Core Labor Standards and the WTO: Beware of Unilateralism!
A Response to Professor Meng

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1. Introduction: Between Diversity, Relativism and Universalism

This wonderful conference is taking place on Mount Scopus, an ancient hill with a beautiful view over the City of Jerusalem – hence its name. This city, a holy city to no less than three central religions of the world, serves as a meeting place between a myriad of different religious sects, cultures, nationalities, convictions and political parties and groups, and symbolizes perhaps more than any other place in the world both the virtue and the vice of human diversity. Cultural, religious and economic diversity is an integral part of our world, indeed of human existence, and is one of the sources of the world's continuous and healthy development, both economically and culturally. In the past, modern Western society saw the "melting pot" as its ideal and as one of the means that would bring peace and prosperity both within the nation-state and between nations. In the post-modern era, however, a realization of the virtue of diversity has emerged and the model of multiculturalism has replaced the melting pot.[1] This realization, however, must not lead us to a destructive type of relativism, where every act or position can be defended and no act or practice – no matter how atrocious or malicious – can be denounced. Certainly there must be certain basic values and "core" human rights that have universal application worldwide and ought to be respected by all.

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[1] See e.g. *Multiculturalism: Examining the Politics of Recognition* (C. Taylor et al., ed) (Princeton University Press, 1994); Will Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1989) (for a liberal-philosophical defence of multiculturalism).

Against this background, I agree fully with the important distinction made by Professor Meng, in his paper on International Labor Standards and International Trade Law, between so-called "core labor standards", that have a universal human rights aspect, and other labor standards – as important as they may be. Labor standards in relation to issues such as wages, social security, vacations and working hours are, as Prof. Meng so rightly points out, a result of history, the level of economic development, tradition and relations within a society that go far beyond mere labor relations. They are a reflection of the relative factor endowment of a national economy, and one cannot even dream of artificially imposing worldwide uniformity on such standards. Therefore, the talk about "social dumping"[2] in this context and about the need to countervail products manufactured under labor conditions lower than those of the importing country, in order to "level the playing field" and ensure "fair trade", often reflects either deep ignorance and misunderstanding, or thinly disguised protectionism. This same logic, normally used to justify restrictions or countervailing duties on cheap imports from the poor to the rich countries, could just as well be used to justify restrictions on imports going the other way. One could easily sustain an argument on similar foundations, according to which such restrictions are required in order to countervail the unfair advantage of the developed economies in fields such as scientific development and ownership of intellectual property – a gap that the developing countries will have a very hard time ever bridging. I often hear arguments for allowing countervailing duties against "social dumping" from US students, who are convinced that "the American way" is *the* way, and that everyone else should just adapt themselves accordingly. When I explain that if their suggestion is adopted into the General Agreement on Tariffs and Trade (GATT), Israel will be able to countervail US products imported into Israel, considering that US labor standards in fields such as maternity leave for mothers and many other

[2] The term "social dumping" refers to the "export of products that owe their competitiveness to low labor standards". Steve Charnowitz, "The Influence of International Labour Standards on the World Trading Regime", 126 *Int'l Lab. Rev.* 565, 566 (1987).

social security guarantees are lower than in Israel, they are first very surprised and then usually change their minds altogether.

Lower wages and lower labor standards are therefore part of the comparative advantage of developing countries, allowing them to take part in the global economy. By blocking their exports, the rich countries will only bring about the closure of their plants and impede their economic development – causing them to sink back into under-development and poverty. This will certainly not improve their living conditions. On the contrary, by allowing their exports to flow freely, we will contribute to their continued economic development and rising standard of living. Experience has shown this to constitute a much more effective strategy for raising labor standards in developing countries.

However, some types of employers' behaviors cannot be justified by any economic development argument, or by any cultural difference. Violations of human rights such as unlawful child labor, forced labor or prohibition of collective bargaining are not part of a country's comparative advantage and should not be justified under international law, nor under international trade law. This is indisputable. Hence the distinction between human rights in the labor field – such as those included in the 1988 Declaration of the International Labor Organization (ILO)[3] - and other labor rights. The question is how one should go about achieving wider acceptance and respect for core labor rights, and whether or not unilateral trade sanctions are the answer.

2. Promotion of Core Labor Standards through GATT Article XX(a): Some Legal Obstacles

[3] *ILO Declaration on Fundamental Principles and Rights at Work, 1998*, ILO Document CIT/1998/PR20A (available through the ILO website http://www.ilo.org).

It is in this regard that I wish to raise some words of caution in relation to Professor Meng's suggestion in Part 4 of his paper.[4] He suggests that human rights protection could be introduced into World Trade Organization (WTO) Law through Article XX(a) GATT,[5] whereby States have a right to deviate from the Agreement if it is necessary to protect "public morals". He argues that "morals" is a synonym of "ethics" and that "human rights are part of the ethical foundations of states". The protection of "public morals" could therefore, in his opinion, be understood to encompass the protection of human rights, at least those protected by the Universal Declaration of Human Rights[6] or other widely accepted international treaties. It would therefore follow, according to this logic, that any WTO member could decide unilaterally to impose trade sanctions on another WTO member in which, in the opinion of the former, there are human rights violations, or where products are produced under conditions not commensurate with core labor standards. The act of the member state imposing sanctions could of course be brought to the scrutiny of a WTO panel and later to the Appellate Body, who would have to decide "on the scope and content of the core labor rights". This proposition, which is not entirely new in the literature,[7] is quite problematic, both legally and politically, and I would like to briefly explain why.

First some legal obstacles: Since Article XX is a limited and conditional exception from obligations under other provisions of the GATT, the practice of GATT/WTO panels has been to interpret Article XX narrowly.[8] They also

[4] Werner Meng, "International Labor Standards and International Trade Law: A Race to the Bottom?", [*ibid.* ____], p. ___.
[5] General Agreement of Tariffs and Trade, *opened for signature* on October 30, 1947, 55 U.N.T.S. 194; T.I.A.S. No. 1700 [hereinafter GATT], Article XX(a).
[6] Universal Declaration of Human Rights, *adopted* Dec. 1948, G.A. Res. 217, U.N. Doc. A/180 at 71 (1948).
[7] See e.g., Göte Hansson, *Social Clauses and International Trade* (London, 1983), 175-76; J.M. Servais, "The Social Clause in Trade Agreements: Wishful Thinking or an Instrument of Social Progress?", 128 *Int'l Lab. Rev.* 423 (1989); Daniel S. Ehrenberg, "The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor", 20 *Yale J. Int'l L.* 361 (1995); and Steve Charnowitz, "The Moral Exception in Trade Policy", 38 *Va. J. Int'l L* 689 (1998).
[8] See e.g. the Tuna I decision, *infra* note 13, para. 5.22; and William J. Davey, "The WTO/GATT World Trading System: An Overview", in *Handbook of GATT Dispute Settlement* 7 (Pierre Pescatore et

place the burden on the party invoking Article XX to justify its invocation, and refrain from examining Article XX exceptions unless invoked.[9] The member invoking Article XX(a) would also have to convince a panel that it has met the requirements of the *chapeau* (the opening provision of the Article), namely that the measures adopted do not constitute "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail."[11] In other words, it would have to show that the trade restriction has been imposed against all countries where core labor standards are not respected, and not just against some of them. This, of course, is not an insurmountable obstacle. The member state choosing this path of action would have to conduct some type of investigation regarding the labor situation in all of its trading partners, and based on its findings adopt some type of uniform trade measures that would satisfy the requirement of non-discrimination.

Secondly, it would have to meet the "least trade restricting measure" test that has been developed by GATT and WTO panels and the Appellate Body throughout several decisions.[12] In particular, a panel may require the imposing

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al. eds, 1988) at 63; and Jan Klabbers, "Jurisprudence in International Trade Law: Article XX of GATT", 26 *J. World Trade* 63, 88-89 (1992).

[9] Tuna I, *ibid.*

[11] GATT, *supra* note 5, Article XX. The *chapeau* of Article XX provides: "Subject to the requirement that such measures 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, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:".This opening sentence is then followed by a list of various circumstances considered to serve as excuses for the imposition of otherwise prohibited measures. The first of which is paragraph (a): "[measures] necessary to protect public morals".

[12] In *United States – Section 337 of the Tariff Act of 1930*, GATT BISD 36S/345, at 394, ruled that "a contracting party cannot justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the *least degree* of inconsistency with other GATT provisions." (Emphasis added). It should be noted, that like paragraph (d), discussed in this case, paragraph (a) of Article XX also uses the term "necessary". This ruling has been followed in many subsequent cases, including the Tuna/Dolphin cases, *infra*. The WTO Appellate Body also showed a clear preference for multilateral cooperative mechanisms over unilateral action in its more recent Shrimp-Turtle Report: *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, 38 I.L.M. 118 (1999), at 170.

state, like it did in the *Tuna-Dolphin* Case,[13] and later in the *Shrimps-Turtle* Case[14] to exhaust the multilateral venue, before using unilateral trade restrictions.[15] This would mean to seriously negotiate, in good faith, an agreement with the country allegedly violating the core labor standards, in order to bring an end to the violation.[16] If that does not help, a multilateral action against it, for instance within the ILO or the Security Council (as suggested by Professor Meng), would have to be considered. If it has not exhausted these alternatives, the trade restriction may be deemed, according to WTO jurisprudence, not to be "necessary", as required by Article XX(a), or to constitute an "arbitrary or unjustifiable discrimination" against the targeted country under the *chapeau*.[17]

Thirdly, this situation will again raise the question of extra-territoriality in relation to the various policy objectives specified in Article XX. In the first Tuna-Dolphin case, it was held that Article XX(b) could only be understood to relate to protection of humans, animals or plants inside the territory of the

[13] *United States – Restrictions on Imports of Tuna*, Sept. 3, 1991, GATT BISD 39S/155 (hereinafter "Tuna I"), para. 5.28 of the report. The panel ruling was not formally adopted by the GATT Council, by mutual agreement of the USA and Mexico. Mexico's consent not to enforce the decision in its favor was motivated by its wish not to jeopardize the then ongoing NAFTA negotiations with the US. The US did however heed the panel's call for a multilateral solution to the problem, and in October 1995 the Declaration of Panama was reached between the US and 11 other nations setting an internationally accepted set of principles to protect dolphins from tuna fishermen. See R. Bhala, *International Trade Law: Theory and Practice* (2nd ed.) (Lexis Publishing, 2000), 1602.

[14] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (issued 12 October 1998, Adopted 6 November 1998), 38 I.L.M. 118 (1999), at 170.

[15] There, the GATT Panel considered that the US unilateral measures did not meet the requirement of necessity set out in the *chapeau* of Article XX: "The United States had not demonstrated to the Panel – as required by a party invoking an Article XX exception – that it had exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with the General Agreement, in particular through the negotiation of international cooperative arrangements…".

[16] There would not be a requirement of actually *concluding* such an international agreement, as was stressed by the Appellate Body in its second decision in the Shrimp-Turtle case, but only to seriously *negotiate* such an agreement with the other parties in good faith. *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia* (AB-2001-4), para. 134.

[17] See the Shrimp report, *ibid.*. In that particular case, the *chapeau* was invoked in light of Malaysia's allegation that the US had failed to conclude the same type of agreement with Malaysia as it had with some other WTO Members, and it is possible that one should see the Appellate Body's reasoning on this background. However, Malaysia's position, when arguing before the Appellate Body, was that the measure at issue results in "arbitrary or unjustifiable discrimination" because it conditions the importation of shrimp into the United States on compliance by the exporting Members with policies and standards "unilaterally" prescribed by the United States (para. 135). And the Appellate Body's reasoning can be understood both ways.

imposing state.[18] While this interpretation prompted wide criticism by many commentators,[19] and was later rejected by the second Tuna-Dolphin panel,[20] it has not yet been ruled upon by the Appellate Body, which left it open in the Shrimps-Turtle case.[21] In our case, it is a much more problematic issue. The record indicates that the "public moral" exception of Article XX was formulated in order to allow a country to restrict importation of "immoral" products, such as pornography, into its territory.[22] It is, therefore, a provision aimed to protect a country's right to administer its own domestic policies in accordance to its own beliefs and values. The suggested interpretation, however, would in fact turn the provision on its head. It would be understood to allow country A to impose trade restrictions on country B in order to try to force B to change some of its domestic practices, which A believes are immoral (in other words a provision allowing a country to interfere in another country's domestic policies). That is indeed quite a daring and far-reaching reading of the provision.

3. Normative Analysis: The Harmful Effects of Unilateral Trade Sanctions

[18] Tuna I, *supra* note 13, para. 5.26.
[19] See, for instance, M.J. Trebilcock & R. Howse, *The Regulation of International Trade* (Routledge, 1995), 347-350.
[20] *United States – Restriction on Imports of Tuna*, reprinted in 33 *International Legal Materials* 839 (1994).
[21] *Supra*, note 14. The Appellate Body observed that the sea turtle species at issue in the case are all known to occur in waters over which the United States exercises jurisdiction. The Appellate Body noted that in this case, "there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g)." (Para. 133). Thus, it did not need to address the question of extra-territorial action.
[22] See R. Bhala & K. Kennedy, *World Trade Law* (Lexis Law Publishing, 1998), 146. Interestingly, there has been no litigation or other GATT practice under Article XX(a) that can shed light on its scope. Most countries, however, have provisions that authorize their custom authorities to seize obscene materials. See for instance 19 U.S.C. § 1305(a). It therefore makes sense that the drafters of the provision would seek to permit such exceptions to the Article XI prohibition on import prohibitions. Bhala & Kennedy, *ibid.*, ascribe the fact that the Article XX(a) public morals exception has never been invoked by a WTO Member, to wise self-restraint on the part of WTO Members, who understand the potentially broad sweep of this exception.

The suggestion to interpret Article XX(a) so as to permit the use of unilateral trade sanctions against countries in which core labor standards are violated, raises some serious normative questions. Do we really think that unilateral trade restrictions by one country against another is the way to go in order to try and raise labor standards worldwide? Can we be sure that the imposing country isn't motivated by protectionist sentiments? If we allow this type of measure, aren't we opening up a loophole of gigantic dimensions that will put into peril the entire multilateral trading system?

One must keep in mind that while the adjudicative system of the WTO is more developed than those found in most other areas of international law, it is still not nearly as developed as most domestic legal systems. WTO panels do not have the authority to order any binding interlocutory measures, nor are their final decisions more than declarations about the obligations of Member States. Proceedings before the panels are usually quite lengthy, always preceded by diplomatic consultations,[23] and often followed by an appeal to the Appellate Body.[24] Thus, a unilateral measure imposed by a Member State against imports from another Member State is bound to stay in place for at least a year or two before a binding ruling against it can be obtained from the WTO Dispute Settlement Body.[25] Then, it can take up to 15 months until the ruling is implemented.[26] A unilateral import measure can therefore cause serious harm

[23] See Article XXII of the GATT, *supra* note 5; and Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the Marrakesh Agreement Establishing the World Trade Organization, reprinted in *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (Geneva: GATT, 1994).

[24] *Ibid.*, Article 17.

[25] A request for the establishment of a panel may be submitted if consultations fail to resolve the dispute within 60 days after the request for consultation (*ibid.*, Article 4.7). The panel proceedings will usually take an additional nine months, or twelve months if the decision is appealed (*ibid.*, Article 20). If we add the time it takes for a Member State (especially a developing state) to decide whether to initiate proceedings and to prepare them, we usually reach a total period of close to two years from the time the import measure is imposed against it, until the date it can obtain a binding decision from the DSB.

[26] Although Article 21.1 of the DSU, *supra* note 23, provides that "prompt compliance with recommendations or rulings of the DSB is essential etc.", it also recognizes that when immediate compliance is "impracticable", "the Member concerned shall have a reasonable period of time in which to do so" (Article 21.3). A reasonable period of time can be the period of time proposed by the Member with the approval of the DSB, generally not to exceed 15 months from the time of the establishment of the panel. In some cases, however, when the question of implementation goes to arbitration, it can take

to the exports of developing countries in terms of the trade losses suffered, even if in the end it is found to be unjustified. Under existing WTO law, the aggrieved Member is not entitled to compensation for this harm.[27] If a Member State has an interest in protecting its domestic industry in certain sectors against inexpensive imports from developing countries, it may therefore have an actual incentive to impose a unilateral measure by invoking the Article XX(a) exception. If Member States have not yet availed themselves of this option, it is probably because such unilateral invocations based on domestic labor policies of other Member States have until now been considered unacceptable. If they become an acceptable norm within the WTO system, this may very well lead to an outbreak of unilateral measures and counter-measures. This, in turn, may eventually cause the collapse of the multilateral trade regime.

Another concern provoked by Professor Meng's suggestion is that it creates the danger of politicization of the WTO and its dispute settlement system. The multilateral trading system has until now managed to stay away from political controversies that are not trade-related. The WTO is one of the very few international organizations where countries with widely differing political agendas, including countries involved in conflicts, are able to put their differences aside, and sit down together to "talk business" in order to improve the welfare of their citizens. In the last WTO Ministerial in Doha, for instance, Israel and several Arab countries found themselves cooperating on several fronts in order to further common positions to their mutual economic

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up to 15 months from the date of the adoption of the report (*ibid.)*. This happened, for instance, in the case of *Japan – Taxes on Alcoholic Beverages*, WT/DS8/15 (1997); and in *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/15 (1998).

[27] See, for instance, the Uruguay Round note by the GATT Secretariat on "Compensation in the context of GATT Dispute Settlement Rules and Procedures", MTN.GNG/NG13/W/13/32 of 14 July 1989; the GATT Panel Report: EEC Restrictions on Imports of Dessert Apples from Chile, Report of the Panel adopted on 22 June 1989, in BISD 36 S/93, 134-135; and the discussion in Ernst-Ulrich Petersmann, "The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System Since 1948", 31 *Com. Mkt. L. Rev.* (1994) 1157, at 1177-1182.

interests.[28] For a WTO Member State to invoke Article XX(a) in the manner suggested, it must in effect "accuse" other Member States, against whom the unilateral measures are targeted, of grave breaches of basic human rights within their domestic labor market. This is bound to stir up heated political controversies, with accusations and counter-accusations, all of which must then be litigated and decided upon by three trade diplomats or trade-lawyers appointed for the respective WTO panel. Today the United States will impose trade sanctions on African countries for not doing more to prevent child labor, and tomorrow the Africans will retaliate accusing the Americans of practicing discrimination against Afro-Americans in the work force. Then we may have unilateral trade sanctions against Hungary for allegedly discriminating against ethnic Rumanians and vice versa, and Arab countries imposing trade sanctions against Israel for allegedly discriminating against Palestinian workers. And how about European trade sanctions against Saudi-Arabia and other Islamic countries for discriminating against women in the labor market (if not eliminating them entirely)? Who can adjudicate such cases? Do we really want WTO panels to enter such minefields? Is it for trade diplomats and trade lawyers to pass such contentious judgements against sovereign governments of numerous WTO Member States? Is it for them to decide for the international community which labor standards are "core" standards and universal human rights, and which are not?

I personally believe that these are questions that we would like to see negotiated on a multilateral level until agreement is reached, and not fought out in the wild boxing arena of aggressive unilateralism, where only the strong and powerful can prevail. It is perhaps relatively easy for the US to impose trade sanctions on a small developing country in Africa for not living up to some labor standards. But who could have imposed trade sanctions against the US when it practiced segregation and discrimination against its black citizens back

[28] Based on reports in Israeli newspapers from the Ministerial. For instance the report of Sapir Peretz in *Globes*, 11.11.01.

in the fifties and the sixties? And who will dare to do so today against China? By suggesting the use of Article XX(a) as *the* solution to the problem of violations of core labor standards, we are in effect suggesting an inherently discriminatory instrument that can be used by the strong against the weak, but not by the weak against the strong. It is therefore not surprising that the suggestions to add a "social clause" to the GATT – the major proponent of which have been the US and some Member States of the European Community - have been met by staunch and consistent opposition by all of the developing countries. This is the type of demand that will cause them to walk away from the negotiating table altogether.

It is also quite clear that unilateral trade sanctions, taken under any of the relevant exceptions of Article XX, are hardly the optimal policy instrument for raising labor standards in developing countries. Rather, it appears as a pretext or excuse for the West not to embrace its moral responsibilities toward the less-developed world. In terms of distributive justice the West should be transferring some of its wealth to the developing countries, rather than using unilateral sanctions. After all, part of the current achievements of the West can be attributed to its extensive colonialist exploitation of both nature and human labour in the 19th and 20th century. A balanced approach to this problem needs to look at it within the broader perspective of imbalances in the world trade structure, such as the unfavorable terms of trade to developing countries, their difficulty to access markets and the conditions of poverty from which many of them suffer. These problems cannot be resolved by unilateral trade sanctions or other types of intimidation. As Van Liemt has argued:

"Why is the question of labour standards brought up in isolation from the broader issues of imbalances in the world trade structure – including the issue of greater market access through accelerated restructuring of developed country economies, and that of raw material prices, many of which are at a low level and continue to fluctuate wildly… why [should] the social clause … be linked only to trade: would action not be more effective if it was also linked to

public capital flows (such as official lending and aid flows) and strategic relations such as defence treaties."[29]

One must also keep in mind that the impact of this instrument is limited. It only targets the manufacturing sector producing for exports to developed countries – which usually covers only a small fraction of most countries' labor markets. In fact, it is questionable whether it is this sector that is in most need of improvement. Edgren has noted that "the most blatant cases of exploitation and deprivation are not generally found in the manufacturing industries which produce for export. The worst offences are usually found in plantations and mines, construction industry and small service firms working entirely for the domestic market."[30] It is also an instrument that, at least in the short run, harms the very individuals that it was aimed to protect – the poor workers in the developing countries – whose products will be barred from some of their export markets, and who consequently may find themselves jobless. It is also likely to harm the less-wealthy consumers in these markets, who are now forced to purchase other more expensive alternatives. Of course, these two last arguments are open for debate: it is possible that in some cases the trade sanctions will cause the targeted employers to raise labor standards without losing their export markets because of increased costs. In such cases, the trade sanctions have achieved good results and may be justified. But the likely effect of trade sanctions is something that needs to be researched carefully and cannot be taken for granted. The fact is that the poor workers themselves or their representatives are not consulted in the process, and some of the evidence indicates that the sanctions cause more harm than good.[31]

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[29] Gijsbert van Liemt, "Minimum Labour Standards and International Trade: Would a Social Clause Work?" 128 *Int'l Labour Rev.* (1989) 433, at 435 and 447.

[30] G. Edgren, "Fair Labour Standards and Trade Liberalization" 118 *Int'l Labour Rev.* (1979) 523, at 525.

[31] Thus, for instance, when, between July and October 1994, thousands of children were fired from their jobs in the garment sector in Bangladesh as a result of feared US trade sanctions, the dismissed children did not merely retire to go to school. The evidence reflects that these children found new jobs, working for underground subcontractors under worse conditions than before, or even working as beggars or prostitutes. See United States Department of Labor, Bureau of International Labor Affairs, *The Apparel Industry and Codes of Conduct: A Solution to the International Child Labor Problem?* 7 (1996), available at http://www.dol.gov/dol/ilab/public/library/reports/iclp/apparel/apparel.pdf.

Finally, one should consider the question of institutional competence. Which is the optimal institutional framework for deciding about labor standards? Is it the WTO or the ILO? There can be no question that the ILO has much more expertise and legitimacy in dealing with labor standards and in deciding not only about their contents, but also about how to enforce them. Beside its expertise, the ILO's institutional tripartite structure, where not only governments, but also employers and employees are amply represented, is much more suited to decide about labor standards than the WTO, which is a purely inter-governmental organization. Labor law in all countries usually consists of three layers: legislation (i.e. acts of the legislator), collective agreements (i.e., agreements between groups of employers and groups of employees, such as labor unions), and private agreements (i.e., acts agreed between individual employers and employees). Why, in the international arena, would we have governments (i.e. the executive branch of the government, not even the legislator) decide about certain labor standards and their enforcement, without the involvement of the other players? In view of that, it is fully understandable why the WTO Ministerial in Singapore, and later in Doha, recognized the ILO as the competent body to set and deal with core labor standards, and not the WTO.[32] It would also be better if the ILO and its members could come to an agreement on whether trade sanctions should be used to enforce certain core labor standards, and if so – which.

4. Alternative Approaches

[32] The first WTO Ministerial meeting was held in Singapore in December 1996. In relation to core labor standards, the Ministers declared as follows: "We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them." (The declaration can be found on the WTO website: http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm. In the last WTO Ministerial, held in Doha in November 2001, the Ministers reaffirmed their declaration made in Singapore regarding internationally recognized core labor standards, and took note of work underway in the ILO on the social dimension of globalization. (See WTO Document: WT/MIN(01)/DEC/W/1; paragraph 8 of the preamble to the declaration).

As our above discussion has shown, there are three major problems with the suggestion to use Article XX(a) in relation to core labor standards: (1) the unilateral nature of such an approach; (2) its confrontational and potentially politicized nature; and (3) its doubtful effectiveness and negative distributive effects. The first problem is connected with the fact that we permit countries to unilaterally impose barriers to trade on the basis of their own assessment, thereby opening the door to potential abusive use by strong developed countries of trade barriers out of protectionist motives. The second problem stems from the fact that in order to invoke the Article XX(a) exception, a WTO Member must in fact accuse another Member of violating basic human rights standards, then deny from such a Member trade benefits that it is otherwise entitled to enjoy under the Agreement, and finally be willing to litigate the whole conflict through the WTO's dispute settlement procedures. The third problem suggests that the means is not suitable for the aim, and may cause more harm than good. One should therefore look for alternative ways to ensure respect for core labor standards in developing countries, ways that avert these three problems.

One possible approach would be to establish some type of a non-political international mechanism that would promote the respect of core labor standards, mainly through cooperation with the government of the country where the alleged violations occur. Instead of working *against* the developing country, we should try to work *together* with it, to assist it in eradicating violations of human rights in its labor market. Only as a last resort, in the absence of sincere cooperation, should one turn to trade sanctions. Such sanctions, however, must be examined and approved *ex ante* by this non-partial and professional body. By entrusting the important task of promoting humane labor conditions to a multilateral body, we ensure that actions are not taken out of protectionist motives, and prevent allegations to the contrary by the targeted country. Such a mechanism is more likely to enjoy the international legitimacy

required in order to take measure with the sensitive issue of domestic labor policies of sovereign states. It would also be more likely to deal with the problem of human right abuses in the labor market in its entirety, and not only within some narrow range of the economy. One could envisage a mechanism based on cooperation between the ILO and the WTO, utilizing the respective expertise and advantages of both multilateral organizations. One mechanism, that has been suggested in the literature,[33] includes an objective and fair determination procedure, based on an impartial panel of international trade and labor experts to decide whether a state has exhibited a consistent pattern of gross and reliably confirmed violations of core labor standards in producing export goods.[34] The mechanism would then enter the remedial phase, which would determine the measures necessary to eliminate those violations and set a timetable for compliance. It would rely on technical cooperation programs with the developing country, certification programs and economic sanctions to achieve its objectives, although the most extreme remedy – trade sanctions – would only be used when a state failed to respond to less severe pressure.[35] The remedial phase should also include consultations with the workers in the affected developing country, before reaching decisions on the measures to be taken to improve their situation.[36]

In order to mandate the use of such a mechanism, an amendment of GATT Article XX would not necessarily be required. Once it exists in one form or another, its use could be mandated through adaptation of the existing jurisprudence of WTO panels and the Appellate Body under Article XX, namely the "least trade restricting measure" doctrine, discussed above.[37]

[33] Ehrenberg, *supra* note 7, at 403-414.
[34] While the trade sanctions mechanism suggested by Ehrenberg is targeted at the export manufacturing sector, the aid and technical cooperation programs should certainly not be limited to that sector, but should relate to the entire economy in an effort to eradicate child labor wherever it occurs and to promote a better education system throughout the country.
[35] Ehrenberg, *supra* note 7, at 416.
[36] On the importance of entering into a dialogue with the developing country workers, see Claire Moore Dickerson, "Transnational Codes of Conduct Through Dialogue: Leveling the Playing Field for Developing-Country Workers", 53 *Fla. L. Rev.* 611 (2001).
[37] *Supra* note 12, and accompanying text.

Hence, a WTO Member State could not invoke the Article XX(a) exception, unless it has tried to solve the problem though the cooperative international mechanism. If it has not exhausted this alternative, its trade restriction would not be deemed "necessary", as required by Article XX(a).

Another possible approach, which could be coupled with the first one, is a system of positive incentives, instead of punitive sanctions, in order to encourage states and employers to take measures against violations of core labor standards within their jurisdiction. A system of carrots, instead of sticks, would not deny WTO Member states the trade benefits that they are entitled under the agreements – and which they often have "paid for" by reciprocal concessions. Instead, it would condition the granting of additional trade concessions, and other economic benefits, such as financial aid, upon a positive record in the field of core labor standards within the country's entire labor market – not just in the export manufacturing sector. The additional trade concessions could involve the lowering of certain tariffs in relation to the regular Most Favored Nation (MFN) rate, on products of interest to the exporting country. Such a scheme would be permitted under the GATT, despite the deviation from the MFN non-discrimination rule, based on the GATT rules on special and preferential treatment of developing countries.[38] In special cases, in which these rules are not applicable, a particular waiver could be granted under GATT Article XXV:5. Preferential treatment could also be tied to other trade benefits, such as general exemptions from anti-dumping duties or countervailing measures, special concessions in relation to trade in services or in agricultural products, and preferential status in government procurement – all conditioned upon respect for core labor standards. The denial of such benefits, in response to established violations of core labor standards in the exporting state, would not constitute a violation of any GATT obligation by the importing state, since any such benefit would be a voluntary non-reciprocal

[38] See e.g. the Tokyo Round Decision of November 18, 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (commonly referred to as the "Enabling Clause"), BISD, 26th Supp. 203 (1979).

concession by the granting state. The use of such schemes would therefore be much less confrontational than unilateral trade sanctions, which most likely will be countered by legal challenges before the WTO dispute settlement tribunals. Instead of using a scheme based on measures that reduce the welfare of both the targeted and the imposing state (increased trade barriers), the suggested schemes would be based on welfare-enhancing measures for both parties (lowered trade barriers).[39] The same type of strategy should be used in connection with other types of economic benefits that developed states bestow upon less developed states, such as financial aid, technical assistance, promotion of investments and technology transfers. Such schemes would not only be more effective, less controversial, and more welfare enhancing, they would also be superior from a moral standpoint. Rich countries *ought to* aid poor and developing countries, and not to seek to punish them for their shortcomings, especially in view of a long history of colonialist exploitation.

Some countries have already, unilaterally, adopted similar schemes as part of their domestic legislation. In the US, for instance, a number of trade and aid programs are conditioned on the granting of "internationally recognized worker rights".[40] In particular the right to enjoy benefits of the Generalized System of Preferences (GSP) may not be granted to a developing country that "has not taken or is not taking steps to afford internationally recognized worker rights to workers in the country".[41] Similar conditions have been incorporated into the European Union's GSP regulations,[42] as well as in their preferential

[39] Of course, the withdrawal of the special benefits in response to alleged violations of core labor standards would reduce welfare, at least in the short run. However, this is the exceptional situation. In the normal course of the scheme, it would generate more trade and increased welfare for both countries, compared to the situation in its absence.

[40] For an overview of such programs, see Virginia A. Leary, "Worker's Rights and International Trade: The Social Clause (GATT, ILO, NAFTA, U.S. Laws)", in *Fair Trade and Harmonization: Prerequisite for Free Trade?* (J. Bhagwati & R. Hudec, eds) (Cambridge, Mass.: MIT Press, 1996), 177, at 210.

[41] 19 U.S.C. § 2462.

[42] See EC Council Regulation 1256/96 of 20 June 1996 and EC Regulation 3281/94 of 19 December 1992. Under these regulations, additional trade benefits may be granted, upon request, to countries that effectively apply the standards laid down in ILO Conventions 87 and 98 on freedom of association and the right to collective bargaining and those of Convention 138 on Child Labour. The regulations also

trade agreements.[43] Such schemes ought to be adopted by more countries and implemented more widely, in order to enhance their effectiveness. This should be promoted through multilateral instruments and international cooperation and not only as sporadic unilateral initiatives. In particular, measures should be taken to avert the sometimes-justified criticism that the implementation of these schemes has been politically motivated and ignored the substance of international law.[44] The main problem seems to be that determinations on whether "adequate steps" have been taken, and regarding which country should be denied GSP status because of its inadequate steps, are taken by national, and often political, organs. If such incentive schemes are to enjoy international legitimacy, they need to be based on determinations made by international impartial bodies according to internationally recognized standards.

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allow for the withdrawal of benefits, in whole or in part, where beneficiary countries practice any form of slavery or forced labor.

[43] For instance, the 2000 Cotunou Agreement between the EC and 77 ACP States includes a special provision, which confirms the parties' commitment to core labour standards (Article 50), thereby making it a potential condition for the preferential treatment granted under the agreement See Commission of the EC, *Promoting Core Labour Standards and Improving Social Governance in the Context of Globalization*, A Communication from the Commission to the Council, Parliament and Economic and Social Committee, COM (2001)416 final, p. 12.

[44] See Philip Alston, "Labor Rights Provisions in US Trade Law; "Aggressive Unilateralism?"", 15 *Human Rights Q.* 1 (1993); Lawyers Committee for Human Rights, *Protection of Workers Rights: A Report on Legal Mechanisms to Protect Worker Rights* 10, 15 (Human Rights and US Foreign Policy Project, Oct. 10, 1991), quoted in Leary, *supra* note 40.