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Social Issues: Labour, Environment and Human Rights

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I. Introduction

A. Trade and social issues

International trade agreements have various effects on the ability of countries to protect their social values, including labour and environmental standards and human rights. At the most general level, trade increases welfare, which can be spent on social protection; indeed, the preamble of the WTO Agreement claims as one of its primary objectives the 'raising [of] standards of living'. As the World Commission on the Social Dimension of Globalisation said in its 2004 report, 'wisely managed, [the global market economy] can deliver unprecedented material progress, generate more productive and better jobs for all, and contribute significantly to reducing world poverty.'[1]

But the 'mutual supportiveness' of trade and social protection is ambiguous at best. At the overall level, structural economic changes as a result of increased trade can enhance employment opportunities for minority groups, but can also do the opposite, and can in addition (and indeed should) also lead to short-term unemployment in inefficient sectors. Increased economic competition, a primary function of trade, should make goods and services more affordable to consumers, but if this undermines public subsidies, it can do precisely the opposite, with detrimental social consequences. With respect to the environment, the economic efficiencies resulting from trade should lead to an efficient use of natural resources, but any increase in economic activity, also a result of trade, can put pressure on the environment. In a very direct sense, trade can increase consumers' access to goods and services useful for achieving non-trade objectives, but also to those that are harmful to social values including national culture, as well as health and safety. At the individual level, trade can enable individuals to enjoy the fruits of their labour, including their intellectual labour, but the restrictions on producing unauthorized goods and services that are inherent in the notion of intellectual property law can limit a country's ability to meet its social objectives, as the debate on TRIPS and essential medicines has amply demonstrated.

Government efforts to achieve social protection in *other* countries can also impact on trade if they use trade sanctions to achieve this goal. Market access restrictions, whether unilateral or agreed (and this by no means excludes some degree of coercion),[2] are frequently applied on products from countries involved in human

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[1] World Commission on the Social Dimension of Globalization, *A Fair Globalization – Creating Opportunities for All* (Geneva: ILO, 2004), at x.

[2] For a discussion of the EU's 'deep trade agenda' in pursuing multilateral agreement on regulatory issues, including social issues, see Alasdair R. Young and John Peterson, 'The EU and the New Trade

rights abuses, from those not complying with environmental treaties, and as an indirect means, via the exclusion of competition, of protecting high domestic standards of social protection (the so-called 'social dumping' issue).[3] The reasons for imposing these restrictions may be moral, more generally political or economically protectionist, or a combination of all three.[4] Trade restrictions with protectionist effects are especially controversial, as the country imposing the restrictions will usually justify its restrictions as a legitimate means of achieving worthy objectives, while the recipient country will see them as merely illegitimate protectionism in another guise.[5]

B. Links between trade and non-trade issues in the WTO

Precisely because of their sensitivity, within the WTO there has barely been a debate on the mutual impacts of trade on social protection, and *vice versa*. There has, it is true, been some recognition of these linkages in the case of trade and environment, though the degree to which this has been resolved is often exaggerated. It is true that the preamble of the WTO Agreement contains a reference to sustainable development, there is a WTO Committee of Trade and Environment, and WTO Members have little trouble agreeing on the importance of liberalizing environmental goods and services. It is also true that the Appellate Body has said that achieving 'sustainable development' is one of the objectives of the WTO itself, basing itself on the questionable argument that 'WTO objectives may well be pursued through measures taken under provisions characterized as exceptions'.[6]

But for all this, virtually no progress has been made on the more difficult aspects of the relationship between trade and social protection, including environmental protection. The 2001 Doha Ministerial Declaration required negotiations on a number of environmental matters,[7] including, at the EU's urging, 'the relationship between

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Politics' (2006) 13 Journal of European Public Policy 795 and Dirk De Bièvre, 'The EU Regulatory Trade Agenda and the Quest for WTO Enforcement' (2006) 13 Journal of European Public Policy 851.

[3] The Preamble of the 1919 Constitution of the International Labour Organization (ILO) states 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 the conditions in their own countries' and efforts to reduce competition by means of low labour standards date back to Daniel Legrand in 1840. See Steve Charnovitz, 'The Labor Dimension of the Emerging Free Trade Area of the Americas' in Philip Alston (ed), *Labour Rights as Human Rights* (Oxford: OUP, 2005), 164. The empirical evidence on whether countries with low social standards have an advantage in the competitiveness of their traded goods and services is equivocal: for a survey of the literature, and the conclusion that there is no 'race to the bottom' see Keith Maskus, 'Trade and Competitiveness Aspects of Environmental and Labor Standards in East Asia' in Kathie Krumm and Homi Kharas (eds), *East Asia Integrates: A Trade and Policy Agenda for Shared Growth* (Washington, DC: World Bank and OUP, 2004), 115-134.

[4] Steve Charnovitz, 'The International Labour Organization in its Second Century' (2000) 4 Max Planck YBIL 147, 167, discussing the ILO.

[5] See eg Gregory Shaffer, 'The Under-Examined Trade-Environment Linkage: Domestic Politics and WTO Disputes', 2005, available at www.columbia.edu/~ap2231/jbconference/Papers/Shaffer_ Bhagwati%20Conference.pdf.

[6] WTO Appellate Body, *EC – Tariff Preferences*, WT/DS246/AB/R, adopted 20 April 2004, para 94. It is more accurate to say, as the Appellate Body did in an earlier report, that sustainable development is one of the objectives of WTO Members. WTO Appellate Body, *US – Shrimp*, WT/DS58/AB/R, adopted 6 November 1998, para 154. The WTO Members committed themselves to this objective in the Doha WTO Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001, para 6.

[7] Doha Declaration, ibid, paras 31, 32, 33 and 51.

existing WTO rules and specific trade obligations set out in multilateral environmental agreements',[8] but this mandate has produced nothing of substance.[9] The topic of labour standards has barely been mentioned at the WTO since the 1996 WTO Singapore Ministerial Conference issued a Declaration punting the issue to the ILO,[10] and adding, for good measure, that high labour standards should not be used for protectionist purposes.[11] And while there has been a recent fruitful joint report by the WTO and ILO Secretariats on the links between trade and employment,[12] at the diplomatic level the relationship remains cool. The Singapore Ministerial Conference was marked by the embarrassing withdrawal, at the request of some developing countries, of an unofficial speaking invitation to the Director-General of the ILO,[13] and a decade later, the ILO enjoys neither regular observer status at WTO meetings,[14] nor speaking rights at WTO Ministerial Conferences.[15] At the more general level, despite UN reports on the potentially negative effect of the WTO on human rights,[16] there has been no systematic attempt in the WTO to consider these issues itself.[17]

Since its founding, then, social issues have been left to one side of the main WTO agenda, much to the relief no doubt of those who were at one stage concerned about

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[8] Doha Declaration, ibid, para 31(i). On the EU's role in the adoption of this statement see Bart Kerremans, 'What Went Wrong in Cancun? A Principal-Agent View on the EU's Rationale Towards the Doha Development Round' (2004) 9 European Foreign Affairs Review 363, 378.

[9] For a summary, see WTO Doc, Committee on Trade and Environment, *Environmental Aspects of the Negotiations – Note by the Secretariat*, WT/CTE/W/243, 27 November 2006.

[10] Ironically, this had the effect of boosting that organization's profile. See Steve Charnovitz, above at n 4, 158-9 and 163.

[11] WTO Singapore Ministerial Declaration, WT/MIN(96)/DEC, 18 December 1996, para 4. The statement is repeated in the ILO Declaration on Fundamental Principles and Rights at Work, 18 June 1998 (1998) 37 ILM 1233, para 5. Even the mention of labour standards was too much for India, Pakistan and Sri Lanka, which consented only very reluctantly: see Kevin Kolben, 'The New Politics of Linkage: India's Opposition to the Workers' Rights Clause' (2006) 13 Indiana Journal of Global Legal Studies 225, 241.

[12] WTO/ILO, *Trade and Employment: Challenges for Policy Research* (Geneva: WTO/ILO, 2007). The Singapore Ministerial Declaration, ibid, para 4, also promised that 'the WTO and ILO Secretariats will continue their existing collaboration'.

[13] Chakravarthi Raghavan, 'EC Labour Standards Move Trashed', Third World Network, 8 November 1999, available at www.twnside.org.sg/title/trashed-cn.htm.

[14] A list of WTO observers is available at http://www.wto.org/english/thewto_e/igo_obs_e.htm.

[15] The ILO has always been invited to attend WTO Ministerial Conferences.

[16] Eg the following UN ECOSOC, documents: *Human Rights and Intellectual Property – Statement by the Committee on Economic Social and Cultural Rights*, E/C.12/2001/15, 14 December 2001, *Globalisation and its Impact on the Full Enjoyment of Human Rights – Report of the High Commissioner for Human Rights*, E/CN.4/2002/54, 15 January 2002, *The Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights – Report of the Commissioner*, E/CN.4/Sub.2/2001/13, 27 June 2001, *Liberalisation of Trade and Services and Human Rights – Report of the High Commissioner*, E/CN.4/Sub.2/2002/9, 25 June 2002, *Human Rights, Trade and Investment – Report of the High Commissioner*, E/CN.4/Sub.2/2003/9, 2 July 2003, *Mainstreaming the Right to Development into International Trade Law and Policy at the World Trade Organization, – Note by the Secretariat*, E/CN.4/Sub.2/2004/17, 9 June 2004.

[17] See the discussion on the proposed ILA Declaration on Trade and Human Rights in ILA, *Report of the International Trade Law Committee*, Toronto Conference (2006), 18-21; also Ernst-Ulrich Petersmann, 'The WTO and Regional Trade Agreements as Competing Fora for Constitutional Reforms: Trade and Human Rights' in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford: OUP, 2006), Ch 12.

its 'contamination' by 'non-trade issues'.[18] And there matters might have remained, but for the sudden increase in the number of regional trade agreements being negotiated and concluded, from the early 1990s to today, which gave an opportunity to those countries with an interest in linking trade and social issues for negotiating corresponding provisions in their new regional trade agreements.

II. Social Issues and Regional Trade Agreements

A. Introduction

Links between social protection and regional trade agreements were originally designed by a handful of developed countries (the US, Canada and the EU) during the 1990s, but this practice has now been taken up by others, including a limited number of developing countries.[19] On the other hand, the practice is far from universal, even among developed countries. Australia, for example, rejects any such linkage as a matter of principle;[20] and, as the following will show, the EFTA countries and Japan are barely more than lukewarm on the link.

Echoing the practice at the multilateral level, most of the regional trade agreements to consider social protection pretend that there is no conflict between this objective and that of trade liberalization. Thus, many agreements promise to '[p]romote economic development in a manner consistent with environmental protection and conservation and with sustainable development'[21] or even to promote sustainable development directly,[22] while in others the parties reaffirm their commitments to various values (such as human rights or labour standards) without explaining what these commitments have to do with the core business of the agreement.[23]

In contrast, there are examples of agreements which respond to the fact that trade and social protection are not always *ad idem*. Some agreements seek to improve on the policy space allowed to WTO Members under the WTO Agreements by modifying the general exceptions clauses, or by subordinating the agreement as a whole to other international agreements with social policy objectives. Others focus directly on the ways in which social protection can be raised or lowered for the illegitimate purposes of influencing trade, for example by way of clauses discouraging the parties from reducing social protections in order to gain trade (or investment) advantages, or, alternatively, discouraging them from using high social standards for protectionist purposes. And still other agreements set positive social standards in the territories of the respective parties to the agreement. These are sometimes linked to trade, as in the

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[18] See the statement signed by 103 intellectuals in 'Third World Intellectuals and NGOs' Statement Against Linkage (TWIN-SAL)', 15 November 1999, available at www.cuts-international.org/Twin-sal.htm.

[19] This chapter does not discuss the role of social issues in integrated 'communities' including those at a nascent stage, such as ASEAN.

[20] Australian Parliament, Joint Standing Committee on Treaties, Report 63: Treaties tabled on 7 December 2004, Ch 3 (Australia-Thailand), para 3.160. Australia's agreement with the US is an obvious exception, and clearly a product of US negotiating objectives.

[21] See, eg, the Preamble to the Chile-Costa Rica agreement. This phrase is drawn from the Preamble of the WTO Agreement.

[22] Preambles to Caricom-Costa Rica, EFTA-Mexico and China-Pakistan.

[23] This is common in the preambles of many regional trade agreements concluded by the Balkan countries.

NAFTA model, or not, as in the model of the EU human rights clause, and occasionally, as in both of these cases, they use the threat of trade sanctions as an enforcement mechanism.

The following will analyse the main techniques for ensuring social protection that have so far been manifested in regional trade agreements, divided into two main categories: provisions seeking to safeguard a right to regulate for social purposes, and provisions seeking to set positive social standards among the parties to the agreement.[24] For the sake of brevity, it focuses on the basis obligations concerning trade in goods, leaving aside for the most part obligations relating to technical barriers to trade, sanitary and phytosanitary standards, services and intellectual property.

B. Rights to regulate

With one notable recent exception,[25] all regional trade agreements include a general exceptions clause similar to Article XX of the GATT 1994, which sets out a list of mainly public policy reasons which (subject to certain conditions) entitle the parties to ignore the remaining obligations in the agreement. One way that parties to regional trade agreements have enhanced their rights to regulate for public policy reasons has been by increasing the scope of these clauses. But countries have also sought to gain regulatory space by including conflicts clauses in their agreements giving priority to rights or obligations under other international agreements between the parties in cases of conflict. Such clauses often make reference to the WTO agreements (including their exceptions) but they also often refer, usually by implication but sometimes expressly, to other agreements between the parties with a more direct purpose of social protection, such as ILO Conventions, or environmental or human rights treaties.

An additional point concerns the effect of any such carve-outs under WTO law. Article XXIV GATT requires the parties to a regional trade agreement to eliminate 'duties and other restrictive regulations of commerce' with respect to 'substantially all the trade' in products originating in their territories 'except, where necessary, those permitted under … Article XX'.[26] This raises the question of the WTO legality of provisions in regional trade agreements that are more generous than Article XX, as well as the question, more likely to arise in practice, of the WTO legality of measures taken under those provisions. The simple answer would be that under the WTO, a measure not covered by a relevant WTO exception is simply not permitted. Indeed, in

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[24] See also Marie-Claire Cordonier Segger, 'Sustainable Development in Regional Trade Agreements' in Bartels and Ortino, above at n 17, Ch 13 and Petersmann, above at n 17.

[25] The 2006 China-Pakistan agreement contains no general or security exceptions. See http://big5.mofcom.gov.cn/gate/big5/english.mofcom.gov.cn/__accessory/200611/1164848706093.doc. However, Art 3 is a conflicts clause in which the parties 'affirm their existing rights and obligations with respect to each other under the WTO Agreement and other agreements to which both Parties are parties'. On the effect of such clauses see below at **[TEXT TO N 60]**.

[26] Art XXIV:8(a)(i) GATT for customs unions and Art XXIV:8(b) GATT for free trade areas. Two additional points: first, it is difficult to see the lexical relevance of the apparent condition 'where necessary' in these paragraphs; second, the security exception in Art XXI GATT, which is not included in the list of permitted exceptions in Art XXIV, also overrides Art XXIV by its own terms. This reduces the value of the argument that the treaty drafters cannot have intended to prohibit parties from taking security measures under regional trade agreements, and therefore that the list in Art XXIV is not exclusive. This argument is usually made in support of the legality of other non-listed trade restrictions under regional trade agreements, in particular trade remedies. On the other hand, this does not explain the inclusion of Art XX in the list.

the WTO case *Canada – Periodicals*,[27] Canada failed to mention the NAFTA 'cultural industries' exception, even though this was undoubtedly relevant to the subject matter of the dispute. On the other hand, it is possible that the WTO dispute settlement system can take account of such law 'applicable between the parties',[28] and therefore it is not entirely certain that Canada should have given up on this possibility. In any case, it is likely that a future defendant in WTO dispute settlement proceedings will invoke a clause in a regional trade agreement between the same parties as a defence to the WTO claim.

1. Exceptions

When it comes to the social exceptions to their core trade obligations, many regional trade agreements simply adopt the list of general exceptions found in Article XX of the GATT, sometimes even incorporating this provision by reference.[29] However, a number of countries have modified these clauses to provide greater policy space, and they have done this in three main areas: environment, culture and indigenous rights. By contrast, and no doubt reflecting the greater sensitivity of these issues, there has been no attempt to meddle with the application of these clauses to measures designed to protect labour and human rights.

(a) Environment

A first class of modifications to the WTO exceptions concerns Article XX of the GATT, which, subject to non-discrimination conditions in the Chapeau, permits measures (b) 'necessary to protect human, animal or plant life or health' and (g) 'relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption'. The word 'environment' does not appear, for the obvious reason that the concept of environmental protection did not exist in 1947, when these words were drafted.

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[27] WTO Appellate Body Report, *Canada –Periodicals*, adopted on 30 July 1997, WT/DS31/AB/R.

[28] For a general discussion of these themes, see Joost Pauwelyn, *Conflict of Norms in Public International Law: WTO Law Relates to Other Rules of International Law* (Cambridge: CUP, 2003). Recent jurisprudence is more conservative, though not entirely on point. In WTO Appellate Body Report, *Mexico – Soft Drinks*, WT/DS308./AB/R, adopted March 24, 2006, the defendant claimed that its measure was justified as a countermeasure in response to an illegal act by the complainant under another agreement (NAFTA). The Appellate Body refused to consider this argument on the basis that this would amount to 'adjudicat[ing] non-WTO disputes' (para 56). For criticism of this reasoning, see comments by this author at http://worldtradelaw.typepad.com/ielpblog/2006/03/_soda_pop.html#comments. See also **[MITCHELL/VOON CHAPTER]**.

[29] Eg Art 12 Australia-Singapore (reiterating Art XX GATT), Art 1601 Australia-Thailand (incorporating by reference), Art 22.1 Australia-US (incorporating by reference with some modifications, as discussed below); Art 15.1 NZ-Thailand (reiterating Art XX GATT), Art 11.22(2) NZ-Transpacific (reiterating with some modifications, as discussed below), Art 19.02 Mexico-Chile, Art 19.02 Mexico-Uruguay, Art 168.1 Mexico-Japan (all incorporating by reference), Art 9.16 Mexico-Costa Rica (reiterating) and Art 19.2(2) Japan-Singapore, Art 10 Japan-Malaysia, Art 23 Japan-Philippines (all incorporating by reference), Art 99 Chile-China, Art 20.02 Chile-Costa Rica, Art 20.01 Chile-Korea (all incorporating by reference), Art 18 China-Macao and Art 18 China-Hong Kong (both incorporating by reference).

In 1993, the NAFTA became the first regional trade agreement to modify these clauses expressly. This agreement incorporates Article XX of the GATT by reference, but then adds the following comment:

> The Parties understand that the measures referred to in GATT Article XX(b) include environmental measures necessary to protect human, animal or plant life or health, and that GATT Article XX(g) applies to measures relating to the conservation of living and non-living exhaustible natural resources.[30]

This wording has been adopted in subsequent agreements by the NAFTA parties[31] as well as by New Zealand in its recent trade agreements[32] – despite the fact that arguably this additional wording achieves nothing. The qualification of the exception to include 'environmental measures' does not increase its scope (the measure must still meet the other criteria), and the clarification that the term 'exhaustible natural resources' includes living resources must be considered redundant since the WTO Appellate Body decided precisely this point almost a decade ago in *US – Shrimp*.[33]

Another model clause, taken from Article 30 of the EC Treaty, states as follows:

> The Agreement shall not preclude prohibitions or restrictions on imports, exports, goods in transit or trade in used goods justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of intellectual, industrial and commercial property or rules relating to gold and silver. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary or unjustifiable discrimination where the same conditions prevail or a disguised restriction on trade between the Parties.

This provision is found in all of the regional trade agreements concluded by the EU except for those with Chile and Mexico, which incorporate by reference Article XX of the GATT. It is also adopted by the EFTA regional trade agreements,[34] other than those with Chile, Mexico, Singapore and SACU, and by a number of agreements concluded by Balkan countries (in almost all cases with the addition of a reference to measures 'justified on grounds of … protection of the environment').[35]

Needless to say, the European Court of Justice (ECJ) has produced a rich jurisprudence on the interpretation of Article 30 of the EC Treaty, which implies a 'strict' proportionality test involving a balancing of the benefits of the measure against the resulting detriment to trade. This is a more intrusive test than under WTO law, which never second guesses the level of protection which a measure is intended to achieve.[36] Where the ECJ has exercised jurisdiction over such clauses in the EU's

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[30] Article 2101 NAFTA.

[31] Art 22.1 Australia-US; Art 21.1 CAFTA; Art O-01 Canada-Chile; Art 10.1 Canada-Israel; Art 11.02 Mexico-Israel; Art 12 US-Jordan; At 21.1 US-Morocco and side letter; Art 21.1 US-Singapore; Art 22.1 US-Peru.

[32] Art 19.1(2) NZ-Transpacific.

[33] *US – Shrimp*, above at n 6, para 131.

[34] Eg Art 17 EFTA-Croatia.

[35] Eg Art 23 Croatia-Albania.

[36] For a comparison see Jan Neumann and Elisabeth Türk, 'Necessity Revisited: Proportionality in World Trade Organization Law After *Korea – Beef*, *EC – Asbestos* and *EC – Sardines*' (2003) 37 JWT 199.

regional trade agreements, it has interpreted this wording in the same way as under Community law,[37] but it is an open question whether other tribunals would also apply the stricter ECJ test.

Other agreements have amended the exceptions available for measures designed to achieve social protection in ways that are not easy to follow. Australia's 1983 agreement with New Zealand abandons the GATT requirement that a measure to conserve exhaustible natural resources be taken in conjunction with domestic restrictions,[38] while India's agreements with Sri Lanka and Nepal[39] and the many agreements concluded by countries of the former Soviet Union (now the Commonwealth of Independent States or CIS) omit any reference to such an exception at all.[40] Perhaps the ANCERTA provision truly is the product of a negotiation process, but one wonders whether the other countries wished to abandon their rights to conserve their exhaustible natural resources. There are also several examples of *ad hoc* exceptions clauses. For example, the Egypt-Jordan agreement allows measures 'for religious, hygienic, security or environmental reasons' so long as they are 'in conformity with the applicable laws and regulations in both countries',[41] which is not much of a condition. As mentioned, the China-Pakistan agreement is remarkable for not containing *any* exceptions clauses.

(b) Culture

A second modification concerns the GATT exceptions available for the protection of cultural heritage. Article XX(f) GATT permits measures 'imposed for the protection of national treasures of artistic, historic or archaeological value', but this does not protect domestic content not rising to the level of a 'national treasure'. To remedy this perceived deficiency, beginning with its 1988 agreement with the US, Canada has sought in all of its regional trade agreements to protect 'cultural industries', defined in terms of persons engaged in the production, distribution or exhibition of print, audio and audio-visual materials.[42] Such a clause has not been adopted by other countries, with the exception of New Zealand, which has an exception in its agreements with Thailand and the Transpacific countries for measures to support 'creative arts of national value'.[43]

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[37] Case C-340/97, *Nazli* [2000] ECR I-957, paras 55-56.

[38] Art 18 ANZCERTA.

[39] Art IX India-Nepal; Art IV India-Sri Lanka (which adopts a subjective test for measures 'which [the party] considers necessary for … the protection of human, animal or plant life and health').

[40] Eg Art 10 Armenia-Georgia.

[41] Art 8 Egypt-Jordan.

[42] Art O-07 Canada-Chile.

[43] Art 15.1(f) NZ-Thailand. Art 19.1(3) NZ-Transpacific. Footnote 1 of the latter agreement defines this term to include 'the performing arts – including theatre, dance and music – visual arts and craft, literature, film and video, language arts, creative on-line content, indigenous traditional practice and contemporary cultural expression, and digital interactive media and hybrid art work, including those that use new technologies to transcend discrete art form divisions. The term encompasses those activities involved in the presentation, execution and interpretation of the arts; and the study and technical development of these art forms and activities.'

(c) Indigenous and minority rights

New Zealand is also responsible for a general exceptions clause in its Thailand and Transpacific agreements allowing affirmative action measures to support its indigenous population. These clauses state that:

> Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods and services, nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Maori in respect of matters covered by this Agreement including in fulfilment of its obligations under the Treaty of Waitangi.[44]

Other regional trade agreements also make allowance for positive discrimination, but in the more limited contexts of cross-border services, investment and government procurement. Thus, in respect of cross-border services and investment Canada reserves 'the right to adopt or maintain any measure denying investors of another Party and their investments, or service providers of another Party, any rights or preferences provided to aboriginal peoples'.[45] Australia's agreements are similar but also include exemptions in the area of government procurement.[46] Some, though apparently not all, of the United States agreements contain exemptions in the areas of services and investment for 'small and minority businesses',[47] while the US-Peru Agreement permits the US 'to adopt or maintain any measure according rights or preferences to socially or economically disadvantaged minorities'.[48]

(d) Modifications to the 'Chapeau' conditions

In a number of agreements, the parties to regional trade agreements have also relaxed the strict conditions set out in the Chapeau to Article XX of the GATT that measures not amount to unjustifiable discrimination, arbitrary discrimination or disguised restriction on international trade.

One very common variation, found in most of the regional trade agreements concluded by the EU,[49] the EFTA countries and other associated European countries, follows Article 30 of the EC Treaty in not making express reference to the first condition that a measure not amount to unjustifiable discrimination. This probably changes little, if anything, as the change can be explained on the basis that, according to these clauses, the measures must be 'justified' on the grounds specified therein, and

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[44] Art 15.8 NZ-Thailand and 19.5 NZ-Transpacific.

[45] Annex II NAFTA and Annex II Canada-Chile (both on cross-border services and investment). The Canada-Costa Rica agreement does not contain significant obligations in services and investment.

[46] Annex II (investment and services) and Annex 15A, Section 7, General Notes (government procurement), Australia-US; Ch 6 Art 15 (government procurement) and Annex 4-II(A) (investment and services) Australia-Singapore; Annex on Australian commitments on services and investment Australia-Thailand (this agreement contains no substantive obligations on government procurement).

[47] Eg Annex II (investment and services) Australia-US.

[48] Annex II (investment and services) US-Peru.

[49] Art 27 EC-South Africa TDCA is unusual in that it replicates the three Chapeau conditions, despite the fact that it is otherwise on the model of Art 30 of the EC Treaty.

therefore, like the Chapeau, measures amounting to unjustified discrimination still remain unprotected.[50]

More significant perhaps are agreements omitting (or almost omitting) any Chapeau-type conditions, such as the Caricom-Dominican Republic agreement. But worthy of particular mention is the formulation found in the many regional trade agreements concluded by the CIS countries, allowing for:

> measures generally accepted in the international practice which are considered by the Contracting Party necessary for the protection of its vital interests or which are undoubtedly necessary for the implementation of international agreements of which [the party] is a signatory or intends to become a signatory if these measures concern … health protection of people, animals and plants.[51]

Doing away with the traditional non-discrimination conditions, this provision adds two alternatives. One is that, in the opinion of the relevant party, the measure is necessary for the protection of its 'vital interests', a test which, despite its subjectivity, is set rather high for a measure designed, for example, to protect a minor species of animal. A subset of the CIS agreements (some of the Kyrgyzstan and Georgia agreements)[52] add that such measures must also be 'general[ly] accepted in the international practice', though it is not entirely clear what this might mean. Second, measures are permitted if they are 'undoubtedly necessary' for the implementation of an international agreement. This test is, as the next section will demonstrate, unusual more for being placed in an exceptions clause than for its content.

2. Conflicts with other international agreements

Many regional trade agreements have made use of conflicts clauses to protect rights and/or obligations under other international agreements with social objectives. Such conflicts clauses have effect under Article 30(2) of the Vienna Convention on the Law of Treaties, which provides that '[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail'.[53]

There is a well known example of such a conflicts clause in NAFTA, which states that certain environmental treaties[54] are to take priority in the event of any inconsistency, 'provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement.'[55] The US

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[50] Admittedly, the Appellate Body in *US – Shrimp* stated that '[t]he policy goal of a measure at issue cannot provide its rationale or justification under the standards of the chapeau of Article XX' but this makes no sense, otherwise there is no way to assess the possibility of 'justifiable discrimination'. For this point, see Sanford Gaines, 'The WTO's Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures' (2001) 22 U Penn JIEL 739, 778.

[51] Art 11 Kyrgyzstan-Moldova. On these agreements generally, see Rilka Dragneva and Joop de Kort, 'The Legal Regime for Free Trade in the Commonwealth of Independent States' (2007) 56 ICLQ 233.

[52] Eg Art 11 Kyrgyzstan-Moldova.

[53] See the International Law Commission Commentary on (then) Article 26(2) of the draft Vienna Convention on the Law of Treaties, in ILC, *Report of the International Law Commission on the work of the second part of its seventeenth session*, Document A/6309/Rev.l, (1966) II YILC 214-216.

[54] CITES, the Montreal Protocol, the Basel Convention, and two bilateral environmental agreements.

[55] Art 104 NAFTA. The clause was very briefly considered in S.D. Myers, *Partial Award*, 13

abandoned this clause in subsequent regional trade agreements,[56] although the US-Peru agreement has resurrected an interesting variation. Article 18.13.4 of this agreement provides that:

> In the event of any inconsistency between a Party's obligations under this Agreement and a covered agreement [a list of environmental agreements is set out in Annex 18.2], the Party shall seek to balance its obligations under both agreements, but this shall not preclude the Party from taking a particular measure to comply with its obligations under the covered agreement, provided that the primary purpose of the measure is not to impose a disguised restriction on trade.

This is a very peculiar provision. If there is truly an inconsistency between obligations, it is impossible to 'balance' them without violating one of them. In fact, the only sensible reading of this provision is to the same effect as the standard 'conflicts' clause, according to which measures taken under the listed environmental agreements will prevail, but where there is a choice between two measures, the least trade restrictive measure must be chosen.

The traditional clause survived in the practice of the two other NAFTA parties, being adopted in Canada's agreements with Chile and Costa Rica and Mexico's agreement with Chile. Chile evidently found this clause to its liking, taking it up in its agreement with Costa Rica, and recently it has also surfaced in an agreement between Panama and Taiwan.[57]

There are also examples of more wide-ranging conflicts clauses, such as this clause in the EFTA-Singapore FTA:

> The provisions of this Agreement shall be without prejudice to the rights and obligations of the Parties under the [WTO Agreement] and any other international agreement to which they are a party[58]

In addition, there are instances of a more targeted use of this formulation. Thus, in the Australia-Thailand FTA the parties 'affirm with respect to each other their existing rights and obligations relating to technical regulations' not only under the TBT Agreement but also under 'all other all other international agreements, including environmental and conservation agreements, to which the Parties are party.'[59]

Also worth noting are a number of ambiguous conflicts provisions, as in the China-Pakistan agreement mentioned above, in which the parties 'confirm' (or 'affirm') their rights and obligations under other agreements.[60] It is not entirely clear whether this

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November 2000, para 215, available at www.state.gov/s/l/c3746.htm.

[56] The 2001 US-Jordan agreement contained nothing on point, and the later agreements contain statements on 'the mutual supportiveness' of environmental and trade agreements and promises to consult on this matter within the WTO: Art 19.8 AUSFTA; Art 17.2 US-CAFTA; Art 17.8 US-Morocco; Art 18.8 US-Singapore; Art 18.12 US-Colombia.

[57] Art A-04 Canada-Chile, Art I.3 Canada-Costa Rica, Art 1-06 Chile-Mexico, Art 1.03 Panama-Taiwan.

[58] Art 4 EFTA-Singapore. See also Art 1.3 Chile-Korea; Art 18.2 NZ-Transpacific; Art 3 China-Pakistan, Art 20.1 China-Hong Kong, Art 20.1 China-Macao; cf Art 4.2 EFTA-SACU (which covers only 'obligations').

[59] Art 703(1) Australia-Thailand.

[60] Art 3 China-Pakistan; Art 4 EFTA-Chile; Art 42.4 EFTA-Tunisia; also Art 3 China-Chile; Art 1.1(2) Singapore-Jordan.

means that the treaty 'is not to be considered as incompatible' with the other agreements, as required by Art 30(2) of the Vienna Convention; an alternative reading would be that the provision amounts to an unenforceable political statement of the 'mutual supportiveness' of the different regimes. In the same way, the parties frequently reiterate commitments under other regimes, for instance human rights regimes, but this does not necessarily mean that those regimes prevail in cases of conflict. The preambular recitals found in many EFTA (and now Balkan) agreements that 'no provision of this Agreement may be interpreted as exempting the Contracting Parties from their obligations under other international agreements' are of similarly ambiguous legal effect.[61] Here the language is clearer, though there are limits to how far mere 'interpretation' can avoid a conflict[62] but the fact that the language is located in a preamble weakens the binding force of the statement.

C. Positive regulation of social issues

Provisions in regional trade agreements allowing the parties free scope to take protective measures go part of the way to resolving any problems between trade and social protection. Some countries however have decided on a more complete solution, which is to use regional trade agreements as a platform for the positive regulation of social protection in the territory of the other country. For convenience these are categorized here according to the countries which have adopted these clauses, though thematically they fall into two main groups: clauses which establish standards, sometimes enforceable, and clauses providing for cooperation on social matters.

1. The North American model

(a) NAFTA

NAFTA was groundbreaking in linking (via two side agreements) the regulation of social matters to trade obligations. These side agreements impose substantive social obligations on the parties: they require the parties to enforce their domestic environmental and labour legislation[63] (subject to a responsible exercise of discretion and a *bona fide* decision to allocate resources to other relevant matters);[64] and they require that each party 'shall ensure' that its legislation provides for high levels of environmental protection and labour standards respectively, and 'shall strive' continually to improve those regulations.[65] There is an emphasis on public

[61] The recital originates in the agreements between the EC and the four EFTA countries (Switzerland, Norway, Iceland and Liechtenstein) in 1972.

[62] See Pauwelyn, above at n *28*.

[63] Art 3 NAAEC; Article 4 NAALC. Note that 'environmental law' excludes legislation with the primary purpose of managing commercial or aboriginal harvesting of natural resources: Art 45(2)(b) NAALC.

[64] Art 45(1) NAAEC; Art 49(1) NAALC.

[65] In Annex 1 NAALC, the labour agreement lists eleven guiding 'labour principles' on matters ranging from freedom of association to protection of migrant workers, though it is expressly stated that these principles do not represent minimum legal standards. These principles are: (i) freedom of association and protection of the right to organize; (ii) the right to bargain collectively; (iii) the right to strike; (iv) prohibition of forced labour; (v) labour protection for children and young persons; (vi) minimum employment standards, such as minimum wages and overtime pay, covering wage earners, including those not covered by collective agreements; (vii) elimination of employment discrimination on the basis of such grounds as race, religion, age, sex, or other grounds as determined by each party's

participation: the parties are obliged to publicize their laws, and must provide for private party enforcement of these laws before impartial tribunals.[66]

Two types of enforcement are foreseen: the possibility of submissions by NGOs or other persons claiming that a party is not effectively enforcing its domestic laws ('citizen submissions') and a mechanism of inter-state enforcement. Under the environment side agreement, a citizen submission is lodged with the secretariat of the body administering the agreement (the Commission for Environmental Cooperation), and may lead to that body preparing a factual record of the issue;[67] under the labour agreement the submissions are lodged with the relevant party itself, which is under no obligation to take the matter any further.[68] There have been over fifty citizen submissions under the environment agreement, and slightly fewer under the labour agreement.[69]

The modes of inter-state enforcement vary according to the obligations at issue,[70] and have not yet been used. Simplifying somewhat, consultations are available for any matter under these agreements, while formal dispute settlement is only available in cases of a failure to enforce labour and environmental legislation in a manner that is trade-related, and when that failure represents a 'persistent pattern' of behaviour. There is in both cases the possibility of arbitral panels with the power to award a monetary penalty, collected if necessary by suspending trade concessions, though the labour side agreement limits this remedy cases involving occupational safety and health, child labour or minimum wage standards.[71] The monetary penalty is to be spent respectively on labour or environmental law enforcement (or also environmental improvements) in the territory of the party in default.[72]

The side agreements also set out elaborate institutional frameworks for cooperation in their respective fields. They each establish a commission, supported by a permanent secretariat, with a mandate for active promotion of cooperation on a variety of environment and labour-related topics (and, as mentioned, a role with respect to citizen submissions under the environment agreement). In terms of cooperation the function of the commission under the labour agreement is informative in nature, while the commission under the environment agreement also has the power to make normative recommendations on matters such as public access to environmental information or appropriate pollutant limits,[73] as well as environmental impact assessments and follow-up.[74]

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domestic laws; (viii) equal pay for men and women; (ix) prevention of occupational injuries and illnesses; (x) compensation in cases of occupational injuries and illnesses; and (xi) protection of migrant workers.

[66] Arts 4, 6-7 NAAEC; Arts 4-7 NAALC.

[67] Arts 14 and 15 NAAEC.

[68] Art 16(3) NAALC.

[69] See the lists at www.cec.org/citizen/index.cfm?varlan=english and www.dol.gov/ilab/programs/nao/status.htm respectively.

[70] Parts 4 and 5 NAAEC; Parts 4 and 5 NAALC.

[71] Canada is not subject to trade sanctions, and has arranged that any fines will be enforced domestically by Canadian courts: Annex 36A NAAEC; Annex 41A NAALC.

[72] Annex 34(3) NAAEC; Annex 39(3) NAALC.

[73] Art 10(5)(a) and (b) NAAEC.

[74] Para 7 NAAEC.

(b) Canada

The first NAFTA party to conclude regional trade agreements after the NAFTA was Canada, which concluded agreements in 1996 with Israel and Chile and another in 2001 with Costa Rica. Its agreement with Israel contained no particular reference to social issues, but its agreement with Chile was accompanied by labour and environment side agreements very much on the NAFTA model. Its agreement with Costa Rica contains equivalent obligations, including a system of citizen submissions,[75] but has a reduced system of inter-state enforcement. Enforcement under the labour agreement is limited to 'reasonable and appropriate measures, exclusive of fines or any measure affecting trade, but including the modification of cooperative activities […] to encourage the other Party to remedy that persistent pattern',[76] while the environment agreement replaces enforcement with a system of implementation by 'government to government coordination'.[77] The environment agreement also adds in its preamble that 'it is inappropriate to relax environmental laws in order to encourage trade'.

(c) United States

Because of the absence of 'fast track' negotiating authority between 1994 and 2002, the US was only able to negotiate one regional trade agreement during this period, namely with Jordan in 2001. This agreement was for some time (prior to the 2006 US-Peru agreement) considered to represent the high-water mark of the US regulation of social protection in its regional trade agreements,[78] though, as the following will show in more detail, it is difficult to see why. Its obligations are weaker than in NAFTA, there is no longer any obligation to provide for private party enforcement rights, and the parties have agreed not to use those enforcement mechanisms which are at least nominally available to them on the face of the agreement. On the first of these three points the subsequent agreements are similar, and on the remainder they are actually stronger.

The main obligation (now part of the body of the agreement) in the US-Jordan agreement is that the parties must 'not fail to effectively enforce' domestic environmental and labour legislation in a manner affecting trade,[79] which matches the narrowest (and only enforceable) tier of the NAFTA obligations. The standard of protection for both labour and environment is also effectively weakened. As far as labour is concerned, the parties 'reaffirm their obligations' as ILO members and their 'commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up'[80] but their obligation to 'ensure' a high standard of

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[75] Art 9 CCRAEC; Art 11 CCRALC.

[76] Art 23(5) CCRALC.

[77] Art 7(1) CCRAEC.

[78] For a glowing report, see Roman Grynberg and Veniana Qalo, 'Labour Standards in US and EU Preferential Trading Arrangements' (2006) 40 JWT 619; for a more sceptical view, see Philip Alston, '"Core Labour Standards" and the Transformation of the International Labour Rights Regime' (2004) 15 EJIL 457.

[79] Arts 5(3) and 6(4) US-Jordan.

[80] Art 6(1) US-Jordan. Philip Alston has sparked a debate on whether the ILO Declaration (and the use of this Declaration in US regional trade agreements) threatens the ILO regime, See Alston, above at n 78, and responses: Brian Langille, 'Core Labour Rights – The True Story (Reply to Alston' (2005) 16

protection reflecting these norms[81] is reduced to an obligation to 'strive to ensure' this standard of protection.[82] Similarly, they are only obliged to 'strive to ensure' that their laws provide for high standards of environmental protection.[83]

In terms of inter-state cooperation and enforcement there are also some changes. No cooperation is foreseen for environmental matters, except insofar as this might be within the competence of the Joint Committee established to implement the agreement. By contrast, the parties 'recognize that cooperation between them provides enhanced opportunities to improve labor standards' and specify that the Joint Committee shall 'consider any such opportunity identified by a Party'. In theory, enforcement for violations of the environmental and labour obligations is strengthened, as these obligations are now subject to the same dispute settlement provisions as the economic aspects of the agreement, which allow for 'any appropriate and commensurate measure'.[84] However, side letters between the US and Jordan have ruled out this option.[85]

The Trade Promotion Authority Act of 2002, which granted fast track negotiating authority for another five years, sets out negotiating objectives on a range of matters, including on labour and environmental provisions.[86] Similar to the US-Jordan agreement, future agreements are to include a provision prohibiting the parties from failing to enforce their environmental or labour legislation in a manner affecting trade, and negotiators must now 'seek' equal dispute settlement rights for all types of obligations (including this one).[87] But the standard which the parties are to 'strive to ensure' is lower, described in terms of 'not weakening or reducing' environmental and labour protections and limited to activities which are 'an encouragement for trade'. [88]

With two qualifications, US regional trade agreements negotiated pursuant to this legislation with Singapore, Chile, Morocco, CAFTA-DR, Bahrain, Colombia and Peru have generally met or exceeded these negotiating objectives. In addition to the primary obligation not to fail to effectively enforce their environmental and labour laws, the parties are obliged to 'strive to ensure' that their labour laws meet ILO standards, which they also reaffirm, and – improving on the US-Jordan model – to

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EJIL 409, Francis Maupain, 'Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights' (2005) 16 EJIL 439, Philip Alston, 'Facing Up to the Complexities of the ILO's Core Labour Standards Agenda' (2005) 16 EJIL 467.

[81] Art 6(6) US-Jordan contains a list of 'internationally recognized labor rights', which nonetheless fails to include the ILO 'core labour standard' of non-discrimination, and includes an additional standard requiring minimum wages.

[82] Arts 6(1) and 6(3) US-Jordan. Certainly it is not true to say that 'Article 6(1) requires parties to enact domestic legislation to provide for a minimum wage': see Grynberg and Qalo, above at n 78, 630.

[83] Art 5(2) US-Jordan.

[84] Art 17(2)(b) US-Jordan.

[85] See the identical side letters dated 23 July 2001, in which the representatives of the US and Jordan each promised that 'my Government would not expect or intend to apply the Agreement's dispute settlement enforcement procedures to secure its rights under the Agreement in a manner that results in blocking trade'. For discussion of the relevance of these side letters for the enforcement of the labour provisions of the agreement, US Congressional Record, Proceedings and Debates of the 107th Congress, First Session, House of Representatives, 31 July 2001, pp H4871-H4881 (text of letters at H4874-H4875).

[86] 19 USC 3802(a)(5)-(7), (9) and (b)(11).

[87] 19 USC 3802(b)(12)(G).

[88] 19 USC 3802(a)(7).

'ensure' high levels of environmental protection. One new development is the inclusion of a clause in the Singapore, CAFTA-DR, Colombia and Peru agreements 'recall[ing] that paragraph 5 of the ILO Declaration states that labor standards should not be used for protectionist trade purposes.' The agreements also all include NAFTA-style private party enforcement rights and establish, in various ways, institutions for future cooperation on environmental and labour matters.

The qualifications concern dispute settlement. First, only the primary obligation not to fail to enforce domestic environmental and labour legislation is subject to dispute settlement; and second, in contrast to the economic provisions of the agreements, which are generally subject to trade retaliation, for violations of the social provisions there is only the possibility of fines (limited in all cases to $15m, adjusted for inflation, collected by suspension of concessions, and spent on labour and environmental matters in the territory of the party in default). Both of these points have attracted the ire of the US Labor Advisory Committee,[89] which compares these agreements unfavourably to the US-Jordan agreement and claims that the agreements fail to meet the negotiating objective of equivalent dispute settlement provisions for all aspects of the agreement.[90] Perhaps these criticisms are a little harsh. Little is gained by the (theoretical) availability of dispute settlement in the US-Jordan agreement for an obligation to 'strive to ensure' high standards of labour and environmental protection; and the dispute settlement objective merely requires negotiators to 'seek' equivalence, not to achieve it. This is not to say that US negotiators have not failed to meet this particular objective; only that such a conclusion depends on evidence other than the final text of the agreement.

Recent events have also pointed to significant changes in US trade policy. In May 2007, both Democrat and Republican parties announced agreement on strengthened social provisions in future regional trade agreements, among other changes.[91] Under the title 'A New Trade Policy for America', the parties announced that future free trade agreements would contain fully enforceable obligations to comply with five basic ILO labour standards[92] as well as certain multilateral environmental agreements,[93] and fully enforceable obligations not to lower of existing labour and

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[89] This is a body established to advise on trade negotiations.

[90] See, eg Labor Advisory Committee for Trade Negotiations and Trade Policy, *Report to the President, the Congress and the United States Trade Representative on the US-Chile and US-Singapore Free Trade Agreements*, 28 February 2003.

[91] The proposal also announces changes on intellectual property, port security, and investment provisions, as well as on US worker assistance legislation.

[92] These are listed as freedom of association, the effective recognition of the right to collective bargaining, elimination of all forms of forced or compulsory labor; effective abolition of child labor and a prohibition on the worst forms of child labor; and elimination of discrimination in respect of employment and occupation.

[93] These are listed as the Convention on International Trade in Endangered Species, the Montreal Protocol on Ozone Depleting Substances, the Convention on Marine Pollution, the Inter-American Tropical Tuna convention, the Ramsar Convention on the Wetlands, the International Convention for the Regulation of Whaling, and the Convention on Conservation of Antarctic Marine Living Resources. Special mention is made of 'an Annex fully requiring Peru to take major specific steps to crack down on illegal logging, and additional action to stop illegal logging of mahogany' and an 'unprecedented' provision permitting the United States to inspect illegal logging within Peru and prevent shipping at the border.

environmental standards.[94] Future agreements would also reduce the parties' discretion to direct resources from the enforcement of labour standards, would permit labour standards conditionality in government procurement, and would provide for the same remedies for these social provisions as for the economic provisions of the agreements. It was reported that this may lead to renegotiations of the agreements with Colombia, Peru, Panama and Korea, which have been signed but not yet ratified by Congress,[95] and in June 2007 the text of the signed US-Peru agreement was released, which reflects these renegotiations.

The changes in the US- Peru agreement are indeed radical. For the first time, social provisions in US regional trade agreements mandate an objective standard of protection. Concerning labour standards, Article 17.2.1 of the US-Peru agreement provides that:

> Each Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights [which are listed], as stated in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998) (ILO Declaration).

Article 18.2, on environmental agreements, provides similarly, that:

> A Party shall adopt, maintain, and implement laws, regulations, and all other measures to fulfill its obligations under the multilateral environmental agreements listed in Annex 18.2 …

On the other hand, footnotes to both of these obligations are immediately limited to trade and investment related measures.[96]

The other change of major importance is that that these obligations are now fully subject to settlement, though the parties must comply with additional preliminary procedures[97] and, in the case of labour standards, 'where the agreement admits of more than one permissible interpretation relevant to an issue in the dispute and the Party complained against relies on one such interpretation, accept that interpretation'[98].

In sum, while it is limited to measures affecting trade and investment, it does now appear that the parties to the US-Peru agreement are now under hard obligations, enforceable in dispute settlement proceedings, to comply with the obligations established in the ILO Declaration and in the relevant list of environmental agreements. This is a significant change in US policy, and may have ramifications beyond the practice of this one country.

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[94] 'Congress and Administration Announce New Trade Policy', Press Release, US House of Representatives, 11 May 2007, http://waysandmeans.house.gov/news.asp?formmode=release&id=512.

[95] 'Specter of FTA Renegotiation Rears Head', english.chosun.com, 13 May 2007, at http://english.chosun.com/w21data/html/news/200704/200704130016.html reports that the US administration has already asked Colombia, Peru and Panama for renegotiations. The Peru negotiations have taken place.

[96] In the case of labour standards, this is also repeated in an apparently tautological Article 17.2.2.

[97] Arts 17.7 and 18.12 US-Peru.

[98] Art 18.12.8(c) US-Peru. This is similar to the language of Art 17.6(ii) second sentence of the WTO Antidumping Agreement, and is widely considered to be an empty phrase.

(d) New Zealand

The post-NAFTA practice of the US has clearly influenced New Zealand,[99] which has negotiated labour and environment side agreements to its agreement with Thailand and its 'Transpacific' agreement' with Singapore, Brunei and Chile. In these side agreements the parties promise that they will 'not seek to gain trade or investment advantage' by weakening or derogating from their labour or environment legislation, and reaffirm (or, in the case of non-Members, affirm) their ILO obligations and commitments. They also promise to 'work actively to ensure' that their legislation is 'in harmony' with 'internationally recognised labour principles and rights' and 'internationally accepted levels of environmental protection such as those established by multilateral environment agreements to which the Participants are party', and 'to promote public awareness of [their] environmental laws, regulations, policies and practices domestically'. Similar to at least some of the US agreements, these also state that each party 'will ensure' (this being notably stronger than the previous terminology of 'work actively to ensure') that its trade and environmental legislation and policies are not used for trade protectionist purposes.

The two sets of agreements differ in one respect; namely that the NZ-Transpacific agreements contain a provision in which the parties promise to respect the 'sovereign right' of each party to 'set, administer and enforce' its own legislation 'according to its priorities'. This provision seems to be drawn from the NAFTA model, which provides that a party does not violate its obligation to enforce its labour and environmental legislation if this represents a *bona fide* decision to allocate resources to other labour or environmental matters respectively.[100] In two key respects however this version is broader: first, it applies to the 'setting' of environmental and labour legislation as well as to its enforcement; and second, the 'priorities' of the party are entirely unqualified. If taken seriously (as the term 'sovereign right' implies it should), this escape clause undermines the other provisions in these agreements.

Institutionally, the NZ-Thailand agreements establish Labour and Environment Committees, with the function of organising cooperative activities, serving as a channel for dialogue, reviewing the agreement and managing disputes, while the NZ-Transpacific agreements leave these functions up to *ad hoc* meetings of respective government officials. On the other hand, in both the Thailand and Transpacific agreements, there is no enforcement of the labour provisions, other than consultations, while in the environment agreements there is a dispute settlement procedure even if a little weak. A dispute may be referred to a meeting of the 'interested Parties' for report, and the affected parties are then under an independent obligation to implement the resulting report.

2. The European model

The approach of the European Union to social issues is rather different, and consists of two main components. On the one hand, it has a highly developed practice of including 'human rights clauses' in its international agreements (including regional

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[99] In 2001 New Zealand adopted frameworks for integrating labour and environment issues into its regional trade agreements. See www.mfat.govt.nz/Trade-and-Economic-Relations/NZ-and-the-WTO/Trade-Issues/.

[100] Art 45(1) NAAEC; Art 49(1) NAALC.

trade agreements) which allow for the suspension of the agreement in the event that one of the parties violates human rights or democratic principles. On the other, it prefers to deal with 'softer' social issues, including labour and environment, by way of cooperation, entailing also where necessary financial and technical assistance.

(a) Human rights clause

Human rights clauses have their origins in the Lomé Conventions of the 1970s and 1980s, but the EU decided in 1995 on a systematic policy of including such clauses in all future international trade agreements, including regional trade agreements.[101] Clauses of this type are now found in the nine regional trade agreements between the EU and its Mediterranean neighbours,[102] in the three 'stabilization and accession' regional trade agreements with countries of the Western Balkans[103] and in the regional trade agreements with South Africa, Mexico and Chile. It is also found in the Cotonou Agreement[104] and is planned to be included in the six Economic Partnership Agreements currently being negotiated to replace the trade provisions of this agreement.[105] It is also included in a large number of non-preferential trade and cooperation agreements.

The human rights clause consists of two main parts. First is an 'essential elements' clause, which states that:

> Respect for the democratic principles and fundamental human rights established by the Universal Declaration of Human Rights shall inspire the domestic and international policies of the Parties and shall constitute an essential element of this Agreement.

This basic provision is given its main operative effect via a 'non-execution' clause, which states that a failure to fulfil an obligation under the agreement, including human rights obligations, entitles the other party, subject to a consultation procedure, to take 'appropriate measures'.

To date, human rights clauses have been applied in cases involving gross human rights violations and military coups, but there is little doubt that they have the potential to cover a range of matters, including any violations of labour or environmental rights that rise to the level of 'human rights'.

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[101] For a full analysis of these clauses see Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford: OUP, 2005).

[102] There are EU 'Euro-Mediterranean' Association Agreements with Israel, Tunisia, Morocco, Jordan, Egypt, Lebanon and Algeria (all in force) and with Syria (initialled), and an 'interim' association agreement with the Palestinian Authority (in force). The political framework is known as the 'Barcelona Process'.

[103] There are EU Stabilisation and Association Agreements (SAAs) with Croatia and the Former Yugoslav Republic of Macedonia (in force) and Albania (awaiting ratification by Albania). SAA negotiations have started with Bosnia-Herzegovina, Montenegro and Serbia (currently interrupted).

[104] The Cotonou Agreement is a framework trade and development agreement between the EU and 79 developing countries, mainly ex-colonies. Its trade provisions establish non-reciprocal free trade into the EU in violation of Article XXIV GATT, and the agreement therefore exists under a WTO waiver until 31 December 2007.

[105] European Commission, *Recommendation for a Council Decision authorising the Commission to negotiate Economic Partnership Agreements with the ACP countries and regions*, SEC (2002) 351, Annex 1.

(b) Cooperation on social issues

As opposed to this standard setting for human rights and democratic principles, the EU's main approach to other social issues, such as environment, labour, culture and occasionally gender[106] is to treat these as matters for cooperation, where appropriate supported by financial and technical assistance.[107] Even in the case of labour, the EU shies away from the standard setting of the countries discussed above, preferring to use the general term 'social matters'. In those cases in which it has conceded to use the term 'fundamental social rights'[108] this is only for the purposes of 'giv[ing] priority' to such rights, though in one case the parties also 'recognise the responsibility to guarantee basic social rights'.[109] It has been suggested that South Africa refused to accept positive commitments on labour standards in this agreement in order to protect its positive discrimination program under its Black Economic Empowerment (BEE) program,[110] but one can imagine, based on the EU's practice, that it was pushing at an open door. Only in the Cotonou Agreement do the parties go as far as incorporating a legally binding standard, when they 'reaffirm their commitment to the internationally recognised core labour standards, as defined by the relevant International Labour Organisation (ILO) Conventions'. The Cotonou Agreement also represents a novelty in the EU's practice by including a statement that 'labour standards should not be used for protectionist trade purposes.'[111]

3. Other countries

For other countries, the case for considering social protection as a relevant topic in regional trade agreements (not including integrationalist 'communities') is yet fully to be made out.

For instance, about half of the EFTA agreements contain a type of human rights clause on the model of the EU agreements,[112] but on more specific social issues the agreements are decidedly reticent, even on the prospect of cooperation: at most, some

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[106] Separate provisions for cooperation on gender are set out in Art 45 EU-Chile; Art 31 Cotonou.

[107] In principle, cooperation in these areas is administered jointly by the Joint Councils established under the agreements; in practice, it is treated as part of the EU's development cooperation program.

[108] Art 74 EU-Algeria; Art 82(1) EU-Jordan; Art 110(1) EU-Syria; Art 44(1) EU-Chile (with a further promise to 'promote' relevant ILO Conventions).

[109] Art 86(2) EU-SA TDCA. This provision also lists the core labour standards of the ILO.

[110] Paul Kruger, 'Labour provisions and commitments in the TDCA and Cotonou Agreement', Tralac, 17 October 2006, available at http://epa.tralac.org/scripts/content.php?id=5395. For potential conflicts between BEE objectives and non-discrimination provisions in WTO law (relevant to the equivalent provisions in the EU-South Africa TDCA) see Jon Mortensen, 'WTO vs BEE: Why Trade Liberalisation May Block Black South Africans' Access to Wealth, Prosperity or Just a White-Collar Job', Danish Institute for International Studies Working Paper No 2006/30. I am grateful to Paul Kruger for providing me with this reference.

[111] Art 50(1) and (3) Cotonou.

[112] Art 1.2 of EFTA-Jordan, EFTA-Morocco, EFTA-Palestinian Authority, and EFTA-Macedonia. Two other agreements permit 'rebalancing measures' in the event of a failure to fulfill an obligation (See Arts 1.2, 28 EFTA-Croatia and Arts 1.2 and 33 EFTA-Lebanon). The preamble to the EFTA-Tunisia agreement refers to 'the observance of human rights and political and economic freedom, which form the very basis for co-operation between the EFTA States and Tunisia'. The EFTA agreements with Turkey, Israel, Mexico, Singapore, Chile, Singapore and SACU have no operative human rights provisions.

agreements allow that '[c]onservation of the environment shall be taken into account in the implementation of assistance [in the context of economic cooperation]'.[113] Japan has a stuttering practice of including provisions on cooperation,[114] in the areas of environmental conservation and the promotion of sustainable development,[115] though not on the more sensitive issue of labour standards. Another interesting development is the conclusion of two labour and environment side agreements to the Chile-China regional trade agreement,[116] of which at the time of writing only the first is publicly available.[117] This instrument does not purport to set standards, but provides for 'mutually agreed co-operation activities' consisting of research and information exchange. For these countries, then, standard setting is so far unattractive, and cooperation only partially less so.

Finally, one should mention the increase in preambular references to principles of sustainable development, ILO labour standards and human rights in agreements which otherwise contain no binding obligations on these matters. Though unwilling to replicate NAFTA-type binding standards in its later agreements, Mexico has included that agreement's preambular statements on social issues in a number of its later agreements with Latin American countries.[118] Other countries with exposure to such statements have also incorporated them into own treaty practice. Thus, references to social protection are found in the preambles to the Chile-Costa Rica, Chile-Korea and Caricom-Costa Rica agreements. Similarly, the EU's insistence on a human rights dimension has influenced the preambles of agreements concluded by the Balkan countries. Whether these preambular references presage operative provisions in future agreements by these countries is difficult to say.

III. Prospects for social issues in future regional trade agreements

The relationship between trade and social issues has become both more obvious and more sensitive over the past decade, and it is a signal failure of WTO Members to have failed to grapple with those areas in which these objectives are in conflict. It is therefore to be welcomed that this inevitable discussion is being taken up in negotiations at the regional level, where parties with an interest in the matter are more able to experiment with different forms of regulation.

As the foregoing has shown, at present some countries are committed to negotiating a link between trade and social protection, some are feeling their way, and still others have doubts about any link. As the 2007 amendments to the US-Peru agreement have demonstrated, the US will continue to press for social protections in its future regional trade agreements, and it seems highly likely that these will be very much strengthened. Canada is likely similarly to continue its similar policies, with the

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[113] Art 31(2) EFTA-SACU.

[114] Art 41(b)) Japan-Malaysia Implementing Agreement. Japan-Singapore (2002) did not have this; nor does Japan-Philippines in (2006).

[115] Art 41(a) Japan-Malaysia Implementing Agreement; Art 147(1) Japan-Mexico; Art 35(a)(2) Japan-Philippines Implementing Agreement.

[116] Art 108 Chile-China.

[117] China-Chile Memorandum of Understanding on Labor and Social Security Cooperation, available at www.direcon.cl/documentos/China2/memorando_entendimiento_laboral_china_en.pdf.

[118] See Mexico's agreements with Costa Rica and Bolivia, Colombia and Venezuela, Nicaragua, Chile, and with El Salvador, Guatemala and Honduras. Mexico does not however mention human rights in its agreements with Israel, Uruguay or Japan.

addition of its 'cultural exception', the EU is committed to its policies of human rights conditionality and (mainly funded) cooperation on other social issues, New Zealand is testing forms of regulation for labour and environmental standards with various countries, and Japan has indicated a willingness to include provisions on environmental cooperation in its agreements.

The picture is far from uniform, even among developed countries. Australia remains opposed to any link between trade and social protection (despite the existence of such provisions in its agreement with the US), the EFTA countries are ambivalent, allowing at times for a human rights clause but otherwise placing no great emphasis on social issues even as a matter for cooperation, and it is difficult to gauge the independent enthusiasm of those countries who have entered into social provisions with these pioneering countries.

Nonetheless, the trend seems to favour a gradual acceptance of the role of social issues in regional trade agreements. Thanks partly to the social justice movement, the public in many countries are becoming more educated and vocal about their concerns about trade and social protection, and beginning to demand that these links be recognized in new regional trade agreements. In addition, the idea that the links are valid seems to be gaining its own dynamic. As the foregoing has shown, a number of agreements include preambular references to social issues in regional trade agreements, even in the absence of any follow-up normative provisions, and this may well lead to operative provisions at a later stage.[119] More generally, this trend fits with broader changes in international relations. All of the new supranational 'communities' cover social issues, a development no doubt related to the increasing willingness of countries to use international law as a means of regulating matters previously left to domestic discretion.[120]

One may also hazard a prediction as to the design of future provisions linking trade and social protection. The safeguarding of individual rights to regulate is at present a haphazard affair, and the implications of conflicts clauses privileging other agreements between the parties have yet to be fully worked out, especially in the WTO context. But those provisions seeking to regulate social protection by the parties to a regional trade agreement may to some extent be categorised. One category of provisions (for example, in NAFTA) establishes standards with no link to the effect of failing to meet these standards on trade and investment. Another establishes standards, but to limits the obligation to comply with these standards to situations when not to do so would affect trade and investment. At present, it is this second type of provision that is proving to be more popular.[121] A third is the corollary of the second, comprising a commitment (in line with the WTO Singapore Ministerial Declaration and ILO Declaration on core labour standards) against *increasing* social protections as a means of protecting their domestic industries.

While it is impossible to predict precisely how future regional trade agreements will attempt to manage the various links between social protection and trade liberalization,

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[119] The EU's human rights clause evolved in this way from Lomé III (1985) to IVbis (1995).

[120] This phenomenon is sometimes referred to as the 'Europeanization' of international law. See eg Joost Pauwelyn, 'Europe, American and the "Unity" of International Law', 2 September 2005.

[121] This type of provision is itself a compromise, because if the 'race-to-the-bottom' theory is valid, a reduction in social protection can have the *effect* of increasing trade and investment, even if this is not its purpose.

it can at least be said that this will continue to occur, and it will consist of some mix of clauses protecting rights to regulate, clauses setting mutual standards and prohibitions on backsliding on standards, with a variety of enforcement options, and provisions on future cooperation. However these provisions come to look in detail, it must be considered a positive development that so many countries are increasingly focusing on the different (and not always 'mutually supportive') ways in which trade and social protection relate to each other. It is certainly an improvement on the stalemate presently gripping the multilateral stage.