trade regulations. Indeed all regulation somehow *de facto* restricts trade. If a labour regulation can be WTO-consistent (under GATT 1994 or TBT), they should operate consistently within an RTA. The introduction of labour standards *only* on internal trade should not lead to restrictions with third-Members, in compliance with Article XXIV:5. If the standards are imposed against imports as well, the issue is more complex and calls for the application of the national treatment obligation where the labour-PPM issue will have to be addressed. Moreover, some have argued that WTO-consistent TBT, SPS, and competition regulations could nonetheless be viewed as raising barriers to trade with third-countries, contrary to Article XXIV:5 GATT 1994. All these questions are wide open.

2. *Can an RTA Party Impose (WTO-Consistent) Trade Restrictions Against Another RTA Party When Called Upon To Do So Under the Terms of Their RTA for Violations of the RTA Labour Provisions?*

So far the WTO has not been faced with a situation where a party to an RTA seeks to impose trade retaliation to another party pursuant to their agreement. NAFTA, for example, provides for fines if labour provisions are violated—although in case of non-payment trade countermeasures may be used. Would such a trade restriction, permitted under an RTA, be consistent with Article 23 DSU that prohibits unilateral determinations? One could argue that in allowing for RTAs, Article XXIV must provide for effective RTAs, meaning RTAs with dispute settlement provisions and operational remedies. On the other hand, it needs to be recalled that in case of conflict, the Marrakesh Agreement prevails over any other WTO provisions. But is this a conflict?

⁹³ J Mathis, ‘Regional Trade Agreements and Domestic Regulation: What Reach for “Other Restrictive Regulations of Commerce”’ in L Bartels and F Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford: Oxford University Press, 2006) 79; WTO Negotiating Group on Rules, *Compendium of Issues Related to Regional Trade Agreements*, TN/RL/W/8/Rev.1 (1 August 2002).

Finally, in order to get a clearer picture of the situation of the RTAs by means of an exchange of factual information, the WTO GC decided to establish on a provisional basis a transparency mechanism for all RTAs that are notified.⁹⁴ It is interesting to note that on occasions the RTA Committee has discussed labour provisions where they are present.⁹⁵

IV. CAN LABOUR CONSIDERATIONS CONDITION WTO-CONSISTENT PREFERENCE SCHEMES?

The US and the EC now include a requirement of compliance with some labour considerations as a condition for benefiting from trade preferences or from additional preferences. Pursuant to the Enabling Clause, developed country WTO Members are entitled to provide tariff preferences to imports from developing countries, so long as these preferences are ‘generalized, non-discriminatory and non-reciprocal’.⁹⁶ This is the WTO legal basis for the so-called ‘General System of Preferences’ (GSP), instituted by UNCTAD and received in the GATT 1947 first as a waiver (1972) and then under the Enabling Clause (1979) codified in the GATT 1994. In *EC – Tariff Preferences*, the Appellate Body alluded to the possibility that preference schemes with labour standards be consistent with the Enabling Clause so long as one can argue that compliance with a labour standard is based on objective criteria favouring developing countries’ development, trade, and financial needs, and that countries in similar situations are treated similarly within a fair incentive scheme.

In *EC – Tariff Preferences*, the Appellate Body had to interpret the provision of the Enabling Clause that allows for non-discriminatory preference in favour of developing countries. The Appellate Body first determined that the purpose of the Enabling Clause was to help and respond to the development, financial, and trade needs of developing countries⁹⁷ and that different developing countries may have different development needs. Thus, ‘responding to the “needs of developing countries” may entail treating different developing-country beneficiaries differently’.⁹⁸ It added that the ‘existence of a development, financial or trade need’ must be assessed according to an objective standard; [b]road-based recognition of a particular need, set out in

⁹⁴ WTO, *Transparency Mechanism for Regional Trade Agreements*, WT/L/671 (18 December 2006).

⁹⁵ WTO CRTA, *Factual Presentation: Free Trade Agreement between the United States and Australia*, WT/REG184/3 (11 June 2007), at para 71.

⁹⁶ Enabling Clause, footnote 3.

⁹⁷ Appellate Body Report, *EC – Tariff Preferences*, at paras 158–60.

⁹⁸ *Ibid* at para 162: authorizing preference-granting countries to ‘respond positively’ to ‘needs’ that are *not* necessarily common or shared by all developing countries.

the WTO Agreement or in multilateral instruments adopted by international organisations, could serve as such a standard'.⁹⁹ The Appellate Body added that a 'nexus' should exist between the preferential treatment and the likelihood of alleviating the relevant development, financial, or trade needs.¹⁰⁰ One issue is therefore whether the ILO labour standards could assist in responding to 'needs' of developing countries.

With respect to India's claim that the EC GSP was violating the non-discrimination obligation of the Enabling Clause, the Appellate Body said that 'additional preferences for developing countries with particular needs... is consistent with the object and purpose of the *WTO Agreement* and the Enabling Clause'¹⁰¹ provided that identical treatment is available to all similarly-situated GSP beneficiaries.¹⁰² It then concluded that the EC Drug Arrangement was not based on objective criteria, it was not a real incentive programme that responded to any special and objective needs of developing countries, and therefore developing countries with similar needs may not be treated similarly. This final statement of the Appellate Body contained an *obiter dictum* on labour-related preferences that is quite interesting:

Articles 10 and 25 of the Regulation, which relate specifically to the Drug Arrangements, provide no mechanism under which additional beneficiaries may be added to the list of beneficiaries under the Drug Arrangements as designated in Annex I... *This contrasts with the position under the 'special incentive arrangements for the protection of labour rights' and the 'special incentive arrangements for the protection of the environment', which are described in Article 8 of the Regulation. The Regulation includes detailed provisions setting out the procedure and substantive criteria that apply to a request by a beneficiary under the general arrangements described in Article 7 of the Regulation (the 'General Arrangements') to become a beneficiary under either of those special incentive arrangements.*¹⁰³

Following the recommendations of the DSB, the EC adopted a revised GSP regime composed of three arrangements.¹⁰⁴ The third incentive provides that additional tariff preferences are granted on request to vulnerable and dependent countries that have ratified and effectively implemented the sixteen core conventions on human and labour rights and seven (out of eleven) of the conventions related to the protection of the environment and good governance.¹⁰⁵ Paragraph 8 of the Preamble dealing with this third programme, the so-called 'GSP plus', states that a special incentive arrangement for sustainable development and good governance is set up to promote further economic growth and thereby to respond positively to the needs of developing countries.

⁹⁹ Ibid at para 163.

¹⁰⁰ Ibid at paras 164–65: 'paragraph 3(c) suggests that tariff preferences under GSP schemes may be "non-discriminatory" when the relevant tariff preferences are addressed to a particular "development, financial [or] trade need" and are made available to all beneficiaries that share that need'.

¹⁰¹ Ibid at para 169 (original emphasis).

¹⁰² Ibid at para 173.

¹⁰³ Ibid at para 182 (original emphasis).

¹⁰⁴ WTO CTD, *Generalized System of Preferences – Communication from the European Communities*, WT/COMTD/57 (28 March 2006).

¹⁰⁵ Council Regulation No 980/2005, section 2.

This type of GSP-plus provision raises two main questions. First, can a GSP condition give an additional preference to Members for their respect of principles contained in international conventions on labour rights, a sector not covered by the WTO? Many arguments can be offered against this type of incentive.¹⁰⁶ If a Member challenges such a scheme in a WTO dispute, it will be for a panel to determine whether this GSP regulation addresses objective financial, trade, or development needs of developing countries, whether this is recognized as such by the recommendations of an international organization; whether it provides an objective and transparent mechanism under which GSP-plus beneficiaries may be selected; whether the scheme provides an explicit mechanism to allow countries to benefit, or lose, from the GSP-plus benefits; and whether countries in similar situations are treated similarly. Throughout this exercise the WTO objective of sustainable development is relevant. One difficult issue is whether such a scheme is really 'non-reciprocal' within the meaning of the Enabling Clause, as the grant of preferences is in return for the commitment to adhere to a set of treaties. But conditioning additional preferences to compliance with development, trade, or financial policies can be consistent with the Enabling Clause. The novelty will be to determine whether and how labour considerations address such needs. For some the answer is obvious, at least with respect to labour considerations contained in internationally negotiated conventions.

The second question relates to the determination of compliance with such international labour conventions? In the specific case of the EC scheme,¹⁰⁷ the ILO would be the international actor determining compliance with ILO standards. But what if a GSP scheme only refers to compliance with ILO standards without any indication of who will determine compliance? As with the situation where the TBT Agreement authorizes national measures complying with existing international standards, or where a WTO panel would need to assess the relevance of invoking compliance with any existing international standard to justify the application of a GATT 1994 or GATS exception, it would be ultimately for a panel or the Appellate Body to decide whether the national measure based on ILO standards responds to objective criteria relating to the development, financial, and trade needs of developing countries and is applied fairly. Again, an open question. A coherent approach to specialized international organizations' competence would lead a panel to request information from the ILO on this issue, pursuant to Article 13 DSU. This would not only give legitimacy to the process, but also allow for the good faith application of both the WTO and the ILO treaties.

¹⁰⁶ There is also an important economic literature against linking trade and labour. See, eg, the opposite view in S James, 'Maladjusted: The Misguided Policy of Trade Adjustment Assistance' *CATO Trade Briefing Paper* No 26, at <<http://www.freetrade.org/node/794/print>> (last visited 22 May 2008). On the new EC GSP-plus, see L Bartels, 'The Trade and Development Policy of the European Union' 2007 *European Journal of International Law* 18(4) 715.

¹⁰⁷ WTO CTD, *Generalized System of Preferences - Communication from the European Communities - Addendum*, WT/COMTD/N/4/Add.3 (29 March 2006).

V. CONCLUSIONS

Although the WTO treaty language does not make explicit reference to labour considerations, the first conclusion that emerges from the above analysis is that the 'space' that is left by the existing trade law framework for Members to promote labour and social progress objectives is far from negligible. WTO Members can indeed find ways to comply efficiently and effectively with both their trade and labour regimes.

Legally, labour standards are like any other standards: they are negotiated outside the WTO and may be intertwined with trade measures. But labour standards never relate to the physical characteristics of products but rather to the conditions of workers, and in this sense they are forms of PPMs. The legal considerations of PPMs are not clear in WTO law but, in the context of environmental measures, some non-product related criteria were accepted as WTO-consistent regulatory distinctions, in the application of the exception provisions of the GATT 1994. Arguably, some exceptions, notably the exception protecting public morals, may find application to justify some core labour related trade restrictions. Non-product labour considerations may also be consistent with the TBT Agreement, so long as they pursue legitimate objectives and are applied in good faith.

The issue of trade and labour is complex. The challenge of globalization generated by trade liberalization which constantly modifies relative situations between Members cannot be met simply by static formulas but, as pointed out in a recent report from the ILO DG,¹⁰⁸ calls for dynamic answers consonant with the dynamic character of the phenomenon. It is important to maintain a dynamic of progress by permanently encouraging and accompanying the efforts of all States, as Members of the WTO and ILO, to promote both economic and social progress by considering these two goals together with a view to raising people's standards of livings. The WTO DG's call for a 'Geneva consensus' seems to point exactly in that direction:

But although the opening up of markets produces benefits to many, it also creates adjustments costs which we cannot ignore. These adjustments must not be relegated to the future: they must be an integral part of the opening-up agenda. This is what I call the 'Geneva consensus': a belief that trade opening works for development but only if we address the imbalances it creates between winners and losers, imbalances that are all the more dangerous the more fragile the economies, societies or countries. This is the only way to ensure that the opening up of markets will produce real benefits to all people in their everyday lives. [...] We need to remember that trade is only a tool to elevate the human condition; the ultimate impact of our rules on human beings should always be at the centre of our consideration. We

¹⁰⁸ 'Strengthening the ILO's Capacity to Assist its Members' Efforts to Reach its Objectives in the Context of Globalization', Report V, International Labour Conference, 96th Session, Geneva, 2007, at paras 96–108.

should work first for human beings and for the well-being of our humanity. I want to believe that the new 'Geneva consensus' has the potential to succeed in contributing to the process of humanising globalization and establishing further justice and equity.¹⁰⁹

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¹⁰⁹ P Lamy, 'Humanising Globalization', Speech, Santiago de Chile, Chile (30 January 2006), at <http://www.wto.org/english/news_e/sppl_e/sppl16_e.htm> (last visited 22 May 2008); see also P Lamy, 'Making Trade work for Development: Time for a Geneva Consensus', Emile Noel Lecture New York University Law School, New York (30 October 2006), at <http://www.wto.org/english/news_e/sppl_e/sppl145_e.htm> (last visited 22 May 2008).

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