Part V

The International Organization and Enforcement of Labor Standards

CHAPTER 4
A Role for the WTO

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Introduction

What international action should be taken with regard to labor standards, how should this action be organized, and by what means should it be enforced? The purpose of this chapter is to provide answers to these three questions, and along the way to answer a more pointed question: What role should the World Trade Organization (WTO) play in determining the labor standards of its member governments?

Arguing from the perspective of economic theory, I suggest that progress can be made in answering these questions only after a basic distinction is drawn between the three kinds of problems that are typically associated with the setting of labor standards in a global economy. First, it is often argued that a choice of weak labor standards in one country may trigger "race-to-the-bottom" or "regulatory-chill" effects in other countries, who then face competitive pressures to weaken or refrain from strengthening their own labor standards. Second, it is sometimes argued that weak labor standards and poor labor conditions in one country may create social unrest, thereby inducing "political" concerns in other countries. And third, a country's choice of weak labor standards may induce "humanitarian" concerns in other countries, if those countries have a direct concern for the well-being of workers in this country. I accept that these three problems may each constitute legitimate bases for international action regarding labor standards, but I argue that the first of these problems is distinguished from the other two by the nature of the international externality that is associated with a country's choice of labor standards. And I argue as well that, once this distinction is appreciated, answers to the questions raised above follow readily.

Specifically, in the following section, I begin by observing that the international externality that drives race-to-the-bottom/regulatory-chill effects

is a *pecuniary externality* that is transmitted via *market access* channels. By contrast, the international externality associated with humanitarian/political concerns is a *non-pecuniary externality* that does not travel via market interactions at all. With this basic distinction established, I then to consider the institutional features of the WTO (formerly GATT), and I briefly describe as well the institutional features of the International Labor Organization (ILO), the central international organization focused on labor issues. I argue as a general matter that the WTO is well-designed to address problems that arise as a result of international externalities that are transmitted via market access, and that the organizing principle of the GATT/WTO has been to remain focused on problems that can be cast as market-access issues. The WTO, however, has no particular expertise in the area of labor standards *per se*. The ILO, by contrast, possesses just this kind of expertise. Therefore, I suggest the following perspective: if a problem associated with labor standards is a market-access problem, then its solution should be sought in the WTO; otherwise, its solution should be sought in the ILO.

The fourth section adopts the perspective developed in the previous section to consider the assignment of problems to institutions. On the basis of the distinction drawn in earlier, this perspective leads to the conclusion that the WTO should be assigned the task of preventing race-to-the-bottom/regulatory-chill problems from arising in the context of labor standards choices, while the ILO should be assigned the task of addressing the humanitarian/political problems that are associated with the choice of labor standards. By assigning the problems associated with labor standards across institutions in this way, I suggest that the underlying goals of each institution can be better attained.

This assignment of problems to institutions raises two further questions with regard to the WTO's role in determining the labor standards of its member governments. First, exactly how should the WTO approach the race-to-the-bottom/regulatory-chill problem? And second, what role might the WTO play in helping to *enforce* labor agreements that are negotiated in the ILO?

I take up the first of these questions in the fifth section, where I consider and evaluate two distinct approaches to solving the race-to-the-bottom/regulatory-chill problem. Under a first approach, WTO member-governments would negotiate directly over their labor standards, and would, as a consequence of these negotiations, undertake new WTO commitments concerning their national labor standards. I describe how this approach could work, but in the process I identify key differences between this approach and existing proposals for direct WTO negotiations over labor standards, such as those embodied in the so-called social clause. More specifically, I explain why the proposed WTO social clause is poorly designed as a solution to the race-to-the-bottom/regulatory-chill problem.

I then consider more deeply the source of the race-to-the-bottom/regulatory-chill problem, and argue that this problem would not arise if property rights over negotiated market access levels were sufficiently complete. I observe that a number of GATT Articles can indeed be interpreted as helping to complete the system of property rights over negotiated market access levels in the WTO, a system that is built upon negotiated tariff commitments. And I describe a central role in this regard for the renegotiation and non-violation nullification-or-impairment provisions embodied in these articles.

From this perspective, I suggest a second approach to solving the race-to-the-bottom/regulatory-chill problem: strengthening the renegotiation and non-violation nullification-or-impairment provisions already present in existing GATT Articles. I argue that, like the first approach, this second approach could work to prevent race-to-the-bottom/regulatory-chill problems from arising in the context of labor standards choices. However, I argue that this second approach conforms more closely with existing GATT/WTO practice and principles. For example, a distinctive feature of this second approach is that direct negotiations over labor standards are not necessary to prevent race-to-the-bottom/regulatory-chill problems from arising, and so under this second approach the traditional line between national sovereignty and GATT/WTO commitments is not blurred. I therefore conclude that, of these two approaches, this second approach represents the more-promising avenue by which the WTO might solve the race-to-the-bottom/regulatory-chill problem.

I then consider the role that the WTO might play in helping to enforce labor agreements that are negotiated in the ILO. I observe that economic theory points to circumstances in which explicit "linkage" between the WTO and the ILO for enforcement purposes – whereby violation of ILO commitments would trigger retaliatory trade measures orchestrated by the WTO – may be beneficial, and also circumstances in which such linkage provides no benefits or might even be harmful. But I also observe that explicit linkage of this kind may not be necessary in order for the WTO to play an important role in the enforcement of ILO commitments. More specifically, I suggest that the non-violation nullification-or-impairment provisions and the renegotiation provisions contained in GATT Articles can play a significant role in enforcing ILO agreements. Hence, I conclude that strengthening these already-existing principles may be the most effective way to utilize WTO commitments as a means to help enforce labor agreements negotiated under the ILO.

Collecting the arguments of the previous sections, I propose, in the seventh section, an overall approach to the international organization and enforcement of labor standards, and I comment on some of the appealing and unappealing features of this approach relative to other approaches that have been proposed. This is followed by a brief summary and conclusion.

Identifying the Problems

Why is the United States concerned about the labor standards that India enforces within its own borders? A sensible place to find an answer to this question is to consult the Preamble of the ILO Constitution. After all, the ILO has been concerned with answers to questions of this kind for most of the twentieth century. An examination of the ILO Preamble suggests three possible answers. A first possibility is that the United States is concerned about India's choice of labor standards because of the implications of this choice for the *economic* well-being of US citizens (i.e., the effects that the trade and/or investment implied by India's choice would have on real incomes and working conditions in the United States). A second possibility is that the United States is concerned about India's choice of labor standards because of the possibility that weak labor standards and poor working conditions in India could lead, in the words of the ILO Preamble, to social "unrest so great that the peace and harmony of the world are imperiled," and thereby create *political* spill-over for the United States. A third possibility is *humanitarian*: the United States cares directly about the welfare of workers in India.

Under each of these possibilities, there arises an international externality associated with India's choice of labor standards. The existence of this international externality, in turn, suggests that India's choice of labor standards may be inefficient from an international perspective if this choice is made unilaterally (i.e., without the input of the United States and other affected countries). And the international inefficiency of unilateral choices of labor standards is what gives rise to the possibility of mutually beneficial international action with regard to the determination of labor standards (i.e., eliminate the inefficiencies, and all can potentially gain). Hence, at a basic level, identifying the problems that can be solved by international action over labor standards amounts to characterizing the international externalities imposed by unilateral choices of labor standards.

In standard economic terms, the distinction between the possibilities described above is simple: the first possibility describes a *pecuniary externality* of international dimensions, while the remaining two possibilities each describe a *non-pecuniary externality* of international dimensions. However, to make progress in characterizing these externalities more succinctly, it is convenient at this point to introduce a term that lies at the heart of much of what goes on in the WTO: the term is *market access*. Market access is interpreted in the WTO to reflect *the competitive relationship between imported and domestic products*. For example, all else equal, when the US government agrees to lower an import tariff on a particular product, it alters the competitive relationship between imported and domestic units of the product in favor of

imported units, and it thereby provides greater market access to foreign producers. By agreeing to reduce its tariff, the United States is effectively agreeing to engineer an outward shift of its import demand curve – that is, a greater volume of imports will be demanded in the United States at any given price charged by foreign exporters – and as a result foreign exporters can expect to enjoy an increase in sales into the US market and to receive a higher price.[1]

The key observation about the first possibility described above is that the externality associated with India's unilateral choice of labor standards is in this case transmitted to the United States via its effect on market access. That is, a weakened labor standard in India can effect the *economic* well-being of US citizens if – and only if – it has the effect of altering *market access* in India, in the United States, or in a third-country market where the United States and India both trade or invest.

Several examples illustrate this fundamental point. Suppose first that India were to weaken a labor standard that it applies to its domestic import-competing producers. All else equal, such an action would reduce the market access that India affords to its trading partners – including the United States – to the potential detriment of workers and capital owners in US export industries, who would as a consequence face declining demand for their products (and hence for their factor services) at existing prices.[2] This impact could be attenuated for US capital owners and accentuated for US workers by the possibility of international capital mobility (if US production facilities then relocate to India to produce for the local market). But the essential point is that the externality associated with the weakened labor standard in India is transmitted to the US economy through changes in market access (in this case, access to the Indian market): if there were no change in market access stemming from India's weakened labor standard, there would be no effect on the economic well-being of US citizens.

As a second example, suppose that India were to weaken a labor standard that it applies to its export industries. All else equal, this would have the effect of increasing the access of Indian exporters to the markets of other countries, including the United States, to the potential detriment of US import-competing capital owners and workers. Again this impact could be attenuated for US capital owners and accentuated for US workers by the possibility of international capital mobility (if US production facilities then relocate to India to produce for export), but the essential point again is that the externality associated with the weakened labor standard in India is transmitted to the US economy through changes in market access (in this case, access to the US market).

In short, one country's choice of labor standards can alter the *economic* well-being of the citizens of another country if, and only if, it alters *market access*. As a consequence, if the United States is concerned about India's

choice of labor standards because of the implications of this choice for the economic well-being of US citizens, then the United States is raising an issue that is, fundamentally, a market-access issue.

It is now immediate that fears of a "race to the bottom," in which countries attempt to gain a competitive edge in the international market place by lowering their labor standards, or of "regulatory chill," in which the push for stronger labor regulations in one country is stymied by the competitive consequences when other countries do not follow suit, are fueled by the market-access implications of each country's labor standards choices. That is, these fears reflect a concern that the market-access implications of one government's choice of weak labor standards could trigger other governments to respond in kind, by either weakening their own labor standards or postponing further strengthening of their labor standards, in the name of international "competitiveness."

Thus, in the first example above in which India weakens a labor standard that it applies to its domestic import-competing producers, the United States might be tempted to regain access to the Indian market by diluting the labor standards it applies to its own export industries. Likewise, in the second example above, where India weakens a labor standard that it applies to its export industries, the United States might seek to reduce the level of access that Indian exporters enjoy in its markets by diluting labor standards in its own import-competing industries. Alternatively, the United States might refrain from a planned strengthening of a labor standard in its import-competing sector, if it could not also convince India to apply stronger labor standards to the Indian export sector and thereby avoid unintended market-access consequences of the planned changes in US labor law. Simply put, *the race-to-the-bottom/regulatory-chill problem is driven by a pecuniary externality of international dimensions, and changes in market access are the manifestations of this pecuniary externality.*

Now consider the other two possibilities described above, namely, the political and humanitarian concerns. According to the political concern, the United States is concerned about India's choice of labor standards because of the possibility that weak labor standards and poor working conditions in India could lead to social unrest, and have political spill-over for the United States. And according to the humanitarian concern, the United States is concerned about India's choice of labor standards because it cares directly about the welfare of workers in India. The key distinction between these two possibilities and the first possibility described above is that these possibilities each describe a *non-pecuniary externality* of international dimensions, in which market interactions play no transmission role. In particular, under each of these remaining possibilities, changes in market access play no direct role in determining how the United States is affected by India's choice of labor standards.

To see this distinction, it suffices to return to the first example considered above, in which India weakens a labor standard that it applies to its domestic import-competing producers. As described above, all else equal, such an action would reduce the market access that India affords to its trading partners. But suppose now that, in addition to weakening its labor standard, India also reduces its import tariff in such a way that it preserves the original market access level (i.e., so as to preserve the original competitive relationship between imported and domestic products). While this combined policy action can have no effect on the economic well-being of US citizens, it could certainly alter the welfare of workers in India, and if the United States (a) suffers political effects from the resulting social unrest in India, or (b) cares directly about the welfare of Indian workers, then an international externality is nonetheless transmitted by India's policy choices. But this externality is not a pecuniary externality, and it is in this sense distinct from the first possibility described above.

In summary, the international externality that drives race-to-the-bottom/regulatory-chill effects is a *pecuniary externality* that is transmitted via *market access* channels. By contrast, the international externality that is associated with humanitarian/political concerns is a *non-pecuniary externality* that does not travel via market interactions at all. Of course, non-pecuniary externalities are no less "real" than pecuniary externalities, and each can be the source of important and costly inefficiencies. They are, however, distinct kinds of problems.

But why is this distinction important? Is it largely academic? I think not. Rather, I believe that this distinction has practical importance, because the solutions to each kind of problem described above may look quite different, and because different institutions may have developed specialized expertise for finding solutions to these distinct problems. Before turning in the next section to consider the institutional features of the WTO and the ILO, I close this section with a few additional examples in order to illustrate more concretely how this distinction can arise in practice.

Suppose India chooses to stop enforcing an existing minimum-wage policy in its import-competing sector. If the United States is concerned about India's change in policy because of the implications of this choice for the economic well-being of US citizens, and if this US concern leads India to make an inefficient unilateral choice, then a possible solution might entail India agreeing to mitigate the market-access implications of its decision to do away with its minimum-wage law, perhaps by accompanying this change in its labor standards with a reduction in its import tariff. By so doing, the economic well-being of US citizens is insulated from India's policy decisions, and the international externality that accounted for the inefficiency of India's unilateral labor standards choices is thereby eliminated, yet India retains a degree of sovereignty over its choice of national labor standards.

But such a solution, which focuses on the market-access implications of India's labor standards choices, would be ineffective if the United States is instead concerned about India's change in policy because of the implications of this choice for the welfare of workers in India, and the implied humanitarian/political ramifications. In this case, if international efficiency is to be achieved, a more invasive solution would have to be sought, whereby the United States was given a voice in India's decision about whether to scrap its minimum-wage laws. In particular, it would no longer do to simply provide the United States with assurances that the decision India made would have no important market-access implications. Finally, if both elements of US concern are present in this example, then it may still make sense to seek "targeted" solutions, which address the first concern with market-access agreements and the second concern with more invasive agreements.

Alternatively, suppose that India chooses to stop ensuring the right of workers to organize and form unions in its export sector. If the United States is concerned about India's change in policy because of the implications of this choice for the economic well-being of US citizens, and if this US concern leads India to make an inefficient unilateral choice, then a possible solution might entail India agreeing to mitigate the market access implications of its labor-law decision, perhaps by accompanying this change with an increase in the minimum wage it applies to its export sector. By so doing, the economic well-being of US citizens is once again insulated from India's policy decisions, and the international externality that accounted for the inefficiency of India's unilateral labor standards choices is eliminated, yet India retains a degree of sovereignty over its choice of national labor standards. But once again, such a solution, which focuses on the market access implications of India's labor standards choices, would be ineffective if the United States is instead concerned about India's change in policy because of the implications of this choice for the welfare of workers in India, and the implied humanitarian/political effects. In this case, as in the previous example, a more invasive solution would have to be sought, whereby the United States was given a voice in India's labor-law decisions. In particular, once again it would no longer do to simply provide the United States with assurances that the decision India made would have no important market-access implications. Finally, as in the previous example, if both elements of US concern are present in this example, then it may still make sense to seek "targeted" solutions, which address the first concern with market-access agreements and the second concern with more invasive agreements.

Finally, consider a third and more difficult example. Suppose that India allows the products of prison labor to be exported. This example differs from the first two examples in two potentially important ways. First, I am supposing that there is no *change* in Indian policy being contemplated here, but rather that this has always been Indian policy. And second, the example

of prison labor may invoke strong concerns about "fairness" in the United States. But once again we may ask the question: Does the United States concern for the fairness of the Indian policy emanate from its concern for the economic well-being of US citizens, or rather from a direct concern for the welfare of Indian prison workers or a fear that the treatment of prisoners in India could fuel social unrest with international ramifications? If the United States believes that it is unfair for its citizens to have to compete in US markets with the products of prison labor from India, then this is a market-access issue, and a possible solution might entail the United States taking action to block imports from India if these imports have been produced using prison labor. On the other hand, if the United States is concerned directly about the welfare of prison workers in India or about possible social unrest in India, then a market-access solution is no solution at all, and instead the United States will need to acquire a voice in India's decision of how it treats its prisoners. And once again, if both elements of US concern are present in this example, then it may still make sense to seek "targeted" solutions, which address the first concern with market-access agreements and the second concern with more invasive agreements.

As each of these examples demonstrates, the distinction drawn in this section between the race-to-the-bottom/regulatory-chill problems and the humanitarian/political problems that can arise at an international level with unilateral choices of labor standards has practical importance, because the solutions to each kind of problem may look quite different, and because different institutions may have developed specialized expertise for finding solutions to these distinct problems. I now turn in the next section to consider the institutional features of the WTO and the ILO.

The Institutional Features of the WTO and the ILO

At one level, the WTO and the ILO are similar institutions: each serves as an international negotiating forum for its member governments.[3] At another level, these two institutions are quite distinct. The central purpose of ILO negotiations and agreements is to improve labor standards. The central purpose of WTO negotiations and agreements is to reduce trade barriers or, at its core, to increase market access. In this section, I describe some of the broad features of each institution. I begin with the WTO.

The WTO

My purpose in this subsection is two-fold. First, I describe how the WTO is an institution that is well designed to facilitate international negotiations

over market-access problems, and I suggest that its central purpose is to sponsor tariff negotiations that increase market access in a reciprocal fashion. Second, I show that the race-to-the-bottom/regulatory-chill problems described in the previous section are most likely to arise only when governments have bound their tariffs in market-access negotiations such as those sponsored by the WTO. Consequently, in this subsection I lay the groundwork for two arguments why race-to-the-bottom/regulatory-chill problems associated with labor standards might sensibly be handled in the WTO: they are market access problems, which the WTO is experienced in handling, and they are problems that are likely to be exacerbated by other WTO commitments.

To accomplish my first purpose, I return to the issue of international externalities, and consider a basic question that lies at the heart of the WTO's existence (and the reason for the existence of GATT before it): What is the source of the international inefficiency associated with unilateral tariff choices? After all, if no international inefficiency associated with unilateral tariff choices can be identified, then no basis for mutually beneficial tariff negotiations can be articulated by the WTO member governments, and there would as a consequence be no reason for the WTO (and GATT before it) to exist.

The discussion above is suggestive of two possible sources of international inefficiency that might be associated with unilateral tariff choices. One possibility is that governments impose pecuniary externalities on their trading partners when they make their unilateral tariff choices. I will take up this possibility shortly. But a second possibility is that there are non-pecuniary externalities that extend internationally when governments make their unilateral tariff choices. For example, perhaps the domestic redistributive consequences of one government's tariff choices are of direct concern to other countries, and when the government makes these tariff choices unilaterally an international inefficiency is created. As a general matter, does the WTO appear well designed to solve this second kind of problem?

There is a simple reason why the design features of the WTO appear ill equipped to handle non-pecuniary externalities associated with tariff choices, at least as a general matter. The reason is that WTO tariff commitments ("bindings") are designed to work in one direction: WTO bindings prevent governments from unilaterally raising their tariffs above their bound levels, but these commitments place no constraints on the freedom of governments to set tariffs below their bound levels. Hence, the WTO is "hard-wired" to help governments make reciprocal commitments to *reduce* their tariffs. This is reflected in the Preamble of both the GATT and the WTO, where it is stated that the goals of the member governments will be served by "entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade . . ."

Yet if a government's tariff choices impose non-pecuniary externalities on other countries, there is no particular reason to expect that the problem involves tariffs that are generally too high from an international perspective. For example, depending on the impact of a country's tariff changes on the income distribution within its borders and on how other governments care about this impact, tariffs could just as easily be too low from an international perspective, implying that a mutually beneficial agreement would entail commitments to *raise* tariffs. The point is, the WTO is designed to promote negotiations that result in agreements that reduce tariffs and expand market access on a reciprocal basis, and the existence of non-pecuniary externalities associated with unilateral tariff choices does not provide a compelling reason why mutually beneficial negotiated outcomes should necessarily lead to agreements that take this form.

I now return to the first possibility mentioned above, namely, that governments impose pecuniary externalities on their trading partners when they make their unilateral tariff choices. I ask whether this could be a source of inefficiency that the WTO is well designed to solve. To answer this basic question, a promising line of attack begins with the observation that tariffs affect market access, and hence governments do indeed impose pecuniary externalities on one another when they raise tariffs against imports and thereby restrict market access. Now as a general matter, the existence of pecuniary externalities across decision makers is not enough to conclude that the decentralized choices of these decision makers will be inefficient: inefficiency requires the further condition that at least some of these decision makers are large enough to alter – with their unilateral decisions – the prices at which they trade. In the particular case of government tariff choices, this further condition amounts to the stipulation that the markets of some countries are large enough that, when access to these markets is denied to foreign exporters, the prices received by these foreign exporters fall. There is in fact ample evidence that this further condition is met for many countries and on many products.[4] Consequently, a natural source of inefficiency in unilateral tariff choices that could form the basis for mutually beneficial tariff negotiations between two member-governments of the WTO is the ability of each government to reduce the prices received by the other's exporters via market-access restrictions.

To be more concrete, let us consider further the international inefficiency that arises as a result of pecuniary externalities when a government makes its tariff choice unilaterally. Suppose that the government in question has made its preferred (unilateral) tariff choice, and consider now how this government would feel about setting its tariff slightly higher. The first thing to observe is that the government should be indifferent to making slight changes in its tariff (since otherwise it would not have achieved its preferred unilateral tariff to begin with). This means that the additional benefits that the government perceives from this slight tariff increase must just balance against

the additional costs of this tariff increase, as the government perceives these costs. But the key point is *how* the government perceives these costs. Crucially, what the government is not taking into account in this unilateral calculation – and has no reason to take into account – is the additional cost of the slight tariff increase that is born by foreign exporters who, facing diminished access to the domestic market, receive a lower price for their product. *The ability to shift a portion of the costs of import protection on to foreign exporters is a source of international inefficiency associated with unilateral tariff choices.*

Several important observations may now be made. First, I have said very little about the underlying objectives of governments. In particular, I have said nothing about whether these governments see tariffs as a legitimate means of pursuing various national goals (such as production targets or distributional objectives). Evidently, the existence of the inefficiency associated with unilateral tariff choices described above does not depend upon the details of government preferences: international cost-shifting will lead governments to choices that are collectively inefficient, regardless of their individual trade-policy goals. Second, and again regardless of these details, the nature of the inefficiency associated with unilateral tariff choices will be *insufficient market access*. This follows from the fact that, on the margin, shifting costs on to foreign exporters is associated with *restricting* market access, and so unilateral tariff choices will imply too little market access from the perspective of international efficiency. Put differently, if the international externalities associated with unilateral tariff choices are of a pecuniary nature, then *the essential purpose of mutually beneficial tariff negotiations such as those sponsored in the WTO must be to increase market access*, since it is only by increasing market access that the collective inefficiency associated with unilateral choices can be reduced, and it is only by reducing this inefficiency that all governments can gain. And third, if two member-governments have a basis for engaging in mutually beneficial tariff negotiations, then they can each assuredly gain from the *reciprocal exchange* of (at least a small amount of) market access, provided that reciprocity is understood to imply tariff reductions that result in an equal expansion of exporter sales into each domestic market. This follows from the fact that linking their tariff movements in this reciprocal fashion eliminates the cost-shifting component associated with each government's unilateral tariff calculation, and thereby induces each government to desire a lower tariff (i.e., to offer greater market access).

Hence, if international inefficiencies arise as a result of pecuniary externalities when a government makes its tariff choice unilaterally, mutually advantageous agreements must involve a reciprocal exchange of market-access concessions between countries, much as the Preamble of the GATT and the WTO indicate. In this general way, the central purpose of the WTO may be seen as sponsoring negotiations to solve a fundamental problem related to the market-access implications of the unilateral tariff choices of

member governments. I therefore conclude that the WTO is an institution that is well designed to facilitate international negotiations over market-access problems.[5]

I now turn to the second purpose of this subsection. Specifically, I argue that the race-to-the-bottom/regulatory-chill problems described in the previous section are most likely to arise only when governments have bound their tariffs in market-access negotiations such as those sponsored by the WTO. I accomplish this in two steps. I first make a *stronger* argument: in principle, the race-to-the-bottom/regulatory-chill problems described in the previous section can arise *only* when governments have bound their tariffs in market-access negotiations such as those sponsored by the WTO. I then suggest reasons why in practice this argument might be too strong, but that it nevertheless illustrates clearly why tariff negotiations are likely to exacerbate the race-to-the-bottom/regulatory-chill problem.

To begin, consider again the international cost-shifting motives that enter into a government's unilateral tariff choices. In the absence of market-access negotiations such as those sponsored by the WTO, these cost-shifting motives lead governments to place inefficiently high restrictions on market access, as I have just discussed. If, in addition to tariff choices, governments also make decisions about their labor standards, then these labor-standards choices too can have market-access implications, as I described earlier.[6] Nevertheless, even with this richer portfolio of policies, the point remains that international cost-shifting is achieved – and the international externality that leads to inefficiency at the international level is transmitted – through *changes in market access*. We may therefore conclude that, when a government contemplates adjustments to its *mix* of policies that preserve a *given* level of market access, there is no international cost-shifting occurring, and consequently the government confronts the *full costs and benefits* of these contemplated policy-mix adjustments.

From this conclusion, two important points follow concerning a world in which governments have both tariff and labor policies at their disposal (and when humanitarian/political concerns associated with the choice of labor standards do not arise). The first point is that, when governments choose *all* of their policies unilaterally, the level of market access they provide is inefficiently low, but the mix of policies with which they deliver this market access *is* efficient. Put differently, in a world without international tariff negotiations, levels of market access would be inefficiently low, but governments would have no incentive to distort their labor standards for competitive effect (i.e., there would be no race-to-the-bottom/regulatory-chill problem). This can be understood by noting that each government's unilateral policy decision – given the policy choices of its trading partners – may be broken into two components: a choice of the level of market access (i.e., the competitive relationship between imported and domestic products),

and a choice of the mix of policies that deliver this level of market access (e.g., a low tariff and a weak labor standard, or a high tariff and a strong labor standard). As I have observed above, each government's unilateral choice of the level of market access will be inefficiently low, but having chosen a level of market access, each government faces all the costs and benefits of its policy mix decision, and so this second decision will be made in a globally (and nationally) efficient manner.

The second point is that, if governments attempt to negotiate an expansion of market access to more efficient levels by agreeing to bind their tariffs, these attempts will *create* incentives for each government to subsequently change its labor standards with an eye toward "withdrawing" market access it had previously granted through commitments to lower tariffs. This in turn means that the mix of policies by which each government chooses to deliver market access to the other is now inefficient, in the particular sense that each government now has an incentive to distort its choice of labor standards for competitive effect. And, quite possibly, the level of market access which governments attain with negotiations over tariff bindings will also be inefficient as a consequence. Put differently, *international tariff negotiations such as those sponsored by the WTO can help governments achieve a mutually beneficial expansion of market access, but these tariff negotiations also create the potential for race-to-the-bottom/regulatory-chill type problems.*[7]

I have just argued that, in principle, the race-to-the-bottom/regulatory-chill problems described in the previous section can arise *only* when governments have bound their tariffs in market-access negotiations such as those sponsored by the WTO. In practice, this argument might be too strong. For example, even absent the constraints on a country's tariffs that might be imposed by any formal international commitments, the government of this country might face informal constraints on its tariff choices, imposed perhaps by issues of policy transparency or other concerns.[8] And, like the formal constraints imposed by negotiated tariff commitments, these informal constraints could lead the government to distort its choice of labor standards for competitive effect. But my essential point is simply to illustrate why tariff negotiations are likely to *exacerbate* the race-to-the-bottom/regulatory-chill problem, and this point is likely to remain valid in the presence of these and other practical considerations.

In summary, I have now described two reasons why race-to-the-bottom/regulatory-chill problems associated with labor standards might sensibly be handled in the WTO: (a) they are market-access problems, which the WTO (and GATT before it) has had over 50 years of experience in handling; and (b) they are problems that are likely to be exacerbated by other WTO commitments (i.e., tariff bindings). I now turn to a brief description of the institutional features of the ILO.

The ILO

The creation of the ILO at the Peace Conference of April 11, 1919 predates the creation of GATT by almost 30 years. According to David A. Morse, who was elected to the post of Director-General of the ILO in 1948 and served in this position for over two decades, the basic reason for the ILO's existence is "to improve the working and living conditions of workers everywhere" (Morse, 1969, p. 96). On this there appears to be broad agreement. Indeed, as Johnston (1970, p. 13) observes, the two words "social justice," which are contained in the Preamble to the Constitution of the ILO, have come to symbolize the main objective of the ILO.

However, as Morse (1969, pp. 82–3) describes, there is considerable disagreement over the appropriate means for achieving this objective:

> In the view of some people, the ILO is primarily a standard-setting organization whose most important task is to defend the rights of workers and to protect them from exploitation in the drive for growth, development, and industrialization. In the view of others, the ILO is fundamentally an operational organization which needs to concentrate its efforts on promoting the economic development of the proper countries. Certain people see the ILO's main value as a forum for tripartite discussion; others see it as an organization providing assistance in the training of the labor force.
>
> The truth is that the actual situation of the ILO contains elements of each of these positions . . ."

According to Johnston (1970, p. 88), the functions of the ILO have in fact evolved over time, but it is now seen as serving three basic functions for its members relating to labor issues: standard setting, information dissemination, and technical assistance.

For my purposes here, the important features of the ILO are three: first, the ILO's involvement in international labor issues has been broadly defined, and from the beginning it has included race-to-the-bottom/regulatory-chill concerns as well as concerns of a humanitarian/political nature related to labor policies; second, the ILO does not appear to have any particular expertise in addressing market access issues *per se*; and third, the ILO does have considerable expertise in addressing the details of national labor law. Below I briefly elaborate on each feature in turn.

The humanitarian and political motivations that led to the founding of the ILO can hardly be in doubt. These motives are not surprising given the state of the world into which the ILO was born. And they are reflected most prominently in the Preamble to the ILO Constitution. The first two sentences of the Preamble read:

> Whereas universal and lasting peace can be established only if it is based upon social justice; And whereas conditions of labor exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperiled . . .

But while concerns of the founding members of the ILO were largely of a humanitarian/political nature, it would be incorrect to claim that the motivation behind the formation of the ILO in 1919 had nothing to do with the market-access concerns associated with weak labor standards that underlie fears of race-to-the-bottom/regulatory-chill type problems. Two observations support the position that the ILO was indeed expected to address such concerns. First, the third paragraph of the Preamble to the ILO Constitution says as much:

> Whereas also the failure of any nation to adopt humane conditions of labor is an obstacle in the way of other nations which desire to improve the conditions in their own countries . . .

This is a direct reference to the "regulatory chill" problem as I have described this problem above. And second, there is ample evidence in the drafting history of the ILO to support the position that the ILO was expected to play a role in addressing race-to-the-bottom/regulatory-chill concerns.

As one example, a memorandum prepared by the British Delegation to the Peace Conference of 1919 discusses (The Paris Peace Conference, Volume II, pp. 124–5) how conventions ratified in the ILO would be enforced, and makes the following observations, suggesting that the competitive effects of labor standards in the international market place were very much on the minds of the drafters of the ILO:

> *Complaints against inadequate enforcement.* If the enforcement of conventions is to be made fully effective, it will be necessary to provide some machinery for complaint against inadequate enforcement, otherwise countries might obtain unfair advantage in industrial competition through lax administration of the international standards. To meet this point, it is suggested that it should be open to any Government which considered that it was suffering from such unfair competition to lodge a complaint with the Bureau against the alleged offender . . .
>
> One of the fundamental objects of conventions as to labour conditions is to eliminate unfair competition based on oppressive conditions or working. Any State, therefore, which does not carry out a convention designed to prevent oppressive conditions, is guilty of manufacturing under conditions which create a state of unfair competition in the international market. The appropriate penalty accordingly appears to be that when a two-thirds majority of the

> Conference is satisfied that the terms of the Convention have not been carried out, the signatory States should discriminate against the articles produced under the conditions of unfair competition proved to exist unless those conditions were remedied within one year or such longer period as the Conference might decide.

A second example illustrating that the competitive effects of labor standards in the international market place were very much on the minds of the drafters of the ILO can be found in a memorandum submitted by the National Committee on Prisons and Prison Labor in support of a provision proposed by the US delegation which stated, "No article of commodity shall be shipped or delivered in international commerce in the production of which convict labor has been employed or permitted." The memorandum (The Paris Peace Conference, Volume II, pp. 365–6) continues:

> This provision . . . will recognize on an international basis one of the few prohibitions to international commerce which is found in statutory law. The prohibition existing in the several countries became law because of the fact that convict made goods were being shipped into these countries and were under-selling home manufactures. It was found that the conditions under which the convict made goods were manufactured proved universally to be that of payment of little or no wages or remuneration in return for the labor and workshop facilities which entered into the cost of production . . . Furthermore, this provision will not interfere with the right of a State to conduct its prisons as it may so determine and provides only that the conditions under which they are conducted shall not prove a detriment to the citizens or interests of any other country.

As this memorandum makes clear, the international concern about prison labor was a simple market-access concern. It is therefore evident that market-access concerns associated with the choice of labor standards were part of what motivated the formation of the ILO, and this is the first feature of the ILO that I wish to emphasize. The second feature is simply that the ILO does not appear to have any particular expertise in addressing market-access issues *per se*. This is self-evident, at least when the ILO's expertise in this regard is assessed in relation to that of the WTO where, as I have described above, market-access concerns are *the* central preoccupation.

The third feature of the ILO that I wish to emphasize is that it has considerable expertise in addressing the details of national labor law. This detail is certainly what the business of the ILO was envisaged to be, as the second paragraph of the Preamble to the ILO Constitution indicates:

> And whereas conditions of labor exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the

> peace and harmony of the world are imperiled; and an improvement of those conditions is urgently required; as, for example, by the regulation of the hours of work, including the establishment of a maximum working day and week, the regulation of the labor supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of equal remuneration for work of equal value, recognition of the principle of freedom of association, the organization of vocational and technical education and other measures . . .

And the ILO's expertise in addressing the details of national labor law are especially evident when compared to the WTO's (almost complete lack of) expertise in these matters.

Summarizing this section, I have considered the institutional features of the WTO, and I have briefly described as well the institutional features of the ILO. I have argued as a general matter that the WTO is well designed to address problems that arise as a result of international externalities that are transmitted via market access, and that the organizing principle of the GATT/WTO has been to remain focused on problems that can be cast as market-access issues. The WTO, however, has no particular expertise in the area of labor standards *per se*. The ILO, by contrast, possesses just this kind of expertise. Therefore, I suggest the following perspective: if a problem associated with labor standards is a market-access problem, then its solution should be sought in the WTO; otherwise, its solution should be sought in the ILO. In the next section, I combine this perspective with the characterization of problems associated with labor standards offered earlier to suggest an assignment of problems to institutions.

The Assignment of Problems to Institutions

I have now arrived at the first major policy question regarding the international organization and enforcement of labor standards: How should the international problems associated with the national choices of labor standards be assigned to international institutions? In the previous section I proposed a perspective from which to approach this question: if a problem associated with labor standards is a market-access problem, then its solution should be sought in the WTO; otherwise, its solution should be sought in the ILO. In the second section I offered a characterization of the central problems that arise at the international level when countries choose their national labor standards unilaterally, and I argued that the race-to-the-bottom/regulatory-chill problem associated with the choice of labor standards

is a market-access problem, while the humanitarian/political problem associated with the choice of labor standards is not. In this section I combine the perspective of the previous section with this characterization to suggest an assignment of problems to institutions

The suggested assignment is straightforward: the WTO should be assigned the task of preventing race-to-the-bottom/regulatory-chill problems from arising in the context of labor standards choices, while the ILO should be assigned the task of addressing the humanitarian/political problems that are associated with the choice of labor standards. From the perspective of the current institutional arrangements of the WTO and ILO, this implies a *re*assignment away from the ILO and toward the WTO. I now briefly consider the implications of this reassignment for each institution.

This implied reassignment would leave the ILO with what is in principle a more narrowly defined labor agenda. In practice, however, the breadth of the labor issues taken up by the ILO (e.g. the right to freedom of association and the eight-hour work day) and the nature of the solutions it has attempted (e.g. conventions and recommendations to alter the labor laws of its member countries) might see little change under such a reassignment, as each seems broadly consistent with international actions taken to solve humanitarian/political problems relating to labor standards.[9] And a tighter overall focus might even strengthen the ILO's ability to achieve its fundamental objective "to improve the working and living conditions of workers everywhere." But this reassignment does raise a number of important further questions for the WTO.

One key question for the WTO, which is raised by this reassignment, has to do with enforcement. As the memorandum prepared by the British Delegation to the Peace Conference of 1919 and quoted earlier suggests, effective prevention of race-to-the-bottom/regulatory-chill problems in the context of labor standards requires that enforcement measures be put in place and potentially utilized. Would it be wise for the WTO to utilize its scarce enforcement power to prevent race-to-the-bottom/regulatory-chill problems from occurring?

It turns out that, as long as the WTO's focus on labor issues is narrowly confined to the issue of preventing race-to-the-bottom/regulatory-chill problems, the answer is "Yes."[10] The essential reason is that, as discussed earlier, the race-to-the-bottom/regulatory-chill problem is a market-access issue, and, as noted earlier, the WTO exists to solve the basic problem of insufficient market access. As the problem of enforcement of WTO commitments can be boiled down to the task of keeping each country's market-access commitments at a manageable level – so that no country has an incentive to break its market-access commitments[11] – it is never a good idea for the WTO to focus on some ways by which countries could break their market-access commitments (e.g., a unilateral increase in tariffs) to the

exclusion of others (e.g., a unilateral weakening of a labor standard). Therefore, preventing race-to-the-bottom/regulatory-chill problems from developing is exactly the sort of thing that the dispute settlement procedures of the WTO *should* be used for.

Two additional questions for the WTO are raised by this implied reassignment as well. First, exactly how might the WTO approach this new assignment? This question is the topic of the next section. And second, should the WTO's dispute settlement procedures be used to help enforce agreements reached in the ILO? This question is discussed later.

The Role of the WTO in Preventing Race-to-the-bottom/Regulatory-chill Problems

In this section, I consider and evaluate two distinct approaches to solving the race-to-the-bottom/regulatory-chill problem. Under a first approach, WTO member-governments would negotiate directly over their labor standards, and would, as a consequence of these negotiations, undertake new WTO commitments concerning their national labor standards. I describe how this approach could work, but in the process I identify key differences between this approach and existing proposals for direct WTO negotiations over labor standards, such as those embodied in the so-called social clause. More specifically, I explain why the proposed WTO social clause is poorly designed as a solution to the race-to-the-bottom/regulatory-chill problem.

I then consider more deeply the source of the race-to-the-bottom/regulatory-chill problem, and argue that this problem would not arise if property rights over negotiated market-access levels were sufficiently complete. I observe that a number of GATT Articles can indeed be interpreted as helping to complete the system of property rights over negotiated market-access levels in the WTO, a system that is built upon negotiated tariff commitments. And I describe a central role in this regard for the renegotiation and non-violation nullification-or-impairment provisions embodied in these articles.

From this perspective, I suggest a second approach to solving the race-to-the-bottom/ regulatory-chill problem: strengthening the renegotiation and non-violation nullification-or-impairment provisions already present in existing GATT Articles. I argue that, like the first approach, this second approach could work to prevent race-to-the-bottom/regulatory-chill problems from arising in the context of labor standards choices. However, I argue that this second approach conforms more closely to existing GATT/WTO practice and principles. For example, a distinctive feature of this second approach is that direct negotiations over labor standards are not necessary to prevent race-to-the-bottom/regulatory-chill problems from arising, and

so under this second approach the traditional line between national sovereignty and GATT/WTO commitments need not be blurred. I therefore conclude that, of these two approaches, this second approach represents the more-promising avenue by which the WTO might solve the race-to-the-bottom/regulatory-chill problem.[12]

A direct approach: WTO negotiations over labor standards

If the WTO is to be assigned the task of preventing race-to-the-bottom/regulatory-chill problems associated with the choice of national labor standards, how should it approach this task? One approach would be the following: when two or more member governments meet to engage in market access negotiations sponsored by the WTO, they negotiate over both tariffs *and* labor standards. How does this approach solve the race-to-the-bottom/regulatory-chill problem associated with national labor standards?

Consider first the race-to-the-bottom problem. Recall that this problem arises when countries attempt to gain a competitive edge in the international market place by lowering their labor standards, and that this problem leads to inefficiencies in market-access levels and/or the mix of policies with which market access is delivered. So suppose that, perhaps as a result of prior tariff commitments negotiated in the GATT/WTO, each of these sources of inefficiency exists. When governments are permitted to negotiate over both tariffs and labor standards, they can eliminate both sources of inefficiency (the inefficient market-access level and the inefficiencies in policy mix), solve the race-to-the-bottom problem, and each benefit as a result of the efficiency gains: they simply agree to tariff levels and labor standards that are collectively efficient in light of each government's individual policy goals.

Consider next the regulatory-chill problem. This problem arises when one government's push for stronger national labor regulations is frustrated by the international competitive (i.e., the market access) consequences when other countries do not follow suit. But again, when governments are permitted to negotiate over both tariffs and labor standards, this problem will not arise. Instead, the government who wishes to strengthen its national labor standard but is concerned about the competitive consequences of doing so alone can negotiate with its trading partners over tariffs and labor standards, and through these negotiations "de-link" its choice of national labor standards from market access issues (i.e., it can "agree" in these negotiations to any national labor standard it desires and then focus market access negotiations on its tariff level).

Hence, if governments negotiate over both tariffs and national labor standards in the WTO, they can achieve efficient levels of market access without

triggering a damaging race to the bottom or regulatory chill with regard to labor standards. In a sense this is unsurprising: after all, if governments are permitted to negotiate over each of these policies, why should any inefficiencies remain in the way these policies are set?

But I now observe that, while this direct approach could work to solve the race-to-the-bottom/regulatory-chill problem, there are a number of key differences between it and the commonly heard proposals for a WTO social clause. A first key difference is that, in the direct approach to solving the race-to-the-bottom/regulatory-chill problem that I have just described, all negotiations between governments are *voluntary*, and as a result any commitments made by these governments are perceived by them as *mutually beneficial*. This feature is, of course, standard practice in WTO negotiations, and it was standard practice in negotiations under GATT as well. But it stands in sharp contrast to the proposed WTO social clause, under which the governments of the developing world would effectively be *forced* to accept a set of "core" labor standards, which they would then have to meet or see their access to the markets of the developed world curtailed. A second key difference between the direct approach outlined above and the proposed social clause is that there is no presumption under the former that labor standards need be harmonized across countries, while such harmonization is the stated goal of the social clause. That is, the proposed social clause envisions the international harmonization of labor standards as a key feature of the solution to the race-to-the-bottom/regulatory-chill problem, but the direct approach that I have described above solves this problem without the need for harmonization.

As I have just described, direct negotiations over labor standards in the WTO can solve the race-to-the-bottom/regulatory-chill problem, and this approach exhibits the features that it is structured on a completely voluntary and mutually beneficial basis and that labor standards need not be harmonized across countries. These features are not shared by the proposed WTO social clause. I therefore conclude that, whatever objectives the proposed WTO social clause might be designed to achieve, it is poorly designed as a solution to the race-to-the-bottom/regulatory-chill problem.

An indirect approach: reliance on renegotiation and non-violation nullification rights

While the direct approach described above can in principle work to solve the race-to-the-bottom/regulatory-chill problem associated with the choice of labor standards, it exhibits a number of troubling aspects. First, by making national labor standards the object of direct international negotiation, this approach crosses the traditional line between national sovereignty and

GATT/WTO commitments. And second, having crossed this line with labor standards, there would seem to be no end in sight: the same race-to-the-bottom/regulatory-chill forces are presumably at work in other national regulatory realms, such as environmental policies and even building codes. Is *everything* ultimately to be a matter for international negotiation?

I now describe an ingenious way around this problem. I can say ingenious, because the idea is not mine: it was a creation of the drafters of GATT. Hudec (1990, p. 24) describes the problem as it was perceived at the drafting sessions of the time:

> The standard trade policy rules could deal with the common types of trade policy measure governments usually employ to control trade. But trade can also be affected by other "domestic" measures, such as product safety standards, having nothing to do with trade policy. It would have been next to impossible to catalogue all such possibilities in advance. Moreover, governments would never have agreed to circumscribe their freedom in all these other areas for the sake of a mere tariff agreement.
>
> The shortcomings of the standard legal commitments were recognized in a report by a group of trade experts at the London Monetary and Economic Conference of 1933. The group concluded that trade agreements should have another more general provision which would address itself to any other government action that produced an adverse effect on the balance of commercial opportunity . . ."

Evidently, it was accepted that governments value tariff reductions from their trading partners for the increased access to foreign markets that these tariff cuts imply. And it was accepted as well that subsequent changes in domestic policies could undermine these implied market-access levels. The concern was that such changes could interfere with the maintenance of "reciprocity" – the balance of negotiated market access commitments. As Hudec documents, this concern eventually led to the inclusion of a catch-all "non-violation" nullification-or-impairment right in the articles of GATT.

There are three conditions that have been established by GATT (and now WTO) panels for a successful non-violation complaint (see Petersmann, 1997, p. 172). First, a reciprocal concession was negotiated between two trading partners. Second, a governmental measure, while not in direct violation of any GATT rules, had been introduced subsequently by one of the governments which adversely affected the market access afforded to its trading partner. And third, this measure could not have been reasonably anticipated by the trading partner at the time of the negotiation of the original tariff concession.

In principle, the non-violation nullification-or-impairment right is designed to prevent governments from altering policies that they have *not bound* in GATT/WTO negotiations in such a way as to unilaterally "withdraw"

market-access levels that were implied by the tariffs they *did bind* in GATT/WTO negotiations. To see that this right can in principle solve the race-to-the-bottom problem, it need only be recalled that it is precisely the incentive to alter labor standards in such a way as to unilaterally withdraw market-access levels (which were previously granted with commitments to lower tariffs) that gives rise to the race-to-the-bottom problem. By preventing such unilateral withdrawals, the non-violation nullification-or-impairment right in principle prevents the race-to-the-bottom problem from arising.

Now consider the regulatory-chill problem. As I have shown earlier in the chapter, this too is a market-access problem, and so it might be expected that the non-violation nullification-or-impairment right could prevent regulatory chill as well. But this is not quite correct. The reason is that the market-access forces that create the potential for regulatory chill work in the opposite direction to those that underlie the race to the bottom, and the non-violation nullification-or-impairment right only applies in one direction. To see the problem, recall that the potential for regulatory chill occurs when, as a result of previous commitments that bind its tariffs, a government confronts unintended market access consequences – *increasing* access to its own markets – when it unilaterally strengthens its domestic standards. The non-violation nullification-or-impairment right cannot help in this circumstance, because this right does not apply to a circumstance in which a government takes a unilateral action that *increases* the market access that it affords its trading partners.

Nevertheless, the underlying reason why the non-violation nullification-or-impairment right works in principle to solve the race-to-the-bottom problem is instructive for thinking about an analogous solution to the regulatory-chill problem. The underlying reason why this right works to solve the race-to-the-bottom problem is that the race-to-the-bottom problem reflects a deeper problem: the problem of imperfect property rights over negotiated market-access levels. More specifically, *negotiated tariff bindings alone create imperfect property rights over market-access levels, and the race to the bottom is a manifestation of these property-rights imperfections.* The non-violation nullification-or-impairment right enhances the property rights over market access levels created by negotiated tariff bindings, and in principle it does so sufficiently (in combination with other GATT Articles that contribute to the same purpose) to prevent the race-to-the-bottom problem. But the non-violation nullification-or-impairment right does not complete the property rights over market-access levels created by negotiated tariff bindings sufficiently to prevent regulatory chill. A possible approach to solving the regulatory-chill problem, then, is to make changes to the rules of the WTO so that this right becomes symmetric.

One way to introduce this symmetric right is to work through the already-existing right of renegotiation contained within GATT/WTO rules. Under these rules of renegotiation, a government may modify or withdraw a tariff

concession, but in return it must offer compensating tariff concessions on other products or else accept equivalent withdrawals of concessions by its affected trading partners. The purpose of these renegotiation rules is to permit governments the flexibility to alter their commitments over time without permitting them to upset unilaterally the balance between the rights and obligations that had been established by previous negotiations. In this way, each government is granted the flexibility to amend its negotiated market-access commitments when the need arises while at the same time its trading partners are granted the ability to defend their property rights over the balance of negotiated market-access commitments. In principle then, if a government wished to unilaterally strengthen its domestic standards, and if this action would by itself increase the market access this government affords to its trading partners, then the government might seek to renegotiate its tariff to a higher level and to offer as compensation for its higher tariff the strengthened domestic standards.

With the introduction into the WTO of this symmetric right, a government would be able to offset the market-access implications of a decision to strengthen its domestic standards with an adjustment to its negotiated GATT/WTO commitments (e.g., its tariff bindings). In principle, this change in WTO rules would serve to complete the property rights over market-access levels created by negotiated tariff bindings sufficiently to prevent regulatory chill. To see this, it need only be observed that, with this change, each government could "de-link" its choice of national labor standards from market-access issues.[13]

I will refer to this second, indirect, approach as one of *strengthening the renegotiation and non-violation nullification-or-impairment provisions already present in existing GATT Articles*, and I note that in addition to the introduction of a symmetric right into WTO rules as I have described above, this strengthening might also require other measures which ensured that the renegotiation and non-violation nullification-or-impairment provisions work in practice as I have argued they can work in principle. But like the direct approach described in the previous subsection, I have now argued that this indirect approach can in principle solve the race-to-the-bottom/regulatory-chill problem. I close this section by comparing the two approaches.

I have observed that both approaches entail changes in current WTO rules and/or practice. However, I now argue that, of these two approaches, strengthening the renegotiation and non-violation nullification-or-impairment provisions already present in existing GATT Articles conforms more closely to existing GATT/WTO practice and principles. There are two main components of my argument.

First, a distinctive feature of this approach is that direct international negotiations over labor standards are not necessary to prevent race-to-the-bottom/regulatory-chill problems from arising. Therefore, under this

approach the traditional line between national sovereignty and GATT/WTO commitments is not blurred.

It is worth pausing here to consider how this feature could possibly be part of a solution to the race-to-the-bottom/regulatory-chill problem. After all, isn't the race-to-the-bottom/regulatory-chill problem fueled by the weak labor standards of the developing world, and therefore mustn't the solution to this problem involve finding a way to induce developing countries to accept commitments to strengthen their labor standards? In fact, the answer is "No" on both counts. The race-to-the-bottom/regulatory-chill problem is not fueled by the weak labor standards of the developing world but rather, as I have indicated above, by the weak property rights over market access associated with negotiated tariff bindings. The weakness of these property rights in turn, involves the relationship between each government's tariff bindings and its *own* labor standards. As a consequence, the key to solving the race-to-the-bottom/regulatory-chill problem is to forge the appropriate link between a government's negotiated tariff commitments and its own standards choices: there is no reason that governments need negotiate over their individual standards choices in order to accomplish this.

The second reason why I believe that, of these two approaches, strengthening the renegotiation and non-violation nullification-or-impairment provisions already present in existing GATT Articles conforms more closely with existing GATT/WTO practice and principles, is a more subtle reason. While I have observed above that direct negotiations over labor standards would raise the question, "Is *everything* ultimately to be a matter for international negotiation?," this indirect approach would raise the analogous question: Is *everything* ultimately to be a matter for renegotiating one's tariffs or lodging international complaints of non-violation nullification-or-impairment? Neither question is easy to answer. However, the GATT/WTO dispute settlement bodies have, over the past 50 years, developed some experience and expertise in answering the second question.

Therefore conclude that, of these two approaches, the approach of strengthening the renegotiation and non-violation nullification-or-impairment provisions already present in existing GATT Articles represents the more-promising avenue by which the WTO might solve the race-to-the-bottom/regulatory-chill problem.[14]

The Role of the WTO in Enforcing ILO Agreements

In this section, I consider the role that the WTO might play in helping to enforce labor agreements that are negotiated in the ILO. Difficulties in enforcing ILO agreements have plagued the ILO almost since its inception. For example, in discussions relating to procedures for ensuring the application

of ratified ILO "Conventions," the most substantive form of ILO agreements, the British delegate to the 1926 session of the Conference (as quoted in Landy, 1966, p. 18) stated:

> There is hope that we shall render application more solid and more frequent . . . Not only should we achieve a greater mutual self-confidence as a result of this procedure, but we should be able to prove to the world at large that the common taunt which is so often leveled at our work, namely, that our Conventions are purely paper Conventions, would be finally and completely dissipated and we should be able to prove to the world by the best possible means, by actual fact, that when we pass Conventions and when they are ratified a definite measure of social progress has followed.

The ILO's early struggles with enforcement have continued to plague it into the present, which in large part explains the widespread current interest in exploring ways to bring the enforcement power of the WTO to bear on countries that are not upholding their ILO commitments. However, before considering ways to enhance the enforcement of ILO agreements by forging links between it and the WTO, it is instructive to briefly consider further the ILO's own early discussions of enforcement. Johnston (1970, p. 90) describes some of these early discussions as follows:

> When the original Constitution was being drafted at the Paris Peace Conference in 1919 proposals were made that the International Labour Conference should be given full legislative powers. The French and Italian delegations in particular supported the workers' claims that the Conference should be a legislative assembly in the fullest sense of the term, adopting laws which would be obligatory upon all the members of the Organization. Very wisely, as experience has proved, most of the delegations took the view that the attribution of such supra-national powers to the Conference would not be accepted by the majority of States as consistent with the exercise of their sovereignty. The Constitution therefore limited the basic obligation of members to the submission by them of Conventions and Recommendations to the national competent authority (in most cases the legislature) for the enactment of legislation or other action.
>
> Under the Constitution, therefore, none of the decisions of the Conference have compulsory effect, and no member is under any obligation to ratify them. Nevertheless, the special provisions relating to the procedure of the Conference in the adoption of its decisions constitute an important step forward as compared with the procedure of former diplomatic conferences. The significance of this advance is often overlooked.
>
> In the procedure of the Conference the concept of unanimity which had previously appeared to be the necessary corollary of the sovereign rights of States was definitely set aside. No member has a right of veto at any stage in the procedure leading to the adoption of a Convention or a Recommendation.

These discussions illustrate an important point. Key institutional features of the ILO, such as its non-unanimity voting rules (simple majority voting for some decisions, two-thirds majority voting for others), exist *because* it was decided early on *not* to endow the ILO with independent legislative authority to determine the labor laws of its member countries.

In this light, it would, therefore, be naive to conceive of the ILO as an organization that could dictate national labor standards if only it had the power to enforce its Conventions. If the ILO had been designed with such power, the voting rule acceptable to its members would surely have been unanimity, and with the consequent right of veto few if any ILO Conventions would have ever been adopted. Similarly, it would be unwise to assume that simply "bringing in" outside enforcement powers – such as those supplied by the WTO – would necessarily "fix" the ILO in such a way that it could become a greater force in determining the national labor laws of its member countries. Johnston (1970, p. 279) offers these words of caution:

> Arising out of the criticism that the ILO relies too much on compromise is the further criticism that it is constitutionally too weak; it has no teeth; should its machinery not be strengthened to enable it to put more pressure on governments? When the Constitution of the ILO was being drafted in Paris in 1919, some members of the Commission strongly urged that the Conventions adopted by the Conference should have immediate status and effect of national labor legislation in all member States. If that proposal had been adopted the ILO would inevitably have foundered. The world was not ready then for such a supranational power; it is not ready for it now. National sovereignty is a very tender plant; it has to be handled very carefully.

With this caution in mind, I now briefly consider the question of linkage. In particular, I focus on the specific question of whether the WTO might usefully become involved in helping to ensure that countries who ratify ILO Conventions in fact live up to these Conventions. I wish to emphasize two points.

First, economic theory points to circumstances in which explicit linkage between the WTO and the ILO for enforcement purposes – whereby violation of ILO commitments would trigger retaliatory trade measures authorized by the WTO (and possibly vice versa) – may be beneficial, and also circumstances in which such linkage provides no benefits or may even be harmful.[15] Moreover, explicit linkage of this kind could lead simply to a *reallocation* of enforcement power across WTO and ILO agreements, in which case the effectiveness with which WTO commitments are enforced might be diminished in order to enhance enforcement of ILO commitments, or explicit linkage could lead to the *creation* of additional enforcement power that could in principle enhance the performance of each agreement. The first point I wish to emphasize is simply that the impacts of explicit linkage will depend on circumstances.

The second point I wish to emphasize is this. *Some* linkage between the WTO and the ILO can occur even without the creation of any explicit links between these two organizations, and this "implicit" linkage can in principle *always* enhance the performance of both organizations. Like the explicit linkage described above, the implicit linkage I am referring to involves the possibility of trade measures authorized by the WTO in the circumstance where an ILO commitment is violated. But unlike explicit linkage, where the retaliatory trade measures would represent the use of new retaliation rights under augmented WTO rules, the trade measures under the implicit linkage I am describing simply represent an exercise of already existing non-violation nullification-or-impairment or renegotiation rights in the WTO.

Consider, for example, a country that has ratified an ILO Convention and must therefore ensure that its labor policies are in line with this Convention in order to be in conformance with its ILO obligations. Suppose now that this country binds its tariffs in WTO negotiations. If this country subsequently violates its ILO commitments by non-application of the ratified ILO Convention, and if this non-application has *market-access* implications – by for example reducing access to the country's markets from the level that its trading partners could have reasonably anticipated in light of its bound tariffs *and* ILO-conforming labor policies – then in principle its trading partners would have a right of redress under the WTO's non-violation nullification-or-impairment provisions. Under this right of redress, the country would either have to find a way to restore the original level of market access, or else its trading partners could be authorized under WTO rules to seek compensation for the nullification or impairment of their market-access rights (which could include reciprocal withdrawals of market access, i.e., tariff increases that affect this county's exports). While I have described here a role for use of the WTO's non-violation nullification-or-impairment provisions to help enforce ILO commitments, a similar role can in principle be played by the renegotiation provisions of the WTO.[16]

In this general way, "implicit" linkages between WTO and ILO commitments – implicit because there is no sense in which the violation of an ILO commitment would be considered a violation of WTO commitments – can in principle play a useful role in contributing toward the enforcement of ILO commitments. And at the same time, the legitimate exercise of these links is an important component of enforcing WTO commitments and maintaining the balance between rights and obligations for WTO member governments.[17]

In summary, in this section I have considered the role that the WTO might play in helping to enforce labor agreements that are negotiated in the ILO. I have observed that economic theory points to circumstances in which explicit "linkage" between the WTO and the ILO for enforcement purposes – whereby violation of ILO commitments would trigger retaliatory trade measures orchestrated by the WTO – may be beneficial, and also

circumstances in which such linkage provides no benefit or may even be harmful. But I have also observed that explicit linkage of this kind may not be necessary in order for the WTO to play an important role in the enforcement of ILO commitments. More specifically, I have described how the non-violation nullification-or-impairment provisions and the renegotiation provisions contained in GATT Articles can play a significant role in enforcing ILO agreements. Indeed, in light of the uncertain impacts of developing explicit links between these two organizations, strengthening these already-existing principles of the WTO may be the most effective way to utilize WTO commitments as a means to help enforce labor agreements negotiated under the ILO.

Evaluating the Options

In this section, I collect the arguments of the previous sections and propose an overall approach to the international organization and enforcement of labor standards. I then briefly comment on some of the appealing and unappealing features of this approach relative to other approaches that have been proposed.

Together, the discussions of the previous sections suggest the following overall approach to the international organization and enforcement of labor standards. The ILO should tighten its focus to cover only labor issues that arise as a result of international humanitarian or political concerns, and should set aside race-to-the-bottom/regulatory-chill concerns associated with national labor standards choices. The WTO should take on labor standards issues as they relate to race-to-the-bottom/regulatory-chill concerns. However, the WTO should address these new responsibilities by strengthening the renegotiation and non-violation nullification-or-impairment provisions already present in existing GATT Articles, not by initiating direct negotiations over labor standards between its member governments. Finally, no explicit links between the WTO and the ILO should be established for enforcement purposes, but the enforcement links already implicit between these two organizations – as embodied in the non-violation nullification-or-impairment and renegotiation provisions of the WTO – should be encouraged.[18]

I now briefly comment on some of the appealing and unappealing features of this approach relative to other approaches that have been proposed. I consider in turn three alternative approaches. A first approach is to maintain the status quo operations of the WTO and the ILO. A second approach is to follow the example of the WTO TRIPs agreement in addressing the issue of labor standards in the WTO. A third approach is to expand the use of Article XX of the WTO to allow it to address in a more systematic fashion the labor standards concerns of WTO member governments.

According to the line of argument I have developed in the previous sections, the overall approach I have proposed above is in principle a sensible way to proceed. However, this line of argument is predicated on the view that the essential problem that the WTO is well designed to prevent is the problem of international cost-shifting through unilateral government policy decisions, and that this cost-shifting is fundamentally a market-access issue. If this view is wrong, and if the WTO is in fact acting to solve some other kind of international problem that I have not identified here, then it may be ill-advised to assign additional tasks to the WTO simply because these tasks address what are fundamentally market-access issues. Moreover, even if this view is right, what the WTO can sensibly be asked to do in principle may be very different from what it can competently do in practice. There are serious risks of overburdening the WTO legal system with intractable measurement problems, questions of a "slippery slope," and concerns that WTO could be "hijacked" for protectionist purposes. For these and other reasons, maintaining the status quo operations of the WTO and ILO is an option that should not be dismissed without considerable trepidation. And the arguments I have made in previous sections cannot really offer a convincing case against maintaining the status quo. Rather, they should be interpreted as arguments of the form, "*If* changes are to be made to the existing international organization and enforcement of labor standards, here is a sensible way to proceed."

A different approach to addressing concerns over the setting of national labor standards would be to follow the lead of the WTO TRIPs agreement – as that agreement approached intellectual property rights standards – and to attempt to negotiate an analogous WTO agreement over a set of minimum labor standards that all member governments must meet. Advocates of the proposed WTO social clause often point to the TRIPs agreement in support of their approach to labor standards. But as I have emphasized in the preceding sections, we must ask the question: What problem is such an agreement attempting to solve? I have argued above that when the different kinds of international problems associated with the unilateral choice of labor standards are distinguished, the social clause does not appear to offer a sensible solution to any of these problems. But in fairness, the TRIPs agreement should be held accountable to the same question. In principle, only if the TRIPs agreement can be understood to be a sensible solution to an international problem associated with the unilateral choice of national laws which protect intellectual property rights would the force of the analogy between the TRIPs agreement and the proposed WTO social clause be extinguished.[19]

A final approach that I comment on here is to expand the use of Article XX of the WTO to allow it to address in a more systematic fashion the labor standards concerns of WTO member governments. Already Article XX(e)

permits member governments to take exception from their general MFN obligations and raise discriminatory barriers against imports of the products of prison labor. Accordingly, under this approach, the circumstances under which general exceptions to WTO obligations are granted might be expanded to permit, for example, discriminatory trade barriers to be raised by one member against the imports of another member if that member violates its ILO commitments.[20] This approach would represent a step toward forging explicit enforcement linkages between the WTO and the ILO. One distinctive feature of this approach relative to utilizing the enforcement links already implicit between these two organizations as I have proposed above is that this approach would allow for *discriminatory* trade barriers in response to violations of ILO commitments. A second distinctive feature of this approach relative to utilizing the enforcement links already implicit between these two organizations is that it would presumably be more straightforward for the WTO dispute settlement bodies to administer. These features could be appealing, by giving more "teeth" to the enforcement links between the WTO and the ILO, but they could also have unappealing consequences, if they ultimately led to a significant rise in discrimination in trade relations.

Summary and Conclusion

What international action should be taken with regard to labor standards, how should this action be organized, and by what means should it be enforced? In this chapter I have attempted to provide answers to these three questions, and along the way to answer a more pointed question: What role should the WTO play in determining the labor standards of its member governments?

Taking the perspective of economic theory, I have described here a line of argument that supports the following overall approach to the international organization and enforcement of labor standards. First, the ILO should tighten its focus to cover only labor issues that arise as a result of international humanitarian or political concerns, and should set aside race-to-the-bottom/regulatory-chill concerns associated with national labor standards choices. Second, the WTO should take on labor standards issues as they relate to race-to-the-bottom/regulatory-chill concerns, but should address these new responsibilities by strengthening the renegotiation and non-violation nullification-or-impairment provisions already present in existing GATT Articles, not by initiating direct negotiations over labor standards between its member governments. And third, no explicit links between the WTO and the ILO should be established for enforcement purposes, but the enforcement links already implicit between these two organizations – as embodied

in the non-violation nullification-or-impairment and renegotiation provisions of the WTO – should be encouraged.

I do not advocate that this overall approach is necessarily better than maintaining the status quo operations of the WTO and ILO. But I suggest that *if* changes are to be made to the existing international organization and enforcement of labor standards, then this approach is a sensible way to proceed.

Acknowledgments

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Notes

1. These statements reflect the standard conditions of tariff analysis, under which the Metzler and Lerner paradoxes do not arise. More concisely, when I refer to a change in "market access" or a change in "the competitive relationship between imported and domestic products," I mean a change in the relationship between, on the one hand, the cost in the domestic market of the imported product when exporters receive their original exporter prices, and on the other hand, the cost in the domestic market of the domestic import-competing product when exporters receive prices that maintain either the volume of domestic import demand or the volume of foreign export supply at its original level. A more technical discussion of these points is contained in Bagwell and Staiger (2001a).
2. Of course, US consumers might gain from the ability to purchase US products at lower prices, and so not everyone in the United States need agree on whether the economic effect of India's supposed change in labor standards is good or bad. The important point is that such effects, however complex they may be, travel through changes in market access.
3. More accurately, while WTO negotiation are among the member governments, ILO negotiations have a "tripartite" structure, in which each member country is represented by a government official, a representative for workers and a representative for employers.
4. See, for example, the evidence reviewed in Bagwell and Staiger (2000a).
5. More detailed and formal arguments that various GATT Articles can be interpreted as helping to solve this basic problem may be found in Bagwell and Staiger (1999a, 2000b, 2001b, 2001c, and 2001e).

6. As I described in the second section, the choice of labor standards may also have humanitarian/political implications. However, in order to focus here on the possibility of race-to-the-bottom/regulatory-chill problems associated with the choice of labor standards, I temporarily ignore these humanitarian/political issues, and return to them when I discuss the ILO.
7. More detailed and formal arguments along these lines may be found in Bagwell and Staiger (1999b, 2001b, and 2001e).
8. Wilson (1996) considers a number of reasons that constraints on tax policies might give rise to race-to-the-bottom type problems.
9. Notice that this reassignment does not preclude the ILO from addressing labor issues that have important market access implications. Rather, it implies only that any market access implications of ILO decisions would be handled in the WTO.
10. See Ederington (2001b) for a formal demonstration of this general point.
11. On the general question of how international trade agreements are enforced, see for example Dixit (1987), Bagwell and Staiger (1990, 2000a), and Maggi (1999).
12. A more complete and formal treatment of these points may be found in Bagwell and Staiger (2001b).
13. These points are made formally in Bagwell and Staiger (2001b). It is also interesting to observe that, as compared to GATT, the WTO has already begun moving in this general direction. In particular, the amended rules on subsidies incorporated into the WTO go part way toward explicitly accommodating the granting of domestic subsidies that are intended to offset the financial burden of new environmental regulations on existing firms. Article 8 of the WTO Agreement on Subsidies and Countervailing Measures designates as "non-actionable" the granting of specific domestic subsidies which represent "assistance to promote adaptation of existing facilities to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms . . . ," and which also meet additional criteria specified in the article.
14. Of course, I am ignoring here an important set of practical measurement difficulties by implicitly assuming that tariff changes can be crafted so as to more-or-less offset the market-access implications of changes in labor standards. The subtle way in which labor standards can impact market access suggests that such practical issues could pose a formidable impediment, and these considerations must surely be weighed in assessing the advisability of any new approach to the issue of labor standards. I interpret such considerations mainly as suggesting the wisdom of maintaining the status quo operations of the WTO/ILO (I return to this point in the two final sections).
15. Recent papers on the topic of linkage and trade agreements include Conconi and Perroni (2001), Ederington (2000, 2001a), Limao (2000), and Spagnolo (2001).
16. The WTO's renegotiation provisions might come into play if a country's non-conformance with its ILO obligations were responsible for enhanced export volumes that its trading partners did not wish to accept.
17. It should also be noted that enforcement threats need not be limited to the withdrawal of market access. For example, direct foreign aid can be withheld from a country if it fails to meet its ILO commitments.

18. More generally, while I have presented the arguments above in the context of labor standards, the broader point is that the WTO should handle market access concerns associated with all unilateral policy choices, and that other international institutions should address the non-pecuniary aspects of each specific policy issue (e.g., labor, environment).
19. Some preliminary formal work along these lines can be found in Bagwell and Staiger (2001d, in process). An alternative interpretation would be that the TRIPs agreement was itself, in fact, ill-advised. A formal analysis that lends some support to this alternative interpretation can be found in Deardorff (1992).
20. Such an approach might build off an analogy with GATT Article XX(h), which allows general exceptions to WTO obligations to be taken "in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved". This general line of approach has been discussed in the context of environmental concerns, for example, by Hudec (1996).

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Commentary 4.1
Trade and Labor Standards: To Link or Not to Link?

L. Alan Winters[1]

This chapter is inspired by and complementary to Bob Staiger's excellent study in this volume. I find myself very largely in agreement with Staiger substantively and greatly esteem his methodological contribution as simplifying a complex and contentious debate.[2] He distinguishes between the natures of the various international externalities that figure in the trade and labour standards debate and uses that distinction as the basis for the assignment of policies and institutions to address the different externalities. I seek not to challenge Staiger's argument but to clarify it and place it in context.

Staiger is very cautious – he says "if you must link trade and labour standards together, do it as follows . . ." This is sensible and legitimate, for before we decide between two options (to link or not to link) we must know what each entails, and Staiger gives us his view of the best (dominant) outcome in the link scenario. However, policy-makers ultimately have to grapple with the main question and economists exist to help them, so we do need to consider seriously the question of "the Staiger plan" vs. the status quo. This chapter mainly pertains to this latter question in the sense that I argue that, while Staiger has correctly ranked the alternative ways of linking trade and labour standards, he has under-estimated the problems of his proposal absolutely.

Staiger identifies three externalities – the pecuniary one, which might cause a race to the bottom in standards, a political/civil unrest one and a moral one. The pecuniary externality operates via market access and is, *prima facie*, a candidate for solution via the WTO, since market access is the main business of the WTO. I am less sanguine than Staiger – let alone the enthusiasts for introducing a social clause into WTO – that this is desirable.

First, let me re-emphasize that the economic argument for intervention is not that low Indian standards reduce American exports and wages *per se*, but that they induce suboptional standards in America (and that competition

with America induces suboptimal standards in India). If standards were given or were optimal in each country, India's competitive advantage in "low-standard" industries would be no different from advantages stemming from technology or natural resources. And as such would provide, in economic terms, no case for intervention. In fact, the evidence that labour standards are affected by trade-related spillover is mixed, as Belser (2001) shows, but the exports/wages/jobs argument still has wide currency. This, I suspect, is because workers and politicians conceive of it in mercantilist terms and object to the implications of labour standards on exactly the same grounds as they object to those of trade liberalization and the falling relative price of manufactures (deindustrialization). Indeed, labour standards that reduce developed countries' import prices (and thus which raise the importing country's *economic* welfare if not that of its import-competing producers) attract just as much opposition as other standards issues. In short, much of the popular and political debate is instinctively protectionist in nature rather than "economistic." Consequently, one needs to worry about whether theoretically correct solutions to problems might get captured and abused. This is particularly important when it comes to writing laws or creating institutions, for these have, at best, a huge degree of inertia and, at worst, a capacity to devour their creators and their good intentions. The continuing expansion and spread of the antidumping business is proof enough of this.

Second, all the market-access concerns presume that lower labour standards confer a competitive advantage. If that were not the case there would be no threat to competing producers and hence no incentive for them to press for compensatory reductions in their own local standards. But industries that discriminate against workers typically *reduce* the supply of labour that they can draw on and so *cut* their production levels relative to those possible by paying a competitive wage (Martin and Maskus, 2001). Similarly, if labour is generally under-rewarded, effort and investments in human capital will suffer, again reducing productivity. Evidence that weak labour rights engender competitiveness is absent, and if this is the correct view of the world, there is no problem, and creating institutions to cure it will merely create new opportunities for mischief. Both arguments suggest that Staiger could be over-stating the importance of the pecuniary externality.

Staiger argues that it is *only* because tariff bindings constrain one instrument of market access that the other instrument (labour standards) is liable to be set at suboptimal values. If countries can manipulate both tariffs and labour standards, market access will be inefficiently low but the tariff/labour standards division will be efficient. This is an important insight, which is not restricted to importers' own markets. If low labour standards also confer competitive advantages in export markets – and if governments value these – then quite independent of tariffs, governments will compete in labour standards.[3]

Staiger's proposal to extend property rights in market access has an important limitation that means that it will be viewed as inadequate by most advocates of labour-standards activism. It pertains only to *changes* in labour standards *after* a trade deal has been struck. But most activists want to use it to address current inadequacies. A particular problem of using trade sanctions – in WTO, that means permitting the imposition of restrictions on imports of specific goods – is that even if it works, it will focus labour standards improvements in developing countries just on the tradable sectors. This will tend to worsen standards elsewhere in the economy as labour demand is reduced in the controlled sectors and labour flows out into the uncontrolled sectors. And since the non-tradable sectors are where the weakest members of society are already concentrated, such a development is likely to exacerbate overall poverty and hardship.

The political externality – the spread of civil strife – seems clear enough, but it is worth noting that there may be spillovers in both directions. In addition to the developed country wishing the developing country to raise its standards, the latter might have a legitimate interest in the former reducing its. Suppose that the USA raises its labour standards strongly and that this persuades Mexican workers that they too could ask for an increase. But suppose that Mexico's institutions for compromise and dispute settlement were not as robust as the USA's and that these demands precipitate civil strife. Is there not a case for Mexico asking the USA to desist from the initial improvement? By the logic of spillovers, the USA should be required to negotiate its standards as well.

Second, while the pursuit of peace is clearly a very high priority, it seems to me that the gross violations of labour rights that precipitate *contagious* civil strife are of a different order of magnitude from those that most people have in mind when discussing labour standards. Given the crossovers between objectives and instruments that Staiger identifies – viz. the commercial objectives that clearly pervade the political ILO – one needs, again, to protect carefully against the abuse in everyday life of measures designed to deal with extreme circumstances. If contagion is the problem, let us be very clear that it is rare and that "solutions" should be similarly rare. In fact, for extreme cases we already have access to trade sanctions – as used, for example, against apartheid in South Africa – and to other forms of embargo as ILO has now initiated against Burma (Myanmar). Thus it is not clear that the "peace agreement" really calls for any changes at all to the status quo.

The moral externality is also real – we are our brothers' keepers to some extent. But it too is a two way street. US citizens' concerns over labour rights elsewhere may be legitimate, but what about Indian concerns about family breakdown and drug use?

In the cases of both the non-commercial spillovers, I am less ready than Bob Staiger to consider the right of one nation to interfere in another.

Sovereignty is a dangerous thing – it can be used to justify non-intervention in the face of heinous crimes and it lies behind most armed conflict. However, it is also a useful way of allowing groups of people the self-determination that is politically so attractive in western politics. Economists preach the pre-eminence of individual objectives, so I believe that we should be very clear about the benefits before we sanction interference in other countries' affairs. We must recognise that there are trade-offs – that the solution of one problem may not be worth the possible creation of another. Excess interference (even advice) to weaker states is not ultimately a way of advancing peace and understanding. I do not rule it out, but I do urge caution.

I have similar reactions to Staiger's proof that the WTO *should* deal with the market-access spillover from labour standards. His argument presumes that any market-access issue can be as easily dealt with as any other (implicitly at zero cost), and thus that it is just plain inefficient to leave holes in WTO's coverage. But if the spillovers from labour standards are actually weak but they nonetheless still generate great political heat, and if WTO procedures are costly under these circumstances, then leaving holes – recognising that a small degree of market-access slippage may occur – may be rational. The cost of WTO procedures should not be underestimated. The actual cost of the skilled labour required for a dispute is significant, but the opportunity cost of diverting very scarce skills away from domestic or other trade policy-making could be very high. Worse, the WTO runs on rather a low stock of political capital. If countries fight over labour standards, they are likely to make less progress in other dimensions (Rollo and Winters, 2000). If labour standards contributed significantly to the crash at Seattle in December 1999, the dangers are plain enough.

A particular drain on the WTO's goodwill, legitimacy, and credibility would arise if it became the direct enforcement mechanism for ILO conventions that countries have already signed. Staiger admirably sets out the case that if the ILO had a legislative role and some 'teeth', very few conventions would have been agreed. But it does not seem to me overly cynical to argue that the same applies to individual conventions. To sign a convention as a means of signalling aspirations and objectives is one thing if the cost of failure is a "severe talking to." It is quite another if the cost is trade sanctions.

Two further issues arise if the WTO's dispute settlement procedure (DSP) is extended to cover labour standards. First, Staiger's proposal to make the property rights in market access more symmetric means that before long a country will simultaneously raise labour standards and raise tariffs and justify the latter in terms of maintaining market access at its original level. Suppose that this country is challenged in DSP and loses. Apart from the political fall-out of the "WTO undermines standards" variety, we must also ask how the plaintiff might enforce its "victory." The answer is ultimately by trade sanctions. Now suppose that it is the USA that raises standards and

Ecuador that complains. Effective enforcement is more or less absent: Ecuador will hurt itself much more deeply than it hurts the USA by curtailing their bilateral trade. This asymmetry in the DSP is well known, but it is nonetheless a good reason to avoid putting more strain on it by adding conflicts over labour standards to its coverage. Staiger's proposal offers just one more reason for raising tariffs, and by legitimizing such increases, it increases the probabilities that some domestic interest will eventually persuade a government to use it.

Finally, there is a problem of dimensionality. Labour standards are generally pretty broad in application, but tariffs and the DSP are narrow and specific. A government pursuing the "Staiger portfolio" of tariff and labour standards increases will very probably wish to raise many tariffs. Its trading partners will have to challenge every one separately.

In summary, I think Bob Staiger's chapter is very useful, but I also think that it is a potentially dangerous one. If ever there were a slippery slope in commercial policy, I fear that this is it.

Notes

1. I thank Bob Staiger and T. N. Srinivasan and other participants for comments on the earlier draft of this chapter.
2. I also heartily commend Bagwell and Staiger's whole insightful research programme on the theory of GATT, of which this chapter is part.
3. Placing this argument in a general equilibrium framework reduces its force, but does not undermine it, for exactly the reasons alluded to Staiger's note 1.

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Commentary 4.2
The Need to Micro-Manage Regulatory Diversity

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The Argument in Staiger's Study

Staiger's chapter distinguishes between a pecuniary and a non-pecuniary externality that stem from weak labor standards in some parts of the world: the former stems from the fact that, as a result of weak labor standards (that must be the effect of a change in regulatory policy, see the discussion), a WTO Member is in a position to win more market access (either at home or away) than anticipated when the trade concession (in the form of tariff binding) was agreed; the latter stems from the fact that, as a result of weak labor standards, and independently of market-access concerns, citizens in parts of the world with higher labor standards suffer enough to persuade their governments to do something about it. The non-pecuniary externality can take the form of either social unrest in some societies or could even lead to some humanitarian activity.

Based on this diagnosis, the author goes ahead and proposes an institutional function for the WTO and a different institutional function for the ILO: he argues that the WTO should deal specifically with the pecuniary externality since it is anyway geared to deal with market access issues only and lacks the expertise to do anything else. Conversely, the ILO should deal with the non-pecuniary externality.

He finally advances arguments to ensure that both institutions will be in a position to honour their objective function, as defined by the author.

The Argument in this Commentary

In this brief commentary, I am essentially addressing two questions:

1. How much can be done with respect to labor standards within the existing WTO contract and the adjunct question how much is left out?
2. Where should whatever is left out be discussed?

The methodology I use to address the two questions could be described as instrumentalist, that is, my starting point is the legal instruments available in the WTO contract.

Following this methodology I conclude that the WTO law (that is, both the primary law – the WTO contract – and the secondary law – the WTO case-law) as it now stands, definitely allows WTO Members to address pecuniary externalities stemming from labor standards. It could be the case, although this point is not crystal-clear in case-law, that it also allows WTO Members to address non-pecuniary externalities by invoking their domestic legislation to this effect. It is even less clear to what extent they can do the same by invoking an international agreement concluded outside the WTO and which acknowledges their right to counteract non-pecuniary externalities stemming from (weak) labor standards.

This is not a labor standards-specific conclusion: WTO Members can request from their partners that they respect their public order when trading with them. Because the extent and the shaping of public order differs across nations, there is a need to micro-manage regulatory diversity.

In principle, of course, it is legally possible that the WTO provides the forum for an agreement on labor standards. I do, however, raise a series of objections (complementary to those raised by Bob Staiger) against this thesis. First, remarkably, while there is a lot of talk about the potential form of an international agreement on trade and labor, no (or almost no) comprehensive discussion on whether there are gains from international cooperation when it comes to setting labor standards has taken place (the chapters by Brown et al., and Singh published in this volume being notable exceptions). Second – and assuming my first grounds or critique falls – the existing remedies in the WTO contract do not guarantee that an eventual trade and labor agreement will always be respected, especially if cases are brought against the relatively "big" players. The point here is that the effectiveness of the WTO legal system has probably been exaggerated; third, it would be quite odd to trust the issue of labor standards, which only tangentially has a trade component, to trade delegates.

I take each point in turn.

The Function of the WTO Contract in a Nutshell

Imagine that Oecedia (an OECD-type country) and Developia (a small developing country) are WTO Members. They exchange concessions whereby

Developia binds its tariffs with respect to Oecedian computers and Oecedia binds its tariffs with respect to wheat from Developia and they start trading with each other.

Oecedia, for the purposes of this example, is the high-labor-standards country and Developia is its low-labor-standards counterpart. We further assume for the sake of the example, that Oecedia is hence the *demandeur* in the trade and labor discussion, that is the only party requesting from the other higher standards.

Oecedia and Developia might or might not have a bilateral (or even be part of a multilateral) agreement which obliges them to follow a particular benchmark with respect to labor standards. In case an agreement obliges them to respect an agreed benchmark, such agreement might or might not be reflected in the WTO contract. I take each point in turn.

The case of no bilateral agreement

The WTO: Predominantly negative integration

In this case, both countries are free to endogenously set their own standards. There is absolutely no legal compulsion at all imposed by the WTO contract *per se* with respect to labor standards. The WTO is, with respect to labor standards, a negative integration-type contract. The WTO case-law has by now developed a constant jurisprudence (first in *Shrimps–Turtles* but also more recently, during the *FSC* litigation) accepting this point.

Oecedia and Developia have each unilaterally defined their labor standards, and, as a result, for the sake of our example we are in the presence of regulatory diversity in this context. Now Oecedia, might or might not condition access of products originating in Developia upon the labor standards followed in the latter country. If it does not, we do not need to worry. If it does, it will have to comply with the WTO contract.

The matrix of possible legal actions

What does this mean in practice? Two considerations are important in this respect: on the one hand, as Staiger notes, it could very well be the case that Oecedia counteracts either pecuniary or non-pecuniary externalities. On the other, Oecedia can choose between two strategies: it can decide to take no regulatory action against products from Developia (and attack Developia's practices before the WTO) or do the exact opposite (that is ban, for example imports and expect to defend its measures before a WTO panel). If it chooses the former option, it will use a non-violation complaint (and argue that as a result of Developia's low labor standards, it has lost expected market access).

	Violation complaint (Developia attacks)	Non-violation complaint (Oecedia attacks)
Pecuniary externalities	Arts. III/XI/XX GATT TBT	Art. XXIII.1b GATT
Non-pecuniary externalities	Arts. III/XI/XX GATT TBT	

Figure 4.1 The Oecedia/Developia complaints matrix

If it chooses the latter, it will be prepared to face a violation complaint submitted by Developia against its import ban. The matrix is shown in figure 4.1.

Oecedia attacks

The non-violation complaint instrument is available only in case of pecuniary externalities. This instrument, as it has been interpreted in GATT/WTO case law, essentially allows WTO Members to attack domestic policies by their trading partners, which were not reasonably expected at the moment a concession was negotiated and which reduce the value of the negotiated concession. This latter element is what makes it clear that non-violation complaints cannot be used against non-pecuniary externalities.

Moreover, for a non-violation complaint to succeed, the domestic policy attacked must, as stated above, not have been reasonably anticipated at the moment the concession was negotiated. In its *Kodak–Fuji* jurisprudence, a WTO panel clarified that if the domestic policy attacked occurred after the negotiation was agreed, then there is a legal presumption that the policy at hand could not have been reasonably anticipated by the affected WTO Member (the burden of proof shifts to Developia, if it weakened its labor standards). Conversely, if the measure pre-dates (Developia maintains the same low labor standards pre- and post-conclusion of the concession) the conclusion of the concession, there is a legal presumption that it should have been reasonably anticipated. (In this case, Oecedia would have to show, for example, that, although the weak labor standards were known to it, it could not have anticipated the impact they would eventually have on trade.)

Although this has never so far been the case, existing WTO case-law makes it quite plausible that a non-violation complaint can be based on weak labor standards. In its *Asbestos* jurisprudence, the Appellate Body accepted that non-violation complaints can be submitted against unanticipated health-based trade-obstructing measures. *A fortiori* this should be the case with respect to labor standards.

In case the complaint succeeds, Oecedia and Developia will have to negotiate a mutually satisfactory adjustment (Art. 26.1a DSU). Developia,

however, is under no legal obligation to withdraw its policy (and this is consonant to the fact that WTO with respect to labor standards is a contract respecting regulatory diversity).

Oecedia defends (a) an import ban

Now what if Oecedia bans imports of products originating in Developia? In this case it is simply irrelevant, from a legal perspective, if Oecedia wishes to address a pecuniary or a non-pecuniary externality. Or at least, so it seems to be the case following the *Shrimps–Turtles* jurisprudence.

Assume that Oecedia bans imports/sales of all goods produced through unfair (to its mind, defined as anything below its own) labor standards. To start with, Oecedia will have an incentive to ban sales and not imports: if it bans imports, it will almost immediately carry the burden of proof; Developia will have to assume the relatively easy task to demonstrate the existence of a quantitative restriction. By doing that it will have shown a violation of Art. XI GATT. Then Oecedia will have to show why its measures are justified through recourse to Art. XX GATT.

Two important hurdles are there for Oecedia to overcome: first, it will have to show that the list of Art. XX GATT covers this case. Charnovitz (1998) has taken the view that the term "public morals" appearing in Art. XXa GATT should be interpreted in this sense.

A contextual argument could be advanced to support this thesis: Art. XIV GATS (which has the same function as Art. XX GATT with respect to trade in services) refers to the wider notion of "public order". Since GATT and GATS are, in the Appellate Body's view, Annexes to the same (WTO) agreement, the argument would be that they would have to be co-extensive. It could also be argued that Art. XXd GATT is applicable. It should be noted however that so far there is no case law in the context of Art. XX GATT with respect to labor standards.

Assuming the *ratione materiae* coverage hurdle has been overcome, Oecedia will have to show, irrespective whether it invokes Art. XXa or Art. XXd GATT to justify its import ban, that the measure is necessary for it to achieve its goal: that is, it will have to show that an import ban is the least restrictive option to achieve its goal (which is, either protection of public morals in case Art. XXa GATT has been invoked, or Art. XXd GATT in case enforcement of its otherwise GATT-compatible legislation is sought). The term necessary in GATT/WTO case-law has been constantly interpreted as obliging WTO Members to choose the (reasonably available) least restrictive option to reach their goals.

Given the quasi-customary inability of WTO adjudicating bodies to work with the counterfactual, the burden of proof imposed by Art. XX GATT has proved so far to be insurmountable for WTO Members.

However, in its *Shrimps–Turtles* jurisprudence, the Appellate Body made it clear that policies addressing non-pecuniary externalities can very well be justified through recourse to Art. XX GATT (more on this below).

In a nutshell, the import ban route is not the most attractive option for Oecedia.

Oecedia defends (b) a sales ban

Were however, Oecedia to choose a sales ban, the initial burden of proof which Developia will have to assume is substantially higher. Two WTO Agreements are potentially relevant here: the GATT and the TBT. The latter is applicable in case Oecedia phrases its legislation as described by the Appellate Body in its *Asbestos* litigation (mandatory compliance with product characteristics; applicable to more than one particular transaction; no import ban). Let us turn to the GATT first.

Oecedia has enacted legislation, which bans sales of products produced with weak labor standards. Assume that Oecedia applies this law with respect to both domestic and foreign products. Since the measure is a domestic measure, Developia will have to show that Art. III.4 GATT (since the measure is not of a fiscal nature) has been violated. Moreover, since the measure is facially neutral, Developia will have to show *de facto* discrimination against its products.

In this vein, Developia will first have to show that goods (let us say Oecedian and Developian wheat) produced are the same irrespective whether they have been produced through high- or low-labor standards.

What does WTO case law have to say about that? The frank answer is that it is not at all clear what the law is in this respect: the *Japan-Alcohol* case made it clear that cross-price elasticity is the instrument to determine likeness. In this vein, Oecedian consumers would be asked whether, in the absence of regulatory intervention, they would purchase interchangeably Oecedian and Developian wheat. If Developia could submit persuasive evidence to this effect, then the burden of proof will have to shift to Oecedia to show that a policy reason (reflected in Art. XX GATT, as described above) allows it to intervene and justify the established violation of Art. III.4 GATT.

Recently however, in its *Asbestos* jurisprudence, the Appellate Body seems to deviate from this approach. The Appellate Body, at least in some paragraphs of its report, takes the view that regulatory objectives should be taken into account when defining likeness regardless of consumers' reactions. Independently of the soundness of this approach, if the *Asbestos*-standard prevails, it will be quite hard for Developia to meet its burden of proof.

Hence, the Appellate Body opened the door through its *Asbestos* case law for Oecedia to justify effective exclusion from its market of low-labor-standards-produced goods. To what extent the Oecedias of this world will

use this opportunity (which has to be confirmed since, as stated above, the internal consistency of the *Asbestos* report should not be taken for granted) remains to be seen. At any rate, however, the better option for Oecedia is to impose the sales ban and choose to defend along the lines described above.

The likeness issue in *Asbestos* follows, to a large extent the logic of the TBT Agreement (which combines elements of Art. III.4 and Art. XX GATT). Hence, a similar outcome should be expected in case Oecedia chooses to adopt a technical regulation instead of a pure import ban.

A bilateral agreement is in place

It could of course very well be the case that Oecedia and Developia have agreed to a certain standard to be observed with respect to labor standards by signing an agreement to this effect. Theoretically, such agreement can either be or not be reflected in the WTO contract. I take each point in turn.

The agreement is reflected in the WTO contract

The recent second Art. 21.5 DSU panel report between Brazil and Canada on *Aircraft Subsidies* (WTO Doc. WT/DS46/RW/2) makes it clear that panels will take into account international agreements concluded outside the confines of the WTO to the extent that such agreements are explicitly referred to in the WTO contract.

The agreement is not reflected in the WTO contract

So far there is no precedent in WTO case-law where a panel, when interpreting the WTO contract, took into account an international agreement signed outside the confines of the WTO and not explicitly referred to in the WTO contract itself. The opinion (Palmeter and Mavroidis, 1998) has been expressed that, following customary rules of treaty interpretation, this should indeed be the case. This opinion has been criticized by authors (Trachtman, 1999) who believe that WTO panels should apply to WTO law only.

At this stage it is uncertain which way WTO case law will evolve on this issue.

The Limits of the Current WTO Contract

Where does this analysis leave me? Although the WTO contract contains no rules on labor standards, labor standards can be enforced before WTO panels. This can be the case when a WTO Member with high labor standards

wishes to unilaterally apply its laws to all transactions in its territory. It is less clear that this can be the case if the Member at hand wishes to invoke an international agreement to this effect (unless, of course, the agreement is explicitly referred to in the WTO contract).

Staiger's chapter in a sense proposes a carve-out from the existing regime: only pecuniary externalities should be dealt with in the WTO context. An extension of the *Shrimps–Turtles/Asbestos* case law to labor standards is henceforth in his opinion unwarranted. Unwarranted yes, unavoidable though, maybe not. At the end of the day though the discussion on this issue seems to be how much of its public order Oecedia would like to request its partners to observe and for how much it is prepared to tolerate deviations.

In a nutshell, it seems plausible to argue that Oecedia can legitimately condition access of Developian products to its markets upon compliance with its public order, the latter extending to labor standards. What can be legally done and what is sound policy is not necessarily the same thing.

From can to should*: The need to micro-manage regulatory diversity: non-pecuniary externalities and the effects doctrine*

In a sense, *Shrimps–Turtles* stated the obvious: in the absence of transfer of sovereignty, the United States are free to choose and enforce their own environmental policy. This much is true. Problems start when the United States apply their legislation to their trading partners. Can they do it? The Appellate Body said yes without however discussing at all in a systematic way the permissible extent of a national legislation.

This is where we enter the discussion on extraterritoriality. The WTO contract does not at all address this issue. This however does not mean that the WTO contract provides its Members with a *carte blanche* to enforce their legislation in a manner inconsistent with public international law. Precisely because the WTO is an international contract, WTO adjudicating bodies will have to turn to public international law for inspiration when dealing with the concept of extraterritorial application of national laws.

This is a concept quite well defined in antitrust-jurisprudence on both sides of the Atlantic. In short, if an activity occurs outside national frontiers but its effects are felt within such frontiers, action following national laws of the affected state can legitimately (from a public international law perspective) occur.

To stick to the example of this chapter, if a Developian cartel practices monopoly prices in Oecedia, the latter can enforce its own antitrust laws although the addressees of its decision are Developian nationals and the activity was decided beyond Oecedian frontiers. The fact that the effects of the activity are felt within Oecedia suffices for the latter to exercise jurisdiction.

The next logical question is of course what effects? Do any effects, even if completely indirect, fit the bill? Customary international law answers in the negative: it has to be substantial, foreseeable, and direct effects. It is the latter condition that probably poses the most serious problems when discussing the application of the effects doctrine on non-pecuniary externalities.

It is quite clear that the directness criterion is satisfied when a cartel decides to price in a monopolistic manner when exporting to a foreign country: there is an uninterrupted link between the cause (decision to charge monopoly prices) and the effect (reduction of consumer welfare). Is it also the case when we discuss non-pecuniary externalities? We do not discuss here the case when Developia adopts weak labor standards in order to gain market access in Oecedia; we address the case when Developia's weak labor standards do not impose a pecuniary externality. Hence we must establish a link between Developia's revealed preference and the distress of Oecedia citizens. Is such link so obvious?

The argument here is that the effects doctrine as it currently stands is quite warranted when addressing pecuniary externalities. This is less so the case when addressing non-pecuniary externalities. It is difficult to predict however whether this will indeed be the case. Adjudicating bodies, and especially international ones have the tendency not to interfere too much with national sovereignty. If Oecedia defines its public order so as to include a particular benchmark of labor standards, it is not realistically to be expected that such a choice will be put into question by a WTO panel.

The *Shrimps–Turtles* report could avoid the issue of extraterritoriality since the US measure was designed to save exhaustible natural resources, which might or might not be confined within national frontiers (sea turtles). When the Appellate Body accepted that sea turtles are an exhaustible natural resource, it effectively by-passed the issue of extraterritoriality. This is of course not the case of labor standards.

Do we need an international agreement on labor standards?

In the absence of an international agreement, as mentioned above, Developia runs the risk of seeing its exports to Oecedia blocked because of its labor standards. Is this risk completely imaginary? Not at all. The EC and US GSP- (Generalized System of Preferences) lists now contain a reference to labor standards and provide developing countries with extra preferences in case they raise their standards (this is the attempt of the EC and the US to avoid regulatory chill by developing countries in this respect). The United States and Jordan agreed to include a labor standards-clause in their free-trade agreement. Belgium enacted a standard (in TBT-parlance), which makes

it possible for companies to label fair labor standards-produced goods. There is certainly a growing voice linking trade to labor.

Should then Developia be better off if it is led to the table of negotiations to discuss an international framework for labor standards? This is definitely the case for Developia to decide. It is its sovereign right, as Benvenisti (1999) mentions, however, it belongs to its margin of appreciation to decide whether it should or it should not participate in such a negotiation.

As things stand now, an over-zealous enforcement of public-order-based exceptions to international trade by WTO Members mathematically increases transaction costs. And where does one draw the line? As Henrik Horn in his comments to a previous draft of this chapter suggested to me, what if tomorrow the EC decides not to accept any products from a country which accepts the death penalty and thus bans all US exports to the EC market?

At the same time, it puts into question the very essence of the WTO contract: by forcing trading partners to respect each and every facet of a nationally defined public order, trading partners show little tolerance to regulatory diversity and *de facto* force the internationalization of public order. Is this really the way to go especially when the most ambitious integration process (the European Union) more and more relies on divergence among its constituents?

There is a need for WTO Members to micro-manage their public order. Practice shows that so far there has been a certain self-policing by WTO Members of their respective public orders. The Belgian TBT, the US–Jordan FTA and the GSP lists of the two biggest trading partners show that the picture is changing.

On the other hand, the remedies system in the WTO does not put every WTO Member on the same footing when it comes to providing incentives to act upon their rights (assuming that conditioning market access upon compliance with labor-standards legislation is accepted by WTO case-law as a right) before the WTO adjudicating bodies. There is a gross exaggeration surrounding the effectiveness of the WTO legal system: yes, it is (along with the UNCLOS) the only truly multilateral compulsory third party adjudication-system. But this should not be understood to mean that the system, as it now stands, guarantees always and by all respect of the assumed obligations and effective exercise of rights. Recent discuss in Geneva on implementation of the Uruguay round showed the deplorable record of implementation of the Uruguay round commitments.

If the WTO is not respected, at the end of the day, the complaining party wins the right to take countermeasures. The effectiveness of countermeasures depends on the identity of the complaining party and that of the defendant. Factors such as the extent to which the defendant depends on international trade and/or the particular market, the capacity of the

complaining party to cope, for some time at least, by raising costs for its consumers while awaiting a change in the defendants policies (Mavroidis, 2000) will heavily influence the ultimate decision. The point here is that the WTO system is probably effective when the Oecedias of this world take action against the Developias and not the other way round.

It would be quite Machiavellian to suggest that an agreement is needed because in the alternative, Developia will have to comply anyway with labor-standards-based demands. An agreement should come into place if there are good arguments that gains from cooperation exist in case an agreement is concluded. The chapters by Brown et al., and Singh published in this volume suggest that this is not necessarily the case. Staiger, in his chapter, does not address the issue. He assumes that the need for an agreement has been demonstrated and goes on to suggest that the WTO is probably not the appropriate forum for such an enterprise. Before I move to this discussion, there is one final comment that I would like to make. For the reason mentioned above (the effectiveness of the WTO dispute settlement system depends on the identity of the complainant and the defendant) it is probably not so obvious that one should entrust the WTO with the task of enforcing labor standards negotiated elsewhere.

First, trade sanctions, as economic theory suggests, are not the most appropriate instrument to address this externality (assuming an externality indeed exists). Second, proponents of such linkages should keep in mind that to a large extent, by linking trade to labor in this way, they proclaim the United States and the European Union to be policemen of this world. And the incentive structure of either the United States or the European Union does not necessarily coincide with that of a world-policeman. So even a minimal link (agreements are concluded in the ILO, they are enforced at the WTO) should be viewed with scepticism.

But if we are all for it, where should an agreement be negotiated?

Staiger suggests that if the political will to negotiate an agreement about labor standards is taken for granted, such agreement should not be negotiated within the WTO. Lack of institutional expertise in dealing with non-pecuniary externalities is in his view the decisive factor why this would be the case.

I would add that such an issue might lose its intellectual integrity if negotiated in the WTO. WTO negotiations are *quid pro quo*: Oecedia opens its textile trade as consideration for Developia's decision to buy more computers from it. The aim is to strike a deal that will keep two trading partners happy. Should the same logic apply to labor standards? I have my reservations.

First, the case must be made that labor standards should be discussed at the international plane: in plain language the issue will be why should Developia abandon child labor anyway when the alternatives for its children are horrifying, before even investing on establishing plausible alternatives. A case must be made to this effect and this case has not been made.

Can *quid pro quo* negotiations help? They might persuade Developia to abandon child labor faster than anticipated and create even more social unrest at home, or they might not. At any rate however, Developia will not be addressing the issue in its intellectual integrity. Its arm might be twisted towards one direction precisely because of the state of necessity that Developias of this world find themselves to be in.

Finally, there is something to be said about the administrative overburdens of the WTO. By continuously adding new subjects (while steadily increasing the non-implementation/unfinished business docket), proponents of a new bigger WTO should also keep in mind the potential of the institution to maintain its credibility which could be undermined if the effectiveness of managing the WTO domain is undermined as well.

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