

# *Core Labour Standards and the WTO*

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## **Abstract**

The purpose of this paper is to suggest ways in which core labour standards can be incorporated into the WTO. Though regarded by some as simply a vehicle for protectionism, the campaign for core labour standards is based on sound economics that extends the logic of trade regulation to the international dimension of labour. Getting agreement on core labour standards and enforcing them will be a difficult task, but one best conducted through the WTO – simultaneously bringing to that organisation much-needed legitimacy, and increasing the chances that it can deliver a world of prosperous, open and free trade.

JEL Classification: F02, F13, F41, F42, E24.

## **I. Introduction**

Although not nearly so new as either its opponents or proponents suggest, the process that has become known as ‘globalisation’ is unquestionably the issue of the moment in international political economy.<sup>1</sup> Loudly debated in international meetings of political leaders, officials and academics, and (even more loudly) on the streets of cities that dare to hold such meetings, the controversies surrounding globalisation are concentrated around a handful of topics. Chief amongst these is the question of labour standards. Globalisation, its critics assert, is resulting in a ‘race to the bottom’ as mobile capital searches for lower labour standards and wages.

Consistent with such arguments a number of governments, and various non-government organisations, have sought to incorporate into trade agreements certain ‘core’ labour standards. In 1998 the International Labour Organisation (ILO) codified these in its ‘Declaration on Fundamental Principles and Rights at Work’. The four principles established in the declaration were;

- a) freedom of association and the effective recognition of the right to collective bargaining;
- b) the elimination of all forms of forced and compulsory labour;
- c) the effective elimination of child labour; and
- d) the elimination of discrimination in respect of employment and occupation (ILO 1998a).<sup>2</sup>

The insertion of core labour standards into trade agreements, indeed anything smacking of a ‘social clause’, is opposed by many economists, employers, and a number of

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<sup>1</sup> A loosely defined label that can mean almost anything, here ‘globalisation’ simply refers to the greatly enhanced international mobility of goods, services and capital, coupled with accommodating advances in information technology.

<sup>2</sup> The Declaration was adopted, with no members voting against it (but with 43 abstentions), at the 86<sup>th</sup> Session of the General Conference of the ILO in June 1998.

governments. Such critics deny the existence of an international public good in labour standards. More often than not, they adopt what is frequently called a ‘neo-liberal’ position that asserts the imposition of core labour standards would distort the price of labour and reduce its supply, could lead to a reduction in foreign investment in developing countries and that, at heart, is simply protectionism behind a humanitarian mask. To its proponents, and the position of this paper, the adoption of core labour standards confers economic benefits to developing and developed countries alike. It offers the possibility for greater human capital formation, can increase the supply of labour through the elimination of arbitrary discrimination, and is likely to increase foreign investment into developing countries through its promise of greater economic and social stability. The adoption of core labour standards is also likely to bring greater democratic legitimacy to international economic institutions, the pillars that support the emerging liberal trading order. In its 1996 seminal paper on the issue the OECD concluded that

any fear on the part of developing countries that better core standards would negatively affect either their economic performance or their competitive position in world markets has no economic rationale. On the contrary, it is conceivable that the observance of core standards would strengthen the long-term economic performance of all countries (OECD 1996, p.105).

Revisiting the issue in 2000, the OECD was more explicit in what it saw as the source of these benefits:

Countries which strengthen their core labour standards can increase economic efficiency by raising skill levels in the workforce and by creating an environment which encourages innovation and higher productivity (OECD 2000, p.15).

The ILO took a similar line. Disaggregating the benefits that each of the core standards could be expected to deliver, it concluded that:

- Child labour is detrimental to development since it means that the next generation of workers will be unskilled and less well-educated.

- Collective bargaining and tripartite dialogue are necessary elements for creating an environment that encourages innovation and higher productivity, attracts foreign direct investment and enables the society and economy to adjust to external shocks such as financial crises and natural disasters.
- The discrimination faced by women and minority groups are important obstacles to economic efficiency and social development.<sup>3</sup>

Likewise the World Bank (2001):

Keeping labour standards low is not an effective way of gaining a competitive advantage over trading partners. Indeed, low labor standards are likely to erode competitiveness over time because they reduce incentives for workers to improve skills and for firms to introduce labor-saving technology.

This paper accepts the assessment of the OECD, the ILO, the World Bank and others as to the economic merits of the adoption of core labour standards.<sup>4</sup> It also asserts that the human rights aspects of the issue are unarguable. Accordingly, the paper is not so much concerned with arguing the merits of core labour standards with respect to either its economic or human rights aspects. The paper is concerned, rather, with implementation. It argues that the WTO, in conjunction with the ILO in a standard-setting and supervisory role, is the appropriate institution for ensuring adherence to core labour standards because it is the only international body with non-discriminatory enforcement powers.

The argument thus outlined proceeds as follows. Section II details the course the campaign for core labour standards has followed thus far and suggests that, despite setbacks, it is an imperative that the WTO will be unable to avoid. Section III outlines why the WTO is indispensable to the enforcement of core labour standards. It examines the absence of enforcement measures at the ILO, the problems of selective regulation that excludes labour, the importance of multilateralism, the precedents established by the

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<sup>3</sup> cited in OECD (2000), p.32.

<sup>4</sup> A growing array of studies independent of official bodies have emerged in recent years extolling the economic virtues of enforcing core labour standards. Some of the more influential of these include Marshall (1992), Elmslie and Milberg (1996), Rodrik (1997), Nyland and Castle (1998), Palley (1999), Trebilcock and Howse (1999), and Stiglitz (2000).

regulation of intellectual property rights and by history, and the way that, through the enforcement of core standards, the WTO might ensure its own survival. Section IV is concerned with the practical implementation of core labour standards enforcement at the WTO. It examines a number of vehicles, including the use of the WTO's subsidy provisions and Article XX, the 'general exceptions' clause of General Agreement on Tariffs and Trade (GATT). It finds that the most promising way that the core labour standards issue can be raised is via the WTO's Trade Policy Review Mechanism. Section V concludes the paper.

## **II. The Campaign for Core Labour Standards.**

In December 1996 the United States' delegation to the inaugural Ministerial Meeting of the WTO attempted to establish what became known as the 'Social Clause' to multilateral trade agreements.<sup>5</sup> At the heart of this Clause were a group of labour rights deemed to be applicable to all workers in all countries. Derived from Article 23 of the Universal Declaration of Human Rights, and other human rights covenants, they were identical to the four categories of 'core' rights established by the ILO in 1998.<sup>6</sup>

The Social Clause was defeated in Singapore. The United States' position was supported by a number of other industrial countries, but it was strongly opposed by certain developing countries (notably Malaysia and Egypt) who saw it as nothing other than an attempt to usher in protection by the back door and to negate developing countries' comparative advantage in low-cost labour.<sup>7</sup> Amidst what Haworth and Hughes (1998, p.1) describe as 'high emotion and political intrigue', the Singapore Declaration that concluded the meeting came up with a 'compromise' – that renewed the commitment of countries to core labour standards, but asserted that the ILO was the only competent body

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<sup>5</sup> The Ministerial Conference meets every two years and is the highest authority in the WTO. For details of the inaugural Singapore meeting, see <[http://www.wto.org/english/thewto\\_e/minist\\_e/min96\\_e/min96\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min96_e/min96_e.htm)>.

<sup>6</sup> The most important of these other human rights covenants are the Covenant on Economic, Cultural and Social Rights (1966), the Covenant on Civil and Political Rights (1966) and the Convention on the Rights of the Child (1989).

<sup>7</sup> Two 'developed' countries that also opposed the Social Clause were the United Kingdom and Australia.

to deal with the issue.<sup>8</sup> It affirmed that trade liberalisation fostered economic growth and development and that labour standards should not be used for protectionist purposes. It also affirmed that developing countries' comparative advantage in low cost labour should not be threatened, but urged that 'the WTO and the ILO Secretariats...continue their existing collaboration'.<sup>9</sup>

The Singapore Ministerial Meeting was a major setback for the campaign of including core labour standards in multilateral trade agreements. Collaboration between the WTO and the ILO has not really come to pass, a not so-surprising result given that the 'existing collaboration' referred to in the Declaration had no basis in reality anyway.<sup>10</sup> The sincerity of those countries that loudly proclaimed the ILO as the only body able to deal with the issue has also proved questionable, given that these countries have also usually been at the forefront of efforts opposing the ILO's investigations in the area (Leary 1997, pp.120-121).

Pressure on the labour standards issue from international labour unions, consumer groups, and other non-government organisations nevertheless continues, a fact readily in evident on the streets of the second WTO Ministerial Meeting in Seattle in December 1999, and in a number of meetings of international economic and financial institutions since. At Seattle, the US, the EU and Canada all submitted proposals on labour standards and trade. The US proposed the establishment of a WTO Working Group on Trade and Labour to investigate 'the effects of the multilateral trading system on the living standards and the employment opportunities of working men and women around the world'.<sup>11</sup> In opposition to the Singapore Declaration, the proposal made clear the US view that the WTO *was* the appropriate institution to carry out such a task. The European Union proposed that a joint ILO/WTO Standing Working Forum be established on 'globalisation and labour' with a view to promoting 'a substantive dialogue between all

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<sup>8</sup> This intrigue included a last-minute cancellation, at the request of a number of developing country delegations, of an invitation to the Director-General of the ILO to address the meeting (Trebilcock and Howse 1999, p.457).

<sup>9</sup> Singapore Ministerial Meeting, <[http://www.wto.org/english/thewto\\_e/minist\\_e/min96\\_e/min96\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min96_e/min96_e.htm)>.

<sup>10</sup> Since taking office in September 1999, the WTO Director-General, Mike Moore, has met twice with ILO Director-General, Juan Somavia. No formal consultation arrangements have yet been established.

interested parties'. Canada called for a WTO working group to examine the links between trade, development and social and environment policies, and report to the next WTO Ministerial Meeting. The still very strong divisions between 'north and south' over labour standards and many other issues, divisions the violence on the streets managed to obscure, brought the Seattle Meeting to an end before any of these proposals could be formally considered.<sup>12</sup>

Pressure to consider the issue of core labour standards and trade continues in other fora as well. The OECD (2000, p.60) reports that it is routinely raised in the periodic reviews undertaken under the WTO's Trade Policy Review Mechanism (more of which below). The issue is also a live one in various other bilateral and regional schemes. Both the US and EU include labour standards as a consideration in granting preferences to developing countries.<sup>13</sup> Most prominently, the North American Free Trade Agreement (NAFTA) between the US, Canada and Mexico, includes a parallel accord on labour standards.<sup>14</sup> These 'official' moves, coupled with the advocacy of trade unions and NGOs from the most powerful to the most humble, suggests the question of core labour standards and trade is not likely to go away any time soon.

### **III. Why the WTO?**

#### ***i) The ILO Alone is Insufficient***

In many ways the international body that most obviously springs to mind when contemplating the issue of labour standards is, as the Singapore Declaration concluded, the ILO. The ILO was established in 1919 under the Treaty of Versailles, which

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<sup>11</sup> The submissions on labour standards from the US, EU and Canada are all available on the WTO website, <[www.wto.org](http://www.wto.org)>, under the topic heading 'Preparations for the 1999 Ministerial Conference'.

<sup>12</sup> The Seattle Meeting failed more comprehensively in its primary purpose of initiating a new round of global trade talks, especially with regard to agriculture and financial services.

<sup>13</sup> The Generalised System of Preferences (GSP) schemes of the US and the EU differ slightly. Under the US scheme, countries not adhering to certain labour standards lose preferential access to the American market. Under the European scheme, special incentives are available under the GSP arrangements for countries meeting core labour standards criteria. For a discussion of the schemes, see OECD (2000), pp.67-70.

<sup>14</sup> Details of this accord, the North American Agreement on Labor Cooperation, can be found at <[www.naalc.org](http://www.naalc.org)>.

specifically recognised that the ‘failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve conditions in their own countries’.<sup>15</sup> For eighty years the ILO has been at the forefront of attempts to improve the conditions of labour around the world, and to date has established over 180 conventions covering a myriad of issues.<sup>16</sup>

In considering effectiveness in ensuring the implementation of core labour standards, however, the ILO, alone and as presently constituted, is not up to the task. A tripartite body of governments, employer representatives and organised labour, the ILO has no legal remedies of enforcement to its conventions. Conventions are voluntarily entered into by governments, and the only real censure the ILO can employ against breaches is to ‘name and shame’.<sup>17</sup> Transgressions of the ILO’s designated core are documented in a special list that is published by the ILO to coincide with its annual conference but, as Mehmet, *et al.*(1999, p.72) notes, there is little international publicity given to it. The ILO is a valuable institution in informing, educating and creating a forum for dialogue on labour issues, but its lack of enforcement powers means that, contra to the Singapore declaration, it is not the competent body to ensure adherence to core labour standards.

Of the other international economic institutions, the IMF and the World Bank have some means of enforcement by withholding lending to transgressor states, but clearly such powers are limited to those states seeking their assistance. This is problematic politically, since in actuality this would simply mean that developing countries would be subject to IMF/World Bank censure, whilst the industrialised world would not. For this reason (though there are many other technical objections as well) neither the IMF nor the World

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<sup>15</sup> The provisions of the Treaty of Versailles relating to international labour standards can be found at <<http://www.ilo.org/public/english/about/history.htm>>.

<sup>16</sup> The sheer number of ILO conventions, their diversity and sometimes limited applicability, has presented those concerned with the promotion of core labour standards with a problem of clarity. Most countries, including those with very good overall records on labour relations, are likely to be in breach of one or more ILO conventions. This makes the full list of ILO conventions a difficult marketing tool, and the reason why in 1998 the ILO extracted the four conventions above for special emphasis as the ‘core’.

<sup>17</sup> As the OECD (2000, p.53) notes, The ‘approach of the ILO works best where the parties have a will to conform...or where they are sensitive to public concerns when issues of non-conformity are raised’. The challenge, however, is to design an approach under which core labour standards are respected with or without this goodwill.

Bank are appropriate institutions through which to police adherence to core labour standards.<sup>18</sup>

The one international institution that has both enforcement powers, as well as the ability to treat all states evenly, is the WTO. Formed in 1995 to provide a permanent institution for continuous trade negotiations, the WTO takes as its 'rule book' the GATT as it stood after the Uruguay round of trade negotiations, together with new rules for dealing with trade in services, intellectual property, dispute settlement, and trade policy reviews. In contrast to the GATT, membership of the WTO requires adherence to almost all WTO agreements.<sup>19</sup> These agreements are essentially contracts, entered into by governments and (where applicable) ratified in the parliaments of member countries. Agreements are monitored by the WTO, and disputes brought before it for adjudication by a 'panel of experts', whose rulings are subsequently endorsed or rejected by the WTO's members. The WTO's Dispute Settlement Body monitors these rulings and has the power to authorise retaliation against a member state that does not comply with a ruling. Such retaliation can include the payment of compensation and, when all other avenues have been exhausted, the use of trade sanctions against the transgressor.

## *ii) Selective Regulation and the 'Race to the Bottom'*

Using the WTO as the body to police adherence to core labour standards is generally opposed by economists.<sup>20</sup> Consistent with a wide scale belief that economics should be concerned with 'positive' analysis rather than with 'normative' issues, the WTO is regarded simply as a neutral umpire, there only to ensure the 'rules of the game' that maximise aggregate economic efficiency.

The dichotomy between positive and normative aspects of economic analysis has always been a fictional construction, but it is nowhere more apparent than in the presumptions of

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<sup>18</sup> Both the World Bank and the IMF are, however, paying greater attention to 'social issues' than they have in the past. For a discussion of this in the context of labour standards, see OECD (2000), pp.57-59.

<sup>19</sup> The exceptions concern the trade in civil aircraft, dairy products, meat and government procurement.

<sup>20</sup> See, for example, Bhagwati (1994 and 1995), Krueger (1990 and 1996), Lawrence (1996), Mah (1997), Sapir (1995), Srinivasan (1996) and Wilson (1996).

the WTO, and in trade rules generally. If there is such a thing as a central principle of the WTO, and before it the GATT, it is the concept of Most Favoured Nation (MFN). The idea that if you treat one trading partner in one way, you must treat all others in the same way, it is nothing but the application of non-discrimination fairness.<sup>21</sup> In short, it is a normative concept. Others abound in the trade arena – rule based trade itself is nothing but the application of so-called ‘golden rule fairness’, while the issue of ‘dumping’ (against which the WTO provides sanction) is an application of non-reciprocity fairness (Suranovic 2000, pp.291-294). The recent inclusion of the protection of intellectual property rights as a responsibility of the WTO is defended primarily on the basis of fairness and compensatory justice concerns for the creators of intellectual property – a particularly egregious example, one might conclude, of some forms of ‘labour’ being more equal than others. Of course, the criteria of neo-classical economics in general, that efficiency is the maximisation of aggregate welfare, is a normative concept that elevates ‘maximum benefit fairness’ above those of other considerations – including, for example, equity (Suranovic 2000, pp.302-303).

Nowhere is the normative relativism of the neo-liberal approach more apparent, however, than in what is *chosen* as the basis of nations’ comparative advantage. Implicit in the neo-liberal account is that national *policy* (labour standards adopted) is a legitimate source of comparative advantage, no more and no less than natural resources and the skills and attributes of citizens. This far extends the notion of comparative advantage envisioned by Smith, Ricardo, Mill and the other founders of trade theory. Critically though, it can only possibly be justified on the basis that such policy expresses the ‘aggregated preferences’ of the individuals that make up the nation undertaking such policy (DeMartino 1997, p.304). This is an all-but impossible assertion to make of the most well-run democracies, and a clearly ludicrous proposition to make of the less than representative governments that make up the bulk of nations for whom core labour standards are a sensitive issue. As Trebilcock and Howse (1999, p.445) note, in the end the question of whether a policy that fails core labour standards could yield any gain in national economic welfare ‘would

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<sup>21</sup> This, and other definitions of ‘fairness’ principles that masquerade as value free rules under orthodox assumptions, is drawn from Suranovic (2000), pp.283-307.

entail judgements and analysis that go far beyond the disciplinary expertise of trade economists and trade policy experts’.

It is the selective regulation of trade and labour that opens the theoretical door to a prisoners’ dilemma in labour standards and the potential for a ‘race to the bottom’. The reason for this is that under existing arrangements there is mobility in almost everything except labour and the nation state itself – the latter the one jurisdiction that at this present time regulates labour standards. This means that capital, increasingly with the power of unilateral exit, can engage in regulatory arbitrage. What has been created, in effect, is an international market for labour market regulation, in which each state can be pitted against the other in the pursuit of both export volumes and foreign investment.<sup>22</sup> Of course, this is not a problem for orthodox trade theory, upon which both the existing policy infrastructure of the WTO is built but for which no role is assigned in creating pseudo-comparative advantage through regulatory auction. In the reality of the contemporary world, however, domestic labour standards are subject not just to the actions of the domestic government, but to the actions of governments elsewhere. Clearly this creates something of a democratic deficit – a systematic failure that could compel countries, irrespective of the wishes of their populace, to adopt policies of the lowest common denominator. The solution to all of this is the same as that to all prisoners’ dilemmas – an enforceable agreement that precludes opportunistic cheating. Such an agreement on core labour standards is what this paper has argued is required under the WTO.

### ***iii) Multilateral Enforcement is Better than Unilateralism***

A critical argument in favour of the WTO as the institutional mechanism through which to enforce core labour standards is that, uniquely, it is the WTO that can impose a

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<sup>22</sup> This whole issue is of particular relevance when considering the rise of Export Processing Zones (EPZs). Established for the most part in labour-surplus countries, EPZs are explicitly designed to capture mobile capital searching for cheap labour. EPZs are often exempt from national labour legislation, and their impact upon the countries establishing them ambiguous. In the view of this author, it is not insignificant that the largest operator of EPZs is China (18 million employed), a country not noted for its adherence to human and labour rights treaties. For more on the issue, see ILO (1998b).

multilateral solution. If, as this paper has argued, the advocacy of core standards will not go away politically, then it is likely that some countries, unilaterally or even as a limited group, will attempt to police their adherence. Such an outcome – the unilateral imposition of penalties upon countries subjectively adjudged to be transgressors – would likely result in a chaotic outcome of escalating penalties as charge and counter charge came to dominate, and poison, international economic relations. A type of vigilante beggar-thy-neighbour experience would emerge, a perverted rendering of the inter-war experience, but no less destructive of the goals the WTO has been established to achieve. Using the WTO as the enforcement body removes much of the danger of unilateral action, and gives all countries (especially developing ones) a voice on the choice of the core standards ultimately adopted. Meanwhile, the multilateral nature of WTO penalties would be both more efficient (minimising trade diversion), and more effective, than those of nations unilaterally acting as global sheriffs.<sup>23</sup>

#### *iv) TRIPs as Precedent*

It has been the convention for trade regulation to apply to *products* rather than to *production processes and methods* (PPMs). The latter raising the spectre of a myriad of issues crowding trade negotiations, this convention has often been invoked (at the WTO, and before it at GATT) to dismiss the consideration of labour from the trade arena.

The establishment under the WTO of the Trade-Related Intellectual Property Agreement (TRIPs), however, has clouded this distinction to the point of irrelevancy.<sup>24</sup> TRIPs requires that all members of the WTO set minimum standards for protecting intellectual property rights and to establish measures to ensure the enforcement of these rights. Intellectual property rights include such things as copyright, trademarks, patents and so

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<sup>23</sup> Of course, such unilateral policing is already in place, and already disruptive to world trade. Most notable of such policies is Section 301 of the US Trade and Tariff Act (1974, but as amended 1988) which gives the US Trade Representative discretionary powers to impose trade sanctions against countries that engage in practices that ‘constitute a persistent pattern of conduct denying internationally recognised worker rights’ (Act cited in Trebilcock and Howse 1999, p.458).

<sup>24</sup> For details of TRIPs, see <[http://www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm)>.

on. An agreement such as TRIPs has been strongly pushed by a number of industrial countries over many years, and up until recently resisted by most developing countries.

The economic justification for TRIPs is that unless innovation and creativity is compensated at its full value to society, there will be insufficient incentives to ensure that it will occur at socially optimal levels. Against this, intellectual property rights creates the possibility for the emergence of monopoly, can result in losses in short-term consumer welfare and inhibits useful imitation and adaptation. According to Trebilcock and Howse (1999, p.308), the level of protection a country provides to ensure intellectual property rights will 'be rationally related to whether its comparative advantage resides more in innovation or imitation and adaptation of innovations made elsewhere, and the relative weights it gives to the interests of consumers (including its own producers who are consumers of inputs), imitators and innovators'.

Underlying the economics of the issue, however, is the issue of fair compensation (briefly noted above). Trebilcock and Howse argue (1999, p.308) that this in turn can be found to rest on a Lockean line of argument that 'persons are naturally owners of the fruits of their own labour, and that the taking of these fruits represents an attack on their autonomy – or even the integrity – of the person'.

The parallels between the above and the issue of core labour standards scarcely needs further illumination. Suffice to say perhaps, that TRIPs seeks to ensure a somewhat more abstract notion of the rights of the person that that sought by each of the core labour standards. It is no surprise the whole issue invokes a degree of cynicism that is damaging to the WTO. As the International Confederation of Free Trade Unions (ICFTU 1996, p.3) notes:

The WTO's credibility is undermined when it ensures that Mickey Mouse has more rights than the workers who make toys, because it covers the trade mark but not labour standards.

### ***v) History as Precedent***

The WTO has a predecessor in the International Trade Organisation (ITO). The subject of protracted international negotiations in the late 1940s, the ITO was rendered moribund by the decision of the US Senate not to ratify membership in 1950. The GATT was the surviving remnant of the ITO negotiations and, of course, forms the basis of the WTO's Agreements. The Charter of the ITO specifically linked trade, economic progress and labour standards:

The Members recognise...that all countries have a common interest in the achievement and maintenance of fair labour standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit. The Members recognise that unfair labour conditions, particularly in the production for export, create difficulties in international trade and, accordingly, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory.

Members which are also members of the International Labour Organisation shall cooperate with that organisation in giving effect to this undertaking (Australia, Parliament 1948).

It is hard to accept that what was possible in the 1940s is not possible now.

### ***vi) An Instrumentalist Argument for Core Labour Standards at the WTO***

That the selective regulation of trade and labour questions has political consequences is apparent in a number of the issues explored in this paper. What is not clear, however, is whether this is clearly understood by the WTO, and those in favour of increased trade liberalisation more generally.

Thus far, regulation in the international sphere has been allowed to the extent that it has assisted in the free movement of goods and, lately, in opening up areas such as services, government procurement, investment, and in establishing intellectual property rights. The problem with such regulation is that while it benefits some social groups, it harms others.

Those harmed by selective regulation in the international sphere have not been slow to register their opposition, as the demonstrations on the streets of Seattle *et al.*, all attest, but which is also apparent in a myriad of other ways suggestive that the international economic institutions (especially the only newly-created WTO) enjoy at best the shallow support of member governments. The issue of core labour standards will not go away, moreover, and nor will those who use the issue in opposing global economic liberalisation. The stakes were boldly put by the US Under-Secretary of Labour, Andrew Samet, who declared in February 2000 that:

A multilateral approach through the WTO working together with other international organizations is the best way to address the labor dimension. In the absence of a multilateral approach, pressure will build to advance these concerns in ways that may be less preferable for the global trading system. Further, failure to address the labor dimension in the WTO may lead to precisely the result that critics of the labor-trade link say they want to avoid – an increase in protectionist pressures (Samet 2000).

Not only is the WTO's agenda at stake, but so is the survival of the organisation itself. A WTO that is committed, as part of its mandate, to the elimination of forced and child labour, to an end to discrimination in employment and to the freedom of association, is able to make a much stronger claim that it is truly acting in the interests of people everywhere.

#### **IV. Practical Implementation of Core Labour Standards at the WTO**

##### ***Non-Adherence to Core Labour Standards as a Subsidy***

A prominent argument against using the WTO as the vehicle to enforce core labour standards is the assertion that such a role requires the acceptance of a new set of legal obligations by member countries. This, it is argued, would necessitate the negotiation of a

new legal framework in which to state and enforce these obligations and, given the opposition already to the core labour standards issue, is unlikely to be a starter.<sup>25</sup>

In opposition to this, some labour standards proponents contend that the WTO *already* has the jurisdictional power to enforce core labour standards. Principal here is the contention that core labour standards can be policed by the WTO using its powers to regulate the use of subsidies. Of course, the idea that poor labour conditions should be considered a ‘subsidy’ and should therefore be the subject of countervailing measures, is one that far pre-dates the WTO. Charnovitz (1987) suggests that measures to eliminate the slave trade forms the fundamental precedent, while in terms of international institutions the idea first emerged at the League of Nations in 1927. Notwithstanding this long history, Charnovitz also rightly observes (1987, p.565) that the issue still tends to be ‘treated as a novel concept’.

According to the ‘subsidy argument’, the non-enforcement of labour standards is ‘every bit as real a subsidy as a government grant for a material input’, allowing unfair competition and distorting prices (Charnovitz 1996, p.74). Though a ‘negative’ subsidy in the sense that it is determined (mostly) by the non-action of government rather than through ‘positive’ policy, such a distinction is of little consequence to competing firms whose domicile enforces their own adherence to core standards. Whatever their form, subsidies alter the terms of trade of both the country imposing them and of the rest of the world. As such, they affect both relative demand as well as supply, distorting the division of labour that would otherwise (theoretically) be determined by comparative advantage.

Subsidies are properly the concern of the WTO which, under the ‘Agreement on Subsidies and Counterveiling Measures’, can impose sanctions against subsidies that are deemed to be prohibited or actionable. The WTO defines a subsidy as containing;

- i) a financial contribution
- ii) by a government or any public body...
- iii) which confers a benefit.<sup>26</sup>

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<sup>25</sup> See, for an example of such an argument, Feddersen (1998).

During the negotiations over the Agreement the issue of ‘financial contribution’ proved controversial. It was only inserted following ‘protracted negotiation’, with the WTO itself noting that some members ‘considered that forms of government intervention that did not involve expense to the government nevertheless distorted competition and should thus be considered to be subsidies’. But having defined subsidies thus, the WTO further divides them into three categories. Firstly, there is a ‘prohibited’ group that are designed to meet certain export or import targets. These directly distort trade and are subject to immediate WTO sanction once the facts are proved. Secondly, there are subsidies that are deemed to be ‘actionable’. These are subsidies that the complaining country must prove are *materially damaging* to their interests. Once established to the satisfaction of the WTO’s Dispute Settlement Body these will also attract sanction, but if not they are allowed to continue. The final WTO classification refers to those regarded as non-actionable. These are non-specific subsidies that include such things as research aid, infrastructure support, assistance to certain regions, assistance to meet environmental standards, and so on. These cannot be taken through the WTO’s dispute settlement procedures and are not subject to sanction.

The WTO’s existing interpretation of a subsidy would preclude non-adherence to core labour standards since, as noted, it is a ‘benefit’ conferred to a producer through omission, and there is not likely to be a ‘financial contribution’ from government. Proving that non-adherence to core labour standards would be materially damaging to a competing producer would also be difficult. Indeed, it’s a difficult hurdle in normal subsidy actions, and would be more difficult again in a context in which an aggrieved party would have to argue that they were damaged by a *general* deficiency in another country’s labour standards. Determining the extent of the subsidy delivered by non-adherence to core labour standards would also be an extremely difficult, and contentious, undertaking.

The use of the WTO to enforce core labour standards would not, therefore, be consistent with existing interpretations of its responsibilities with regard to the policing of subsidies.

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<sup>26</sup> Details of the ‘Agreement on Subsidies and Countervailing Measures’ can be found at <[http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm#subsidies](http://www.wto.org/english/docs_e/legal_e/final_e.htm#subsidies)>.

This is not to say, however, that this should remain the case forever.<sup>27</sup> Non-adherence to core labour standards is a distortion of trade, and the WTO is the body that is meant to remove such distortions. The narrow definitions employed by the WTO regarding subsidies are the result of political considerations, not economic ones. At a minimum, the principle of regarding labour standards as an *economic* issue that should be addressed by an *economic* body is enhanced by the subsidy question, and it remains a promising avenue in which advocacy might be directed in the future.

### ***Article XX***

Another channel through which it has been proposed that the WTO (as presently constituted) could enforce the issue of core labour standards has focussed upon Article XX of GATT. Article XX, which was incorporated into the Final Act of the Uruguay Round establishing the WTO, is the ‘General Exceptions’ clause of GATT. It allows member countries to deviate from the otherwise inviolate principle of non-discrimination and to adopt trade restrictions that would otherwise be unlawful under GATT. Such restrictions are allowed then if they are:

- a) necessary to protect public morals;
- b) necessary to protect human, animal or plant life or health;...
  
- e) relating to the products of prison labour...

Subject to;

the requirement that such measures are not applied in a manner which constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade...<sup>28</sup>

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<sup>27</sup> The WTO is presently examining the ways in which systematic undervaluation of environmental resources by countries can be regarded as a subsidy (Mehmet, *et.al.* 1999, p.118).

<sup>28</sup> The full text of Article XX can be found at <[http://www.wto.org/english/tratop\\_e/envir\\_e/issu4\\_e.htm#gatt20](http://www.wto.org/english/tratop_e/envir_e/issu4_e.htm#gatt20)>.

As can be observed, Article XX contains no general exemption from GATT rules for violations of labour rights, only a specific one for the *products* of prison labour. Nevertheless, it is hard to imagine that the intention of the authors of Article XX, who wrote in the expectation that the labour rights provisions of the ITO Charter (above) would come into effect, could contemplate that breaches of core labour standards were consistent with human 'health' or, for that matter, 'public morals'. Trebilcock and Howse (1999, p.456), in supporting the use of the WTO in enforcing labour standards, argue for a 'dynamic' interpretation of Article XX that recognises 'the evolution of human rights as a core element in public morality in many post-war societies and at the international level'. Accordingly, in their analysis, 'public morals' in the context of Article XX 'should extend to universal human rights, including labour rights'. Under Article XX, enforcement of core labour standards could operate through a number of measures, including (at last resort) the withdrawal of WTO rights and obligations.

Using Article XX to enforce core labour standards is not without its critics. Fedderson (1998, p.109) brings up the traditional obstacle (noted above in the discussion of TRIPs) that concern with labour standards is a concern with production processes and methods (PPMs) rather than product attributes. He concludes that Article XX was 'not intended to include measures based on production methods'. Fedderson's argument is, however, disputed by Trebilcock and Howse (1999, p.456), who counter that Article XX contains precisely the opposite inference, 'that there is nothing about the basic purpose or structure of Article XX that renders it inapplicable to PPMs, provided the PPMs in question fall under the heads, such as "public morals"'. Of course, this paper has already noted the hypocrisy of the WTO's position on PPMs in its stance on TRIPs vis-à-vis labour.

In a World Bank study, Maskus worries (1997, p.60) that the use of Article XX to enforce labour standards 'would invite unilateral action against labour standards on a heretofore-unseen scale, endangering the very existence of a liberal trading order'. Maskus is also concerned that enforcing labour standards would put the WTO 'in a new [sic] position of making political judgements rather than focusing on trade rules – a potentially quite significant change in procedure and philosophy'. Suggesting that he

does not really expect his own worst fears to be realised, however, Maskus also incongruously notes that ‘it would be no trivial matter simply to incorporate a further general exception for labour standards into Article XX’.

The naivete of the view that a narrow focus on trade rules involves the WTO in no ‘political judgements’ aside, concerns over the systematic threat to liberal trade can be addressed quite simply. Since the problem here is with regard to unilateralism, a multilateral approach on core labour standards, which could make use of the ILO, could be placed in its stead. Trebilcock and Howse (1999, p.457) envisage a mechanism in which action by the WTO could be made ‘contingent on a judgement of the ILO that a Member that is also signatory to some relevant ILO instrument or Convention is in non-conformity or has refused to cooperate with the ILO organs in addressing the problem’. For countries that are not members of the ILO, the 1998 Declaration on Fundamental Principles noted above provides a ready framework from which it can make judgements nonetheless. The use of the ILO in this monitoring and mandating role is central to the advocacy of the International Confederation of Free Trade Unions (ICFTU 1998) as well as a number of academic writers on the issue (Charnovitz (1996), Ehrenberg (1996)).

Of course, the systematic threat feared by Maskus can also be countered by recalling the chapeau of Article XX – that measures must not ‘constitute a means of arbitrary or unjustifiable discrimination between countries’, nor be ‘a disguised restriction on international trade’.

There have been a number of attempts to invoke the ‘exceptions’ of Article XX in recent years, mostly with regard to efforts to have the WTO adjudicate on environmental issues. Most of these have failed, usually on the basis of breaches to the preamble of Article XX noted above.

One case that has important implications for the issue of core labour standards and Article XX, however, concerned an attempt by the United States in 1998 to overturn a

WTO ruling that outlawed restrictions it had imposed on shrimp imports.<sup>29</sup> These restrictions were levied ostensibly to protect sea turtles from shrimp harvesting practices that differed from the ‘environmentally friendly’ practices employed by the US. The appeal was lost on the basis that the US had used restrictive measures that constituted ‘*arbitrary and unjustifiable* discrimination between Members of the WTO, contrary to the requirements of the chapeau of Article XX’ (emphasis added). Significantly, however, the Appellate Body of the WTO found that the environmental *objective* of the US was legitimate under Article XX. In short, the problem in this case was unjustifiable discrimination, not the use of Article XX in protecting objectives that the WTO allowed as exceptions to its agreements. If an obvious precedent for the core labour standards campaign is created in the ‘Turtles Case’, so too is the potential role of the ILO in ensuring *justifiable* discrimination.

### ***The Trade Policy Review Mechanism***

Article XX and the subsidy categorisation are promising avenues by which advocacy of core labour standards can proceed at the WTO. They will remain, however, highly contentious approaches and their use will not be established without protracted negotiation at the very least.

A possible compromise approach, that would both employ the WTO in considering core labour standards, but which would allow time to establish the best way in which they could be enforced, involves using the WTO’s Trade Policy Review Mechanism (TPRM). The TPRM was established in 1988 as a result of the Uruguay Round of GATT. Subsequently established as a key component of the WTO, the objective of the TPRM is to review member countries’ ‘trade policies and practices and their impact on the functioning of the multilateral trading system’.<sup>30</sup> The reviews are carried out by the WTO Secretariat, whose report is subsequently sent to the WTO General Council (which consists of the full membership of the WTO). In this way, the WTO asserts, the TPRM is

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<sup>29</sup> Details of the case, ‘United States – Import Prohibition of Certain Shrimp and Shrimp Products’, can be found at <[http://www.wto.org/english/tratop\\_e/envir\\_e/edis08\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/edis08_e.htm)>.

<sup>30</sup> Details of the TPRM can be found at the WTO’s website, <[www.wto.org](http://www.wto.org)>.

essentially peer-group assessment. Though all WTO members are subject to review under the TPRM, the regularity of review is determined by their share of world trade. The top four members are subject to review every two years, the next 16 are reviewed every four years, while the remainder are reviewed every six years.<sup>31</sup> As presently constituted, the TPRM does not hand out ‘punishments’, and nor can it be used for the enforcement of specific obligations or to settle disputes.

The TPRM provides ‘a constructive and non-confrontational way’ through which institutional links can be established between social issues and trade (Mehmet *et.al.* 1990, p.202). It is also an approach favoured by the ICFTU who contend that labour standards must be regarded as among the trade related ‘policies and practices’ that are central to the TPRM process. As a way of demonstrating the efficacy of the process, the ICFTU has begun producing its own labour standards reports for countries subject to the periodic Trade Policy Reviews.<sup>32</sup>

Mehmet *et.al.* (1999, p.203) are impressed by the educative possibilities of the use of the TPRM process, noting that ‘it may be the best way to develop our conceptual and empirical understandings of the linkage that is required to develop further policy in this area and, in particular, to determine the extent that labour standards can be subsidizing trade or investment, *whether in a traditional or non-traditional conceptualization of subsidy* (emphasis added). The TPRM also provides the means, they argue, by which ‘aggressive unilateralism’ could be avoided, all the while exposing emerging labour tensions in international economic relations, before they are allowed to escalate into trade disputes.

The WTO is itself impressed with the TPRM as a vehicle of reform. Though reporting on its role in promoting trade liberalisation, the applicability of the process to ‘labour reform’ can be readily imagined:

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<sup>31</sup> Clearly the regularity of the reviews, for all countries, would have to be stepped up should labour standards become part of the TPRM.

<sup>32</sup> These ‘unofficial’ reports can be found at the website of the ICFTU, <[www.icftu.org](http://www.icftu.org)>.

Since the TPRM... has become a well-established feature of the GATT system, it is already possible to draw some conclusions regarding its contribution to a more open and stable trading system. The first is the valuable stimulus of the TPR process to the internal discussion of trade policies in countries under review. Conducting a review, compiling a government report and responding to questions raised by the Secretariat in the preparation of its report, means that the national administration has to carefully examine the overall structure and impact of its own trade policies. For developing countries, this experience has been particularly valuable in assessing - and possibly fine-tuning or providing additional motivation for - domestic reform programs, and enhancing inter-agency cooperation...For trading partners, the TPR process provides an opportunity to examine trade policies and practices in detail, with a view to communicating major areas of concern, and assessing, over time, whether these concerns are being satisfactorily resolved.<sup>33</sup>

In the view of this author, the TPRM also provides the ideal forum within which the ILO can be incorporated into a joint ILO/WTO mechanism for enforcing core labour standards. The synergies of such a joint arrangement have been noted already, but the TPRM structures the process, both in nature and in time. The ICFTU, which is sympathetic to this approach, envisages an arrangement in which the ILO is given responsibility for determining whether countries that are up for periodic review are adhering to core standards.<sup>34</sup> If they are, nothing further is required. If they are not, the ILO would formally report breaches as part of the review process, but would also make available technical and other assistance to the countries concerned to fix matters. A period of time to allow for these improvements (the ICFTU suggests two years) could be granted. Should violations that involved the complicity of the state persist, the matter could be referred to the WTO General Council which could then consider sanctions and

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<sup>33</sup> Extracted from *Developing Countries and the Uruguay Round: An Overview* (1994), internet posting, <[http://www.wto.org/english/docs\\_e/legal\\_e/ldc2\\_512.htm](http://www.wto.org/english/docs_e/legal_e/ldc2_512.htm)>.

<sup>34</sup> Under the 1998 Declaration on Fundamental Principles, the ILO instituted a follow-up mechanism that requires member countries to compile an annual report on their adherence to core standards. These are subject to review by the ILO's Governing Body which makes its findings known at the annual ILO conference each June. From this the ILO determines plans of action, including technical assistance, for countries that have been judged to have failed in their undertakings. In short, the ILO already does much of

other measures. These in turn could be applied in stages – limited initially to those products whose production specifically involved breaches in core labour standards, expanded to a wider range of products of recalcitrant states when required.

A joint ILO/WTO mechanism operating via the TPRM provides a measured blend of enforcement and assistance measures – of ‘stick and carrot’ (ICFTU 1999, p.17). It recognises the core competencies of the ILO and WTO – the first in standard setting, compliance supervision and general expertise in international labour issues – the second in determining the implications of unfair trade practices (once breaches in core labour standards are deemed to be so), and the employment of tried and tested dispute resolution procedures. Time to correct problems through negotiation and assistance is allowed. Unilateralism is avoided in a process that is conducted in a transparent way that eliminates the hijacking of labour standards enforcement for protectionist purposes. In the words of the ICFTU (1999, p.16), in praise of its own, very similar proposal, ‘it has all the elements of clarity, predictability and objectivity that an effective multilateral system requires’.

## **V. Conclusion**

A common argument for protection is that unfettered free trade exposes workers in industrial countries to the ‘sweated labour’ of the developing world. An argument that has been employed by protectionists down the ages, it is an argument that only has currency while ever the international labour market, unlike the markets for goods and services, investment and the property of capital, remains unregulated. In the absence of core labour standards, it is indeed possible that domestically regulated labour will be forced to compete against the product of enslaved labour, of children, and of workers without voice. Creating an international market for labour policy, the absence of internationally enforced core labour standards creates a dangerous democratic deficit at the heart of our international system. The observation in the Treaty of Versailles, that the ‘failure of any nation to adopt humane conditions of labour is an

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what would be required under the system foreshadowed here. For a taste of these procedures as currently practiced though, see ILO (2000a and 2000b).

obstacle in the way of other nations which desire to improve conditions in their own countries' is as true today as it was in 1919.

This paper has argued that adherence to core labour standards is not only a matter of principle, it also makes economic sense. Contra to the generic view of neo-liberal economists, it is even likely to bestow economic benefits for developed and developing countries alike. Given this, the only criteria upon which to decide what institutional form the enforcement of core standards should take is that of effectiveness. In this context the WTO was adjudged the appropriate institution. Such a linking of trade and employment is currently opposed by the WTO. But if the emerging global economic system built upon multilateral institutions is to survive it must have legitimacy – legitimacy that is only likely to emerge when it is demonstrated that freer trade will benefit all and not just a narrow elite. Establishing the means to assure the adherence to core labour standards would do much to establish this legitimacy.

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