Forging institutional cooperation to protect core labour standards in trade: are a world trade organisation and an international labour organisation joint dispute settlement system practical?

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Abstract

This paper analyses the successful attempts that have been made to link environmental protection and related regulatory practices to trade with a view to showing that it is possible to achieve similar outcomes in relation to core labour standards. It argues that such outcomes can be achieved through the cooperation of the World Trade Organisation (WTO) and International Labour Organisation (ILO) and advances proposals on how such cooperation can be established and put into operation. In the short-term, the paper proposes that a joint WTO and ILO Standing Committee be established to address the violation of core labour standards in trade. And for the long-term, it is proposed that the WTO be reformed through the incorporation of a social clause into its multilateral trade regulatory framework. The paper further suggests that the social clause in the new WTO framework place emphasis on the peaceful and non-disruptive resolution of disputes regarding the violation of labour standards in trade with monetary penalties and trade sanctions being used only as a last resort in instances where reasonable and adequate measures earlier taken to resolve the disputes in question have been unsuccessful. This paper concludes that an effective and sustainable means of resolving such disputes is through the establishment of a proposed joint WTO and ILO dispute settlement system.

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INTRODUCTION

Labour standards have become a major issue in international trade.[1] This is in turn closely intertwined with the ongoing controversial debate on the plausibility of linking the right to engage in international trade to respect for human rights.[2] In an era in which countries are vigorously competing for investment by multinational corporations, there is a growing fear that a 'race to the bottom' is occurring. This is based on the logic that labour standards are being lowered to attract these multinational corporation investments.[3] Critics of a trade-labour linkage in the multilateral trade system have argued that: 'Labour standards have no place in the World Trade Organisation (WTO) because it is an organisation that exists primarily to promote mutually beneficial, non-coercive trade through reciprocal and mutually advantageous arrangements aimed at reducing barriers to trade.'[4] These critics suggest that the subject of core labour standards should be dealt with exclusively by the International Labour Organisation (ILO). However, such views might not be, on the whole plausible, as they fail to recognise that the WTO Agreement makes reference to 'sustainable development' as one of its objectives which must, therefore, be balanced against other economic objectives.[5] But the task of establishing a trade-labour linkage in the WTO is fraught with challenges. Accordingly, it is the aim of this article to present

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1 Salem & Rozental 'Labour standards and trade: a review of recent empirical evidence' (2012) 4 *Journal of International Commerce and Economics* 16 1. See also Chartes & Mercurio 'A call for an agreement on trade-related aspects of labour: why and how the WTO should play a role in upholding core labour standards' (2012) 37 *North Carolina Journal of International Law and Commercial Regulation* 665.

2 Griffin, Nyland & O'Rourke 'Trade unions and the Social Clause: a north-south divide' at: http://council.labor.net.au/labor_review/100/update1002.html (last accessed 31 August 2011).

3 Trebilcock & Howse *The regulation of international trade* (2005) 561. Trebilcock and Howse represent a class of academics who do not submit to the 'race to the bottom' concept and do not see any need for the protection of core labour standards as human rights in the multilateral trade system. They have argued that: ' … there is little reason to suppose that liberal trade and investment regimes will precipitate a race to the bottom. Moreover, the empirical evidence provides no support for the claim that liberal international trade and investment regimes are leading developed countries to relax their core labour standards or labour standards generally or that foreign direct investors are investing with weak core labour standards.' Trebilcock and Howse's views represent the differences in opinions amongst Members of the World Trade Organisation (WTO) on whether or not there is a need to recognise the protection of core labour standards in the WTO legal framework. This study will examine such views with a view to establishing whether or not there could be a need in the global era for a trade-labour linkage in multilateral trade arrangements.

4 Lester, Mercurio & Davies *World trade law: text, materials and commentary* (2012) 873.

5 *Id* at 873.

proposals on how the WTO and the ILO can move forward in strengthening the protection of workers' rights in the trade arena. This article starts with an exposition of the general functions and nature of both the WTO and ILO. Thereafter, WTO case law on the trade and environment linkage is briefly analysed to advance the suggestion that there is room for effectively accommodating non-trade issues, such as core labour standards, in the international trade regime. It is then argued that a joint WTO and ILO approach to protecting workers' rights in the trade context is both plausible and possible. In conclusion, ways are proposed which the WTO and ILO can effectively work together to advance the protection of core labour standards in trade, on a short- and long-term basis, without infringing upon each other's institutional turf.

BACKGROUND

Without undermining the significance of free trade to global economic growth, it must be pointed out that the WTO has been reluctant to incorporate a social clause – which aims to protect core labour standards – into its legal framework.[6] The reluctance to recognise and provide tangible expression of a trade-labour linkage in the WTO's legal framework marks a significant departure from the position adopted by the still-born International Trade Organisation (ITO) which explicitly embraced development as a key objective in its institutional agenda, and sought to protect workers' rights in trade.[7] This could suggest failure by the WTO to protect values other than those of unrestrained free trade which largely benefits multinational corporations.[8] The general impression created by the WTO's current approach is that human rights protection is not part of its agenda, and any allusion to human right in relation to multilateral trade is mere rhetoric. It is therefore plausible to argue that the WTO, by failing to acknowledge the need to protect non-trade matters such as core labour standards in its framework, has to a certain degree promoted 'unfair trade' policies, while its envisaged role is to promote 'fair trade'.[9]

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6 Jackson *The World Trading System: Law and Policy of International Economic Relations* (1997) 245.

7 See art 7 of the Havana Charter.

8 See International Forum on Globalization 'The World Trade Organization vs the environment, public health and human rights' at: http://www.ifg.org/EAEF27E2-EB48-4D68-A607-C9733C066A48/FinalDownload/DownloadId-7B437A631401C6102A5C6AF8DB4A1CB6/EAEF27E2-EB48-4D68-A607-C9733C066A48/pdf/cancun/issues-WTOvsEnv.pdf (last accessed 21January 2014).

9 *Ibid*. See also Lester *et al* n 4 above at 67.

Chartes and Mercurio have observed that whilst it might not be possible for the WTO to 'incorporate every area or subject matter which merely may have an effect on trade and traders, it is simply incorrect to state that the WTO has an inherent institutional difficulty imposing obligations that could be viewed as wholly internal.'[10] Further, the WTO's dispute settlement system, which is undoubtedly the most effective mechanism at the multilateral level for dealing with inter-state disputes, has been characterised as exceedingly inequitable, non-transparent, and biased based on the view that it is working exclusively to aid business interests at the expense of competing public objectives.[11] As such, for the WTO to maintain its legitimacy, it is imperative that it effectively integrates non-trade matters, such as core labour standards, into its framework. This might entail having to work together with the ILO to achieve such a challenging but exceedingly desirable goal.

The ILO, on the other hand, has no binding enforcement mechanism, although it does monitor its member states' compliance with labour standards.[12] The ILO Constitution prescribes that complaints can be initiated by an ILO member state where it has reason to believe that another member state is not implementing a convention which it has ratified.[13] Such a complaint, if successful, could give rise to the establishment of a commission to investigate the alleged non-compliance with labour standards. Remedies in such instance could include the recommendation of 'measures of an economic character' as a penalty.[14] Charnovitz has noted that although this procedure has never been used,[15] a plausible argument can be made that

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10 Chartes & Mercurio n 1 above at 665. See also Lester *et al* n 4 above at 874.

11 Chartes & Mercurio n 1 above at 665.

12 Hoekman & Kostecki *The political economy of the world trading system: the WTO and beyond* (2009) 625.

13 See art 33 of the ILO Constitution. Article 33 provides that: 'In the event of any Member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Inquiry, or in the decision of the International Court of Justice, as the case may be, the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith.' It is important to observe that whilst the ILO Constitution theoretically authorises sanctions in the event of non-compliance, in practice the ILO prefers a soft law approach. See also Lester *et al* n 4 above at 877.

14 *Ibid*.

15 Charnovitz 'Should the teeth be pulled? An analysis of WTO sanctions' in Kennedy & Southwick (eds) *The political economy of international trade law* (2002). That the possibility of economic measures being preferred against a member state that violates labour standards has not been used, has led Hoekman and Kostecki to note that: 'As is the case with Intellectual Property Rights, the primary reason proponents are seeking to

core labour standards, by virtue of being human rights, inherently deserve protection.[16] That said, the ILO's enforcement record is clearly inadequate.[17]

A practical illustration of the ILO's weaknesses in enforcement is observed in the organisation's response to the use of forced labour in Myanmar (formerly Burma) for both public and private purposes. The ILO Commission of Inquiry investigated and established that there were extensive violations amounting to 'a saga of untold misery and suffering, oppression and exploitation of large sections of the population inhabiting Myanmar by the Government, military and other public officers'.[18] However, regardless of the recommendations of the ILO Commission of Inquiry requesting the Myanmar government to comply with the ILO Forced Labour Convention,[19] no compliance could be achieved. Eventually, the ILO Governing Body invoked the provisions of article 33 of the ILO Constitution authorising the International Labour Conference to take any measures deemed necessary to ensure compliance. The international community could not impose sanctions as this would be contrary to WTO rules.[20] This

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introduce labour standards into the WTO is because the WTO (unlike the ILO) has a functioning dispute settlement and enforcement system.'

16 Chartes & Mercurio n 1 above at 672. See also Trebilcock & Howse n 3 above at 564.

17 Chartes & Mercurio n 1 above at 673. They point out that: 'One such impediment is that the ILO suffers from a disparate, and sometimes rather low rate of ratification of its treaties (including by leading developed countries such as the United States). This in turn creates a 'patchwork of inconsistent legal obligations' and serves as a major impediment to the global enforcement of labour standards. Moreover a number of ILO conventions are ratified but not implemented. The implication of Chartes & Mercurio's (n 1 above) observations is that the ILO approach could be viewed as a lip service approach to the protection of labour standards. This may need to be addressed with the reinforcement of the ILO's dispute settlement structures to perhaps include direct reference to penalties and sanctions.

18 Lester *et al* n 4 above at 877.

19 See ILO Forced Labour Convention No 29 of 1930.

20 Lester *et al* n 4 above at 877. Only the US proceeded to impose a ban on all trade with Myanmar in terms of the Burmese Freedom and Democracy Act (BFDA) of 2003. The BFDA was signed into law on 28 July 2003 by the then US President, George W Bush and has since been renewed annually. Among other measures the BFDA bans imports of Burmese/Myanmar products. It also freezes assets of senior Burmese officials and bans virtually all remittances to Burma/Myanmar. However regardless of the US' sanctions, ILO Member States such as China and India maintained their trade with Myanmar whilst the European Union (EU) and Australia's trade restrictions only targeted the senior military officials and their family members. The approach of the EU, US, and Australia to impose smart sanctions carries some of the punitive force of outright sanctions. However, preferring sanctions on a WTO Member on the basis of non-trade related matters, such as the violation of human rights, is inconsistent with WTO trade rules as such a measure could be correctly viewed as protectionist and amounting to discrimination against a Member's products on the basis of their origin.

suggests the necessity both for the WTO and ILO to work together, and for revision of the legal and institutional rules that limit such cooperation. The challenges faced by WTO member states in attempting to impose sanctions against a country that violates core labour standards in trade are discussed in the following section.

WHY IMPOSING SANCTIONS FOR LABOUR VIOLATIONS IS INCONSISTENT WITH CURRENT WTO RULES

The reason why countries cannot impose sanctions against states that violate core labour standards in trade, lies in the current framework of the WTO/General Agreement on Tariffs and Trade (GATT) system. Trebilcock has observed that:

> Trade sanctions raise difficult questions under the GATT/WTO system as it currently exists. For example, conditioning the Most Favoured Nation (MFN) treatment on adherence to core labour standards is likely to raise questions as to whether this form of conditionality violates the requirement of 'unconditional' extension of MFN treatment to all GATT/WTO members under Article 1 of the GATT.[21]

An analysis of WTO law and case law would inform whether sanctions can be imposed against WTO member states which violate core labour standards in trade. Under article 1 of the GATT, every WTO member is required to provide unconditional most favoured nation (MNF) treatment to every other WTO member in respect of like products. This could possibly imply that 'unconditionality' might exclude the possibility of distinguishing between products based upon labour-related conditions prevailing in the exporting country.[22] In the *EC-Asbestos*[23] case, the WTO Appellate Body established a framework for determining whether products are 'like' under article III: 4.[24] According to Trebilcock and Howse, the process 'neither explicitly endorses nor rejects the idea that process and production methods are relevant to the assessment of likeness.'[25] They further observed that

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21 Trebilcock & Howse n 3 above at 175.

22 See GATT Article III:4. See also Trebilcock & Howse n 3 above at 572.

23 See *European Communities-Measures Affecting Asbestos and Asbestos Containing Products* WT/DS135/R and Addendum 1 as modified by the WTO Appellate Body Report WT/DS135/AB/R 5 April 2001.

24 Trebilcock *Understanding trade law* (2011) 175–176.

25 Trebilcock & Howse n 3 above at 572.

> the WTO Appellate Body's reasoning strongly suggests that products may be considered 'like' based on the consumer tastes and habits. Thus if there is sufficient evidence that consumers of products produced in conditions violating core labour standards and those produced in conditions consistent with core labour standards would distinguish these products if they had perfect information, then the…products would be 'unlike' … [26]

Should likeness be proven in a case where products are produced in conditions that violate core labour standards, it would be necessary further to show that the difference in treatment between the 'like' products leads to less favourable treatment of the group of imported products as compared to the group of like domestic products, before a violation of GATT Article III: 4 will have been established.[27] With particular reference to core labour standards, this requirement is virtually impossible to satisfy. As such, sanctions proposed for the violation of labour standards in trade would be deemed to violate article III of the GATT. This is why the ILO member states failed to impose sanctions on Myanmar for the proven core labour standards' violation discussed above.

However, another argument for the possibility of invoking sanctions against a WTO member state that violates core labour standards in trade could be founded on the principle of 'public morals'.[28] In the *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (*Gambling* case),[29] the WTO Panel, in interpreting what could constitute the exception of 'public morals' in terms of the WTO General Agreement on Trade and Services (GATS), held that:

> In the Panel's view, the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values.[30]

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26 *Ibid*. In determining 'likeness', the WTO Appellate Body placed emphasis on the need to avoid protectionism in terms of Article III: 1 of the GATT.

27 See *EC-Asbestos* case par 100.

28 See GATT art XX(a). GATT art XX(a) permits otherwise GATT inconsistent measures 'necessary to protect public morals' to be invoked to justify trade sanctions against products that violate labour standards. See also Marceau 'WTO dispute settlement and human rights' (2002) 13 *European Journal of International Law* 753 and Charnovitz 'The moral exception in trade policy' (1998) 38 *Journal of International Law* 4 at 68.

29 See *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services WT/DS285/R* 10 November 2004.

30 *Id* at par 6.461.

The Panel further suggested that each WTO member has the discretion to determine which practices would violate the moral code of its community.[31] Judging from the Panel's reasoning in the *Gambling* case, there would be no compelling basis for objecting to the imposition of sanctions for the violation of core labour standards in trade on the basis of 'public morals'. Whilst the MFN provisions and GATT article III may pose serious challenges to imposing sanctions on countries that violate core labour standards in trade, there could be a credible legal basis for imposing sanctions in terms of the 'public morals' principle under article XX(a) of the GATT. Such enforcement mechanisms could be viewed as ideal alternatives to augment the weak enforcement mechanisms of the ILO. It is therefore submitted that the WTO, in this context, has a powerful enforcement mechanism at its disposal[32] – so powerful, in fact, that great care must be taken not to abuse it.

The economic prosperity of many countries in the world is now highly dependent on international trade, and the process of 'globalisation' is increasing this dependence even further.[33] Growth in prosperity is widely acknowledged to be essential to the ability of states to adopt higher social and humanitarian standards.[34] Therefore, it may be argued that arming the trading system with the means of sanctioning breaches of non-commercial behavioural norms would threaten the prosperity of states. In the increasingly competitive global markets, this could also easily turn the use of trade restrictions into a first-choice protectionist instrument rather than the measure of last resort which proponents of the so-called 'social clause' have claimed it should be.[35] In doing so, the social clause may create a

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31 *Ibid*. See also Trebilcock & Howse n 3 above at 573.

32 Bruce 'UN, World Bank, WTO: reform them all' (2005) 18 *National Journal* 220. Bruce argued that WTO decisions can so often affect domestic regulations, destroy jobs, and create new industries. See also Charnovitz 'The World Trade Organisation in 2020' (2005) 1/2 *Journal of International Law & International Relations* 170.

33 See the UNCTAD Trade and Development Report, 1981–2011. See also UNCTAD 'DOHA Mandate and DOHA Manar' 2012 UNCTAD XII 19. See also UN 'World Economic Situation and Prospects' at: http://www.un.org/en/development/desa/policy/index.shtml (last accessed 14 September 2012).

34 United Nations Development Programme (UNDP) 'Beyond the midpoint: achieving the millennium development goals' at: http://www.sl.undp.org/B6020566-1CD2-4DDF-A954-A356894EC5D0/FinalDownload/DownloadId-9ED97E854D30C32360417F1A414165C0/B6020566-1CD2-4DDF-A954-A356894EC5D0/1_doc/MDG_mid_point.pdf (last accessed September 2012).

35 Palo, Padhi & Panigrahi 'Labour standards in the aftermath of the structural adjustment programme: the case of India' 2000 *Indian Journal of Industrial Relations* 381. See also

tantalising target for protectionist pressures and undermine international trade on a significant scale.[36] A small number of WTO members would contend that they meet the entire extensive list of multilateral standards which the UN and other international bodies have established and are continuing to negotiate, while most countries would not be compliant to a certain extent and would, as such, be exposed to the threat of trade restrictions.[37]

Assuming that trade restrictions are to be applied in terms of the social clause, it is likely that there would be significant disruption to the global trading system, as well as collateral damage to international cooperation and other policy objectives. As such, if a social clause is to work, it must follow a transparent procedure which allows disputes to be resolved promptly through negotiation. Safeguards against the indiscriminate use of sanctions must be incorporated into such a framework. This means that there would be the need for a multilateral agreement on how sanctions could be used, preferably as a last resort after all other prescribed legal steps have failed, to persuade the offending party to address its violations of one or more core labour standard in the pursuit of trade.

COULD THE PROTECTION OF CORE LABOUR STANDARDS IN TRADE BE CONSISTENT WITH CURRENT WTO LAW?

Some commentators have argued that making adherence to core labour standards a condition for global trade participation, is in conformity with WTO law as it currently stands.[38] This view is supported by the idea that the

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Nigam 'Radical politics in the times of globalization: notes on recent Indian experience' at: http://www.iisg.nl/~sephics/papers.htm (last accessed 24 April 2014) and Fields 'International labor standards and decent work: perspectives from the developing world' Paper prepared for the Conference on International Labor Standards, Stanford Law School at: http://www.law.stanford.edu/programs/ils/conference (last accessed 24 April 2014).

36 Howse 'From politics to technocracy – and back again: the fate of the multilateral trading regime' at: http://www.asil.org/B6020566-1CD2-4DDF-A954-A356894EC5D0/FinalDownload/DownloadId-92968700DF2236AA5F97DFA9CC1F52D6/B6020566-1CD2-4DDF-A954-A356894EC5D0/ajil/wto6.pdf (last accessed 12 September 2012).

37 Council of Foreign Relations 'The global climate change regime' at: http://www.cfr.org/climate-change/global-climate-change-regime/p21831 (last accessed 24 April 2014).

38 O'Brien & Zandvliet 'Defining development in WTO law: the legality and parameters of labour rights conditionality in the generalised system of preferences' (25 June 2012) Society of International Economic Law, 3rd Biennial Global Conference 8, available at:

protection of core labour standards in trade is a key element to meeting the now widely acknowledged 'developmental need'[39] facing the international community. In the *EC-Tariffs Preferences*[40] case, the Appellate Body considered the scope of the term 'developmental need' which WTO law is yet to define[41] and held that:

> The existence of a 'development, financial or trade need' must be assessed according to an objective standard. Broad-based recognition of a particular need, set out in the WTO Agreement or in multilateral instruments adopted by international organizations, could serve as such a standard.[42]

In the same case, the Appellate Body also found that:

> …a sufficient nexus should exist between, on the one hand, the preferential treatment provided under the respective measure authorized...and...the likelihood of alleviating the relevant 'development, financial or trade need'. In the context of a Generalised System of Preferences (GSP) scheme, the particular need at issue must, by its nature, be such that it can be effectively addressed through tariff preferences.[43]

The WTO Appellate Body's ruling in *EC-Tariff Preferences* allows a generalised system of preferences (GSP) conditionality *per se,* but restricts the broad discretion of the GSP-grantor in determining when access to its GSP scheme may be linked to non-trade concerns.[44] To argue successfully for the affirmation of GSP-labour standards conditionality in a case before the WTO adjudicating bodies, the grantor would therefore have to show that

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http://ssrn.com/abstract=2091506 (accessed 22 April 2014).

39 Bluethner 'Trade and human rights at work: next round please …?' at: http://unglobalcompact.org/docs/news.../Bluethner_21Aug2006.pdf (last accessed 28 August 2012).

40 World Trade Organization, Report of the Appellate Body 'European Communities – conditions for the granting of tariff preferences to developing countries' WTO Doc No WT/DS246/AB/R (April 7, 2004), (hereafter: *EC -Tariff Preferences* AB). See also Bartels 'The Appellate Body Report in European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries and its Implications for Conditionality in GSP Programmes' in Cottier *et al* (eds) *Human rights and international trade* (2005) 463.

41 Howse 'India's WTO challenge to the drug enforcement conditions in the European Community Generalized System of Preferences: a little known case with major repercussions for "political" conditionality in US trade policy' 2003 *Chicago Journal of International Law* 387.

42 *EC-Tariff Preferences* WTO AB 163.

43 *Id* at 164.

44 *Id* at 187.

in applying the conditionality, it acted in an effective and positive manner, in response to a widely-recognised development need, and on the basis of objective entrance and exit criteria.[45]

It is submitted that the protection of core labour standards in trade could be classified as a developmental need. For example, in developing countries, the shift of resources from low-productivity to high-productivity uses, is a key driver of economic growth.[46] McMillan and Rodrick have observed that economies which have successfully made the transition from low-income to medium- and high-income status, have experienced significant changes in their economic structure which has seen them move from lower productivity to higher productivity uses. [47] Since 1990, African countries which like many other developing countries favour a lowered level of compliance with labour standards as their competitive advantage, have moved from higher to lower productivity employment.[48] Unfortunately, cheap labour as a competitive advantage has been neutralised by other countries through the superior productivity of skilled labour forces, modern infrastructure facilities, and political stability,[49] while non-compliance with core labour standards leads to labour unrest.[50] Trade can play an important role in the creation of better jobs and the improvement of working conditions, but it must be appreciated that gains from trade do not accrue automatically.[51] Policies which complement trade openness must be implemented to ensure maximum positive effect on growth and employment.[52] One such policy initiative could be the establishment of a joint WTO and ILO dispute settlement body to address the violation of core labour standards in the context of trade.

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45 *Id* at 164.

46 Page 'Can Africa industrialise' 2012 *Journal of African Economics* 86.

47 McMillan & Rodrik 'Globalisation, structural change and productivity growth' 2011 *International Food Policy Research Institute: International Growth Centre* 2.

48 *Ibid*.

49 Hossan, Sarker & Afroze 'Recent unrest in the RMG sector of Bangladesh: is this an outcome of poor labour practices' (2012) 7 *International Journal of Business and Management* 3 208. See also Abdullah 'The influence of work environment and the job satisfaction on the productivity of the RMG workers in Bangladesh' (2009) 1 *Journal of Management* 43.

50 Clark & Kanter 'Violence in readymade garments (RMG) industry in Bangladesh' (2010/2011) 3 *Centre for International and Comparative Studies* 1 at 6. See also Haider 'Competitiveness of the Bangladesh ready-made garment industry in major international markets' (2007) 3 *Asia-Pacific Trade and Investment Review* 1.

51 Newfarmer & Sztajerowska 'Trade and employment in a fast-changing world' (2012) *Policy Priorities for International Trade and Jobs* 7.

52 *Ibid*.

However, it must be determined whether or not the two institutions can work together.

CAN THE WTO AND ILO JOINTLY FUNCTION FOR THE PURPOSES OF MAKING THE TRADE-LABOUR STANDARDS LINKAGE A REALITY?

It is submitted that the WTO and ILO can work together to protect core labour standards in trade on both a short-term and long-term basis. This section will outline how the two organisations can collaborate to accomplish that goal.

Short-term WTO and ILO cooperation for trade-labour standards linkage

A Joint WTO and ILO Standing Committee could be established, on a short-term basis, to undertake the drafting of a code of good practice for implementation of the trade-labour standards linkage.[53] In our view it should not be difficult to achieve such an arrangement as a Joint WTO and ILO Standing Committee which looks into matters concerning synergies between trade and labour already exists. The code of good practice could ensure avoidance of conflicts between the two organisations in the event of potential overlap in their mandates. The code could also create a foundation for establishing a stronger WTO/ILO relationship to address the challenges posed by globalisation. Such an approach would be cost-effective given that a joint WTO and ILO secretariat which works towards establishing areas of cooperation between the organisations is already in place.[54] The Standing Committee can also be used as an advisory and informal, but non-binding, dispute settlement body which, through dialogue, tries to assist countries that get into dispute over violations of labour standards in trade, to reach an amicable resolution. Where disputes cannot be resolved through the dispute resolution procedures provided in the bilateral or regional trade agreements

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[53] The USA-Cambodia Textile Agreement of 1999 contains provisions which offer a good example of a programme for implementing and promoting improved working conditions between the two countries. It has the Better Factories Programme which was started in 2001 and includes positive incentives for compliance with employees' rights as well as a monitoring function for the ILO.

[54] WTO 'Work with other international organizations: the WTO and International Labour Organization' at: http://www.wto.org/english/thewto_e/coher_e/wto_ilo_e.htm (last accessed 10 October 2012).

which already incorporate social clauses,[55] the joint WTO and ILO Standing Committee must recommend what it considers the most appropriate course of action in addressing the dispute at hand.

The recommendations of the joint WTO and ILO Standing Committee, whilst relying on the expert knowledge of qualified personnel already appointed to the secretariat, shall not, *per se,* be binding, but will serve as tentative guidelines on how best to settle the dispute in issue. Should the countries involved be unwilling to rely on the recommendations of the joint WTO and ILO Standing Committee, the matter should be declared as unresolved and the ultimate decision on whether or not to continue with the agreement left to the parties to the specific trade agreement in issue. This approach is unlikely to cause tensions amongst WTO member states because it retains the existing arrangements of the countries as provided for in their trade agreements. This is a feature which is unlikely to infringe upon the sovereignty and political preferences of the relevant countries. Since this proposal is a short-term measure, the joint WTO and ILO Standing Committee should be in a position to monitor each trade agreement with a view to developing a record of the problematic areas in the ongoing attempts to recognise a trade-labour linkage through bilateral and/or regional trade agreements. This record should then be reviewed by the joint WTO and ILO governing bodies in order to determine the ideal way to incorporate a social clause in the WTO on a long-term basis.

It is also necessary to propose that, as an interim measure, the WTO should amend its founding agreement to recognise the need to have specialists in non-trade-related matters, such as labour economists, sit as specialist advisors to members of the WTO Panel or the WTO Appellate Body when they are adjudicating disputes in terms of the current WTO dispute settlement system.[56] This proposal of inviting ILO specialists in non-trade related matters to participate in the panel and appeal processes of the WTO as advisors to the panellists, is consistent with Trebilcock's views that: '[T]hese issues of institutional competence and legitimacy would appear to require creative forms of horizontal coordination or linkage between the WTO and other international organisations, particularly in the WTO's

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[55] Examples include the US-Chile FTA that was concluded on 6 June 2003, the Agreement on the Establishment of a Free Trade Area US-Jordan of October 24 2000, US-Cambodia Agreement of 20 January 1999 and most notably the North American Agreement on Labour Cooperation (NAALC) between US, Canada and Mexico of 17 December 1992.

[56] Trebilcock n 24 above at 176.

dispute settlement role.'[57] In some bilateral and regional trade agreements, the ILO has been invited to offer guidance on specific issues in relation to disputes regarding the trade-labour linkage.[58] This could be indicative of the fact that the WTO and ILO can in fact cooperate to curb the violation of labour standards in trade. Also, such an approach could provide an additional platform upon which a comprehensive WTO legal framework on the trade-labour linkage could be developed in future.

Long-term WTO and ILO cooperation for trade-labour linkage

It must be appreciated that while short-term measures might not lead to political tensions, they might not offer an ideal long-term solution to the violation of core labour standards in trade as they do not provide for any enforcement, and/or punitive measures against state parties which violate labour standards in trade. A long-term measure which seeks to establish a balance between the need to recognise the sovereignty and political independence of countries in the world, and the need to respect human rights in trade, must still be developed and adopted. With the advent of globalisation, governments are no longer the major players in the policy-making process given that socio-economic and even political problems that are usually multifaceted in nature now demand an holistic approach for their resolution.[59] It is in light of this realisation that many governments are engaging labour and business in discussions that go beyond the traditional labour matters. Together, government, labour and business are now termed 'social partners' and the three parties are involved in a process termed 'social dialogue'. The term 'social dialogue' has no clear-cut definition, but

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[57] *Ibid*. Take note that the advice of the ILO specialists would not be binding but would be regarded as opinions which could be persuasive to the panellists and members of the appellate body. It would thus be the duty of the panellists and members of the appellate body to rationalise the opinions advanced by the ILO specialists subject to WTO laws and procedures in order to determine the appropriate measure to adopt against an offending party. See also Trebilcock n 24 above at 177. Such an approach is likely to allay fears surrounding the usurping of powers of ILO by the WTO or vice-versa as there are clearly defined boundaries within which officials from either institution would operate.

[58] A prime example is the US-Cambodia Free Trade Agreement of 20 January 1999 in which there had to be prior certification by the ILO of compliance with core labour standards before trade practices could be deemed fair.

[59] Bertuci and Alberti 'Globalization and the role of the state: challenges and perspectives' at: http://unpan1.un.org/intradoc/groups/public/documents/un/unpan006225.pdf (last accessed 22 January 2014).

broadly defined, it involves the interface and exchange of ideas between and within nations.[60]

The ILO defines social dialogue as: 'negotiation, consultation and information sharing either among the bipartite parties in the workplace or the tripartite partners at the national level on the functioning of the labour market and broad issues of economic and social policy'.[61] Consultations are important in that:

> Through consultations, parties exchange information, assess the strengths and weaknesses of their respective cases, narrow the scope of the differences between them and, in many cases, reach a mutually agreed solution... Moreover, even where no such agreed solution is reached, consultations provide the parties an opportunity to define and delimit the scope of the dispute between them. Clearly, consultations afford many benefits to complaining and responding parties as well as to third parties and to the dispute settlement system as a whole.[62]

In the same vein, WTO consultations – like the ILO social dialogue process – allow for a diplomatic approach enabling parties to a dispute to resolve their differences jointly. From the nature of the current consultation process within the WTO legal framework, the Dispute Settlement Understanding provides few rules on the conduct of consultations.[63] A dispute settlement

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60 Fashoyin 'The imperative of social partnership and social dialogue for socio-economic development' 2010 at: http://www.heathrose.co.nz/files/Tayo%20Fashoyin-%20Social%20Partnership(1).pdf. (last accessed 25 Jaunary2014). Professor Tayo Fashoyin has argued that: 'cooperation between labour and management is one of the outstanding features of industrial relations. Joint effort aimed at promoting workers' welfare and enterprise productivity is a manifestation of the resolve of the two sides of industry to work together on issues of mutual interest, such as enterprise performance and sustainability. Thus, labour-management cooperation can be seen as a step towards a social partnership by which work, productivity, reward and industrial peace are sought and achieved. Bipartite relation of this kind can promote or reinforce the tripartite process, which involves labour, employers and government, usually at the national level … This conception of social dialogue as an institutional configuration designed to facilitate consensus building, represents a broader perspective on the role of employment relations in organizing the world of work at both the enterprise and national levels.'

61 See the proceedings of the 276th Session of the ILO Governing Body, November 1999.

62 Van Den Bossche *Law and policy of the WTO: cases, texts and materials* (2008) 269. Consultations are significant to the proposed Joint WTO and ILO dispute settlement system in that they are what Van Den Bossche terms 'a political-diplomatic process' which most member states of the WTO would appreciate as they do not mirror the formalism brought by a rigid legal mechanism. See Van Den Bossche 270.

63 See art 4.6 of the WTO Dispute Settlement Understanding.

provision[64] specifically designed for the implementation of the social clause in a new WTO agreement, is therefore proposed. The proposed Joint WTO and ILO Dispute Settlement system would see the Joint WTO and ILO Standing Committee operating alongside the current WTO Dispute Settlement Body with equal status.[65] The Joint WTO and ILO Standing Committee would receive requests for consultation and should only facilitate the consultation process. If the dispute cannot be resolved at the consultation stage, the Joint WTO and ILO Standing Committee would then establish a Joint WTO and ILO Panel to adjudicate over the dispute. If the Joint WTO and ILO Panel delivers its findings, and no appeal is lodged against such findings, the Joint WTO and ILO Standing Committee would then adopt the report. If an appeal is lodged against the findings of the Joint WTO and ILO Panel, the Joint WTO and ILO Appellate Body would then adjudicate over the appeal which would then be adopted by the Joint WTO and ILO Standing Committee.

It is submitted that the adoption of a joint WTO and ILO dispute settlement system would be a positive approach to addressing disputes certain to result from incorporation of a trade-labour linkage into the legal framework of the WTO. In this regard, Trebilcock has observed that

> … where trade sanctions have been invoked against imports from foreign countries for failure to observe core labour standards or other universal human rights, and these sanctions have been challenged before the WTO

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64 See the US-Jordan FTA of 17 December 2001. The proposed dispute settlement provision in the proposed WTO side Agreement on Labour follows the model adopted in the US-Jordan FTA which has been able to embrace consultations and or dialogue as the first crucial step to resolving disputes at the multilateral level. See also Jordan Shutting Abusive Factories' *Washington Times* at*:* http://www.washingtontimes.com/news/2006/jun/16/20060616-105349-6847r/?page=all (last accessed 5 October 2012). The consultation process appears to be useful as the large numbers of sweatshops in Jordan have significantly decreased due to ongoing dialogue between the country and the US. See also Bessma 'A Middle East Free Trade Area: economic interdependence and peace considered' (2007) 30 *The World Economy* 11 1682. Bessma observes that the agreement has not only been successful from a consultative perspective but has also seen a significant growth in Jordan's economy.

65 See art 2.1 of the WTO Dispute Settlement Understanding (DSU) which establishes the WTO Dispute Settlement Body (DSB). The DSB administers the DSU's rules and procedures. Like the DSB, the Joint WTO and ILO Standing Committee must be given an elevated status to assume the authority to establish dispute settlement panels, adopt the Joint WTO and ILO Panel and Appellate Body reports, maintain surveillance of implementation rulings and if necessary authorise WTO Members to suspend concessions and other obligations to trade agreements where a WTO Member violates labour standards in trade. See also Lester *et al* n 4 above at 153.

> Dispute Settlement Body by exporting countries, it would seem appropriate that the WTO Dispute Settlement Body seek opinions from other international organisations whose mandates squarely embrace these issues about whether systematic violations of core labour standards or universal human rights have occurred or are occurring, leaving the WTO dispute-settlement system to address the proportionality of the proposed sanctions relative to the severity and persistence of the abuses in question and to screen out arbitrary or unjustifiable forms of discrimination or disguised restrictions on trade under the conditions in the chapeau of Article XX.[66]

However, it must be appreciated that consultations alone may not achieve the intended objectives of incorporating a social clause into the WTO system. As such, the social dialogue approach of the ILO must be reinforced with the sanctions model of the WTO, as sanctions could be an efficient tool to secure the compliance of offending state parties with their international obligations.[67] The sanctions model of the WTO is undoubtedly the best legal mechanism at the multilateral level which is able to ensure compliance with international standards by offending parties.[68] It is therefore recommended that a provision allowing for the use of sanctions in the aftermath of failed consultations, be included in the proposed WTO agreement in order to give effect to the social clause. The sanctions provision should be based initially on monetary fines to be used to improve the levels of protection of core labour standards in the offending country. It is acknowledged that no system is without its flaws.[69] Therefore, should a country fail to pay its monetary

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66 Trebilcock n 24 above at 172 & 177.

67 Guzman 'The design of international agreements' (2005) 16 *European Journal of International Law* 4 at 579. See also the UN Security Council Resolution SC/1079 of 19 September 2012. The Resolution adopted the use of targeted sanctions as a means of punishing parties that violate the rights of children in armed conflict. Whilst the Resolution might have nothing to do with trade and labour matters, it underlines the significant role played by sanctions in international law in trying to address the continued violations of human rights.

68 WTO 'Settling disputes: the priority is to settle disputes, not to pass judgement' at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap3_e.pdf (last accessed 5 October 2012). The WTO itself has observes that: 'dispute settlement is the central pillar of the multilateral trading system, and the WTO's unique contribution to the stability of the global economy. Without a means of settling disputes, the rules-based system would be less effective because the rules could not be enforced. The WTO's procedure underscores the rule of law, and it makes the trading system more secure and predictable. The system is based on clearly-defined rules, with timetables for completing a case'.

69 The monetary fines model is based on the Canada-Chile and Canada-EU models. However, the monetary fines should differ from the models adopted in the two agreements alluded to in that there should be an acknowledgement of the differences in the levels of development which exist between fast developing countries and least

penalty as imposed by the Joint WTO and ILO Standing Committee, it is proposed that the trade benefits of the offending country be suspended.[70] It is further proposed that such a suspension provision be incorporated into the proposed new WTO agreement. These proposals designed to give effect to a social clause in the WTO are similar to provisions that have been successfully implemented in bilateral or regional trade agreements which include a social clause.[71] It is hoped that the continuing application of these similar frameworks at the bilateral and regional levels will provide inspiration and appropriate reference points for the adoption of an effective framework for the inclusion of a social clause at the multilateral level of the WTO.

CONCLUSION

There is a cogent and compelling need to establish a trade-labour standards linkage in the legal framework of the WTO in order to address challenges related to development, and the complex issues that have emerged in labour markets as a result of globalisation.[72] This article has sought to examine the calls to incorporate a social clause into the WTO framework as a means of promoting sustainable development, especially in developing countries. The ultimate objective is to ensure that the WTO and ILO work together to protect workers against the violation of core labour standards in trade. We have proposed how the WTO and the ILO could work together to protect core labour standards in the multilateral trading system. Against the background of this proposal, the WTO could be forced to rethink its approach to non-trade matters with a view to adopting a more favourable disposition towards the case for recognition of a trade-labour linkage within its regulatory system.[73] Such a rethink of the WTO's approach to non-trade matters, would necessitate forging alliances with organisations such as the

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developing countries. Therefore there should be set differences in the monetary fines to be imposed on fast and least developing countries. However the difference must be fairly marginal to avoid resistance from fast developing countries who have argued that any significant differences in treatment between themselves and least developing countries would limit their potential to maximise their gains from trade and would amount to an act of discriminating against them in favour of least developed countries.

70 A good example of a suspension provision can be found in the NAALC which as already stated in this article, was signed on September 14, 1993, by the Presidents of Mexico and the United States, and the Prime Minister of Canada, as one of the supplementary accords to the North America Free Trade Agreement (NAFTA). It entered into force on January 1, 1994.

71 Examples of such agreements include the NAALC and US-Chile FTA.

72 Chartes & Mercurio n 1 above at 665.

73 Trebilcock n 24 above at 191. See also Hoekman & Kostecki n 12 above at 670.

ILO. We have shown that such alliances are possible, and that the establishment of a joint WTO and ILO dispute settlement system is certainly not beyond our reach. Both institutions are already working together through the joint WTO and ILO Standing Committee in efforts aimed at addressing matters related to labour and trade. Therefore, it is not unrealistic to imagine a joint WTO and ILO dispute settlement system in the not-too-distant future.