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BOOK REVIEW

Raj Bhala *et al.*, *Scrutinizing RTAs: A Comparative Review of David Gantz, Regional Trade Agreements: Law, Policy and Practice (Durham: Carolina Academic Press, 2009)*

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MAKING A CASE FOR THE IMPOSITION OF UNILATERAL TRADE SANCTIONS TO PROTECT LABOUR AND BASIC HUMAN RIGHTS

ADITYA SWARUP*

While liberalization and free trade play an important role in trade law, related concerns for labour and human rights cannot be ignored. These concerns have given rise to the modern concept of the “social clause”, a provision in trade agreements allowing sanctions to curb labour exploitation. The WTO, however, via the Singapore Ministerial Declaration, has taken the stance that concerns for labour rights fall outside the domain of its regulation and are not to be used for protectionist purposes. In this manner, strict sanction has been given under the WTO regime to principles of international trade law such as Most Favored Nation status and National Treatment. Barring a few exceptional circumstances, these principles bar nations from imposing unilateral trade sanctions that target a particular nation.

This note makes a case for unilateral trade sanctions imposed with an aim to protect labour and basic human rights. While agreements such as the North American Agreement on Labor Cooperation under the NAFTA have failed to act as an enforceable social clause, a strong case for practicable incorporation of labour and human standards can be made under Article XX of GATT. Article XX of GATT, if interpreted as a social clause allowing for countermeasures in defence of erga omnes obligations, acts as a “backdoor” for the entry of human and labour standards in the WTO trade regime. An appraisal of measures allowed under Article XX suggests that if unilateral trade sanctions are absolutely necessary to curb violations of labour rights, such sanctions can be justified under the WTO regime.

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I. INTRODUCTION

In an era of the World Trade Organization (WTO) and free trade agreements (FTAs), we have been witnessing intensive trade liberalization between states, prompting advocates of human rights to explore possible links between human rights, labour standards and trade. While most states have called for a separation of labour standards from trade treaties, many scholars have argued for the linkage of labour rights to trade within the context of international trade law.¹ The United Nations (UN) has called for the WTO to shift to a human rights based approach in international trade, the idea being that the “primacy to human rights law over all other regimes of international law is a basic and fundamental principle that should not be departed from.”²

We are at a stage when trade law is symbolized by practices of non-discrimination, national and most-favoured-nation (MFN) treatment. Also, a peculiarity of global trade today is that concerns for labour standards seem to be

¹ Padideh Ala'i, *A Human Rights Critique of the WTO: Some Preliminary Observations*, 33 GEO. WASH. INT'L L. REV. 537 (2001); Tatjana Eres, *The Limits of GATT Article XX: A Back Door for Human Rights*, 35 GEO. J. INT'L L. 597 (2003-2004) (Hereinafter Eres); Adele Blackett, *Whither Social Clause: Human Rights, Trade Theory and Treaty Interpretation*, 31 COLUM. HUM. RTS. L. REV. 1 (1999-2000) (hereinafter Blackett).

² J. Oloka-Onyango & Deepika Udagama, *The Realisation of Economic, Social and Cultural Rights: Globalisation and its Impact on the Full Enjoyment of Human Rights*, U.N. ESCOR, 52d Sess., U.N. Doc. E/CN.4/Sub.2/2000/13 (2000). See also Eres, *Id.*

non-existent in trade treaties. In fact, the WTO has itself stated that labour standards must be kept separate from trade and should be specifically addressed through the International Labour Organization (ILO).³ With no specific provision in trade treaties to promote labour standards, a question that arises is whether existing treaties can be interpreted in a manner so as to incorporate and promote these standards? This can occur only if a link between trade and labour standards can be found in the *corpus* of international law.

This note shall endeavour to present and further explain this link between trade, labour and human rights. It specifically focuses on the issue of the imposition of unilateral trade-sanctions with an aim to protect trade, labour and basic human rights; and the justifiability of such sanctions in the context of the North Atlantic Free Trade Agreement (NAFTA)⁴ and the General Agreement on Tariffs and Trade (GATT).⁵ In doing so, and in order for the reader to better visualize the author's ideas, the note seeks to address the following factual situation:

Suppose the United States of America finds conclusive evidence to show that certain clothes imported from Mexico are manufactured by children in Mexico so as to lower the cost of production of the product, would it be justified for the US government to impose duties and trade sanctions in an effort to force Mexico to address the situation of child labour?

Contra

Assuming there is conclusive evidence to show that the cotton used in the clothes imported from Mexico is spun by children in Bangladesh so as to lower the cost of production of the product, would it be justified for the US Government to impose duties and sanction against Mexico so as to force it not to buy such cotton from Bangladesh?

It is the purpose of the following discourse to present a legal argument justifying such an action by a government by examining the NAFTA, GATT and other principles of international law. Against this backdrop, Part II presents an understanding of the link between trade and labour standards in light of the concept of the "social clause", while Part III examines the NAFTA and Labour

³ World Trade Organization: Singapore Ministerial Declaration, Dec. 13, 1996, 36 I.L.M. 218 (1997) (hereinafter Singapore Ministerial Declaration).

⁴ North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States, and the Government of the United States of America, December 17, 1992, 32 I.L.M. 289 (hereinafter NAFTA).

⁵ General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Results of the Uruguay round, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) (hereinafter GATT).

Side Accords to see whether these agreements can assist in addressing the above factual situation. Part IV suggests that the answer may lie in Article XX of GATT and explores this idea further. In all, this work seeks to justify unilateral trade measures imposed by a government to protect labour standards and basic human rights linked to international trade.

II. A SOCIAL CLAUSE: UNDERSTANDING THE LINK BETWEEN TRADE AND LABOUR RIGHTS

A. *Trade and Labour Rights: Inherently Linked*

It is imperative to understand the link between trade and labour standards in order to appreciate the arguments presented in this work. There have been divergent views on the issue;⁶ the starting point of any discussion, however, is the Havana Charter.⁷ When the Havana Charter was drafted back in 1950, Article 7 of the Charter contained a provision recognizing that all countries have a common interest in the maintenance of fair labour standards related to productivity and that unfair labour conditions would create difficulties in international trade. The Havana Charter, framed at a time when the Universal Declaration of Human Rights (UDHR)⁸ was gaining prominence, first expressed the relation between trade and labour rights in an explicit manner.⁹ When the GATT 1947,¹⁰ later came into force, it did not contain an explicit clause (as was present in the Havana Charter) reaffirming the commitment to labour rights whilst promoting and regulating free trade. The same position continues with the formation of the World Trade Organization.¹¹

⁶ While many scholars argue for the linkage between trade and labour rights, others contend that no direct link exists between the two within the framework of the WTO. *See generally* Eres, *supra* note 1.

⁷ Final Act and Related Documents, Mar. 24, 1948, United Nations Conference on Trade and Development, UN Doc. ICITO/1/4 and E/Conf.2/78 (hereinafter Havana Charter). The Havana Charter never entered into force due to the failure of the United States to ratify. *See* JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 38 (2002).

⁸ Universal Declaration on Human Rights, Dec. 10, 1948, GA Res. 217A (III), at 71, UN Doc. A/810 (Dec. 12, 1988) (hereinafter UDHR).

⁹ Salman Bal, *International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT*, 10 MINN. J. GLOBAL TRADE 62 (2001) (hereinafter Bal).

¹⁰ General Agreement on Tariffs and Trade, October 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194. *See generally* Bal, *Id.*

¹¹ Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1144 (1995). (hereinafter WTO Agreement).

However, it seems fairly obvious that unfair labour standards, including minimum wage violations, make it cheaper for the manufacturer to produce his product and thereby reduce the overall cost of production. Thus, a violation of labour laws and rights can aid in reducing the cost of production, a phenomenon seen more often in developing countries. As a result, when these products are exported to developed countries where these rights are respected, they create an unfair atmosphere of competition and affect that particular industry of the developed state.¹² When this argument was presented at the Singapore Ministerial Conference¹³ of the WTO, the organization declared its commitment to “internationally recognized core labour standards”, but at the same time rejected the “use of such labour standards for protectionist purposes”.¹⁴ This was in conformity with the stand of the majority of developing countries, who had expressed their concern that the United States and other developed countries would make use of such provisions for protectionist purposes and impose unfair sanctions on them. They felt that better working conditions and improved labour rights arose through economic growth and the WTO need not link the two. It was proposed that the ILO was a more competent body to deal with such labour violations and trade law should be kept out of it.¹⁵

In time, the ILO adopted the Declaration of Fundamental Principles and Rights at Work¹⁶ which recognized trade related human rights and labour standards and called for the elimination of all forms of forced and compulsory labour, abolition of child labour, the implementation of the freedom of association and collective bargaining and the elimination of discrimination in matters related to employment. However, while this link was acknowledged, another crucial point of debate became whether the aegis of trade law could be used for the enforcement of these labour standards and rights.

¹² Some authors characterize this as a “protectionist approach” of developed countries with an aim to ensure the security of their economy while at the same time reducing the comparative advantages of developing economies. See Erika De Wet, *Labour Standards in a Globalised Economy: The inclusion of a Social Clause in the General Agreement on Tariff and Trade/World Trade Organization*, 17 HUM. RTS. Q. 443 (1995) (hereinafter Erika De Wet).

¹³ Singapore Ministerial Declaration, *supra* note 3.

¹⁴ See Lejo Sibbel & Petra Borrmann, *Linking Trade with Labour Rights: The ILO Better Factories Cambodia Project*, 24 ARIZ. J. INT'L & COMP. L. 235 (2007) (hereinafter Sibbel & Borrmann).

¹⁵ See Virginia Leary, *The WTO and the Social Clause: Post Singapore*, 8(1) EURO. J. INT'L L. 118 (1997), available at: <http://207.57.19.226/journal/Vol8/No1/art7.html> (last visited Jul. 22, 2009)

¹⁶ International Labour Organization (ILO), *Declaration on Fundamental Principles and Rights at Work and Annex*, Jun. 18, 1988, 37 I.L.M. 1233 (1998). See generally Sibbel & Borrmann, *supra* note 14.

B. *What is a Social Clause?*

Simply put, a “social clause” is a provision in a trade agreement aimed at removing extreme forms of labour exploitation in exporting countries. This is done by allowing the importing countries to take trade measures against exporting countries which fail to observe a set of internationally agreed minimum labour standards.¹⁷ Adele Blackett explains lucidly that:

A social clause may be defined narrowly as one or more provisions within the WTO agreement that would explicitly enable the parties to the agreement to enforce violations of certain worker’s fundamental human rights through the WTO’s dispute settlement mechanisms. This term can also encompass attempts to read a clause into existing trade agreements.¹⁸

Read in this sense, while principles such as non-discrimination,¹⁹ national treatment²⁰ and MFN clauses incorporated in the GATT restrict the ability of a state to impose trade sanctions and unilateral trade measures, a “social clause” may be used as a justification for the imposition of such measures when the link between the labour standard and the product is established.²¹

The social clause may be used in two broad situations: First, where the members use trade measures in order to enforce human rights and labour standards²² that are generally violated by another state that may or may not be necessary or have a direct nexus to trade. The second is more specific in nature and requires the establishment of a nexus and that the trade measure at issue was

¹⁷ HOE LIM, THE SOCIAL CLAUSE: ISSUES AND CHALLENGES 3.1 (2001), *available at*: <http://actrav.itcilo.org/actrav-english/telearn/global/ilo/guide/hoelim.htm> (last visited Jul. 22, 2009).

¹⁸ See Blackett, *supra* note 1.

¹⁹ See GATT *supra* note 5, at arts. I and II.

²⁰ *Id.* at art. III.

²¹ See Eres, *supra* note 1. Eres argues that by the inclusion of these Articles in the GATT the members contracted away the right to impose unilateral trade-restrictive measures. This argument is further discussed in Part IV.

²² The terms “human rights” and “labour standards” are used together because the ILO has drafted a series of Conventions and classified important labour rights as “basic human rights”. These include: Convention Concerning the Minimum Wage for Admission to Employment, Jun. 26, 1973, 1015 U.N.T.S. 297; Convention Concerning Discrimination in Respect of Employment and Occupation, Jun. 25, 1958, 362 U.N.T.S. 31; Convention Concerning the Abolition of Forced Labour, Jun. 25, 1957, 320 U.N.T.S. 291; Convention Concerning the Application of the Principles of the Right to Organize and Bargain Collectively, Jul. 1, 1949, 96 U.N.T.S. 257. See generally Bal, *supra* note 9.

necessary to protect such rights and standards.²³ Closely linked to the latter issue is the notion of “social dumping”. Article VI of the GATT defines “dumping” as a situation in which products of one country are introduced in the economy of another at less than the normal value of the products.²⁴ In most developing countries, the conditions of production are responsible for the lowering of the cost of production.²⁵ The idea of “social dumping” is one where countries make use of unacceptable labour practices in order to lower the price of production.²⁶

If these practices go unchecked, developed countries would be forced to cut labour costs and reduce the number of employees to stay in competition. This phenomenon is described as a “race to the bottom”.²⁷ The very essential ideals of free and fair trade would be undermined in such a situation.²⁸ The aim of international labour standards should be to prevent and redress these practices that include child labour, prison labour, forced labour, unsafe and unhealthy conditions of work, unfair wages and discriminatory practices.²⁹ Thus, in order to promote free and fair trade, it is essential that international labour standards be enforced through trade agreements and trade measures.³⁰

III. NAFTA AND THE LABOUR SIDE ACCORDS

A. Background to the Agreement

When the United States and Canada signed the Canada – United States Free Trade Agreement³¹ (CUSFTA), scholars argued that amongst other negative effects, it would lead to wage cuts, job losses, the erosion of labour standards and

²³ This is especially true of Article XX of the GATT. See Eres, *supra* note 1.

²⁴ See GATT, *supra* note 5, at art.VI.

²⁵ See Erika De Wet, *supra* note 12.

²⁶ *Id.* See also Blackett, *supra* note 1.

²⁷ George Sogas, *Labour Standards in International Trade Agreements: An Assessment of the Arguments*, 10 INT. J. OF HUM. RESOURCE MANAG. 351 (1999) (hereinafter Sogas); Stephen S. Golub, *Are International Labour Standards needed to Prevent Social Dumping?*, FINANCE & DEVELOPMENT 20 (1997) available at: <http://www.imf.org/external/pubs/ft/fandd/1997/12/pdf/golub.pdf> (hereinafter Golub).

²⁸ Steve Suranovic, *International Labour and Environmental Standards Agreements: Is This Fair Trade?* 25 THE WORLD ECONOMY 231 (2002).

²⁹ *Supra* note 24. See also Thomas R. Donahue, *Worker's Rights in a Global Village: Observations of an American Trade Unionist in INTERNATIONAL LABOUR STANDARDS AND ECONOMIC INDEPENDENCE* 198 (W. Sengenberger & D. Campbell eds., 1994).

³⁰ See Sogas, *supra* note 27.

³¹ Free Trade Agreement between the Government of Canada and the Government of the United States of America, Jan. 2, 1988, 3 Can. T. S. (1989).

the harmonization of labour laws to the lowest common denominator.³² In this sense, a “race to the bottom” was foreseen. These concerns spiraled when Mexico was made a party and the NAFTA came into force.³³ It was felt that increased trade liberalization would “expose the Canadian economy to competition from low wage workers in Mexico and southern United States.”³⁴ The need of the hour was to have comprehensive measures to address such concerns amongst the state parties.

The NAFTA text itself, save for the Preamble, does not address labour concerns. Such exclusion is ironic because the United States was one of the nations that vehemently argued for the inclusion of labour standards in trade agreements fearing competition from developing countries.³⁵ Nevertheless, *via* the Preamble the NAFTA parties do resolve to protect, enhance and enforce basic workers’ rights.³⁶ No illustration is offered, however, of any of these “basic worker’s rights”, with the ILO Conventions seen as offering some help in this regard.

When the Clinton administration came to power in the US, concerns for labour standards escalated, but it was considered to be too late to address labour standards within the NAFTA itself.³⁷ The result was a side-agreement on labour called the North Atlantic Agreement on Labour Conditions (NAALC)³⁸ wherein state parties purported to bind themselves to certain minimum standards of labour. The NAALC required the state parties to protect and promote eleven core principles recognized in the agreement.³⁹ These include the freedom of association, right to organize, free collective bargaining, prohibitions on child labour, and the right to safe and healthy work environments.⁴⁰

³² Roy Adams and Jerry White, *Labor and the Canada – US Free Trade Agreement*, 17(1) ILR REPORT, 15(1989), at 15.

³³ See Parbudyal Singh, *NAFTA and Labour: A Canadian Perspective*, 23(3) J. LABOR RES. 433 (hereinafter Singh).

³⁴ *Id.* at 434.

³⁵ Terry Collingsworth, *An Enforceable Social Clause*, 3(28) FOREIGN POLICY IN FOCUS 1 (Oct. 1998), available at: www.fpif.org/pdf/vol3/28ifsoc.pdf (last visited Jul. 22, 2009).

³⁶ Preamble, NAFTA, *supra* note 4.

³⁷ Elizabeth B. Chilcoat, *Pinkie Promises of Blood Oaths: Using Social Clauses in Free Trade Agreements to Eradicate Child Labour*, 7 WASH. U. GLOBAL STUD. L. REV. 307 (2008) (hereinafter Chilcoat).

³⁸ North American Agreement on Labor Cooperation, Sept. 13, 1993, 32 I.L.M. 1499 (1993) (hereinafter NAALC).

³⁹ Singh, *supra* note 33, at 433. See also Roy Adams and Parbudyal Singh, *Early Experience with NAFTA’s Labour Side Agreement*, 19 COMP. LABOR L. AND POL’Y J. 161, (1997).

⁴⁰ NAALC, *supra* note 38, at art.11.

As a result of the NAALC, National Administrative Offices (NAOs) were set up⁴¹ in each member country and any individual or aggrieved party could bring a complaint for the violation of labour standards within NAFTA member countries. If the complaint appeared to demonstrate that the country in question was not enforcing its labour laws as per the commitments in the NAALC,⁴² then ministerial consultations could be recommended.⁴³ The results of ministerial consultations had no binding force and arbitral panels giving binding decisions could only be constituted when the complaint related to occupational safety and health, child labour or minimum wage standards.⁴⁴

B. The NAALC has Failed to act as an Enforceable Social Clause

In as much as the NAALC may be seen as an effort to promote and enforce labour standards amongst the members of NAFTA, it has failed to act as an enforceable social clause. This can be substantiated on two separate grounds: one legal and the other supported by practical application of the facts.

The idea of a social clause is one that explicitly enables a party to undertake measures to make another party enforce and comply with its labour laws and standards.⁴⁵ This measure taken by the importing country then has a sort of extra-territorial application with the result of achieving public and economic good within its own and other jurisdictions. Unfortunately, with the NAALC, the contracting parties explicitly ruled out such measures by the inclusion of Article 43 and only providing for consultation in such matters. Article 43 of the NAALC states that:⁴⁶ “Nothing in this Agreement shall be construed to empower a Party’s authorities to undertake labour enforcement activities in the territory of another Party.” Thus, a State may not impose a unilateral trade measure against another in order to enforce any human rights or labour standards in the other State’s territory. Moreover, a binding decision on the consultation and ensuing dispute resolution can only be achieved if the matter concerns occupational safety and health, child labour and minimum wage technical labour standards.⁴⁷ This then creates a loophole in the

⁴¹ *Id.* at arts.15 & 16.

⁴² Singh, *supra* note 33, at 433. *See also* A. L. C. de Mestral, *The Significance of the Labour Side Agreements on Environmental and Labour Cooperation*, 15 ARIZ. J. OF INT’L AND COMP. L. 169 (1998).

⁴³ NAALC, *supra* note 38, at art.22.

⁴⁴ *Id.* at art.29(1).

⁴⁵ For more discussion on the issue, *see supra* notes 14 – 17.

⁴⁶ NAALC, *supra* note 38, at art.43.

⁴⁷ NAALC, *supra* note 38, at art.29. *See also* Singh, *supra* note 33, at 433.

enforcement of the other core labour standards mentioned in the NAALC⁴⁸ and gives freedom to the party in matters of implementation of these standards.

Even if the NAALC may seem like a strong commitment towards labour rights, in its application it has failed to enforce labour standards.⁴⁹ Even after 15 years of the NAFTA being in force, Parties still have to deal with various labour rights violations and non-implementation of core labour and basic human rights.⁵⁰ As one author puts it, the “fatal flaw” in the labor accord is that there is “no legal bridge from the side agreement to the main agreement” and recommends that it be renegotiated so that trade sanctions can be applied to ensure that “core labor rights”, are not violated.⁵¹ Even though the NAALC recognizes its commitment to the fundamental rights of workers, important rights such as the right to collective bargaining and freedom of association cannot be enforced and hence there is no effective remedy for those workers whose rights are violated.⁵²

A textbook instance of how the NAALC has failed to enforce labour standards and protect the rights of workers is the wide spread prevalence of child labour in Mexico. Though the NAALC explicitly vows not to tolerate child labour and may even authorize the imposition of binding trade sanction to control it,⁵³ it has not been able to curb and check this widespread violation.⁵⁴ According to the UN Children’s Fund (UNICEF), sixteen percent of children between the ages of five and fourteen years in Mexico were engaged in child labor between 1999 and

⁴⁸ NAALC, *supra* note 38, at art.11.

⁴⁹ See Laura Okin Pomeroy, *The Labor Side Agreement Under the NAFTA: Analysis of Its Failure to Include Strong Enforcement Provisions and Recommendations for Future Labor Agreements Negotiated with Developing Countries*, 29 GEO. WASH. J. INT’L L. & ECO. 769 (1996) (hereinafter Pomeroy).

⁵⁰ Joel Solomon, *Trading Away Rights: the Unfulfilled Promise of NAFTA’s Labor Side Agreement*, 13(2) HRW REPORT iv (Apr. 2001), available at: www.hrw.org/legacy/reports/2001/nafta/ (last visited Jul. 22, 2009).

⁵¹ JEROME LEVINSON, NAFTA’S LABOR SIDE AGREEMENT: LESSONS FROM THE FIRST THREE YEARS 11 (Institute for Policy Studies and the International Labor Rights Fund, 1996). See also Peter Zernite, *NAFTA Flaw Leaves Workers Without Rights*, ALBION MONITOR (Dec. 3, 1996) available at: www.albionmonitor.net/9612a/ss-naftafail.html (last visited Jul. 22, 2009)

⁵² See Pomeroy, *supra* note 49. See also Morton Bahr, President, Communication Workers of America, comments reproduced in Commission for Labor Cooperation, *Review of the North American Agreement on Labor Cooperation*, (March 1999), available at: http://new.naalc.org/publications/press_release/nafta_labor_agreement.htm (last visited Jul. 22, 2009).

⁵³ NAALC, *supra* note 38, at art.29. See also Singh, *supra* note 33, at 433.

⁵⁴ Joshua Briones, *Paying the Price for NAFTA: NAFTA’s Effect on Women and Children Laborers in Mexico*, 9 U.C.L.A. WOMEN’S L.J. 301 (1999) (hereinafter Briones).

2005.⁵⁵ Author Elizabeth Chilcoat says that the principles binding state parties to the NAALC are easily erodible and criticizes it for low enforcement standards, especially with regard to eradicating child labour.⁵⁶ She argues that this is mainly because of the fact that NAALC protections are limited almost exclusively to unionized workers and the children are for the most not part of such unions.⁵⁷

The above factors clearly indicate that the NAALC lacks the teeth to effectively enforce labour rights and trade-related human rights. With the provisions of the NAALC not being able to justify unilateral trade sanctions to protect extra territorial rights, other international instruments like the GATT must be examined to effectively address the factual situations posed at the start of this work.

IV. THE GATT AS A BACKDOOR TO ENFORCEMENT OF LABOUR STANDARDS AND BASIC HUMAN RIGHTS

The fundamental issue, as previously discussed, is whether an importing country can impose unilateral trade sanctions in an effort to make the exporting country comply with labour standards and basic human rights. It is clear that there exists an unequivocal link between trade and human rights, and the emergence of the “social clause” concept facilitates the justification of such measures. For various reasons, both legal and practical, agreements such as the NAALC have failed to act as enforceable social clauses. It becomes necessary then to look at the possibility of incorporating the “social clause” concept into GATT and examine underlying principles of international law which may be used in order to justify such unilateral actions.

A. Countermeasures, Jus Cogens Norms and Erga Omnes Obligations

The justifications of unilateral trade measures stem from the theory of a countermeasure in defence of obligations *erga omnes*. Very simply put, in the *Barcelona Traction* case,⁵⁸ the International Court of Justice held that there are two types of obligations: one that one state owes to another and a second type that a state owes towards the international community as a whole.⁵⁹ Obligations of the

⁵⁵ United Nations Childrens Fund (UNICEF), *At a Glance: Mexico*, available at: www.unicef.org/infobycountry/mexico_statistics.html#30 (last visited Jul. 22, 2009).

⁵⁶ See Chilcoat, *supra* note 37.

⁵⁷ *Id.* See also Briones *supra* note 54.

⁵⁸ *Barcelona Traction, Light and Power Company, Ltd.* (Belgium v. Spain), ICJ Rep. 4 (1970), (hereinafter *Barcelona Traction*).

⁵⁹ See Claudia Annaker, *The Legal Regime of Erga Omnes Obligations in International Law*, 46 AUSTRIAN J. OF PUBL. INT'L L. 131 (1994); Michale Byers, *Conceptualising the Relationship*

second type are referenced as *erga omnes* obligations and any interested state may take action and seek a remedy without having express jurisdiction to do so. The ILO, in its Constitution, does recognize the obligations of all state parties to commit and enforce the rights elucidated in its Conventions.⁶⁰ Further, under Article 26 of the ILO Convention⁶¹ any member, whether affected by the labour rights violation or not, may file a complaint with the ILO office thus showing semblances of an *erga omnes* obligation.⁶² Most of these obligations emanate from customary international law and some have even attained the status of peremptory norms of international law.

Since the passing of the Philadelphia Declaration⁶³ and the setting up of the ILO, important labour rights such as those against child labour⁶⁴ and forced labour⁶⁵ have attained the status of *jus cogens* under international law.⁶⁶ The classification of such norms as *erga omnes* obligations⁶⁷ too, gives any State, whether affected by such violation or not, the right to seek remedy of such violation.

Under the customary international law doctrine of countermeasures, states may take otherwise unlawful action in response to prior unlawful action and justify

between Jus Cogens and Erga Omnes Rules, 66 NORDIC J. OF INT'L L. 211 (1997) (hereinafter Byers).

⁶⁰ Preamble, Constitution of the International Labour Organization, Jun. 28, 1919, 15 U.N.T.S. 35 (1919).

⁶¹ *Id.* at art.28.

⁶² CHRISTIAN. J. TAMS, ENFORCING ERGA OMNES OBLIGATIONS IN INTERNATIONAL LAW 72 (1d. ed., 2005). *See also Portugal/Libya Complaint*, 46 ILO Bulletin, No. 2, Supp. II (1962).

⁶³ International Labour Organization [ILO], Declaration Concerning Aims and Purposes of the International Labour Organization, Philadelphia, May 10, 1944, 15 U.N.T.S. 40 (1944).

⁶⁴ ILO Convention 182, Concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labour, Jun. 17, 1999, 38 I.L.M. 1207 (1999); UN Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (1989).

⁶⁵ ILO Convention 105, Abolition of Forced Labour, Jun. 25, 1957, 320 U.N.T.S. 291 (1957); ILO Convention 29, Forced Labour, Jun. 28, 1930, 39 U.N.T.S. 291 (1930).

⁶⁶ *See, for example*, the argument comparing child labour, in its strict-sense, with slavery, and thus making the prohibition not only a part of customary law, but a peremptory norm of *jus cogens*. Lenzerini, *International Trade and Child Labour Standards in ENVIRONMENT, HUMAN RIGHTS AND INTERNATIONAL TRADE* 285 (F. Francioni ed., 2001) at 308. *See also* Philip Alston, 'Core Labour Standards' and the Transformation of the International Labour Rights Regime in SOCIAL ISSUES, GLOBALISATION AND INTERNATIONAL INSTITUTIONS 49 (Virginia Leary & Daniel Warner eds., 2006).

⁶⁷ *See* Byers, *supra* note 59.

the same as long as such action is necessary to remedy the situation.⁶⁸ Thus, if there is an international law violation by one State, the other State may take actions in the nature of counter measures against the former to remedy the same. This principle was recognized by the International Court of Justice in the *Gabcikovo – Nagymaros*⁶⁹ case and has also been held valid in several arbitral decisions.⁷⁰ What is interesting to note is that when it comes to trade sanctions in justification of *erga omnes* obligations to protect the environment, such sanctions have been upheld even though they may be wrongful acts.⁷¹

B. Understanding GATT Article XX

An explanation of the doctrine of countermeasures and *erga omnes* obligations is vital in order to understand the notion that GATT Article XX may be a codification of the doctrine. Article XX of the GATT,⁷² titled “General

⁶⁸ Draft Articles on Responsibility of States for Internationally Wrongful Acts, published in the Report of the International Law Commission, Fifty-Third Session, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (adopted November 6, 2001), at art.51.

⁶⁹ *Case Concerning the Gabcikovo – Nagymaros Project* (Hungary v. Slovakia), ICJ Rep., 7 (1997).

⁷⁰ *Case Relating to the Responsibility of Germany for damage caused in the Portuguese Colonies in the South of Africa* (Naulilaa), 2 UNRIAA 1011 (1928); *Case Relating to the Responsibility of Germany for Acts Committed Subsequent to 31 July, 1914 and Before Portugal Entered into the War* (Cysne), 2 UNRIAA 1035 (1930); *Case Related to the Air Services Agreement of 27 March 1946* (United States v. France), 18 UNRIAA 416 (1979).

⁷¹ See Mary Ellen O'Connell, *Using Trade to Enforce International Environmental Law: Implications for United States Law*, 1 IND. J. GLOBAL L. STUD. 273 (1994) (hereinafter O'Connell); Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 AM. J. INT'L L. 268 (1997) (hereinafter Schoenbaum).

⁷² Article XX of the GATT, *supra* note 5, states:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- (c) relating to the importations or exportations of gold or silver;
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
- (e) relating to the products of prison labour;

Exceptions”, authorizes governments to apply otherwise illegal measures when such measures are necessary to deal with the listed social or economic policy problems.⁷³ The practice of the WTO Panels has been to interpret this provision narrowly so as to put Article XX as a conditional and limited exception from obligations under other provisions of the GATT, and not as a positive rule establishing obligations itself.⁷⁴

Article XX is meant to be a justification and thus only comes into play when a measure taken by one State is in contravention of the other provisions of the GATT.⁷⁵ It places the burden of proving justifiable cause on the party invoking the exception.⁷⁶ Furthermore, the measures taken by the party must not be arbitrary or

(f) imposed for the protection of national treasures of artistic, historic or archaeological value;

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

(h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;*

(i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; *Provided* that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;

(j) essential to the acquisition or distribution of products in general or local short supply; *Provided* that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this subparagraph not later than 30 June 1960.

⁷³ See Bal, *supra* note 9.

⁷⁴ GATT Panel Report, *United States: Restriction on Imports of Tuna*, B.I.S.D. (39th Supp.) 155 (1993; adopted Aug. 6, 1991). (hereinafter *Tuna – Dolphin*); See also Bal, *supra* note 9.

⁷⁵ See Bal *supra* note 9; See generally M. T. Mitro, *Outlawing the Trade in Child Labour Products: Why the GATT Article XX Health Exception authorizes Unilateral Sanctions*, 51 AM. UNIV. L. REV. 1223 (2001-2002) (hereinafter Mitro).

⁷⁶ Appellate Body Report, *United States: Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R at 22 (adopted May 20, 1996). See also Committee on Trade and

constitute an unjustifiable discrimination⁷⁷ in any manner and must be necessary in order to obtain the justified ends mentioned in Article XX. Thus, in order to apply and use Article XX as a justification, a three tier test must be satisfied, wherein the State must show: first, that the policy meets the standards in the introductory phase, which require non-arbitrary and non-discriminatory policies; second, that the adopted measures fall within one of the policy areas recognized in the general exceptions, and; third, that there is a connection between the policy and the trade and that the policy is needed in order to reach the stated end.⁷⁸

However, human rights and labour standards are not explicitly mentioned in the text of Article XX, which prompts the question of whether Article XX can be used to justify violations of labour and basic human rights. This can only be answered by an interpretative discourse on Article XX.

C. *Public Morals and Health Standards: Making a case for the incorporation of Labour rights in Article XX*

It is the author's opinion, supported by views of others,⁷⁹ that clauses (a), (b) and (d) of Article XX of the GATT can be used to enforce labour standards between GATT members.⁸⁰ The conception of public morals⁸¹ and protection of human, animal or plant life or health⁸² in the GATT are broadly worded and recent jurisprudence of the WTO shows that basic human rights and labour standards may be incorporated under it.

The starting point for such reasoning is to understand that there is an unequivocal link between trade and human rights⁸³ and that international trade law must be understood in this background of human rights and labour standards. It must then be realized that clauses (a) and (b) have never been used to justify human rights or labour standards violations.⁸⁴

Environment, *GATT/WTO Dispute Settlement Practice Relating to Article XX paragraphs (b), (d) and (g) of GATT – Note by the Secretariat*, WT/CTE/W/53/Rev.1 (Oct. 26, 1998).

⁷⁷ GATT, art.XX, *supra* note 72.

⁷⁸ See Bal, *supra* note 9.

⁷⁹ See Mitro, *supra* note 75; Blackett, *supra* note 1; Bal, *supra* note 9; Jan Klabbers, *Jurisprudence in International Trade Law: Article XX of GATT*, 26 J. WORLD TRADE 63 (1992).

⁸⁰ For contrary views see Eres, *supra* note 1, where the author argues that labour standards were never meant to be incorporated in Article XX and that the State parties expressly contracted away those rights.

⁸¹ GATT, *supra* note 72, at art.XX(a).

⁸² GATT, *supra* note 72, at art.XX(b).

⁸³ For an extensive discussion, see Part II.

⁸⁴ See Bal, *supra* note 9, at 79.

While “public morals” haven’t been defined explicitly, in the *Tuna-Dolphin* dispute,⁸⁵ the Australian government argued, *inter alia*, that Article XX(a) could justify inhumane treatment of animals, if such measures applied equally to domestic and foreign products. Salman Bal argues that this very definition and the fact that the Dispute Settlement Body did not reject it, could probably imply that inhuman treatment could cover labour standards.⁸⁶ He substantiates this opinion with a case in the European Court of Human Rights where inhuman treatment was held to involve “at least such treatment as deliberately causes severe suffering, mental or physical, which in a particular situation is justifiable”.⁸⁷ According to him, a violation of poor work conditions, might then satisfy the definition of inhuman treatment.⁸⁸

While such an argument is completely plausible, it can be taken further. The idea is that the morality criterion in “public morals” can be used to incorporate fair labour standards. “Morality”, in this sense, would include actions that aim at “civilizing”, “constraining”, “resisting” or “democratizing” labour markets in the name of justice and fairness.⁸⁹ It is this component of justice that can be evoked to explain the usage and incorporation of fair labour standards in Article XX(a). This would be synonymous with the understanding of Article XX to be a “public policy” exception⁹⁰ wherein public policy is held to include fundamental principles of law, justice,⁹¹ equity and fairness.⁹²

However, a member seeking to justify a unilateral trade-restrictive measure on the ground that it advances labour standards must first demonstrate a nexus between the measure as such and its chosen policy objective by proving a

⁸⁵ *Tuna – Dolphin* Panel Report, *supra* note 74, at 181.

⁸⁶ See Bal, *supra* note 9, at 77.

⁸⁷ *The Greek Case* (Denmark v. Greece; Sweden v. Greece; Netherlands v. Greece; Norway v. Greece), Y. B. Eur. Conv. on H. R. 12 (1969). See Bal, *id.*

⁸⁸ See Bal, *id.*

⁸⁹ Brian Langille, *What is International Labour Law For?*, report prepared for the International Institute for Labor Studies (2005), available at: www.ilo.org/public/english/bureau/inst/download/langille.pdf.

⁹⁰ See generally Bal, *supra* note 9.

⁹¹ This interpretation of “public policy” is taken from the interpretation of arbitral instruments like the UNCITRAL Model Law on International Commercial Arbitration. See *Report of the Committee on the Enforcement of International Arbitral Awards*, 28th March 1955, UN Doc. E/2704 and E/AC.42/4/Rev.1 (1955). See also J. F. POUDRET AND SEBASTIEN BESSON, *COMPARATIVE LAW OF INTERNATIONAL ARBITRATION* 856 (2d. ed., 2007).

⁹² See *Attorney General for Canada v. SD Myers Inc.*, (2004) FC 38; *Parsons and Whitmore Inc. v. Societe Generale de L’industrie du Papier RAKTA and Bank of America*, 508 F.2d 969, 2nd Circuit (1974).

connection between the measure and the risk posed by it.⁹³ This requirement restricts the usage of Article XX(a) to protect and promote labour standards.

If Article XX(a) leaves any doubt as to usage of labour standards to impose unilateral trade measures, it is cleared by Article XX(b). The text of Article XX(b) talks of measures necessary to protect human, animal or plant life or health. Read in context of international instruments⁹⁴ concerning the right to life and health, it can be said that the right to life also includes matters of public health, environmental measures, worker safety laws, industrial accidents and matters involving basic human dignity.⁹⁵ In the same light, health has been looked at as the prescription of minimum conditions of occupational health and safety in the context of ILO Conventions.⁹⁶ Moreover, the Preamble of the GATT states that contracting parties recognize that “their relations in the field of trade and economic endeavour should be conducted with a view to raising the standards of living”.⁹⁷ In *Thai – Cigarettes*, the Panel asserted that Article XX(b) “clearly allowed contracting parties to give priority to human health over trade liberalization” and stated that trade related human rights, such as working conditions, undoubtedly contributed towards living standards.⁹⁸ However, the rider to Article XX(a) requiring a nexus between the measure and the concerned violation applies to this provision as well. A State is thus restricted from invoking unilateral trade sections of a general nature that are not *necessary* to promote labour standards.

D. Drawing a Parallel: GATT Article XX and Measures Protecting the Environment

In the *United States – Shrimp Turtle* dispute,⁹⁹ the United States imposed a prohibition on certain varieties of shrimp on the basis that the usage of certain technology to harvest shrimps would harm the life of sea turtles. In an action

⁹³ Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos containing Products*, WT/DS135/R 8, at p. 169 (Sept 18, 2000) (hereinafter *EC – Asbestos*). See also Eres, *supra* note 1.

⁹⁴ International Covenant of Civil and Political Rights, 1966, 999 U.N.T.S 171 (1966); UDHR, *supra* note 8; International Covenant on Economic, Social and Cultural Rights, 3 Jan., 1976, 993 U.N.T.S 3 (1976).

⁹⁵ F. Przetacznik, *The Right to Life as a Basic Human Right*, 9 HRJ 585 (1976). See also THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND UNITED KINGDOM LAW 174 (David Harris & Sarah Joseph eds., 1995).

⁹⁶ MATTHEW CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT 240 (1995).

⁹⁷ Preamble, GATT, *supra* note 5. See also Bal, *supra* note 9, at 83.

⁹⁸ Panel Report, *Thailand: Restriction on Importation of and Internal Taxes on Cigarettes*, 30 I.L.M 1122 (Nov. 7, 1990) (hereinafter *Thai – Cigarettes*). See generally Bal, *supra* note 9, at 84.

⁹⁹ Appellate Body Report, *Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998 (hereinafter *United States Shrimp Turtle*)

brought to the Dispute Settlement Body by India, Malaysia, Pakistan and Thailand, the Appellate Body held that sovereign nations and Members of the WTO can adopt measures to protect endangered species and the environment under Article XX.¹⁰⁰ In later disputes,¹⁰¹ the WTO Dispute Settlement Body has further clarified that unilateral trade measures taken in a manner that is essential for the protection of the environment and demonstrating the requirement of a causal linkage are justified under Article XX.¹⁰²

However, it must be noted that the adoption of such measures to protect the environment must be non-discriminatory and necessary to protect the environment.¹⁰³ The usage of this approach by WTO Panels, even though the “protection of the environment” has not been explicitly stated in Article XX, prompts creation of a parallel wherein labour standards and basic human rights related to trade may also be incorporated. Measures taken to achieve the above objective may then be justified under Article XX if shown to be non-discriminatory and necessary to promote and protect labour standards.

V. CONCLUSION: APPLYING THE LAW

While the NAFTA itself may not be helpful, Article 2101 of the Agreement states that GATT Article XX shall apply as a general exception and be incorporated in the NAFTA.¹⁰⁴ The principle of law emanating from Part IV of this note is clear: if there is a nexus between the labour rights violation and trade and a specific trade sanction is *necessary* to stop such violation, it may be justified under the GATT regime.

In addressing the factual situations posed at the beginning of this note,¹⁰⁵ it is clear that no action can be undertaken under the NAFTA by virtue of Article 43 of the NAALC, which prohibits state parties from taking measures to enforce their actions in the territories of other state parties. Any sanction must then be undertaken through the provisions of the GATT, specifically Article XX. Thus, if

¹⁰⁰ *Id* at ¶185. The Appellate Body, however, held that the measures adopted by the United States were applied in an arbitrary manner and thus were illegal.

¹⁰¹ Appellate Body Report, *Korea- Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R (2000; adopted Jan. 10, 2001); Appellate Body Report, *EC – Asbestos*, WT/DS135/AB/R (Mar. 12, 2001).

¹⁰² See O’Connell, *supra* note 71 and Schoenbaum, *supra* note 71.

¹⁰³ See Bal, *supra* note 9. See also R. W. Parker, *The Use and Abuse of Trade Leverage to Protect Global Commons: What We Can Learn from the Dolphin – Tuna Conflict*, 12 GEO. INT’L ENVTL L. REV. 1 (1999).

¹⁰⁴ NAFTA, *supra* note 4, at art.2101.

¹⁰⁵ See *supra* Part I.

in the first scenario the United States can demonstrate a causal link between the employment of Mexican children and the cost of the product itself, and such that sanctions were necessary to stop this unfair practice, it may be justified.

However, in the second scenario it may not be possible to establish a conclusive link between the employment of children in Bangladesh and the manufacture of that product in Mexico. Unless this link is established, no sanction under the GATT is possible.

In both these situations what is striking is the power and competence of the WTO to enforce such sanctions and act as a protector of human rights and labour standards, as well. While the ILO also has concrete provisions regarding the same, enforcement through the WTO mechanisms seems more effective in compelling States to prescribe to labour norms and basic human rights standards.

There is, however, one concern in applying this law on the issue of extra-territorial application. While Article 43 of the NAALC stated explicitly that the instrument may not be used to enforce its actions in the territory of another state, an argument was raised by Mexico in the *Tuna – Dolphin*¹⁰⁶ dispute where it contended that nothing in Article XX entitled a state party to impose measures that were not in its jurisdiction while being enforced. The Panel unfortunately accepted this principle and stated that Article XX(b) referred only to the protection of life and health within the territory of the contracting party protecting such rights.¹⁰⁷ While use of this decision may serve to complicate the solution, it is fortunate that in later decisions¹⁰⁸ concerning extra territorial application of actions, this question has not arisen and the sanctions imposed have been upheld.

In as much as no case has come before an international dispute settlement body on this issue,¹⁰⁹ the author truly hopes that the reasoning laid out above is applied, or at least discussed and debated upon, at the international level and labour standards and basic human rights come to play a greater role in increasing trade liberalization.

¹⁰⁶ See Bal, *supra* note 9.

¹⁰⁷ See also Lorand Bartels, *Article XX of GATT and the Problem of Extra-territorial Jurisdiction: The case of Trade Measures for the Protection of Human Rights*, 36 J.W.T. 353 (2002).

¹⁰⁸ *United States Shrimp Turtle*, Appellate Body Report, *supra* note 99.

¹⁰⁹ See Bal, *supra* note 9.