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"LEGAL ASPECTS REGARDING THE ESTABLISHMENT OF LABOUR REGULATIONS ON BILATERAL FTAS: PRESENTING THE CHILEAN INTEGRATION FRAMEWORK AS AN ALTERNATIVE MODEL FOR LATIN AMERICAN DEVELOPMENT"

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GUSTAVO LUIZ VON BAHTEN

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Thesis submitted in partial fulfillment of the requirements for the PhD degree in Labour Studies awarded by the Graduate School of Social, Economic and Political Sciences of the Università degli Studi di Milano.

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To Pablo Neftalí Reyes Basualdo – or simply Pablo Neruda, for his words,

To Italy, just because it exists,

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In sum, to everyone who made possible those unforgettable years.

Any remaining errors are mine alone.

A lei, che è stata la
ispirazione per questa avventura.

“Amigos míos,

Seguramente esta es la última oportunidad en que me pueda dirigir a ustedes. La Fuerza Aérea ha bombardeado las torres de Radio Portales y Radio Corporación.

Mis palabras no tienen amargura, sino decepción, y serán ellas el castigo moral para los que han traicionado el juramento que hicieron... soldados de Chile, comandantes en jefe titulares, el almirante Merino que se ha autodesignado, más el señor Mendoza, general rastrero... que sólo ayer manifestara su fidelidad y lealtad al gobierno, también se ha nominado director general de Carabineros.

Ante estos hechos, sólo me cabe decirle a los trabajadores: ¡Yo no voy a renunciar! Colocado en un tránsito histórico, pagaré con mi vida la lealtad del pueblo. Y les digo que tengo la certeza de que la semilla que entregáramos a la conciencia digna de miles y miles de chilenos, no podrá ser segada definitivamente.

Tienen la fuerza, podrán avasallarnos, pero no se detienen los procesos sociales ni con el crimen... ni con la fuerza. La historia es nuestra y la hacen los pueblos.

Trabajadores de mi patria: Quiero agradecerles la lealtad que siempre tuvieron, la confianza que depositaron en un hombre que sólo fue intérprete de grandes anhelos de justicia, que empeñó su palabra en que respetaría la Constitución y la ley y así lo hizo. En este momento definitivo, el último en que yo pueda dirigirme a ustedes, quiero que aprovechen la lección. El capital foráneo, el imperialismo, unido a la reacción, creó el clima para que las Fuerzas Armadas rompieran su tradición, la que les enseñara Schneider y que reafirmara el comandante Araya, víctimas del mismo sector social que hoy estará en sus casas, esperando con mano ajena reconquistar el poder para seguir defendiendo sus granjerías y sus privilegios.

Me dirijo, sobre todo, a la modesta mujer de nuestra tierra, a la campesina que creyó en nosotros; a la obrera que trabajó más, a la madre que supo de nuestra preocupación por los niños. Me dirijo a los profesionales de la patria, a los profesionales patriotas, a los que hace días estuvieron trabajando contra la sedición auspiciada por los Colegios profesionales, colegios de clase para defender también las ventajas que una sociedad capitalista da a unos pocos. Me dirijo a la juventud, a aquellos que cantaron, entregaron su alegría y su espíritu de lucha. Me dirijo al hombre de Chile, al obrero, al campesino, al intelectual, a aquellos que serán perseguidos... porque en nuestro país el fascismo ya estuvo hace muchas horas presente en los atentados terroristas, volando los puentes, cortando la línea férrea, destruyendo los oleoductos y los gasoductos, frente al silencio de los que tenían la obligación de proceder: estaban comprometidos. La historia los juzgará.

Seguramente Radio Magallanes será acallada y el metal tranquilo de mi voz no llegará a ustedes. No importa, lo seguirán oyendo. Siempre estaré junto a ustedes. Por lo menos, mi recuerdo será el de un hombre digno que fue leal a la lealtad de los trabajadores.El pueblo debe defenderse, pero no sacrificarse. El pueblo no debe dejarse arrasar ni acribillar, pero tampoco puede humillarse.

Trabajadores de mi patria: tengo fe en Chile y su destino. Superarán otros hombres este momento gris y amargo, donde la traición pretende imponerse. Sigan ustedes sabiendo que, mucho más temprano que tarde, de nuevo abrirán las grandes alamedas por donde pase el hombre libre para construir una sociedad mejor.

¡Viva Chile! ¡Viva el pueblo! ¡Vivan los trabajadores!

Éstas son mis últimas palabras y tengo la certeza de que mi sacrificio no será en vano. Tengo la certeza de que, por lo menos, habrá una lección moral que castigará la felonía, la cobardía y la traición.”

Santiago de Chile, September 11th, 1973, 9:10 A.M.
Salvador Allende´s last speech

ABSTRACT

There is a great challenge on our contemporary society, which is to conciliate the global trade liberalization with the establishment of an efficient labour protection network, both on developed and on developing countries.

The primary scope of this research is to bring up an analysis of the main direct and indirect impacts and the 'effet utile' of the inclusion of labour regulations on several contemporary bilateral free-trade agreements, in particular through a comparison concerning the dichotomy between the American pragmatic trade policies and the European idealist conceptions on this field.

This investigation does not intend to discuss the merit of possible commercial advantages of FTAs, but endeavour to acquaint their consequences on the labour area, making efforts to ensure worker's rights protection without bringing up protectionist measures that could embarrass an already complex international commercial system.

Furthermore, this study aims to present the Chilean successful economic integration model, which for more than three decades combines trade liberalization and social advances through the establishment of significant FTAs with strategic trade partners, and must be understood as an efficient legal, political and economical framework for other Latin American States.

On a post-habermasian international paradigm with deep inspiration on the transmodernity proposed by Dussel, those considerations assume a crucial importance, and the concrete outcomes brought by the Chilean economic agreements must be used as good examples for a Continent where, unfortunately, rhetorical skills still prevail among pragmatism and where there is a disturbing dissemination of an ideology typical of authoritarian, populist and anachronistic governments.

Keywords: Chilean labour policies – Free trade agreements – Generalized systems of preferences – ILO – Labour standards – Social clauses – WTO.

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1. INTRODUCTION

"All wealth is the product of labor."
John Locke (1632-1704), English philosopher

1.1. THE COLLAPSE OF NEOLIBERALISM AND THE CONTEMPORARY NECESSITY TO SET UP A 'FREE AND FAIR' TRADE MODEL

The recent global financial crisis put in check economic theories which prevailed during the last three decades. Since the end of the 70´s the welfare State model – typical of Keynesianism – has been gradually replaced by a fledgling neoliberal development scheme. In conformity with that emergent political, economic and social configuration, unfettered markets were admitted as incontestable universal solutions in order to sort out all kinds of difficulties, being able to – *per se* – spread favorable economic and social advances all over. That neoliberal thought strengthened during the 80´s – particularly influencing Thatcher´s and Reagan´s agendas – and, after the end of the Cold War, it became truly hegemonic: there was a consensus that fostering an extreme trade liberalization would be the only available possibility in order to set up consistent economic development worldwide[1].

Following this reasoning, the most part of countries made efforts in accommodating their internal idiosyncrasies into a transnational neoliberal reality[2], looking forward to be included on an international free trade system[3] which was frequently misunderstood as a real panacea.

Hence, oftentimes States endeavored to constitute comparative commercial advantages[4] with 'simple' measures that diminished and flexibilized domestic legislation on sensitive areas such as environmental protection, intellectual property and labour

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[1] BURKI, Shahid. EDWARDS, Sebastian. A *América Latina e a crise mexicana:novos desafios*. In: *A nova América Latina* (coord. Carlos Langoni). Rio de Janeiro: FGV, 1996. p.2 "Líderes de um número cada vez maior de países da região concluíram que reformas profundas – feitas com agilidade – são a única forma de (...) avançar firmemente em direção à prosperidade e à harmonia social."

[2] THUROW, Lester C. *The future of capitalism: how today´s economic forces shape tomorrow´s world*. NB; London, 1996. p.127."Instead of a world where national policies guide economic forces, a global economy gives rise to a world in which extranational geoeconomic forces dictate national economic policies. With internationalization, national governments lose many of their traditional levers of economic control."

[3] As precisely described by SALVATI, Michele (Italian economist, politician and intellectual), trade liberalization is "*part and parcel of the switch of political, economic and cultural hegemony (...) from Keynesianism to neoliberalism*".

[4] VIETOR, Richard H.K. *How countries compete: strategy, structure and government in the global economy.* Boston: Harvard Business School Press, 2006. p. 271. "Because of globalization, countries now compete to develop. (...). Success in this competitive environment breeds growth and wealth."

rights[5], in order to build up relative economic advantages[6] that could facilitate their entrance on a dynamic international trade market[7].

Particularly on the labour field, as correctly stated by Jacques DELORS, an analysis of the experience and the economic precedents of some countries during the 90´s would lead to the inference that a more flexible[8] - less protective - labour legislation would result on the creation of new job positions.[9] Domestic labour and social security laws were frequently misunderstood as mere obstacles which should be removed, costs which should be eliminated.

Nevertheless, during the last twenty years those neoliberal promises proved to be a fallacy which overestimated markets´ own capacity to regulate labour standards on a satisfactory manner. Indeed, uncontrolled globalization set up a scenario with catastrophic social outcomes[10]. Those initiatives of 'social dumping'[11] have not been only unable to

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[5] SENGENBERGER,Werner. *International labour standards on a globalized society: the issues.* In: *International labour standards and economic interdependence.* (ed. by SENGENBERGER, Werner and CAMPBELL, Duncan). International Institute fro Labour Studies: Geneva, 1994. p.6. "While the economy has grown increasingly international and partly global, labour institutions and labour market regulation remain largely constituted on the national and sub-national level."

[6] COFFEY, Peter. RILEY, Robert. *Reform of the International Institutions: the IMF, World Bank and the WTO.* Edward Legal Publishing. Cheltenham, 2006. p.86. "These kinds of 'race-to-the-bottom' fears permeate the criticism of the WTO regarding its impact on environmental, labour, and broader regulatory policies and conditions."

[7] Recent OECD studies claim that those measures are not even able to bring short-term comparative benefits.

[8] GARCÍA MARTÍNEZ, Roberto. *Derecho del Trabajo y de la Seguridad Social – Teoría general de los principios e instituciones del Derecho del Trabajo y de la Seguridad Social.* Buenos Aires: Ad hoc, 1998. p. 383. "En los últimos tiempos se viene desarrollando la teoría - base de la llamada 'flexibilización` laboral, según la cual el derecho del trabajo está sometido a la economía y, por lo tanto, el desarrollo económico depende del desbaratamiento o del debilitamiento de las instituciones básicas laborales. Incluso se ha sostenido la incorporación del derecho del trabajo al derecho económico. (…) Una primera reflexión: todo este debate a favor de la 'flexibilización' parte de una premisa equivocada: no tener en cuenta que el objetivo del derecho del trabajo es distinto al de la economía. El trabajo no es solamente un medio de producción ni una mercadería. La economía estudia los procesos de producción, distribución y consumo. El derecho del trabajo tiene por objetivo principal la humanización y dignificación del trabajo."

[9] DELORS, Jacques. *Pour entrer dans le XXIe siècle.* Paris: Michel Lafon Ramsay, 1994. p.273. "Les expériences de certains États membres laissent penser qu´une organisation de travail plus flexible permettrait de susciter la création de nouveaux postes de travail."

[10] *Informe Nacional sobre el impacto social de la globalización en Argentina. Resumen ejecutivo. Op. cit.* p.28. "Resulta importante destacar que, hasta el presente, han surgido dificultades, tanto en la agenda internacional como en las políticas nacionales, para dar respuesta a los retos que plantea la globalización. Las medidas de apertura de los mercados han predominado por sobre las consideraciones sociales. Por ello, es necesario recordar - una vez más - la importancia de que el empleo y la desigualdad, tanto salarial como de ingresos, sean considerados como parte fundamental de los objetivos de la política."

[11] O´HIGGINS, Paul. *The Interaction of the ILO, the Council of Europe and European Union labour standards.* In: *Social and Labour rights in a global context: international and comparative perspectives.* (ed. by Bob Hepple). Cambridge University Press,2002. p. 56. "Historically, the two most important reasons for the adoption of international labour standards have been fear of social disorder and revolution (...) and the fear of lower labour standards in less developed countries leading to the undercutting of prices of goods and services in the more advanced industrialized countries – what one might call the 'social dumping factor'.

bring positive economic results[12], but also have been disadvantageous to the international society as a whole[13]. This 'race to the bottom' set up deficient labour markets, stimulated inequalities and raised the social gap, bringing up conflicts, unemployment, exclusion and marginality. In sum: it brought a depressing scenario for workers all around the world[14].

The decadence of the neoliberal thought was already evidenced during the middle and late nineties with the advent of severe crisis– especially among emerging economies – such as the cases of Mexico (1994-1995), Argentina (1995-1996/1999-2001), Thailand (1997-1998), Indonesia (1997-1998), Malaysia (1997-1998), South Korea (1997-1998), Russia (1998), Romania (1998-1999), Ecuador (1998-1999), Brazil (1998-2002), Turkey (2000-2001) and Uruguay (2002)[15].

Notwithstanding, this deterioration process culminated only recently, with the global financial crisis of 2008, affecting the most developed world economies. As stated by Carlos TOMADA, Argentinean Minister of Labour, Employment and Social Security, the bankruptcy of Lehman Brothers and the global banking collapse that followed put in check

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[12] SOROS, George. *A crise do capitalimso global: os perigos da sociedade globalizada – uma visão crítica do mercado financeiro internacional.* Rio de Janeiro: Campus, 2001. p. 17. "O sistema capitalista global geraou um campo de jogo muito desigual. A distância entre ricos e pobres está aumentando.(...). Infelizmente, a arquitetura financeira global predominante hoje não oferece praticamente nenhum suporte para os menos afortunados."

[13] HARE, Ivan. *Social rights as fundamental human rights.* In: *Social and Labour rights in a global context: international and comparative perspectives.* (ed. by Bob Hepple). Cambridge University Press,2002.p.180. "The normative argument in favour of the protection of social rights is a powerful one. It must be true that those who live in wretchedly deprived conditions cannot lead full and rewarding lives. It is also probably correct argue that indigence and dire living conditions reduce the extent to which many individuals will exercise their civil and political rights and participate fully in society."

[14] DICKEN, Peter. *Mudança global: mapeando as novas fronteiras da economia mundial.* 5 ed. Porto Alegre: Bookman, 2010.p. 577. "Existem diferenças óbvias nos padrões trabalhistas nas diversas partes do mundo. (...) os direitos básicos dos trabalhadores são negados em diversos países. As condições de trabalho muitas vezes são deprimentes.(...).

[15] TAYLOR, John B. *Lessons of the Financial Crisis for the Design of the New International Financial Architecture*. Hoover Institution and Stanford University, written Version of Keynote Address - Conference on the 2002 Uruguayan Financial Crisis and its Aftermath. Montevideo: May 29th, 2007. p. 3. "The list starts with Mexico, which the then director of the IMF called the "first crisis of the 21st Century." He used this terminology because of the capital account nature of the crisis. It was a capital account crisis in comparison to so many crises in the past, which were current account crises. Indeed, it was to help countries deal with current account crises that the IMF was established; the IMF was to provide loans to countries to help get them through balance of payment crises in a fixed exchange rate world. The Mexico crisis was different. Following Mexico, there were many more similar crisis of the capital account variety. First there was the "tequila effect" or the contagion from Mexico which hit Argentina and other countries of Latin America. Of course the tequila effect was felt in Uruguay too. The "tequila effect" was also something new about the period. Soon after the Mexican crisis, the Asian crisis began: Thailand, Indonesia, Malaysia, Korea, and there was obviously a connection between those, sometimes called the Asian contagion. And the crises continued. There was a real big one in Russia, which sent shock waves around the world. Brazil was hit. Romania was hit. Ecuador was hit, and, of course, Argentina's ultimate movement towards crisis was initially set off by that contagion from Russia. I have not listed all the countries that seemed to be in crisis during this particular period. Note that there was also a crisis in Turkey; it is hard to prove that was related to these other crises, but it was a big one which must be on the list. Last on the list is Uruguay's crisis in 2002, which came on the heals of Argentina. (...)."

the current models of development and global governance. After years of an hegemonic consensus – the Minister claims – this crisis reaffirmed the need to reform the current architecture of power that govern multilateral relations, which has tended more to perpetuate relations of dependency than to encourage fair, equitable and productive processes of integration[16].

More, paradoxically, there is a growing opinion that in order to guarantee the efficiency of free-market policies the international community must ensure the enforcement of international rules, on several fields[17]. Effective international regulations are necessary in order to perfectionate freedom and competition at the global level[18].

In addition, there is no doubt that an adequate protection of fundamental labour rights must be a key pillar of this new global development model. The promotion of core workers´ rights is not only a human rights issue, but also an essential factor from an economic point of view. First of all, developed countries have been suffering significant economic losses brought by the crescent competition of emerging markets – which frequently deny access to fundamental labour standards in order to reduce production costs. This 'unfair' competition provoked a flexibilization tendency which could be verified on several developed countries, fostering the so-called 'race to the bottom'. Moreover, a liberalized trade system shall not be considered efficient when millions of potential consumers live under the poverty line.

For those reasons, the new structure of global governance – combining economic and social goals – must include effective enforcement mechanisms of international labour standards, in order to be able to effectively promote sustainable development[19]. Therefore, one of the most relevant demands on the contemporary globalized society is to constitute a

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[16] *Informe Nacional sobre el impacto social de la globalización en Argentina. Resumen ejecutivo.* 1ª edición. Buenos Aires: Oficina de OIT en Argentina, 2009. p.9. "La caída de Lehman Brothers Holdings Inc. en septiembre del 2008 y el descalabro bancario mundial que le siguió, han puesto de nuevo sobre el estrado la cuestión del modelo de desarrollo y la gobernanza global.(…). Esta crisis ha puesto nuevamente, tras largos años de un hegemónico consenso, la necesidad de reformar la actual arquitectura de poder que rige las relaciones multilaterales, la cual, lamentablemente, ha tendido mucho mas a perpetuar relaciones de dependencia o a atrofiar las capacidades de crecimiento que a fomentar un proceso de integración equitativo, justo y productivo."

[17] OHLER, Christoph. *International regulation and supervision of financial markets after the crisis.* In: *Working papers on global financial markets, n.4*. Halle/Jena: 2009. p. 29. "(...) any regulatory provision, whether reasonable or not, remains useless if the competent authorities are not able or not willing to enforce it effectively (...)."

[18] SOROS, George. *Op. cit. p.17.* "(...) a meta tem sido a imposição de uma maior disciplina de mercado. Todavia, se os mercados são instáveis por natureza, a imposição de mercado significa a imposição de instabilidade – e quanta instabilidade as sociedades são capazes de tolerar?".

[19] CANUT DE BON L., Alejandro. Desarrollo sustentable y temas afines. Santiago: IGD, 2007. p.117. "(…) este pilar, evita que la preocupación sólo se centre en cuidar el medioambiente y el desarrollo económico, sino que busca que se haga todo ello, pero con participación de la sociedad y en beneficio social."

socially responsible international free trade system[20] (a 'free and fair[21] trade model'), conciliating the necessary – and delayed – trade liberalization process with the establishment of an efficient labour protection network, both on developed and on developing countries.

1.2. INTERPRETATING TRADE AGREEMENTS IN A HUMAN RIGHTS PERSPECTIVE

Indeed, collisions between trade rules and human rights are quite common, as exemplified by the *Bosphorus*[22] and *Kennedy/Waite*[23] cases. Since there is no hierarchy between international treaties[24], which rule/interpretation shall prevail?

Essentially, every international agreement shall always be interpreted in the light of human rights, even on the absence of express clauses on this sense. Following this argument, no trade norm should ever be enforced in a manner which violates fundamental labour standards.

1.2.1. Labour rights as *jus cogens*

Several scholars argue that human rights – and consequently core labour rights – shall always prevail over trade rules, since they shall be considered *jus cogens*, peremptory norms imposed *erga omnes*. Notwithstanding, the definition of *jus cogens* – norms which shall be respected by all States – is brought by the article 53 of the Vienna Convention on the Law of the Treaties (1969):

> *Article 53- "Treaties conflicting with a peremptory norm of general international law ("jus cogens") -*

[20] BREUSS, Fritz. *Does the 'Development round' foster development?* In: GRILLER, Stefan. (ed.) *At the crossroads: the world trading system and the Doha round*. Spronger-Verlag. Wien: 2008.p.235. "In general the question whether more openness is better for growth and development and whether it is even a remedy for poverty reduction is not always easy to answer (...). The nexus of openness and poverty reduction is ambiguous and complex."

[21] LANFRANCHI, Marie-Pierre. *Op. cit.* p.59. "(...) les États appliquant une législation sociale faible bénéficient d´un avantage comparatif jugé déloyal par les autres États."

[22] Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi (Bosphorus Airlines) vs. Ireland, European Court of Human Rights, 2005.

[23] Waite and Kennedy vs. Germany, European Court of Human Rights, 1999.

[24] On this topic, see SEIDL-HOHENVELDERN, Ignaz. *Hierarchy of treaties.* In: KLABBERS, Jan. LEFEBER, René. (ed.). *Essays on the law of treaties: a collection of essays in honour of Bert Vierdag*. The Hague: Kluwer Law International, 1998.

> *A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.* ***For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character****."*

In spite of the unequivocal importance of human (labour) rights, the interpretation of *jus cogens* – mentioned for the first time on the *Barcelona Traction* case – must be restrictive, being only applied to extreme cases such as slavery, genocide and torture. Contrariwise to *jus cogens* rules, labour rights norms might be derogated by States in specific cases, such as state of necessity.

Therefore, claiming that labour standards shall be recognized as *jus cogens* is an incorrect argument in order to justify their prevalence over trade rules.

1.2.2. The formal superiority of the UN Charter

Another possible answer is alleging that human rights should prevail because of the rule stated on article 103 of the UN Charter[25] (1948):

> *Article 103 - "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."*

Following this reasoning, rules stated on the UN Charter must prevail over multilateral trade agreements (such as the Marrakesh Agreement, GATT, GATS and TRIPS), regional agreements (NAFTA, EU) and bilateral ones.

Human rights are protected by the UN Charter on its preamble:

> *"**We the peoples of the United Nations determined**:*

[25] Approved by the United NationsGeneral Assembly in 1948.

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women *and of nations large and small, and*
to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and
to promote social progress and better standards of life in larger freedom*,*
And for these ends:
to practice tolerance and live together in peace with one another as good neighbours, and
to unite our strength to maintain international peace and security, and
to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and
to employ international machinery for the promotion of the economic and social advancement of all peoples,
(...)"

so as on its article one:

"Article 1 - The purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international co-operation in solving international problems

> *of an economic, social, cultural, or humanitarian character, and in* ***promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion****; (...).”*

Corroborating this argument, on the *Southern Rodhesia* case the UN Security Council decided that it is possible using military force in order to implement fundamental human rights. On that decision, human rights violations were considered threats to peace.

Notwithstanding, despite of its political importance, the UN charter shall not be considered an international bill of rights and, therefore, it is not binding: members shall merely ‘take steps’ in order to accomplish with its rules. Moreover, it is important clarifying the the UN Charter is not a statement of customary law.

1.2.3. Human rights and the Vienna Convention on the Law of the Treaties (1969)

However, denying that core labour standards shall be considered jus cogens and defending that the UN Charter is not binding do not mean that trade agreements shall not be interpreted in the light of internationally recognized human (labour) rights. This initiative is consolidated on the article 31 (3) (c) of the Vienna Convention on the Law of the Treaties:

> *Article 31*
> *General rule of interpretation*
> *1.A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given*
> *to the terms of the treaty in their context and in the light of its object and purpose.*
> *2.The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*
> *(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*
> *(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*

> ***3.There shall be taken into account, together with the context:***
> *(a) any subsequent agreement between the parties regarding the interpretation of the treaty or theapplication of its provisions;*
> *(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
> ***(c) any relevant rules of international law applicable in the relations between the parties.***
> *4.A special meaning shall be given to a term if it is established that the parties so intended."*

Another relevant subject regarding the interpretation of treaties concerns the posteriority of agreements. During the last decades several international documents have been approved on this field, such as the International Covenant on Civil and Political Rights (1966) and its additional protocol, the International Covenant on Economic, Social and Cultural Rights (1966), the Convention on the Rights of the Child and regional instruments, especially at the European, African and American levels. However, when a trade agreement is signed, does it derogate those rules? Obviously not, since those rules shall not be considered incompatible. In accordance with the Vienna Convention, article 59:

> *Article 59 – "Termination or suspension of the operation of a treaty implied by conclusion of a later treaty*
> *1.A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and:*
> *(a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or*
> ***(b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.***
> *2.The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties."*

Therefore, in an ideal international society, all international agreements should be interpreted in the light of human (labour) rights, and there was no necessity to include

express clauses on this sense in every treaty. Notwithstanding, empirically, the international community is far from being competent on the enforcement of this understanding: trade agreements frequently infringe fundamental human (labour) rights and, consequently, it is necessary developing alternatives legal intruments in order to overcome this problem.

1.3. THE PRESENT INVESTIGATION: AN OVERVIEW

As we´ll see on the further chapters of this study, the idea to establish an international trade system based on the respect of workers´ rights has its origins on the XIX century[26], given that the reduction of social costs on a State would imply on a comparative 'unfair' advantage which should not be supported by the other members of international community. This was precisely one of the main reasons behind the constitution of the International Labour Organization (ILO) after the World War I[27]. Since then, this conception has also been permeating international organizations directly related to trade, such as the International Trade Organization (ITO), the GATT system and its successor, the World Trade Organization (WTO). Nevertheless, as we shall see in the following research, this idea still finds great deadlocks on all multilateral negotiations.

As a result, the primary objective of this research is to present the inclusion of social clauses on free trade agreements[28] (FTAs) and generalized systems of preferences[29] (GSPs) as possible operative mechanisms able to effectively set up a link between trade and labour; concrete recourses[30] which would be able to ensure the accomplishment of core labor standards internationally recognized. This investigation, however, does not

[26] MOREAU, Marie-Ange. *Le clause sociale dans les traités internationaux: bilan et perspectives*. In: Revue Française des Affaires Sociales. Ministère du Travail et des Affaires Sociales. Jan/Mar 1996, n.1. p.89. "L´organisation d´une articulation des règles du commerce international et des normes équitables du travail fait l´objet de discussions depuis la fin du XIXe siècle."

[27] LANFRANCHI, Marie-Pierre. *Les droits sociaux fondamentaux dans le droit applicable au commerce international.* In: CHÉROT, Jean-Yves. REENEN, Tobias (dir.). *Les droits sociaux fondamentaux à l´âge de la mondialisation.* Aix-en-Provence: Presses Universitaires d´Aix-Marseille, 2005. p.59. "(...) les liens commerce/normes sociales ont été depuis fort longtemps mis en évidence. C´est même l´une des raisons qui préside à la création de l´Organisation internationale du travail (OIT) en 1919."

[28] *Id.* p.272. "All major countries are involved in cross-regional FTAs."

[29] KAUFMANN, Christine. *Globalisation and labour rights: the conflict between core labour rights and International Economic Law.* Hart Publishing. Oxford and Portland, 2007. p.174. "The GSP system has been the primary trade provision utilized to promote labour rights."

[30] BREUSS, Fritz. *Op.cit.* p. 233. "On the one hand liberalization (market access) is delayed; on the other hand representatives of the United States and the EU immediately afterwards expressed their sympathy with a switch in their trade policy preferences towards more bi- or unilateralism."

intend to discuss the merit of possible economic advantages of FTAs and GSPs, exclusively aspiring to acquaint their major consequences on the labour field.

Social clauses should be understood as unilateral, bilateral, regional or multilateral attempts to legally bind trade and social standards, ensuring their enforceability through economic sanctions or incentives, accordingly to the degree of accomplishment on social matters by the different countries.

On the first part of this study we will discuss the role of multilateral institutions on the labour field, demonstrating that they have not been able to bring positive answers to the knotty dilemma of combining trade liberalization and the protection of workers´ rights. Initially, in chapter 2, this paper will present the activity of the International Labour Organization on the promotion and defense of internationally recognized worker´s rights since its foundation, in 1919. More, this study will debate the ILO´s voluntary character, laying out how the "*old lady of the UN system*" concretely deals with violations of core labour rights. Finally, it will be evident that even with the possibility to enforce the accomplishment of labour rights through the proceedings stated by Article 33 of its Constitution, the ILO still exclusively depends on moral sanctions against its Members.

Afterwards, in Chapter 3, this investigation will analyze the historical participation of the international trade system on the promotion of worker´s rights, since the post-war period. It will be shown that contrariwise to the Havana Charter – which aimed to set up a link between labour rights and trade at the ITO – the GATT and the WTO rules do not contain specific provisions on this topic[31]. Nevertheless, it will be shown that labour standards could be easily included on the WTO regime through an extensive interpretation of the exceptions prescribed on GATT Article XX, letters (a), (b) and (e) and/or on a stricter content for the expression "*like products*" – which must consider the employment of non-incorporated PPMs (process and production methods), following the precedent established by the *Asbestos case* (2001).

More, it will be shown the central characteristics of the WTO dispute settlement system, analyzing topics such as: (1) the complementary role of the ILO as a standardizing body; (2) the concept of WTO Membership; (3) the existence of possible dichotomies between developed, developing and least-developed Members; and (4) the residual role of

[31] KAUFMANN, Christine. *Op.cit.* p.135. "Unlike the Havana Charter, however, which contained a stipulation that members were to 'take measures against unfair labour conditions', neither the GATT nor the WTO agreement contains a similar provision on labour rights (...)".

non-State actors, presenting possibilities to increase the participation trade unions and employers´ associations under the WTO rules.

At last, it will be demonstrated that, in spite of the fact that a social clause "*is a logical adjunt to a process which has created an undeniable economic and social interdependence between all nations*"[32], several Members - particularly developing States and LDCs – are still reluctant to include such a norm on the WTO system.

Furthermore, in chapter 4, this paper will introduce the general framework of the inclusion of social clauses on generalized systems of preferences and free trade agreements, specifically discussing their "uni/bilateral" characteristics and their "positive" and "negative" dimensions. Social clauses are, so, introduced as important instruments in order to guarantee the protection of worker´s rights without setting up protectionist measures that could embarrass an already complex international commercial system[33]. More, this research will debate the potential effects of sanctioning policies on the labour field, its pros and cons.

Then, on the following sections this research will present the main similarities and differences between two of the most relevant models of the inclusion of social clauses on GSPs and on FTAs: the American and the European ones. We will see that while the US model is based on an aggressive unilateralism (e.g. the *2003 Burma Freedom and Democracy Act*), the European perspective is founded on political dialogue and cooperation with third countries. We will discuss the most important features of the free trade agreements signed by them and the effectiveness of both GSP regimes.

Notwithstanding, this investigation will not be restricted to theoretically examine pros and cons of the different models of social clauses. It will also present and scrutinize the Chilean case study – in order to describe and discuss their potential and material outcomes.

Chile was chosen to be our model because of its favorable economic performance during the last decades, based on market-oriented policies. More, the country has an

[32] PURSEY, Stephen. *Op. Cit.* p.238. "A social clause is not an anti-market germ that would infect and destroy the multilateral trading system. On the contrary, it is a logical adjunt to a process which has created an undeniable economic and social interdependence between all nations."

[33] DEAKIN, Simon. MORRIS, Gillian S. *Labour Law.* 4th edition. Hart Publishing. Oxford and Portland, 2005. p. 110. "A common feature of institutionalized international labour standards generally is the weakness in the mechanisms for enforcing them. An additional mechanism, of potentially great significance, is to make compliance with such standards a condition of international trade agreements (...). There are a number of recent examples of 'social clauses' being inserted into trade agreements, although to date a social clause has yet to be adopted by the World Trade Organization (...)".

extensive net of FTAs, being a pioneer on the inclusion of social clauses on them. Furthermore, Chile is internationally acknowledged by its positive social results[34] during the last twenty years, and by an impressive number of recent legal reforms. Therefore, this thesis aims to verify the initial hypothesis which states that recent social advances in Chile are directly linked to the inclusion of social commitments on its liberal trade agenda. With this scope, this thesis will bring up essential data in order to evidence if (1) the recent developments on the configuration of the Chilean labour market are significantly different than what may be observed in other Latin American countries, (2) if the positive results on the Chilean labour system could be considered consequences of the inclusion of social clauses in its FTAs and (3) if the Chilean case could be exported as a model to other Latin American States.

So, as a second part of this research, there will be an analysis of the Chilean experience on the inclusion of social clauses on its bilateral trade agreements. After presenting Chilean general data (Chapter 6) and an overview of the Chilean trade policies during the last thirty years (Chapter 7), this investigation will provide a detailed description of the labour rules present on the most relevant trade agreements signed by Chile, so as elaborated information concerning the negotiation of those items on several FTAs (Chapter 8).

Exempli gratia, concerning the Chile-United States FTA, this thesis describes the whole negotiation process, since the early initiatives aiming to make Chile the fourth NAFTA member, passing through the difficulties raised by the lack of 'fast-track'/TPA by the American Executive, the September 11th, the distinct reactions of Republicans and Democrats, the questions raised by employers and unions of both sides, the pressure made by the U.S. on Chile, conditioning the signature of the agreement with the Chilean support on the UN Security Council on the resolution concerning the invasion of Iraq, and the

[34] ALVARADO M. Macarena. JÉLVEZ M., Maurício. *¿Cómo continuar avanzando hacia el desarrollo? Propuestas para una política nacional de empleo*.Santiago: Oficina Internacional del Trabajo, 2009. p. 11. "Chile ha logrado importantes avances en esta materia. Durante las últimas décadas se han realizado esfuerzos por aumentar la cantidad y calidad de las políticas sociales de manera de contar en la actualidad con un sistema de protección social que permita neutralizar o reducir la vulnerabilidad de personas afectadas por enfermedades, invalidez, vejez, desempleo y pobreza. La red de protección social cuenta con un conjunto de beneficios que buscan cubrir las principales necesidades de la población a lo largo de todo su ciclo de vida, como son el programa de protección a la primera infancia "Chile crece contigo", las becas de educación escolar y educación superior, el subsidio a la contratación de jóvenes, las garantías explícitas de salud entregadas por el plan AUGE, los subsidios para la vivienda, el Sistema Chile Solidario – que atiende a la población más vulnerable de país – el seguro de cesantía con cada uno de sus componentes que buscan fortalecer la intermediación laboral, la 'Pensión Básica Solidaria' y el 'Bono por Hijo Nacido Vivo o Adoptado'. Todas estas iniciativas son parte de la respuesta que como pais hemos sido capaces de construir para darle sustentabilidad a nuestro proceso de búsqueda de crecimiento económico con equidad."

several obstacles to the final approval of the treaty on the American Congress. More, there is a comprehensive approach of the labour contents of that bilateral agreement, stressing the labour rights protected by the FTA, the prohibition of social dumping, the concern on the enforcement of domestic legislations, procedural guarantees, individual claims, mutual cooperation, and the inclusion of a developed dispute settlement system (presenting its institutional bodies and dispute settlement procedures).

In an equivalent manner, this research presents the negotiations and the labour rules contained on other relevant bilateral agreements signed by Chile, such as those with the European Union, Canada, China, Colombia, Japan, Australia, Peru and Panama, so as the P-4/ Trans-Pacific Strategic Economic Partnership Agreement (Chile, New Zealand, Brunei Darussalam and Singapore).

On the third moment of this study, we introduce the main aspects of the Chilean labour legislation, in order to infer the impacts of the inclusion of those international commitments on the Chilean domestic legal system (Chapter 9). In order to accomplish with this goal, however, there is not only a description of Chilean law, but also a comparative analysis with the legislative bodies of other South American States. The discussion is extended to several topics, such as employment contracts (definition, basic contents, categories, special contracts, individual and collective dismissals, notice of termination of employment), remuneration (minimum wage, supplementary annual salary, insalubrity premium, risk premium), working time (daily/weekly journey, daily rest period, interval between working days, weekly rest, annual leave, overtime, nightwork, effective working hours), licenses and family protection (paternal and maternal leave, day nurseries and breastfeeding), special topics regarding women´s work (prohibition of certain activities, equality between men and women, pregnant workers), employment of minors, worker´s nationality, social security (pensions, health protection, unemployment insurance, insurance for occupational injuries), vocational education/training, trade unions and procedural labour law.

In addition, this paper discusses if the inclusion of social clauses on FTAs fostered the observance of the fundamental ILO principles in Chile (chapter 10), in topics related to child labour, right to organize and freedom of association, non-discrimination and forced labour.

At last, on chapter 12, this research will bring conclusions concerning connections between the establishment of social clauses on bilateral FTAs signed by Chile and its

labour and social security laws and policies, examining topics such as the relationship between those clauses and the ratification of ILO core Conventions, recent legal reforms and the development of enforcement mechanisms.

In sum, it is patent that the international community must find an efficacious legal mechanism able to impose labour standards universally. Therefore, the main scope of this study is debating – making use of the Chilean experience – if the incorporation of social clauses on free trade agreements may be employed as complementary solutions for the lack of coerciveness which is the great challenge faced by the International Labour Law[35] on our current globalized society.[36]

As stated by SMITH and SOLINGER[37], "*the world is at a crucial crossroads (...) we live in interesting times. (...) Blind faith in the unfettered market without concern for social consequences led to fascist and Stalinist States last time. Freedom must be more than the protection of property rights. Let us hope that there is truly progress – and not only for the selected few*."

[35] SZÁSKI, István. *International Labour Law.* Aw.Sijthoff-Leyden/ Budapest:1968. "This designation has been given to the section of labour law in public international law, i.e., the sum total of the rules of public international law which regulate international legal relations in the sphere of labour law. Rules of this class are included in several bilateral or multilateral, collective conventions on labour, of which the Labour Conventions approved at conferences of the ILO in Geneva and since ratified by the member States are among the foremost." DELGADO, Maurício Godinho. *Curso de Direito do Trabalho*. 3ª ed. São Paulo:LTr, 2004. p. 61. "Cabe acrescer-se, por fim, a função civilizatória e democrática, que é própria do Direito do Trabalho. Esse ramo jurídico especializado tornou-se, na história do capitalismo ocidental, um dos instrumentos mais relevantes na inserção da sociedade econômica de parte significativa dos segmentos sociais despossuídos de riqueza material acumulada, e que, por isso mesmo, vivem, essencialmente, do seu próprio trabalho. Nesta linha, ele adquiriu o caráter, ao longo dos últimos 150/200 anos, de um dos principais mecanismos de controle e atenuação das distorções socioeconômicas inevitáveis do mercado e sistema capitalistas. Ao lado disso, também dentro se sua função democrática e civilizatória, o Direito do Trabalho consumou-se como um dos mais eficazes instrumentos de gestão e moderação de uma das mais importantes relações de poder existentes na sociedade contemporânea, a relação de emprego."

[36]VICUÑA, Francisco Orrego. *International Dispute Settlement in an Evolving Global Society.*Cambridge: Cambridge University Press, 2004. P.3. "An international society evolves, the phenomenon of globalization is taking hold. Beginning with the integration of financial markets and followed by the partial liberalization of world trade, globalization appears to be a lasting feature of international society. These developments are in turn linked to the revolution in communications and information technology, the fourth technological revolution, new horizons in science, and the powerful emergence of leading developing economies that have introduced new dimensions into international competitiveness".

[37] SMITH, David A. SOLINGER, Dorothy J. TOPIK, Steven C. (eds.). *States and sovereignty in the global economy.* Routlegde. London, 1999. p.17. "The world is at a crucial crossroads. In the curse, we live in interesting times. (...) Blind faith in the unfettered market without concern for social consequences led to fascist and Stalinist States last time. Freedom must be more than the protection of property rights. Let us hope that there is truly progress – and not only for the selected few."

2. THE INTERNATIONAL LABOR ORGANIZATION

> *"God sells us all things at the price of labor."*
> Leonardo da Vinci (1452-1519), Italian polymath: painter, sculptor, architect, musician, scientist, mathematician, engineer, inventor, anatomist, geologist, cartographer, botanist and writer.

2.1. THE HISTORICAL ROLE OF THE ILO

The idea to bring up an international body capable to promote minimum labour standards globally has its origins in the end of the XIX century. An International Labour Office was founded on May 1st, 1901 in Basel, Switzerland, with the scope to promote labour standards, to give publicity to different national labour legislations and to centralize the debate on those fields[38]. Nevertheless, the quality step was made only after the end of the World War I, by the Versailles treaty, which set up the International Labour Organization[39].

Since its founding, in 1919, "*the old lady of the UN system*" has gone through a dialectical process of adaptation and change[40]. The ILO survived the Great Depression, the World War II, decolonization processes and The Cold War. It played a central role in the support of labor rights, and it became a real global organization[41], currently with 183 Member States.

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[38] MAZIÈRE, Pierre. *Droit Social International*. Paris: Archétype, 2007. p. 30. "L´idée d´un organe chargé de promouvoir des normes minimales de protection en matière de droit du travail est née en Suisse à la fin du 19ième siècle. Si les premières initiatives échouèrent, l´idée devait être évoquée, notamment, à Berlin en mars 1890. Au congrès international de législation du travail de Paris, en 1900, fut votée l´adoption des statuts d´une Association internationale pour la protection légale des travailleurs, et la création d´un Office internationale du travail. Cet office a commencé à fonctionner le 1er mai 1901, à Bâle. Entre autres, l´Association s´étatit donnée pour but de '*servir de lien entre ceux qui, dans les pays industriels, considèrent la législation protectrice des travailleurs comme nécessaire*'. Mais là n´était pas son seul objectif. Dès sa création, l´Association a été conçue également comme un organe de centralisation et de publication de législation sociale."

[39] SENGENBERGER,Werner. *Op.cit.* p.12. "For the creation of the ILO and the setting of international labor standards a comprehensive coalition of interests, a broad consensus, was required. In 1919 there appeared to be one of those great moments in history which achieved a broad-based consensus among conflicting groups. The ideas and pronciples that were written on the 'labor' part of the Treaty of Versailles had gradually been conceived in the course of the 19th century by a rather diverse constituency."

[40] "The original text of the Constitution, established in 1919, has been modified by the amendment of 1922 which entered into force on 4 June 1934; the Instrument of Amendment of 1945 which entered into force on 26 September 1946; the Instrument of Amendment of 1946 which entered into force on 20 April 1948; the Instrument of Amendment of 1953 which entered into force on 20 May 1954; the Instrument of Amendment of 1962 which entered into force on 22 May 1963; and the Instrument of Amendment of 1972 which entered into force on 1 November 1974." *Source*: ILO.

[41] MAUPAIN, Francis. *Is the ILO effective in upholding worker´s rights?: reflections on the Myanmar experience*. In: ALSTON, Philip. (ed.).*Labor rights as Human Rights*. Oxford University Press, 2005. p. 88. "After surviving the great depression – which represented a serious blow to the credibility of achieving social

Examples of the ILO's dynamic evolution include (1) the **Declaration of Philadelphia**[42], adopted in 1944[43] to reaffirm the importance of humanistic and democratic principles which have embodied the ILO's role since. Four fundamental pillars[44] customized a brand new configuration for the Organization: (i) the key-statement that "labour is not a commodity", (ii) the acknowledgement that the freedom of expression and freedom of association must be guaranteed, (iii) the recognition that the fight against poverty must be kept '*avec une inlassable énergie au sein de chaque nation et par un effort international continue et concerté*' and (iv) the idea that the ILO must be based on tripartism[45]. (2) More recently, establishing **the concept of "decent work"**, based on the conception that workers' rights, labor standards, creation of employment, enterprise

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progress through voluntary State action, the ILO had to face WWII. Unlike the League of Nations, it had survived thanks to its decision to join the camp of the allies materialized by its move from Geneva to Montreal, and the tripartite support it has enjoyed across countries after the war. Afterwards, the ILO had to endure the process of decolonization and the Cold War. From an initial membership that was largely limited to European industrialized countries, the ILO became a truly universal organization. The ILO is now facing the new challenges of globalisation."

[42] SÜSSEKIND, Arnaldo. *Op. Cit.* p. 124. "(...) a Declaracao de Filadélfia, relativa aos fins e objetivos da OIT, deu nova dimensao ao Direito Internacional do Trabalho e ampliou as finalidades e a competencia dessa organizacao. (...) além de referir-se a questoes típicas de Direito do Trabalho e Seguridade Social, incluiu, entre os programas que a OIT deve fomentar: a plenitude do emprego e a elevação dos níveis de vida; a formação profissional e a garantia de iguais oportunidades educativas e profissionais; a colabiracao entre empregadores e empregados na preparacao e aplicacao das medidas sociais e economicas; a protecao à infância e à maternidade e a promoção de alimentos, habitação, recreação e cultura adequados (art. III). E estabeleceu que a OIT deve colaborar com os demais organismos internacionais competentes visando à adoção de medidas sobre a expansão da produção e do consumo, sem graves flutuações, o progresso econômico e social das regiões menos desenvolvidas, o favorecimento de um comércio internacional de volume elevado e constante, a melhoria da saúde, o aperfeiçoamento da educação e o bem-estar de todos os povos (art. IV)."

[43] Declaration concerning the aims and purposes of the International Labour Organisation - "The General Conference of the International Labour Organization, meeting in its Twenty-sixth Session in Philadelphia, hereby adopts, this tenth day of May in the year nineteen hundred and forty-four, the present Declaration of the aims and purposes of the International Labour Organization and of the principles which should inspire the policy of its Members."

[44] MAZIÈRE, Pierre. *Op. cit.* p.32. "Lorsqu´éclate la seconde guerre mondiale, l´OIT est déjà une institution suffisamment développée pour que, à bord du cuirassé Potomac, et 'quelque part sur l´océan Atlantique', les alliés rappellent dans la Charte de l´Atlantique que la libération de la peur et du besoin reste, pour les alliés, y compris en temps de paix, leur objectif prioritaire. La poursuite de cette quête, qui est celle des droits de l´homme, de leur respect, de leur diffusion universelle reprendra avant même que tout conflit militaire soit éteint, le 10 mai 1944, jour que verra la Conférence Internationale du Travail adopter la Declaration de Philadelphie aux fins de moderniser les objectifs et la constitution de l´OIT. Quatre principes fondamentaux donnent à l´Organisation sa nouvelle architecture: - le travail n´est pas una marchandise, - les libertés d´expression et d´association doivent être garanties, - la lutte contre la pauvreté doit être maintenue '*avec une inlassable énergie au sein de chaque nation et par un effort international continue et concerté*', - le tripartisme demeure le ciment des travaux de l´OIT."

[45] Declaration of Philadelphia, article I – **"**The Conference reaffirms the fundamental principles on which the Organization is based and, in particular, that: *(a)* labour is not a commodity; *(b)* freedom of expression and of association are essential to sustained progress; *(c)* poverty anywhere constitutes a danger to prosperity everywhere; *(d)* the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare."

development, social protection and social dialogue are interdependent and complementary mechanisms.

During the last nine decades the International Labor Organization (ILO) has been playing a relevant role in advocating workers' rights[46] and in the constitution of municipal[47] and international labor policies[48]. The ILO has continuously collaborated with Member States to implement labor standards[49], through methods which include**:** technical assistance, training, research, information exchange, social dialogue and tripartite consultations.

In the past few years, the ILO has increased its function in the promotion of workers' rights. However, frequent breaches of provisions related to labor rights[50] have checked its capacity to enforce fundamental norms established by its own Conventions. Hence, the main challenge currently faced by the ILO is to make an all out effort to increase its effectiveness in advocating and implementing labor standards on a global multilateral system[51].

[46] KAUFMAN, Bruce G. *The global evolution of IR.* ILO: Geneva, 2004. p. 212. "Since its foundation in 1919, the ILO has been the single most active and influential force in the world community pressuring (...) governments to take a more humane, progressive stance of labor."

[47] SWEPSTON, Lee. *Globalization and International Labor Standards: countering the Seattle syndrome.* Conference addressed in Lund, in 2002. "Its essential purpose was, and remains, to create a system of labor standards applicable to the entire world."

[48] O´HIGGINS, Paul. *Op.cit.* p.57. "The ILO was the first international organization to set labor standards, which include, in particular, ILO Conventions, recommendations, and, above all, the ILO Constitution itself (...)"

[49] KAUFMAN, Bruce G. *Op. Cit.* p. 203. "(...) during the nineteenth century a number of social reformers, trade unionists and humanitarian employers had lobbied for adoption of international labor standards.Their motivation was partly a humanitarian desire to improve the conditions of labor, and partly recognition that a coordinated effort across countries to raise labor standards is necessary if one country´s forward movement is not to be undercut by the threat of lower cost competition from others."

[50] MARTINEZ, Pedro Romano. *Op. cit.* p. 204. "Quanto a este último ponto, o papel da OIT não tem sido positivo, pois nao conseguiu evitar que alguns Estados desenvolvessem a sua economia à custa de deficientes condições de trabalho, quem contribuído para o comummente designado dumping social, mediante o qual se transferem empresas para países do chamado terceiro mundo, em que os salários e o 'preço' das condições de trabalho são mais atractivos para os empresários. Estas situações colocam sérios entraves à concorrência internacional, levando a questionar a justificação da manutenção de algumas regras laborais, principalmente nos sistemas jurídicos mais proteccionistas."

[51] POTTER, Edward. *International Labor Standards:the global economy and trade.* In: *International labour standards and economic interdependence.* (ed. by SENGENBERGER, Werner and CAMPBELL, Duncan). International Institute for Labour Studies: Geneva, 1994. p. 365. "The globalized world economy is a very different economic framework from that existing when the ILO was formed in 1919."

2.2. THE ILO FULL LEGAL PERSONALITY

The ILO was set up as an integrant part of the League of Nations, but since then have been acting as an autonomous entity[52], *exempli gratia*, admitting Germany and Austria as its members even if they were not part of the League of Nations. The same occurred in cases concerning Brazil and Argentina, which left the League and kept their ILO memberships.

Particularly after the World War II, with the signature of the UN Charter, in San Francisco (1945), and the subsequent revision of the ILO Constitution, in Montreal (1946), the ILO autonomy became definitively affirmed[53], particularly through the article 39[54] of the ILO constitution – which declares its full juridical personality.

Nowadays the ILO still maintains its independence, under the regime of a specialized agency of the United Nations, in accordance with the article 57[55] of the UN Charter.

2.3. THE ILO STRUCTURE

The ILO has a tripartite structure, both considering the number of organs (the International Labor Conference, the Administrative Council and the International Labour Office) and the representativeness inside them.[56]

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[52] SÜSSEKIND, Arnaldo. *Op. Cit.* p. 119. "A Organização Internacional do Trabalho (OIT) foi criada pelo Tratado de Paz, de 1919 (Tratado de Versailles), como parte da Sociedade das Nações, da qual recebia a receita destinada ao custeio das atividades empreendidas. (...) A autonomia da OIT se esboçou, desde logo, quando a Primeira Reunião da Conferência Internacional do Trabalho (Washington, 1919) deliberou admitir a Alemanha e a Áustria como membros da Organização, apesar de nao serem partes da Sociedade das Nações (SDN), tendo sido essa orientação seguida, no correr dos anos, em relação à outros Estados. Por seu turno, quando, em 1920, a Argentina se retirou da SDN, Albert Thomas defendeu, com sucesso, a tese de que ela poderia continuar como membro da OIT. E, na mesma década, esse entendimento permitiu a permanência do Brasil nessa Organização, quando também se desligou da SDN."

[53] SÜSSEKIND, Arnaldo. *Op. Cit.* p. 119. "Com a aprovação da Carta das Nações Unidas (São Francisco, 1945), da qual resultou a criação da ONU e a revisão da Constituição da OIT (Montreal – 1946), ficou definitivamente afirmada a personalidade jurídica própria da OIT, como pessoa jurídica de direito público internacional."

[54] *Article 39* – "The International Labour Organization shall possess full juridical personality and in particular the capacity: *(a)* to contract; *(b)* to acquire and dispose of immovable and movable property; *(c)* to institute legal proceedings."

[55] *Article 57* – "1.The various specialized agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63. 2. Such agencies thus brought into relationship with the United Nations are hereinafter referred to as specialized agencies."

[56] MARTINEZ, Pedro Romano. *Direito do Trabalho.* Instituto de Direito do Trabalho da Faculdade de Direito de Lisboa/ Lisboa: Almedina,2002. p. 198. "A OIT é uma organização internacional com uma

In accordance with the ILO Constitution, article 2:

> *"The permanent organization shall consist of:*
> *(a) a General Conference of representatives of the Members;*
> *(b) a Governing Body composed as described in article 7; and*
> *(c) an International Labour Office controlled by the Governing Body."*

2.3.1. The International Labour Conference

The most relevant ILO instance is the **International Labour Conference,** which has legislative functions[57], meeting every June in Geneva. It is composed by delegations from every ILO member States, which must respect the principle of tripartism on their composition[58]. Indeed, every member State counts with four delegates, two of them representing the government, one representing employers and the other one being a representative of employees[59] (ILO Constitution, article 3.1[60]). Those delegates, however, are free to deliberate and vote (article 4.1[61]), and actually there are frequent dissonant voices and votes inside the same delegation.[62] The Conference´s main role is to elaborate

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estrutura original, pois apresenta uma composição tripartida sob dois aspectos: no que respeita ao número de órgãos e em relação à representatividade dos próprios órgãos.

[57] MAZIÈRE, Pierre. *Op.cit.* p.31. "En son sein, la Conférence Internationale du Travail définit les lignes essentielles de la politique sociale internationale, vote les conventions et recommendations de l´OIT, suit leur application, et vote le budget. Il faut insister sur l´originalité de cette Organisation, qui repose en toutes ses composantes et pur chacune de ses procédures sur le principe d´une représentation tripartite. Il en résulte que participent à son fonctionnement des représentants de gouvernements des États membres, des représentants des employeurs, et des représentants des salariés. Cette triple représentation est présente jusque dans les organes dirigeants de l´OIT."

[58] MARTINEZ, Pedro Romano. *Op. cit.* p.199. "Na Conferência Geral há uma representação tripartida, pois nela têm assento os representantes dos Estados, das associações sindicais e das associações patronais. Cada Estado tem quatro representantes, dois nomeados pelo Governo, um pelas associacoes sindicais e um pelas associacoes patronais (...) representantes sindicais e patronais nao dependem de nomeacao governamental e não têm de respeitar a orientação de seu próprio Governo nas votações (...). A Conferência Geral, em princípio, reúne uma vez por ano (...) tem competência para aprovar recomendações e convenções."

[59] MAZIÈRE, Pierre. *Op.cit.* p.33. "La Conférence Internationale du Travail (CIT) se réunit annuellement à Genève au mois de juin. Elle se compose des représentants de tous les États membres de l´Organisation, qui en sont les délégués. Chaque délégation incarne le principe du tripartisme. Une délégation se compose en effet de deux délégués gouvernamentaux, un délégué représentant les intérêts des employeurs eu un délégué représentant les intérêts des travailleurs."

[60] Article 3.1. "The meetings of the General Conference of representatives of the Members shall be held from time to time as occasion may require, and at least once in every year. It shall be composed of four representatives of each of the Members, of whom two shall be Government delegates and the two others shall be delegates representing respectively the employers and the workpeople of each of the Members."

[61] Article 4. 1. "Every delegate shall be entitled to vote individually on all matters which are taken into consideration by the Conference."

[62] MAZIÈRE, Pierre. *Op.cit.* p.34. "Chaque délégué s´exprime et vote librement, quitte à entrer en opposition avec les autres membres de sa propre délégation."

and adopt Conventions and recommendations, so as to control the enforcement of those norms on the members´ domestic legal systems. More, the Conference examines the annual report prepared by the International Labour Office, it approves the Organization's budget and elects the Governing Body[63].

2.3.2. The Administrative Council

The **Administrative Council** (also named as the 'Governing Body') is the ILO executive body, which meets twice a year. In accordance with the Article 7[64] of the ILO Constitution, it shall be composed by 56 members, being 46 elected (18 representing States, 14 representing trade unions and 14 representing employer´s associations) and 10 with effective nomination (from the ten most important industrial countries)[65]. The Council takes political decisions concerning the International Labour Office, and establishes the "*ordre du jour*" of the International Labour Conference (article 14[66]). More,

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[63] MAZIÈRE, Pierre. *Op.cit.* p.34. "De fait, l´OIT n´hésite pas à comparer la Conférence à un parlement international du travail (...) la Conférence élabore et adopte des normes internationales du travail sous formes de conventions et recommandations. (...) en surveille l´application pour chaque État membre. Elle dispose pour ce faire des rapports qui lui sont annuellement fournis par lesdits États, déclinant l´obligation de soumission que leur fait l´article 19 de la Constitution de l´OIT, et d´autres mécanismes de contrôle régulier de l´application des normes. (...) la Conférence examine annuellement le rapport global préparé par le Bureau (...) la Conférence est un forum devant lequel sont débattues librement les plus larges questions sociales et de travail qui intéressent le monde entier. (...) C´est elle enfin qui adopte le budget de l´Organisation et qui en élit le Conseil d´Administration."

[64] *Article 7.*- "1. "The Governing Body shall consist of fifty-six persons:Twenty-eight representing governments, Fourteen representing the employers, and Fourteen representing the workers. 2. Of the twenty-eight persons representing governments, ten shall be appointed by the Members of chief industrial importance, and eighteen shall be appointed by the Members selected for that purpose by the Government delegates to the Conference, excluding the delegates of the ten Members mentioned above. (...) 3. The Governing Body shall as occasion requires determine which are the Members of the Organization of chief industrial importance and shall make rules to ensure that all questions relating to the selection of the Members of chief industrial importance are considered by an impartial committee before being decided by the Governing Body. Any appeal made by a Member from the declaration of the Governing Body as to which are the Members of chief industrial importance shall be decided by the Conference, but an appeal to the Conference shall not suspend the application of the declaration until such time as the Conference decides the appeal. 4. The persons representing the employers and the persons representing the workers shall be elected respectively by the Employers' delegates and the Workers' delegates to the Conference. 5. The period of office of the Governing Body shall be three years. If for any reason the Governing Body elections do not take place on the expiry of this period, the Governing Body shall remain in office until such elections are held. (...)"

[65] MARTINEZ, Pedro Romano. *Op. cit.* p. 199. "Do Conselho de Administração fazem parte 56 membros, 46 são eleitos e 10 são de nomeação efectiva. Os membros eleitos também se integram na composição tripartida, pois 18 representam os Estados, 14 representao associacoes sindicais e outros 14 associacoes patronais (...). Os membros efectivos são nomeados pelos dez Estados de maios importância industrial (...). O Conselho de Administração têm, entre outras incumbências, por função estudar os problemas relativos ao Direito do Trabalho e elaborar as propostas de convenções, que vão ser apresentadas à assembléia."

[66] *Article 14.*- "1. "The agenda for all meetings of the Conference will be settled by the Governing Body, which shall consider any suggestion as to the agenda that may be made by the government of any of the Members or by any representative organization recognized for the purpose of article 3, or by any public

it prepares the Organization's budget and elects the ILO´s Director General[67] (article 8[68]). The Council is composed by several commissions and committees, so as by working groups on specific topics, which submit periodic reports to Council´s approval[69].

2.3.3. The International Labour Office

The **International Labour Office**, on the other hand, performs the role of a permanent secretariat, centralizing the information provided by all State Members, particularly those concerning their respective domestic social legislations[70]. Also, it develops several technical cooperation programmes, counting with offices all around the globe. Its head is the ILO Director General[71]. Its main functions are prescribed by the ILO Constitution, Article 10:

> ***Article 10 – "****1. The functions of the International Labour Office shall include the collection and distribution of information on all subjects relating to the international adjustment of conditions of industrial life and labour, and particularly the examination of subjects which it is proposed to bring before the Conference with a view to the conclusion of international Conventions, and the conduct of such special investigations as may be ordered by the Conference or by the Governing Body.*
> *2. Subject to such directions as the Governing Body may give, the Office shall:*

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international organization. 2. The Governing Body shall make rules to ensure thorough technical preparation and adequate consultation of the Members primarily concerned, by means of a preparatory conference or otherwise, prior to the adoption of a Convention or Recommendation by the Conference."

[67] MAZIÈRE, Pierre. *Op.cit.* p.35. "Le Conseil d´Administration est l´organe exécutif du Bureau International du Travail, qui se réunit deux fois par an; une session complète d´automne (en novembre), une autre au printemps (mars-avril). (...) C´est cette instance qui prend les décisions relatives à la politique du BIT et établit l´ordre du jour de la Conférence Internationale. (...) élabore encore le programme de l´OIT et le budget qu´il soumet à la Conférence pour adoption. Il en élit le Directeur général."

[68] *Article 8* -"1. There shall be a Director-General of the International Labour Office, who shall be appointed by the Governing Body, and, subject to the instructions of the Governing Body, shall be responsible for the efficient conduct of the International Labour Office and for such other duties as may be assigned to him. 2. The Director-General or his deputy shall attend all meetings of the Governing Body."

[69] MAZIÈRE, Pierre. *Op.cit.* p.36. "Le Conseil d´Administration répartit en son sein le travail entre des commissions et comités. Au besoin, il établit des groupes de travail appelés à examiner certaines questions spécifiques. (...) Naturellement, l´ensemble des Commissions et Comités fait régulièrement rapport au Conseil d´Administration des diverses activités conduites sous leur responsabilité. (...) Dans les autres cas les rapports des Commissions sont adoptés par le Conseil sans procédure particulière (...)."

[70] MAZIÈRE, Pierre. *Op.cit.* p.36. "Le Bureau International du Travail (BIT) est l´organe permanent de l´OIT, dont il incarne le secrétariat. (...) centraliser de nombreuses informations en provenance des différents États membres, notamment relatives au contenu de leurs législations sociales respectives."

[71] MARTINEZ, Pedro Romano. *Op. cit.* p.200. "O Secretariado Internacional do Trabalho (...) tem poderes de execução e é chefiado por um Director Geral, designado pelo Conselho de Administração."

(a) prepare the documents on the various items of the agenda for the meetings of the Conference;
(b) accord to governments at their request all appropriate assistance within its power in connection with the framing of laws and regulations on the basis of the decisions of the Conference and the improvement of administrative practices and systems of inspection;
(c) carry out the duties required of it by the provisions of this Constitution in connection with the effective observance of Conventions;
(d) edit and issue, in such languages as the Governing Body may think desirable, publications dealing with problems of industry and employment of international interest.
3. Generally, it shall have such other powers and duties as may be assigned to it by the Conference or by the Governing Body."

2.4. ILO NORMATIVE INSTRUMENTS

The ILO normative instruments are conventions, recommendations, declarations, resolutions and conclusions.

2.4.1. Conventions

Conventions are species of international treaties, normative, mandatory and programmatic documents approved by international institutions as the ILO. They have to be approved by qualified majority (two-thirds majority, accordingly to the article 19.2[72]). Nevertheless, only after internal ratification[73] they become formal sources of domestic Law, heteronomous normative sources[74].

[72] *Article 19.*- "2. In either case a majority of two-thirds of the votes cast by the delegates present shall be necessary on the final vote for the adoption of the Convention or Recommendation, as the case may be, by the Conference. "
[73] MARTINEZ, Pedro Romano. *Op. cit.* p.200. "Tais convenções seguem o regime geral, na medida em que têm que ser aprovadas e ratificadas pelos Estados, que passarão a ser partes nas mesmas (...), mas, contrariamente ao que é usual, elas não são negociadas pelos Estados. "
[74] DELGADO, Maurício Godinho. *Op. cit.* p. 154. "Convenções são espécies de tratados. Constituem-se em documentos obrigacionais, normativos e programáticos aprovados por entidade internacional, a que aderem voluntariamente seus membros. (...) podem ser fonte formal do Direito interno aos Estados envolvidos. Assim, irão se englobar no conceito de fonte normativa heterônoma (lei, em sentido material ou sentido amplo), desde que o respectivo Estado lhes confira ratificação ou adesão – requisitos institucionais derivados da soberania."

It is also noteworthy that if a Convention does not reach the two-thirds majority, it is still possible to agree to such a Convention among the Members which supported it (article 21.1[75]).

By now the ILO has enacted 188 Conventions, which may be classified in three categories: fundamental (core) Conventions, priority and ordinary ones.

Fundamental ILO Conventions (also known as 'core Conventions') are those defined as such by the 1998 '*Declaration of Fundamental Principles and Rights at work*', which aimed to constitute an universal set of workers´ rights, ensuring that social advances follows economic development. The current ILO Conventions considered as 'core' ones are:

1. Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87)
2. Right to Organize and Collective Bargaining Convention, 1949 (No. 98)
3. Forced Labour Convention, 1930 (No. 29)
4. Abolition of Forced Labour Convention, 1957 (No. 105)
5. Minimum Age Convention, 1973 (No. 138)
6. Worst Forms of Child Labour Convention, 1999 (No. 182)
7. Equal Remuneration Convention, 1951 (No. 100)
8. Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

'Priority' conventions, on the other hand, are those which are strongly encouraged By the ILO *"because of their importance for the functioning of the international labour standards system"* [76]. They are:

1. Labour Inspection Convention, 1947 (No. 81) ;
2. Labour Inspection (Agriculture) Convention, 1969 (No. 129) ;

[75] *Article 21* – "1. If any Convention coming before the Conference for final consideration fails to secure the support of two-thirds of the votes cast by the delegates present, it shall nevertheless be within the right of any of the Members of the Organization to agree to such Convention among themselves."

[76] "The ILO's Governing Body has also designated another four conventions as "priority" instruments, thereby encouraging member states to ratify them because of their importance for the functioning of the international labour standards system." *Source*: ILO.

3. Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144) ;

4. Employment Policy Convention, 1964 (No. 122).

And finally, **'ordinary' Conventions** are those which are not classified as priority or fundamental ones.

More about the enforcement of ILO Conventions will be debated further, still on this chapter.

2.4.2. Recommendations

Recommendations are also documents approved by the Conference on general assmbly by a two-thirds majority (article 19.2), following a proposition from a competent technical commission. Nevertheless, differently of Conventions, recommendations do not need any kind of ratification procedure, do not become mandatory[77] and do not set up rights or obligations for the ILO members[78]. They are referential rules, material sources of Law, which should be used as inspiration by States on the elaboration of their own social politics and domestic legislation[79].

However, in spite of this non-mandatory nature, the ILO closely observes the implementation of recommendations on its Members, in accordance with article 19.6[80] of the ILO Constitution.

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[77] MARTINEZ, Pedro Romano. *Op. cit.* p.201. "Das recomendações constam medidas a pôr em prática pelos Estados membros, que não são vinculativas."

[78] DELGADO, Maurício Godinho. *Op. cit.* p. 155. "A recomendação consiste em diploma programático expedido por ente internacional enunciando aperfeiçoamento normativo considerado relevante para ser incorporado pelos Estados. A declaração também é evento programático, embora expedido por Estados soberanos em face de determinado evento ao congresso. Tanto a recomendação como a declaração não constituem fontes formais do Direito, nao gerando direitos e obrigações aos indivíduos na ordem jurídica interna dos Estados celebrantes. Contudo, certamente têm o caráter de fonte jurídica material, uma vez que cumprem o relevante papel político e cultural de induzir os Estados a aperfeiçoar sua legislação interna na direção lançada por esses documentos programáticos internacionais."

[79] MAZIÈRE, Pierre. *Op.cit.* p.47. "La décision d´adopter une recommandation à la place d´une convention est prise par la CIT en assemblée plénière, sur proposition de la commission technique compétente. (...) Les recommendations diffèrent des conventions en ce que les mesures qu´elles renferment ne deviennent pas obligatoires par voie de ratification. Elles ne sont d´ailleurs pas soumises à cette procédure, et n´ont pas vocation à devenir des traités internationaux. Les recommendations constituent seulement des normes de référence dont elles incitent les États membres à s´inspirer en matière de politique sociale."

[80] *Article 19* – "6. In the case of a Recommendation: *(a)* the Recommendation will be communicated to all Members for their consideration with a view to effect being given to it by national legislation or otherwise; *(b)* each of the Members undertakes that it will, within a period of one year at most from the closing of the session of the Conference or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than 18 months after the closing of

2.4.3. Other instruments: declarations, resolutions and conclusions

Other ILO normative instruments are declarations, resolutions and conclusions, which may be differentiated by their origins and contents[81].

Declarations are documents adopted by the Administrative Council and by the Conference, stating ILO fundamental principles and essential objectives, so as technical regulations[82].

At last, **resolutions** and **conclusions** may be taken by the Conference, technical commissions, *ad hoc* bodies, regional conferences (article 38[83]) and technical meetings[84] depending on their convenience.

2.5. THE ILO VOLUNTARY CHARACTER

The ILO founding fathers strived to create an organization with a self-executing supranational legislation which could be imposed upon all of its Members. However, this idea met strong international resistance, since there was the danger of disincentive countries to join the organization, or become useless, by setting lower common standards in order to accommodate more Members.

Contrariwise to other international legal schemes, the most part of ILO regulations do not have the pretentious to be considered self-contained or self-executing.

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the Conference, bring the Recommendation before the authority or authorities within whose competence the matter lies for the enactment of legislation or other action; *(c)* the Members shall inform the Director-General of the International Labour Office of the measures taken in accordance with this article to bring the Recommendation before the said competent authority or authorities with particulars of the authority or authorities regarded as competent, and of the action taken by them; *(d)* apart from bringing the Recommendation before the said competent authority or authorities, no further obligation shall rest upon the Members, except that they shall report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of the law and practice in their country in regard to the matters dealt with in the Recommendation, showing the extent to which effect has been given, or is proposed to be given, to the provisions of the Recommendation and such modifications of these provisions as it has been found or may be found necessary to make in adopting or applying them."

[81] MAZIÈRE, Pierre. *Op.cit.* p.47. "Les déclarations et les résolutions sont des instruments de politique sociale. Ils diffèrent cependant quant à leur contenu et quant à leurs origines."

[82] *Id.* p.48. "(...) l´appellation ´déclaration' est réservée aux textes les plus solennels adopté par le Conseil d´administration et la CIT. Dans leur contenu, les déclarations proclament des principes fondamentaux, des objectifs essentiels de l´Organisation, mais aussi des normes techniques d´un niveau variable."

[83] ILO Constitution - *Article 38* - "1. The International Labour Organization may convene such regional conferences and establish such regional agencies as may be desirable to promote the aims and purposes of the Organization. 2. The powers, functions and procedure of regional conferences shall be governed by rules drawn up by the Governing Body and submitted to the General Conference for confirmation."

[84] MAZIÈRE, Pierre. *Op.cit.* p.48. "Des 'résolutions' et des 'conclusions' sont encore prises par divers organes internes de l´OIT, comme la Conférence Internationale du Travail, les commissions techniques des experts, les conférences spéciales, les corps créés pour couvrir des secteurs en particulier (...), les conférences régionales et les réunions techniques tenus en Asie/Pacifique, Afrique, Europe, et en Amérique."

After the adoption of Conventions by the International Labour Conference, they have to be ratified and internalized as domestic legislation by the competent internal authorities within the period of one year – extendable to 18 months (article 19.5. (a) (b) (c)[85]). Those ILO non-fundamental Conventions remain inactive until a certain number of ratifications is reached[86]. The ratification is, therefore, not only a confirmation of a certain agreement, but a free and voluntary acceptation given by a sovereign State[87].

Ratifications shall be communicated by the ILO Members to the Director-General (article 19.5 (d)[88]), who shall report to "*the Secretary-General of the United Nations for registration in accordance with the provisions of article 102 of the Charter of the United Nations*"(article 20[89]).

Moreover, States that have ratified Conventions must present every year a report to the International Labour Office concerning the "*the measures which it has taken to give effect to the provisions of Conventions"*. "*These reports shall be made in such form and shall contain such particulars as the Governing Body may request*" (article 22[90]).

Furthermore, periodical reports must be delivered even in cases of non-ratification by the domestic competent authorities[91]:

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[85] *Article 19* – "5. In the case of a Convention: *(a)* the Convention will be communicated to all Members for ratification; *(b)* each of the Members undertakes that it will, within the period of one year at most from the closing of the session of the Conference, or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than 18 months from the closing of the session of the Conference, bring the Convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action; *(c)* Members shall inform the Director-General of the International Labour Office of the measures taken in accordance with this article to bring the Convention before the said competent authority or authorities, with particulars of the authority or authorities regarded as competent, and of the action taken by them;(...)"

[86] MAZIÈRE, Pierre. *Op.cit.* p.52. "Malgré son adoption par la Conférence Internationale du Travail, une norme OIT demeure en quelque sorte inactive, comme en sommeil, jusqu´à ce qu´elle obtienne un nombre déterminé de ratification, qui la rendent active."

[87] *Id.*. p.55. "La ratification d´une Convention OIT est un acte purement volontaire, effet de sa souveraineté, pour lequel un État prend l´engagement d´appliquer dans son droit national les dispositions d´un instrument international. Il est important est ici de rappeler que, lors de son adoption devant la Conférence Internationale du Travail, la Convention ne reçoit la signature d´aucun des États membres. Sa ratification postérieure n´en est donc pas une confirmation, mais l´acceptation libre et volontaire donnée par un État souverain."

[88] *Article 19* – "5 *(d)* "if the Member obtains the consent of the authority or authorities within whose competence the matter lies, it will communicate the formal ratification of the Convention to the Director-General and will take such action as may be necessary to make effective the provisions of such Convention;"

[89] *Article 20* – "Any Convention so ratified shall be communicated by the Director-General of the International Labour Office to the Secretary-General of the United Nations for registration in accordance with the provisions of article 102 of the Charter of the United Nations but shall only be binding upon the Members which ratify it."

[90] *Article 22* – "Each of the Members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request."

[91] MARTINEZ, Pedro Romano. *Op. cit.* p.201. "(...) caso o Estado não a ratifique, nos termos do art 19, 5, alínea e) Constituição da OIT, deverá, periodicamente, enviar um relatório sobre o Estado da sua legislação, explicando que medidas foram tomadas."

> *Article 19.5. "(e)* ***if the Member does not obtain the consent of the authority or authorities within whose competence the matter lies****, no further obligation shall rest upon the Member except that* ***it shall report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of its law and practice in regard to the matters dealt with in the Convention, showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention by legislation, administrative action, collective agreement or otherwise and stating the difficulties which prevent or delay the ratification of such Convention.****"*

Notwithstanding, the non-mandatory nature of ILO regulations have suffered a significant change during the past two decades. The final declaration of the *1995 World Summit for Social Development*[92] (also known as the 'Copenhagen Declaration') stated that even countries which still had not ratified certain ILO Conventions by then, should make an all out efforts to accomplish with basic labour rights:

> ***"Commitment 3 –*** *We commit ourselves to promoting the goal of full employment as a basic priority of our economic and social policies, and to enabling all men and women to attain secure and sustainable livelihoods through freely chosen productive employment and work. (...)*
>
> *(a)* ***Put the creation of employment, the reduction of unemployment and the promotion of appropriately and adequately remunerated employment at the centre of strategies and policies of Governments, with full respect for workers' rights and with the participation of employers, workers and their respective organizations****, giving special attention to the problems of structural, long-term unemployment and underemployment of youth, women, people with disabilities, and all other disadvantaged groups and individuals;*
>
> *(d) Develop policies to ensure that workers and employers have the education, information and training needed to adapt to changing economic conditions, technologies and labour markets;*
>
> *(...)*
>
> *(i)* ***Pursue the goal of ensuring quality jobs, and safeguard the basic rights and interests of workers and to this end, freely promote respect for relevant***

[92] The summit was held in Copenhagen (Denmark) in March 1995.

> ***International Labour Organization conventions***, *including those on the prohibition of forced and child labour, the freedom of association, the right to organize and bargain collectively, and the principle of non-discrimination." (...)*

The referred Copenhagen Declaration, summed with the 1996 WTO Ministerial Meeting in Singapore – which will be discussed on the next chapter of this study – constrained the ILO to re-adequate its norms in order to function harmoniously with a globalized trade system[93].

Therefore, subsequently, in 1998, the International Labor Conference instituted the '*Declaration of Fundamental Principles and Rights at work*'[94], stressing the necessity to conciliate social and economic development. The 1998 ILO Declaration was the final result of complex negotiations which found great resistance, particularly from developing countries, and was finally approved by majority, without the desired consensus[95].

Notwithstanding, **the 1998 ILO Declaration is considered to be one of the most important steps in the history of the defense of international labour rights**. Following the approval of the Declaration, the ILO Director-General stressed the importance of the establishment of a global social platform based on recognized common values:

> *"(...) ya era hora de que la OIT se dotase de los medios necesarios para responder a las consecuencias sociales de la mundialización de la economía (...) creo que podemos estar muy orgullosos de la Declaración que se acaba de adoptar. Gracias a ella, la comunidad internacional dispone de una verdadera plataforma social mundial, firmemente asentada en valores comunes. (...) se encamina a la promoción de los principios y de los derechos*

[93] RESTREPO, Marta A. *Op. Cit.* p. 320. "Así llegamos a 1998; la necesidad de adoptar la Declaración sobre Derechos Humanos surgió de la preocupación de la comunidad internacional respecto de los procesos de globalización y de las eventuales consecuencias sociales de la liberalización del comercio, expresada sobre todo en la Cumbre Mundial de las Naciones Unidas sobre el Desarrollo Social (Copenhage, 1995) y la Conferencia Ministerial de la OMC (Singapur, 1996) que expresaron su apoyo a las normas fundamentales del trabajo internacionalmente reconocidas y a la OIT como el órgano competente para establecer esas normas y ocuparse de ellas."

[94] MAZIÈRE, Pierre. *Op.cit.* p.45. "Adoptée en 1998, la Déclaration de l´OIT 'relative aux principes et droits fondamentales dau travail' a pour objectif d´assurer que le progrès social accompagne le progrès de l´économie et du développement. Cette déclaration incarne une démarche atypique de l´Organisation Internationale du Travail par laquelle les États membres sont liés au respect de conventions que, le cas échéant, ils n´auraient pourtant pas ratifiées."

[95] RESTREPO, Marta A. *Op. Cit.* p. 319. "La adopción de la Declaración se realizó luego de una serie de negociaciones muy complejas, de hecho, no se adoptó por consenso, sino por mayoría, y en el debate se puso de presente la preocupación de los gobiernos de los países en desarrollo, especialmente."

fundamentales que constituyen el Objeto de la Declaración. Nada más y nada menos."[96]

The Declaration supports the recognition of universal values within the labor field and establishes minimum standards for a global labour system[97]. Nevertheless, it stresses that neither the promotion of labour rights nor this general imposition should be used with protectionist purposes, in order to diminish legitimate comparative advantages.[98]

At present, the labour rights which have a "fundamental" status are: (1) freedom of association and the right to collective bargaining[99]; (2) the abolition of compulsory labour[100]; (3) non-discrimination in respect of employment and occupation[101] and (4) eradication of child labor[102].

Notwithstanding, it is noteworthy that only five States[103] have not ratified any of the Conventions related to fundamental labor rights, while 127 countries have ratified all of them[104]. Moreover, even in States which still have not ratified some ILO Core Conventions, they are frequently used as models to draft domestic legislation. Thus, the main ILO setback is not the non-signature or the non-ratification of ILO rules, but rather the infrequent implementation of relevant national labor legislation.

As a conclusion, with the notable exception of core labour rights – which should be imposed to all ILO members, even to those which have not ratified the correspondents conventions – both the ratification of ILO Conventions and the implementation of its recommendations are discretionary State acts. Once a State signs an ILO Convention, its norms have to be ratified and transferred into the internal legal systems through a national Parliament, in order to be effectively considered *in force*[105]. In the same way,

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[96] *Id.* p. 321.
[97] *Ibid.* p. 319. "En la 86ª Reunión de la Conferencia Internacional del Trabajo llevada a cabo en Ginebra en junio de 1998, se adoptó por mayoría la Declaración de Principios de la OIT relativa a los derechos fundamentales en el trabajo, que compromete a los 174 Estados Miembros de la Organización a respectar a los principios contenidos en siete convenios laborales básicos y a promover su aplicación universal."
[98] *Ibid.* p. 320. "La Declaración 'subraya que las normas de trabajo no deberían utilizarse con fines comerciales proteccionistas y que nada en la presente Declaración y su seguimiento podrá invocarse ni utilizarse de otro modo con dichos fines; además, no debería en modo alguno ponerse en cuestión la ventaja comparativa de cualquier país sobre la base de la presente Declaración y su seguimiento."
[99] ILO Conventions 87 and 98.
[100] ILO Conventions 29 and 105.
[101] ILO Conventions 100 and 111.
[102] ILO Conventions 138 and 182.
[103] Brunei Darussalam, Marshall Islands, Samoa, Timor-Leste and Tuvalu.
[104] It is noteworthy that the United States had ratified only two of those fundamental Conventions (105 and 182).
[105] POTTER, Edward. *Op.cit.* p. 362."(...) the real effect of Conventions is contigent on their being ratified and implemented."

implementation of ILO recommendations depends on the will (the good will) of States[106] - which still monopolize the internal judicial apparatus. Domestic authorities still have the ultimate power to apply, *in concretu*, any kind of social standards. MAUPAIN stated that it is a real prisoner's dilemma, since "*social progress in an open economy depends on the good will of others* (...)."

In sum: the criticism that the voluntary character of the ILO would debilitate its function is not true, given the elevated number of ratifications not only on the fundamental Conventions, but also on priority and on ordinary ones. ILO critics, nevertheless, highlight that in spite of the great number of ratifications, the main debility in the ILO system is still its lack of effectiveness, since it is not able to coercively impose upon its Members the concrete accomplishment of its Conventions and Recommendations[107] - not even the aforementioned fundamental ones, which should be imposed *erga omnes*, with a *jus cogens* status – what will be the object of the next session of this investigation.

2.6. ILO ENFORCEMENT PROCEDURES

The ILO has the right and the duty to perform periodical examinations regarding the application of standards in every country. This assessment is performed by both the '*Committee of Experts on the Application of Conventions and Recommendations* and by the '*Committee on the Application of Standards*'. Those technical reports are based on direct contacts with the State authorities, and have relevant political importance, influencing governments to adopt recommendations and even to ratify conventions[108].

The assessment is then discussed by the '*Conference Committee on the Application of Standards*'. In the cases of Conventions´ breaches, trade unions, employers´ associations and ILO Member States may recur to, respectively, two elementary procedures[109]: the representation (article 24[110]) and complaints (article 26).

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[106] SENGENBERGER,Werner. *Op. Cit.* p. 6. "Cooperation with the ILO is voluntary."

[107] *International Trade and Core Labor Standards*. OECD policy brief. Oct/2000. p. 2. "Moreover, there remains a continuing gap between the international recognition of core labor standards and their application."

[108] MARTINEZ, Pedro Romano. *Op. cit.* p.201. "Estes relatórios têm um certo peso político, pelo que poderão vir a influenciar os Estados no sentido de acatar as recomendações ou de ratificar as convenções."

[109] *Id.* p.202. "(...) tanto as organizações sindicais e patronais, como qualquer membro pode, respectivamente, reclamar ou apresentar queixa junto do secretariado, pelo facto de um Estado desrespeitar regras de uma convenção por ele ratificada (...) podendo, em última análise, qualquer membro manifestar ao Director Geral que pretende submeter a questão ao Tribunal Internacional de Justiça (...)."

[110] *Article 24* - "In the event of any representation being made to the International Labour Office by an industrial association of employers or of workers that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party, the Governing Body

(1) The **representation of non-observance of Conventions** is the dispositive available to employers´ associations and trade unions, and may not be invoked by States or by ILO institutions.

The representation is addressed to the International Labour Office (Secretariat), which receives the documents, informs the government and the Governing Body. The Council, then, determines its admission, and sets up a committee composed by three members[111] (if it is the case, it also sends the reclamation to the special committee on 'freedom of association'). This committee, thereafter, decides to hear governmental arguments.

Afterwards, the Council may publicize the reclamation (article 25[112]), or to proceed its filing. It may also address specific recommendations to the government or start a complaint procedure[113].

(2) The **complaints of non-observance** may be requested by a delegate of the International Labour Conference, by the Administrative Council or by an ILO Member State[114] (notwithstanding only if it has ratified the controversial Convention)[115].

Once a complaint is received, the Governing Body may request the manifestation of the demanded State (article 26.2[116]), or directly proceed to the constitution of a Commission of Inquiry (article 26.3[117]) – which shall study the case independently[118], and

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may communicate this representation to the government against which it is made, and may invite that government to make such statement on the subject as it may think fit. "

[111] MAZIÈRE, Pierre. *Op.cit.* p. 63. "(...) le dispositif réserve la procédure de réclamation aux organisations professionnelles, pour en exclure les États membres et les institutions de l´OIT. La réclamation est adressée au Bureau International du Travail, qui la reçoit, informe le gouvernement visé et saisit le Conseil d´administration. Ce dernier détermine la recevabilité de la réclamation, et constitue, le cas échéant un comité formé de trois membres aux fins de l´examiner. (...) le comité tripartite peut juger utile d´entendre le gouvernement concerné."

[112] *Article 25* - "If no statement is received within a reasonable time from the government in question, or if the statement when received is not deemed to be satisfactory by the Governing Body, the latter shall have the right to publish the representation and the statement, if any, made in reply to it."

[113] MAZIÈRE, Pierre. *Op.cit.* p.64. "S´il l´estime justifié, le Conseil d´administration peut décider de rendre publique la réclamation, ou de procéder à son classement. Il peut encore d´adresser une recommandation au gouvernment concerné, ou décider d´entamer à son égard une procédure de plainte (...)."

[114] *Article 26* – ""1. Any of the Members shall have the right to file a complaint with the International Labour Office if it is not satisfied that any other Member is securing the effective observance of any Convention which both have ratified in accordance with the foregoing articles."

[115] MAZIÈRE, Pierre. *Op.cit.* p.64. "S´expose à une procédure de plainte l´État membre qui n´assure pas de manière suffisante l´exécution d´une Convention OIT, qu´il a pourtant ratifiée. La plainte est accessible à un autre État membre de l´OIT, à condition qu´il ait lui aussi ratifié la convention litigieuse, ou à un délégué à la Conférence Internationale du Travail, ou encore au Conseil d´administration lui-même."

[116] *Article 26* – "2. The Governing Body may, if it thinks fit, before referring such a complaint to a Commission of Inquiry, as hereinafter provided for, communicate with the government in question in the manner described in article 24."

[117] *Article 26* – "3. If the Governing Body does not think it necessary to communicate the complaint to the government in question, or if, when it has made such communication, no statement in reply has been received

request the necessary information from the complained State, which has the duty to fully cooperate (article 27[119]). Afterwards, the Commission delivers a report which presents its conclusions and recommendations (article 28[120]). This final report is made public, and sent to the Council and to the demanded State (article 29[121]), which shall take – within three months – a triple option[122]:

a) *Accept the report and its recommendations*;
b) *Refuse the report and its recommendations* (article 30[123]) – on this case the Council delivers its own recommendations and send the case to the *Committee of Experts on the Application of Conventions and Recommendations* [124] and to the Conference;
c) *Request the sending of the affaire to the International Court of Justice*, which shall take a final decision (article 31[125]) which may "*affirm, vary or reverse any of the findings or recommendations of the Commission of Inquiry, if any*" (article 32[126]).

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within a reasonable time which the Governing Body considers to be satisfactory, the Governing Body may appoint a Commission of Inquiry to consider the complaint and to report thereon."

[118] MAZIÈRE, Pierre. *Op.cit.* p.64. "Saisi une plainte, le Conseil d´administration peut former une commission d´enquête. (...) la Commission d´enquête étudie la plainte de manière approfondie et indépendante. (...) La Comission dépose donc ensuite un rapport contenant ses conclusions dand lequel elle formule des recommandations à destination de l´Etat concerné."

[119] *Article 27* - "The Members agree that, in the event of the reference of a complaint to a Commission of Inquiry under article 26, they will each, whether directly concerned in the complaint or not, place at the disposal of the Commission all the information in their possession which bears upon the subject-matter of the complaint."

[120] *Article 28* - "When the Commission of Inquiry has fully considered the complaint, it shall prepare a report embodying its findings on all questions of fact relevant to determining the issue between the parties and containing such recommendations as it may think proper as to the steps which should be taken to meet the complaint and the time within which they should be taken."

[121] *Article 29* - "1. The Director-General of the International Labour Office shall communicate the report of the Commission of Inquiry to the Governing Body and to each of the governments concerned in the complaint, and shall cause it to be published. 2. Each of these governments shall within three months inform the Director-General of the International Labour Office whether or not it accepts the recommendations contained in the report of the Commission; and if not, whether it proposes to refer the complaint to the International Court of Justice. "

[122] MAZIÈRE, Pierre. *Op.cit.* p.65. "Le rapport est rendu public et adressé au Conseil d´administration ainsi qu´au gouvernement concerné. Ce dernier dispose d´une triple option (Manuel sur les procédures, art. 29). Il peut en effet accepter le rapport et ses recommandations, ou bien les refuser, ou encore solliciter le renvoi de l´affaire devant la CIJ."

[123] *Article 30* - "In the event of any Member failing to take the action required by paragraphs 5 *(b)*, 6 *(b)* or 7 *(b)* (i) of article 19 with regard to a Convention or Recommendation, any other Member shall be entitled to refer the matter to the Governing Body. In the event of the Governing Body finding that there has been such a failure, it shall report the matter to the Conference."

[124] MAZIÈRE, Pierre. *Op.cit.* p.65. "Devant l´éventuelle résistance de l´État concerné, le Conseil d´administration formule ses propres recommandations à partir du rapport de la commission (...). La commission d´experts pour l´application des conventions et recommandations en assure le suivi."

[125] *Article 31* - "The decision of the International Court of Justice in regard to a complaint or matter which has been referred to it in pursuance of article 29 shall be final."

[126] *Article 32* – "The International Court of Justice may affirm, vary or reverse any of the findings or recommendations of the Commission of Inquiry, if any."

Notwithstanding, the possibility to take cases of labor rights violations to the International Court of Justice has yet to occur.

If a violation is confirmed, a solution is not satisfactory negotiated and the country refuses to comply with the ILO recommendations or the ICJ decision, then there is the option to apply concrete sanctions on the demanded Members States, through the application of Article 33 of the Constitution of the ILO, which states**:**

> ***"In the event of any Member failing to carry out within the time specified the recommendations****, if any, contained in the report of the Commission of Inquiry, or in the decision of the International Court of Justice, as the case may be,* ***the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith****."*

This article, nevertheless, deliberately does not specify which sanctions may be applied, and, *in praxis*, it works as an efficacious threat mechanism against Member States. Thus, it was never concretely applied by the ILO, and remains an open tool. Scholars argue that, hypothetically, Article 33 may include not only the end of technical assistance and international cooperation, but also sanctions of other international bodies, such as the end of loans from the World Bank and the International Monetary Fund, and monetary and trade sanctions on the World Trade Organization system.

However, Article 33 does not authorize the possibility of expulsion or suspension of a Member State from the organization. Notwithstanding, the ILO once forced a country to ask for a voluntary withdraw: this happened to South Africa during the Apartheid regime[127]. However, this alternative is not likely to happen again. The general consensus is that such an action escalates an already undesirable scenario in which the abusing State becomes even more alienated, and its population becomes even more vulnerable.

More, in accordance with article 34:

> *"**The defaulting government may at any time inform the Governing Body that it has taken the steps necessary to comply with the recommendations of the Commission of Inquiry or with those in the decision of the International Court of Justice, as the***

[127] SÜSSEKIND, Arnaldo. *Op. Cit.* p 136. "(...) esse país exerceu seu direito de desligar-se voluntariamente da Organização, que se consumou em 1966. Entretanto, em 1994, já sob a presidência de Mandela, esse país retornou à OIT."

> ***case may be, and may request it to constitute a Commission of Inquiry to verify its contention****. In this case the provisions of articles 27, 28, 29, 31 and 32 shall apply, and if the report of the Commission of Inquiry or the decision of the International Court of Justice is in favour of the defaulting government,* ***the Governing Body shall forthwith recommend the discontinuance of any action taken in pursuance of article 33****."*

In praxis, however, representations and complaints of non-observance are not as frequent on the ILO system as one could imagine, being invoked only on exceptional circumstances. The regular control system, based on the examination of national reports by the Commission of experts and by the Conference frequently satisfy the Organizations´ needs[128]. Even when there is the initiation of a representation/complaint procedure, the frequent satisfactory solutions are not based, generally, on any kind of sanctions or threatening mechanisms, but rather**:**

(1) **After the initiation of ILO proceedings, State authorities agree to cooperate and implement ILO recommendations.** Usually, states which receive unfavorable reports from the ILO experts do not deny allegations of non-compliance; The existence of breaches of labor standards are frequently cited as being caused by economic and/or political difficulties[129] which delay or impede the implementation of ILO conventions. However, because of international pressure, difficulties may be overcome with technical assistance and economic support. In addition, reports generated by ILO experts are frequently used by trade unions and employee associations as viable means of bargaining against their own governments;

(2) **Regimes which insist on violating labor standards frequently collapse**[130].

As we have seen, the main criticism suffered by the ILO is that it is unable to enforce its decisions when it is verified that a particular country is not observing core labor

[128] MAZIÈRE, Pierre. *Op.cit.* p.65. "À ce jour, l´OIT a très peu recouru aux commissions d´enquête. Outre le coût induit par cette procédure, la raison principale en est que la procédure de plainte elle-même fut très peu utilisée. Le système de contrôle régulier, fondé sur l´examen des rapports par la commission d´experts et par la commission de la conférence satisfait en effet largement aux besoins."

[129] POTTER, Edward. *Op. Cit.* p. 362. "Many developing countries simply do not have the economic or political ability to implement ILO standards."

[130] MAUPAIN, Francis. *Op.cit.* p. 95. "The most serious cases of violations brought under the complaint procedure of article 26 have been solved either because the countries concerned were reluctantly led to accept the ILO recommendations and progressively managed to implement them, or very significantly, because the collapse of the regime guilty of the violations solved the problem".

rights. The Prime Minister of Singapore, in a noted statement, said that "*the ILO has no teeth*". Nevertheless, as we demonstrated, this is not necessarily or completely true. The general ILO strategy is to put real priorities in an open technical and political dialogue, so as to convince Member States to act in accordance with fundamental labor conventions. Furthermore, the organization insists on negotiation procedures until a common satisfactory solution can be found when established labor conventions are breached. Only when dialogue is not enough to enforce core labor rights the ILO has to defer to other proceedings, such as, the *Burma/Myanmar case*, when the sanctioning mechanism prescribed on the Article 33 was invoked for the first time.

2.7. THE BURMA/MYANMAR CASE

For almost three decades the International Labor Organization has tried to cooperate with the Burmese government in order to improve labor conditions within that country. Particularly, the problem of forced labor - which is clearly in violation of Convention n.29 – must have been solved.

The Burmese authorities have systematically refused to cooperate with the ILO commission of inquiry[131], and they have impeded the work of ILO inspectors, on a true "dialogue of deaf"—as defined by MAUPAIN[132]. Therefore, the ILO decided, for the first time in history, to apply the sanctioning procedure prescribed in the aforementioned Article 33**:** in 1999 the International Labor Conference banned all technical cooperation with Burmese authorities.

Afterwards, in March 2000, Burma finally recognized and acknowledged the existence of forced labor, and accepted the visit of a Technical Cooperation Mission. The Administration announced that it would take "*appropriate measures including administrative, executive and legislative measures to ensure prevention of such occurrences in the future.*"[133]

In November of the same year there was a second ILO Technical Cooperation Mission, and Burmese legislation was modified, including penal sanctions which punish

[131] *Id.* "(...) The Commission of Inquiry, which was appointed to examine the complaint filed against the country, reached devastating conclusions about the gravity of the violations of Convention n. 29, on the other hand, the ILO was faced with a very uncooperative and even highly critical attitude of the authorities, and no sign that a change would occur."
[132] *Ibid.*
[133] *Ibid.*

forced labor cases. Therefore, a high level ILO team was allowed to perform an independent evaluation.

Nonetheless, the Burmese government finally decided to cooperate and open its facilities to inspectors not only because of the ramifications of Article 33. On a domestic level several other measures had already been taken, such as the European withdrawn of Burma´s beneficial treatment under its Generalized System of Preferences (GSP) as well as the US *Burma Freedom and Democracy Act* (these topics shall be discussed in a later chapter of this investigation).

2.8. FINAL REMARKS

Even after ninety years, the Constitution of the ILO still plays a central role in advocating international labor rights[134], which is derived from its unique tripartite structure, its mandate, and its dynamic nature. The organization is now facing new challenges brought about by globalization, which reopened the debate regarding the incentive of competence based n the reduction of social costs and new protectionist methods[135]. New ideas (e.g., the social label initiative[136]) must be found to promote and instill workers' rights around the globe.

It is true that in spite of the existence of Article 33, the ILO depends almost exclusively on moral sanctions and it has never been able to impose any kind of economic or any other kind of coercive measures on any abusing State. Nevertheless, it is noteworthy that political dialogue has been successful in finding satisfactory outcomes regarding some of the most controversial cases of labor rights violations – with the great exception of the *Myanmar case.*

In sum, maybe the "old lady" of the UN is not just a *toothless old lady* at all[137]. One might figuratively say that *she* allows for the privilege of a meaningful dialogue

[134] *Ibid.* p.140. "The natural conclusion is that the ILO does indeed have a strong capacity to promote, in a verifiable manner, its objectives."
[135] RESTREPO, Marta A. *Op. Cit.* p.319. "(...) las nuevas formas de integración regional y la globalización del comercio han reabierto la discusión sobre la competencia entre los países basada en las diferencias de los costos laborales, y en lo que podría convertirse en nuevas formas de proteccionismo."
[136] *Exempli gratia*, social labeling. MAUPAIN, Francis. *Is the ILO effective in upholding worker´s rights?: reflections on the Myanmar experience*. In: ALSTON, Philip. (ed.).*Labor rights as Human Rights*. Oxford University Press, 2005. "The global social label initiative was met with great resistance and was promptly shelved. However, the idea was not completely lost. Some countries are in the process of introducing, or have introduced (in the case of Belgium), national legislation to create a label based on the rights recognized by the Declaration."
[137] The analogy between the 'old lady' being 'toothless' can be found in MAUPAIN, Francis. *Op.cit.*

before "biting". This posture is concurrent with the *2004 World Commission on the Social Dimension of Globalization*, which stressed, **more than sanctions, it is relevant to highlight the importance of alternatives in dispute resolution methods, such as technical cooperation, joint research, exchange of information, transparency, and open tripartite debates** - all of which are incentives to Member States that comply with fundamental labor standards.

3. LEGAL ASPECTS REGARDING THE LABOUR PROTECTION UNDER THE WTO SYSTEM

> *"Labor is prior to, and independent of, capital. Capital is only the fruit of labor, and could never have existed if labor had not first existed. Labor is the superior of capital, and deserves much the higher consideration."*
> Abraham Lincoln (1809 – 1865), 16th President of the United States

3.1. THE HISTORICAL LINK BETWEEN TRADE AND LABOUR RIGHTS ON A MULTILATERAL LEVEL: ITO, GATT, WTO

It is patent that the flexibilization – frequently an euphemism for the mere non-observance – of internationally recognized workers´ rights is able to set up significant distortions on the international trade system[138]. Notwithstanding, in spite of the irrefutable magnitude of this topic, the inherent connection between trade and labor rights remains one of the most controversial issues under the *World Trade Organization* (WTO) umbrella.

As precisely stated by SCHERRER, there is a "*tradition of multilateral trade agreements to tackle new challenges as they arise"*[139]. Nevertheless, contrariwise to other contemporary WTO "hot topics" – such as environmental protection and intellectual property rights –, the linkage between trade and labour is not a new or an original debate, since it has been continuously taking place at least during the last six decades. And, not surprisingly, it is still stagnated[140].

Actually, controversies on this field already started out on the post-war period, with the original idea to constitute an *International Trade Organization* (ITO), even before the establishment of the WTO´s predecessor, the ***General Agreement on Tariffs and Trade*** **(**GATT) in 1948.

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[138] HELD, David. HELD, David; MCGREW, Anthony; GOLDBLATT, David; PERRATON, Jonathan. *Global Transformations – Politics, economics and culture*. Stanford: Stanford University Press. p. 184. "As trade has encouraged the evolution of global markets, demand for labour is coming to be significantly influenced by global competitive forces. Wages in the tradables sector tend to play an important benchmark role for the rest of the economy. International competition through trade, especially from developing countries, is often assumed to reduce wages and social and environmental standards to the lowest common denominator (...)."

[139] SCHERRER, Christoph. *Op. cit.* p.66. "If today the changed conditions in world markets and a new political awareness placed the issues of the environment and worker´s rights on the agenda, the treatment of these subjects would accord precisely with the tradition of multilateral trade agreements to tackle new challenges as they arise."

[140] LANFRANCHI, Marie-Pierre. *Op. cit.* p.66. "Le débat est aujourd´hui gelé (...)."

Just after the World War II, many countries, particularly the United States, sought to increase international trade liberalization, and reverse global protectionism that had remained in place since the financial crisis of 1929[141]. Therefore, in December of 1945, the war-time Allies held discussions aiming to constitute a multilateral trade system capable of binding countries with common rules and mutual tariff concessions. These were ambitious negotiations. They sought to create an International Trade Organization as a specialized United Nations agency, to act as a third "Bretton Woods" institution, complementing the role of the *World Bank* and the *International Monetary Fund*[142].

A preparatory Committee – established in February of 1946 – met for the first time in London in October of 1946, and during the following year it worked in Geneva until an agreement was finally reached, in October of 1947[143].

Incontrovertibly, the main scope of the ITO was the direct regulation of international trade. Nonetheless, the agreement was much wider, including a variety of trade-related topics such as rules concerning commodity agreements, restrictive business practices, international investments, services and, not surprisingly, labor issues[144].

The ITO Charter was approved by the *United Nations Conference on Trade and Development* in Havana, in March of 1948. However, it has never been implemented[145]

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[141] DIEZ DE VELASCO, Manuel. *Las organizaciones internacionales.* – 11 ed. Santiago: Tecnos.. P. 441. "La necesidad de facilitar el comercio mundial, eliminando las restricciones al mismo, fue un objectivo auspiciado por los aliados occidentales incluso en plena Segunda Guerra Mundial. No es extraño que en uno de los puntos de la Carta del Atlántico (firmada por el Presidente F.D. Roosevelt y el Premier británico Churchill en 1941) figurara el de facilitar 'el acceso al comercio y a las materias primas del mundo, que son indispensables para su prosperidad económica'. La experiencia de la década de los años treinta, con su depresión económica, sin duda se tuvo presente."

[142] *Understanding the WTO/World Trade Organization Information and Media Relations Division.* 3rd edition. September, 2003. p.15. "The original intention was to create a third institution to handle the trade side of international economic cooperation, joining the two 'Bretton Woods' institutions, the World Bank and the International Monetary Fund. Over 50 countries participated in negotiations to create and International Trade Organization (ITO) as a specialized agency of the United Nations."

[143] VAN DEN BOSSCHE, Peter. *The Law and policy of the World Trade Organization: text, cases and materials.* 2nd edition. Cambridge University Press: Cambridge, 2008. p. 78. "The history of the GATT begins in December 1945 when the United States invited its war-time allies to enter into negotiations to conclude a multilateral agreement for the reciprocal reduction of tariffs on trade in goods. These multilateral tariff negotiations took place in the context of a more ambitious project on international trade. (...). A Preparatory Committee was established in February 1946 and met for the first time in London in October 1946 to work on the charter of an international organization for trade. The work continued from April to November 1947 in Geneva (...) and by October 1947 the negotiators had reached an agreement".

[144] *Understanding the WTO/World Trade Organization Information and Media Relations Division. Op. cit.* p.15. "The draft ITO Charter was ambitious. It extended beyond world trade disciplines, to include rules on employment, commodity agreements, restrictive business practices, international investments, and services."

[145] VAN DEN BOSSCHE, Peter. *Op.cit.* p.79. "In March 1948, the negotiations on the ITO Charter were successfully completed in Havana. The Charter provided for the establishment of the ITO, and set out the basic rules and disciplines for international trade and other international economic matters. However, the ITO Charter never entered into force."

because many national parliaments refused to ratify it, particularly the United States Congress[146] [147].

Concomitantly, in January of 1948, twenty-three founding Members constituted the *General Agreement on Tariffs and Trade* (GATT), which established provisional international trade rules and mutual tariff concessions. **Because of those initial deadlocks within the institution of the International Trade Organization[148], the GATT – which was supposed to be a temporary tool in order to liberalize international trade – remained in force for over forty-seven years[149], playing a key-role[150] during the second half of the 20th century**[151].

In 1952, occurred the first GATT case concerning the influence of labour regulations on trade distortions, on a controversy involving Denmark and Norway versus Belgium (claimed). On this first decision, the group of experts decided that it was not possible conditioning imports on the accomplishment of specific labour rules[152]. In spite of

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[146] *Understanding the WTO/World Trade Organization Information and Media Relations Division. Op.cit.* p.15. "Although the ITO Charter was finally agreed at a UN Conference on Trade and Employment in Havana in March 1948, ratification in some national legislatures proved impossible. The most serious opposition was in the US Congress."

[147] SENTI, Richard. *WTO-System und Funktionsweise der Welthandelnsordnung.* Schulthess Juridische Medien AG. Zürich, 2000. p.15. "Die Havanna-Charta, ohne Zweifel die Frucht der Initiative der US-Exekutive (Staatsdepartement), kam schliesslich durch die US-Legislative (Kongress) zu Fall. Die Ablehnung der Havanna-Charta in Kreisen der Wirtschaft und bei deren Vertretern im Parlament bewog den US-Präsidenten Harry S. Truman im Jahr 1950, die Charta dem Kongress nicht vorzulegen."

[148] FERNÁNDEZ PONS, Xavier. *La Organización Mundial del Comercio y el Derecho Internacional: un estudio sobre el sistema de solución de diferencias de la OMC y las normas secundarias del Derecho internacional general.* Madrid/Barcelona: Marcial Pons,Ediciones Jurídicas y Sociales, 2006. p. 61. "Como es notorio, el GATT de 1947 vino a colmar parcialmente el vacío dejado por la no entrada en vigor de la llamada 'Carta de La Habana', adoptada en 1948 por la Conferencia de las Naciones Unidas sobre el Comercio y el Empleo. Dicha Conferencia había sido convocada en 1946 por el Consejo Económico y Social, enmarcándose en los esfuerzos de reestructuración de las relaciones económicas mundiales desplegados al finalizar la Segunda Guerra Mundial."

[149] MANGAS MARTIN, Araceli. In: DIEZ DE VELASCO, Manuel. Op. Cit. p. 441 "El Acuerdo tuvo una importancia no prevista por sus redactores, dado que al fracasar la entrada en vigor de la Carta de La Habana y la Organización Internacional del Comercio, el GATT se convirtió hasta 1994 en el más importante instrumento anunciador de normas comerciales aceptadas por la inmensa mayoría de los Estados que participan en el comercio mundial, así como en el impulsor de ocho grandes rondas de negociaciones multilaterales encaminadas a liberalizar el comercio internacional."

[150] GREENWALD, Joseph.*Solución de controversias en la OMC.* In: Revista Foro Internacional. Abril-Junio, 2001. P.271-282p.271. "En sus 50 años de existencia, las reglas e instituciones de comercio del sistema GATT ocasionaron una reducción considerable de los aranceles aduaneros y las barreras comerciales de las economías de mercado del mundo industrializado, así como un grado sin precedentes de interdependencia internacional."

[151] *Understanding the WTO/World Trade Organization Information and Media Relations Division. Op.cit.* p.17. "GATT was provisional with a limited field of action, but its success over 47 years in promoting and securing the liberalization of much of world trade is incontestable."

[152] LANFRANCHI, Marie-Pierre. *Op. cit.* p.63. "Dès 1952, la question de savoir si un État peut subordonner ses importations au respect de normes sociales par le pays d´origine s´est posée. Le groupe d´experts, saisi de ce différend qui apposé la Belgique (État mis en cause) au Danemark et à la Norvège, avait répondu non mais sans vraiment expliquer la solution adoptée."

vague, this was the only case that ever expressly linked labour and trade on the GATT dispute settlement system.

The first GATT negotiation rounds[153] were restricted to tariffs, but since the *Tokyo round* (1973-1979) other topics have slowly been included in its ambit, such as intellectual property rights, sanitary and phytosanitary measures, customs duties and technical barriers to trade. Since then, **the United States has made several attempts to include labor standards within the GATT system**.

Following Tokyo, the *Uruguay Round* (1986-1994) may be considered the most ambitious multilateral trade negotiation since 1947. It resulted on an average tariff reduction of 33%, on an extension of the GATT competence to new areas, such as textiles, services and intellectual property rights and on the reinforcement of antidumping[154] procedures[155]. Also, during the *Uruguay Round* the United States, with the support of the European Community, the Nordic countries, Switzerland, Canada, New Zealand, Japan and some Eastern European States requested the formation of a working group to discuss the incorporation of labour rights on the GATT system, but once again, because of the opposition of developing countries – particularly from Asia.[156] – an agreement was not

[153] GATT negotiation rounds: Geneva (1947); Annecy (1949); Torquay (1951); Geneva II (1956); Dillon (1960-1961); Kennedy (1964-1967); Tokyo (1973-1979); Uruguay (1986-1994); Doha (2001- ?).

[154] LOWENFELD, Andreas F. *International Economic Law.* Oxford: Oxford University Press, 2002. p. 243."Dumping as a technical term in the law of international trade is quite different from the lay person´s understanding of the term. The popular definition of dumping embraces any sales by a producer or merchant at low prices to dispose of surplus – if possible after costs of production of the entire line have been recovered. In the language of law of international trade, the definition of dumping is more limited and technical. Article VI of the GATT, modeled roughly but not precisely on the United States Anti-Dumping Act of 1921, defines dumping as an export of a product by a producer or seller in Patria to importers in Xantia 'at less than its normal value', i.e. at less than the price at which the product in question is sold when destined for comsumption in Patria. (…) In three successive Anti-Duping Codes or agreements, concluded in the Kennedy, Tokyo and Uruguay Rounds, the basic definition has been refined and elaborated somewhat (…) but not essentially altered."

[155] GERBET, Pierre (avec la participation de Victor Yves GHÉBALÍ et Marie-Renée MOUTON). *Le rêve d´un ordre mondial – de la SDN à l´ONU.* Paris: Imprimerie Nationale, 2006. p. 407. "Le huitième cycle de négotiations multilatérales s´est ouvert le 20 septembre 1986 à Punta del Este (Uruguay). L´accord final a été signé le 15 avril 1994 à Marrakech (Maroc). Il comporte un abaissement des droites de douane de 33% en moyenne: 40% en cinq uns sur les produits industriels, 36% en six ans sur les produits agricoles. Il prévoit une réduction de 20% des soutiens publics internes, une diminution de 36% des subventions à l´exportation quant à leur montant et de 21% quant aux quantités auxquelles elles s´apliquent. La compétence du GATT est étendue aux produits textiles et d´habillement, aux services qui représentent une part important du commerce mondial, aux droits de propriété intellectuelle qui touchent au commerce. La procédure antidumping est renforcée. Le cycle de l´Uruguay représente ainsi la plus ambitieuse libéralisation du commerce mondial. C´est, depuis 1947, la plus grande baisse des droits de douane sur les marchandises et qui, pour la première fois, inclut l´agriculture et le textile."

[156] PURSEY, Stephen. *The case for social clauses in International Trade Policy.* In: *Internationale Politik und Gesellschaft.* Friedrich-Ebert-Stiftung, 1994. p. 235. "The completion of the Uruguay Round has restimulated the often sharp debate over the inclusion of social clauses in international trade agreements. President Clinton and the US Trade Representative Kantor have included the idea of linking worker´s rights and trade on their new trade agenda. The President of the European Commission Jacques Delors has similarly

settled[157]. This American initiative was also corroborated by worker´s unions such as the AFL-CIO and the ICFTU[158] [159].

As a corollary of the *Uruguay Round*, the **World Trade Organization[160] was constituted**[161] by 125 countries that signed the Marrakesh Agreement, in order to set up a permanent international organization able to foster and control the so current trade liberalization[162] tendency, succeeding the GATT structure after January 1st, 1995. The main objectives of the WTO are the administration, implementation and budgetary control of trade-related multilateral agreements[163] (particularly the GATT, GATS and TRIPS)

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identified the social dimension of trade liberalization as an unavoidable issue. On the other hand, a number of developing country governments, especially in Asia, have denounced such proposals as thinly disguised protectionism."

[157] HEPPLE, Bob. *Labor Laws and Global Trade.* Hart Publishing: Oxford and Portland, Oregon:2005. p. 130. "During the Tokyo Round of multilateral trade negotiations (1973-1979) the United States raised the issue of labor standards, but failed again to gain support. The reciprocal allegations between developed and developing countries of social dumping and protectionism surfaced again during the Uruguay Round (1986-1994). The United States requested that a working group be formed to study the issue. Although this had the support of the EU, the Nordic countries, Switzerland, Canada, New Zealand, some Eastern European countries and Japan, no agreement could be reached."

[158] RESTREPO, Marta A. *Op. Cit.* p. 322. "Es así como durante la Reunión Ministerial de Uruguay de Negociaciones del GATT en 1986, el representante de los Estados Unidos, de acuerdo con la AFL-CIO, propuso que el tema se incluyera en las negociaciones. Sin embargo su propuesta fue derrotada debido a la oposición de la mayoría de los países en vías de desarrollo, a pesar de haber contado con el apoyo de los países industrializados. También en 1987 y 1990, los Estados Unidos propusieron en el Consejo del GATT, que éste debería establecer un grupo de trabajo para considerar la relación entre el comercio internacional y el respeto por los derechos de los trebajadores internacionalmente reconocidos; la CIOLS realizó ingentes esfuerzos para que los países afiliados al GATT aceptasen su propuesta, sin embargo ésta fue rechazada por numerosos países, lo que ha bloqueado su adopción."

[159] PURSEY, Stephen. *Op. Cit.* p.238. "The social clause is a practical proposition and that is why the ICFTU places a special emphasis on a GATT/ILO Advisory Body to specify a list of minimum standards and oversee implementation of the clause."

[160] SHAW, Malcolm N. *International Law.* 5th edition. Cambridge: Cambridge University Press, 2003. p. 1167. "The organization consists of a Ministerial Conference, consisting of representatives of all members meeting at least once every two years; a General Council composed of representatives of all members meeting as appropriate and exercising the functions of the Conference between sessions; Councils for Trade in Goods, Trade in Services and Trade Related Aspects of Intellectual Property Rights operating under the general guidance of the General Council; a Secretariat and a Director-General."

[161] SKLAIR, Leslie. *Globalization: capitalism and its alternatives*. Oxford University Press, 2002. p. 17. "In April 1994, 125 governments signed a global trade treaty in Morocco to set up the World Trade Organization (WTO) to replace GATT in 1995. WTO has accelerated the pressures to liberalize trade in goods and services and to protect intellectual property rights. It has tougher dispute-settlement powers than GATT and there is no single country veto power in WTO."

[162] SANTA MARIA, Alberto. *Il Diritto internazionale dell´economia*. In: BARIATTI, Stefania (et al.) Istituzioni di Diritto Internazionale. 3a ed. G.Gappichelli Editore: Torino, 2000. p. 481. "Al GATT/WTO aderiscono attualmente quasi tutti gli Stati del mondo il cui sistema economico sia improntato al libero scambio (...) Così che si può dire che il GATT/WTO costituisce ormai, nella realtà delle cose, la regolamentazione 'generale' del funzionamento dei traffici internazionali".

[163] Agreement establishing the World Trade Organization, 1994, Article II. " (…) 2. The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as 'Multilateral Trade Agreements') are integral parts of this Agreement, binding on all Members. 3. The agreements and associated legal instruments included in Annex 4 (hereinafter referred to as 'Plurilateral Trade Agreements' are also part of this Agreement for those Members that have accepted them, and are binding on those Members. The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them."

signed under its umbrella, the establishment of an encouraging environment for future negotiations and the institution of an effective dispute settlement system[164].

In 1996, during the first WTO Ministerial Conference[165], the inclusion of labor standards under the administration of the WTO had been directly questioned[166]. In fact, the connection between trade and labor rights was one of the main "Singapore issues"[167] – which caused intense debates. Developed countries exerted significant pressure to include regulation regarding labor standards on the WTO scheme. They argued that this would encourage all members to improve workplace conditions[168]. Notwithstanding, a large portion of developing countries strongly opposed this idea, since, they argued, it would be no more than a *"smokescreen for protectionism"*. Developing countries state that the main thrust behind the campaign is to establish minimum labor standards on WTO Members in an attempt to "*undermine the comparative advantages of lower wage trading partners*."[169]

In the end, after several rounds of discussion, WTO Members expressly decided not to include the advocacy and the defense of labor standards in the specific WTO agenda[170], recognizing the ILO as the competent body on this topic[171].

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[164] GERBET, Pierre (avec la participation de Victor Yves GHÉBALÍ et Marie-Renée MOUTON).*Op. cit.* p.407. "Le GATT s´est transformé, au janvier 1995, en Organisation mondiale du commerce qui est chargée de surveiller l´application des accords concluant le cycle d´Uruguay, de constituer une enceinte pour les négotiations commerciales multilatérales et surtout de mettre en ouvre un nouveau système de règlements des litiges, plus contraignant que celui du GATT, afin d´éviter que les États-Unis ne continuent à décider des représailles commerciales unilatérales."

[165] SENTI, Richard. *Op.cit.* p.687. "Die erste Ministerkonferenz der WTO fand vom 9 bis 13 Dezember 1996 in Singapur statt."

[166] DIEZ DE VELASCO, Manuel. *Op. cit.*p. 460. "Desde diversos medios sociales y políticos se defendia el mantenimiento e, incluso, el fortalecimiento de las barreras comerciales para combatir la brutal competencia desleal de los bajos salarios de los países del Tercer Mundo y, lo que es más grave, de países que ya no pueden ser considerados como tales debido a la fuerte industrialización que están desarrollando. Es el caso de los países del Este de Asia como Singapur, Malasia, Taiwan, Corea del Sur, Tailandia y otros como Pakistan, Sri Lanka, Hong Kong, India, Isla Mauricio o China. (...)"

[167] *Understanding the WTO/World Trade Organization Information and Media Relations Division. Op.cit.* p.74. "Trade and labor standards is a highly controversial issue. At the 1996 Singapore Ministerial Conference, WTO members defined the organization´s role more clearly identifying the International Labor Organization (ILO) as the competent body to deal with labor standards. There is currently no work on the subject in the WTO."

[168] *Id.* p.75. "The WTO agreements do not deal with any core labor standards. But some industrial nations believe the issue should be studied by the WTO as a first step toward bringing the matter of core labor standards into the organization. WTO rules and disciplines, they argue, would provide incentive for member nations to improve work place conditions."

[169] *Ibid.* p. 75. "Many developing and some developed nations believe the issue has no place in the WTO framework. These nations argue that efforts to bring labor standards into the arena of multilateral trade negotiations are little more than a smokescreen for protectionism. Many officials in developing countries believe the campaign to bring labor issues into the WTO is actually a bid by industrial nations to undermine the comparative advantage of lower wage trading partners."

[170] *Ibid.* p.75. "The concluding remarks of the chairman, Singapore´s trade and industry minister, Mr. Yeo Chow Tong, added that the declaration does not put labor on the WTO´s agenda."

Nevertheless, the Members reaffirmed their commitment regarding the compliance of ILO's core labor rights and stated that labor standards should not be used with protectionist purposes.

Three years later, in Seattle, the United States, Europe and Canada proposed the organization of working groups on this subject[172], but again a final consensus was not achieved.

Since the launching of the Doha Development Round, in 2001, many developed countries, and particularly the European Communities, have been focusing on a more comprehensive agenda for the WTO, aiming to include, among other topics, the relationship between trade and core labor standards[173]. But, once again, such proposals have been finding strong opposition from developing countries, and the topic have been once more left outside the negotiation table.

3.2. WTO SUBSTANTIVE RULES REGARDING LABOUR STANDARDS

In spite of its non-binding nature, the preamble of the GATT brings the idea that "*trade liberalization is not an end itself*"[174], what could be an indicative that the organization should play an active role on the social field. Nevertheless, considering that (1) there are no clauses on the three central WTO Agreements (GATT, GATS[175], TRIPS[176]) which expressly mention the link between labor rights and trade[177], and (2) that the WTO dispute settlement system still had not the opportunity to concretely discuss this topic, many commentators conclude that (1) workers´ rights could not be invoked before

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[171] DICKEN, Peter. *Op. cit.* p. 576. "O argumento daqueles que se opõem à sua inclusão na competência da OMC é o de que os padrões trabalhistas fazem parte da esfera de responsabilidade da Organização Internacional do Trabalho (OIT). (...). O contra-argumento é que faltam à OIT poderes de imposição."

[172] *International Trade and Core Labor Standards*. *Op.cit.* p. 2. "(...) the U.S. proposed establishing a WTO Working Group on Trade and Labor. The EU favoured a joint ILO/WTO Standing Working Forum on the issue, and Canada suggested a WTO Working Group on the relationships between appropriate trade, developmental, social and environmental policy choices in the context of adjusting to globalisation".

[173] VAN DEN BOSSCHE, Peter. *Op.cit.* p.90. "Some WTO members, and in particular the European Communities, wanted a broader agenda for the Doha Development Round. They also wanted the WTO to start negotiations on, for example, the relationship between trade and investments, the relationship between trade and competition law and the relationship between trade and core labor standards." (...) "At the Doha session of the Ministerial Conference, WTO members decided that there will be no negotiations, within the context of the WTO, on the relationship between trade and core labor standards."

[174] PURSEY, Stephen. *Op. Cit.* p. 235. "The notion that trade liberalization is not an end itself was accepted in the Preamble of the General Agreement on Tariffs and Trade (...)."

[175] General agreement on trade in services.

[176] Agreement on trade-related aspects of intellectual property rights.

[177] LANFRANCHI, Marie-Pierre. *Op. cit.* p.60. "(...) le Préambule, comme on sait, est dépourvu de force obligatoire et le dispositif des accords ne confère aucune compétence à l´OMC dans le domaine social."

WTO Panels (an consequently neither before the Appellate Body) – and that (2) the International Labour Organization would be the exclusive international forum available to discuss breaches of labour standards by WTO Members.

Nonetheless, those are inaccurate inferences. As properly stated by KAUFMANN, the referred decisions made in Singapore and Seattle – which excluded labor standards from the WTO negotiation schedules – "*by no means (...) prevents the application of core labor rights by the WTO dispute settlement organs.*"[178] That is to say, the WTO system, despite the fact that it has no right to create labor regulations[179] or to review ILO decisions[180] - even because of the principle of specialization[181] - is not prevented from dealing with labor issues within its own system. And more, as we´ll see, the WTO has the duty to enforce cooperation with the International Labor Organization and to incorporate ILO core standards on the rulings of its own dispute settlement system.

Furthermore, it will be evident that it is dispensable changing WTO substantive rules in order to include labor rights in the WTO system**:** several GATT clauses already open possibilities to do that through the employment of classic interpretive tools.

The next sessions of this investigation will carefully examine the most relevant GATT/WTO articles and jurisprudence which could be used as legal fundaments to ensure the enforcement of labour standards by/on WTO members. Basically, there are three hypotheses:

(1) to exclude the application of GATT Article I and III by arguing that goods produced without the accomplishment of core ILO standards should not be considered "like products" when compared to those developed in accordance with those basic norms. There is significant jurisprudence on this sense, especially on the environmental field – e.g., on the *Asbestos* case – that could be employed analogously on the labour area;

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[178] KAUFMANN, Christine. *Op.cit.* p.291. "Therefore, WTO dispute settlement organs have no jurisdiction to rule on claims of violation of core labor rights and cannot actively enforce them. (...). However, the Singapore Declaration by no means prevents the application of core labor rights by the WTO dispute settlement organs. (...). In practice, problems will arise when it comes to interpretating core labor rights in light of the WTO agreements."

[179] *Id.* p.292."What is required to enhance the protection of core labor rights within the WTO is not the creation of new legal rules but firstly the improvement of institutional cooperation with the ILO."

[180] *Ibid.* p.292. "When the ILO comes to a conclusion, for example under an Article 33 procedure such as in the case of Burma/Myanmar, there is no rooms for a legal review by the WTO."

[181] SCHERRER, Christoph. *Op. cit.* p.66. "Moreover, for the WTO to take over responsibility for ILO tasks would run counter to the existing principle of specialization in the polical handling of international problems."

(2) to include the violation of fundamental labour rights on the exceptions prescribed by GATT article XX, letters “a”, “b” and “e”;
(3) to set up generalized systems of preferences and free trade agreements which condition trade liberalization to the accomplishment of fundamental labour standards.

Nonetheless, before concretely start examining GATT/WTO regulations and jurisprudence, it is necessary understanding which labour rights may be applied on the system, and the complementary role of the ILO on the standardizing function.

3.2.1. Defining which *‘labor standards’* may be enforced through the WTO dispute settlement system: the complementary role of the ILO

The WTO maintains close relationships with several international organizations – such as the World Bank, the International Monetary Fund and the International Labour Organization – usually on fields related to technical cooperation. Nevertheless, one of the most important functions performed by international organizations on the WTO system is the **setting up of standards.**

The establishment of those standards has direct impact on the decisions of the WTO dispute settlement system, since neither panels nor the Appellate body have competence to set up such guidelines. Notwithstanding, the organisms part of the DSS frequently refer to standards enacted by specialized organizations such as the *International Telecommunication Union* (ITU), the *International Electrotechnical Commission* (IEC) , the *International Standards Organization* (ISO), the *Codex Alimentarius Commission* and the *International Office of Epizootic* , among others. More, the Member´s engagement in those standardizing organizations is expressly promoted by relevant WTO agreements such as the TBT (*WTO Agreement on Technical Barriers to Trade*):

> Article 2.4
> “***Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations*** *except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfillment of the*

legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.
2.6 With a view to harmonizing technical regulations on as wide a basis as possible, ***Members shall play a full part, within the limits of their resources, in the preparation by appropriate international standardizing bodies of international standards for products for which they either have adopted, or expect to adopt, technical regulations****."*

and the SPS (***WTO Agreement on the Application of Sanitary and Phytosanitary Measures*****):**

Article 3 - Harmonization
"1. To harmonize sanitary and phytosanitary measures on as wide a basis as possible, ***Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist****, except as otherwise provided for in this Agreement, and in particular in paragraph 3."*
(...)
"4. ***Members shall play a full part, within the limits of their resources, in the relevant international organizations and their subsidiary bodies, in particular the Codex Alimentarius Commission, the International Office of Epizootics, and the international and regional organizations operating within the framework of the International Plant Protection Convention, to promote within these organizations the development and periodic review of standards, guidelines and recommendations with respect to all aspects of sanitary and phytosanitary measures****."*
(...)

Annex A
"3. International standards, guidelines and recommendations
(a) for food safety, the standards, guidelines and recommendations established by the Codex Alimentarius Commission relating to food additives, veterinary drug and pesticide residues, contaminants, methods of analysis and sampling, and codes and guidelines of hygienic practice;

> *(b) for animal health and zoonoses, the standards, guidelines and recommendations developed under the auspices of the International Office of Epizootics;*
> *(c) for plant health, the international standards, guidelines and recommendations developed under the auspices of the Secretariat of the International Plant Protection Convention in cooperation with regional organizations operating within the framework of the International Plant Protection Convention; and*
> *(d) for matters not covered by the above organizations, appropriate standards, guidelines and recommendations promulgated by other relevant international organizations open for membership to all Members, as identified by the Committee."*

Analogously[182]**, on the Singapore Ministerial Meeting the WTO Members recognized the International Labour Organization as the competent body to deal with labor issues at the international level**. Therefore, the WTO opened doors for the application of **ILO standards which may – and must – be invoked on multilateral negotiations and before its dispute settlement system.**

More, the cooperation with other international organizations is stated by the article 12 of the ILO Constitution:

> *Article 12 -"1. The International Labour Organization shall cooperate within the terms of this Constitution with any general international organization entrusted with the coordination of the activities of public international organizations having specialized responsibilities and with public international organizations having specialized responsibilities in related fields.*
> *2. The International Labour Organization may make appropriate arrangements for the representatives of public international organizations to participate without vote in its deliberations.*
> *3. The International Labour Organization may make suitable arrangements for such consultation as it may think desirable with recognized non-governmental international organizations, including international*

[182] SCHERRER, Christoph. *Op. cit.* p.66. "Moreover, where trade in foodstuffs was concerned, the UN Codex Alimentarius Commission would lay down the standards that the WTO would have to police. This arrangement would be exactly the same as has been proposed for the WTO and the ILO with regard to social clauses."

organizations of employers, workers, agriculturists and cooperators. "

On this sense, given that all WTO members and the organization itself should observe ILO standards, a further question would be: "*Could every ILO Convention be enforced by the WTO DSS?* "

As we´ve seen on the specific chapter of this study, the ILO founding fathers strived to create an organization with a self-executing supranational legislation which could be imposed upon all of its Members. However, this idea met strong international resistance, since there was the danger of disincentive countries to join the organization, or become useless, by setting lower common standards in order to accommodate more Members.

More, the most part of ILO regulations – with the notable exception of the fundamental Conventions recognized as such by the 1998 '*Declaration of Fundamental Principles and Rights at work*' – are not self-contained or self-executing, that is, they are general statements of values which are not automatically binding and must be internalized within every Member State through domestic regulation.

Therefore, the answer to our question must be: no, **the WTO dispute settlement system must not be used as a way to enforce all obligations assumed by its Members before the ILO, since this would be against the non-mandatory nature of that institution**. More, in a global organization such as the WTO – where there is a huge economic disparity among its Members – the "stick" must not be used with protectionist purposes. **Nevertheless, the WTO DSS is a feasible alternative to ensure the enforcement of core labour standards, recognized as such by the referred ILO[183] *Declaration of Fundamental Principles and Rights at work*' (1998)**.

[183] KAUFMANN, Christine. *Op.cit.*. p.293. "What is still lacking is a translation of the legal concept into standards that are applicable in the trade context. This is where the ILO must provide guidance."

3.2.2. Labour standards, the concept of "like products" and the application of the principles of "national treatment" and the "most-favored nation" clause

All agreements signed under the WTO umbrella are guided by the non-discrimination principle[184], expresses on two fundamental – and complementary[185] - rules: the "national treatment" and the "most-favoured nation" clauses.

3.2.2.1. Definition of "national treatment"

The principle of national treatment is stated in the three main WTO agreements (GATT article III, GATS article XVII and TRIPS article III) and ensures that no discriminatory measures may be taken against foreign products[186] when compared with "like products" of a certain industry.

> ***"Article III: National Treatment on Internal Taxation and Regulation***
> *1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.*
> *2.* ***The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.*** *Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.*

[184] MOTA, Pedro Infante. *O sistema GATT/OMC: introdução histórica e princípios fundamentais*. Edições Almedina/Gráfica de Coimbra, Coimbra: 2005. p. 107. "O mais importante desses princípios é, certamente, o da não discriminação, o qual se desdobra em duas vertentes: a cláusula da nação mais favorecida e a cláusula do tratamento nacional."
[185] *Id.* p. 130. "Na maioria dos casos, as duas cláusulas são complememtares, aparecendo ambas consagradas, por vezes, numa só disposição."
[186] Also applied to services, patents, trademarks, etc.

(...)"[187]

In other words, a country is not allowed to enact regulations that compel foreign goods to comply with higher standards other than the ones concretely applied to its domestic products.

Notwithstanding, if a State applies high standards for its internal industry, could it compel foreign manufacturers (of imported goods) to comply with those same rules?

The immediate answer is *no*. Countries are not allowed to impose national standards on imported "*like products*" since it would start a situation of extraterritorial application of domestic law[188]. *Exempli gratia*, if French workers have a weekly journey of thirty-five working hours on the production of a product X, France is not allowed to oblige all foreign industries that produce X to apply that same rule.

Nevertheless, this does not mean that countries are compelled to accept goods produced in violation of minimum worker rights, since this unfair competition could cause damage to their own domestic production and/or generate a possible '*race-to-the-bottom*'. Therefore, it is important to include labor rights under the WTO umbrella and to use the concept of national treatment reversely**:** countries must be able to demand the protection of '*minimum labor standards*' abroad, in order to protect their own workers.

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[187] *GATT 1947, Article III. National Treatment on Internal Taxation and Regulation*. " 1.The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production. 2.The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1. 3. With respect to any existing internal tax which is inconsistent with the provisions of paragraph 2, but which is specifically authorized under a trade agreement, in force on April 10, 1947, in which the import duty on the taxed product is bound against increase, the contracting party imposing the tax shall be free to postpone the application of the provisions of paragraph 2 to such tax until such time as it can obtain release from the obligations of such trade agreement in order to permit the increase of such duty to the extent necessary to compensate for the elimination of the protective element of the tax. 4.The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product. (…)". *Source*: WTO.

[188] KAUFMANN, Christine. *Op.cit.* p.144. "It is not clear whether a Member State can invoke these provisions in order, for example, to protect the health of the workers in another country or to fight child labour abroad."

3.2.2.2. Definition of the "most favored nation" clause (MFN)

The first fundamental WTO pillar is the principle of the "most favorite nation" (MFN), expressed on the first GATT article:

> ***"Article I:***
> ***General Most-Favoured-Nation Treatment***
> *1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, **any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties**.*
> *(...)"*[189]

The MFN clause states that trade advantages which benefit one country in particular must be extended to all other countries which are part of the multilateral trade system, automatically and unconditionally[190]. This means that the advantages conceded to a State member Z must be extended to all other WTO Members even if they do not meet with the same conditions imposed originally to the country Z – on this sense see *Indonesia – certain measures affecting the automobile industry* and the *Belgian family allowances* cases. It is noteworthy that the article refers to "other country" (and not to "another Member"). That is to say that advantages conceded to countries – even if they are not WTO Members – are also subject of this clause[191].

[189] *Source*: WTO.

[190] DIEZ DE VELASCO, Manuel. Op. Cit. p. 445. "Luego, por el hecho mismo de ser Partes Contratantes, éstas se conceden la cláusula de nación más favorecida con un alcance multilateral, incondicional y automático."

[191] *Id.* p. 113. "(...) é importante realçar que o n. 1 do art I do GATT tem em conta não só as vantagens concedidas aos produtos originários os Membros da OMC ou a eles destinados, mas também as vantagens concedidas a um 'outro país' Se a Comunidade Européia, Membro da OMC, conceder uma vantagem (...) à Rússia, que não aderiu ainda à OMC, a Comunidade é obrigada a estender essa vantagem a todos os outros Membros da OMC. Em contrapartida, não se encontrando a Rússia sujeita às obrigações previstas no GATT, qualquer vantagem por ela concedida à Comunidade Europeia só beneficiará esta última.".

The importance of the MFN clause derives, among other causes, from the fact that: (1) it benefits developing and less-significant[192] countries, extending to them advantages negotiated between the 'big players', (2) it avoids trade distortions, since all countries receive the same treatment, (3) it reduce transaction costs, since it is not necessary determine the precise origin of every product[193] , (4) it multiplies and accelerates trade liberalization[194].

3.2.2.3. The compatibility between the principle of national treatment, the MFN clause and the restrictions concerning labor rights under the WTO legal system: analyzing the WTO jurisprudence regarding the concept of "like products"

As we´ve seen, GATT articles I and III state that countries are not allowed to take discriminatory measures against foreign '*like products*'[195]. Notwithstanding, the GATT Agreement does not bring a univocal definition of this expression[196]. Hence, several controversies have been already raised regarding this topic on the GATT/WTO dispute settlement system, such as *Australian Ammonium Sulphate*[197] *, Spain – Tariff Treatment on Unroasted Coffee*[198] and on *Japan – Tariff Import of Spruce Pine fir Dimension Lumber*[199], but still no common interpretation has prevailed.

[192] Regarding trade.
[193] It is applied to all products, and not only on those which part of concession lists.
[194] MOTA, Pedro Infante. *Op. cit.* p. 122. "A aplicação da cláusula da nação mais favorecida oferece inúmeras vantagens: i) possibilita que todos partilhem das vantagens resultantes da redução ou eliminação dos obstáculos ao comércio, nomeadamente, permitindo que os países pouco impornates do ponto de vista comercial recebam, igualmente, as vantagens que as grandes potências comerciais trocam entre si (no caso de negociações bilaterais com as grandes potências comerciais, os países pequenos teriam muito menos possibilidades de obter essas vantagens); ii) se não existisse a cláusula da nação mais favorecida, os países teriam ininterruptamente de ajustar e renegociar os respectivos acordos comerciais face a qualquer alteração significativa da sua situação comercial; iii) previne a distorção dos mercados mundiais, visto que todos os países terceiros recebem o mesmo tratamento, iv) reduz os custos de transacção, dado evitar que os funcionários aduaneiros tenham que determinar a origem dos produtos; v) multiplica e acelera os efeitos de liberalização comercial; vi) do ponto de vista econômico, o acatamento da cláusula da nação mais favorecida pela generalidade dos países assegura a observância da teoria da vantagem comparativa de David Ricardo."
[195] The expression may be found on several articles of the GATT , *exempli gratia*, on articles I,1; II, 2, a); III, 2, 4; VI, 1, a) and b), 7; IX, 1; XI, 2, c); XIII, 1, XVI, 4.
[196] LANFRANCHI, Marie-Pierre. *Op. cit.* p.62. "Or, aucun des accords de l´OMC ne donne de définition de la notion de 'produits similaires'. La question est donc posée."
[197] 1950.
[198] 1981.
[199] 1989.

On several cases the panels had restrictive interpretations, like in *Japan – Alcoholic Beverages*, suggesting the utilization of previous classifications as reasonable criteria[200]. Other criteria had been already recommended by the working group on the *Border Tax Adjustments*[201] case, such as final uses, properties, nature, quality, preferences and habits of consumers[202].

Recently, less restrictive interpretations have been taking into consideration on the analysis of the "likeness" of two products. Initially, panels started to accept that processes and production methods (PPMs) could be used as relevant criteria, always when they could be defined as incorporated ones – those which directly affect the final products, like the use of pesticides on a certain agricultural good[203]. On the other hand, non-incorporated PPMs – those which do not directly affect the final products – were for a long time *a priori* discarded as elements of "likeness" between two goods, [204] an interpretation that emerged on the *Tuna/Dolphin* cases.

This interpretation has a major impact on the labour field, since the accomplishment with labour regulations – even the core ones – do not affect the physical characteristics of the final product, being considered a non-incorporated PPM *per excellence*. Therefore, a less restrictive interpretation would allow that goods produced by countries which do not respect core labor rights should not be considered "*like products*" when compared to those produced in accordance with ILO fundamental labor standards[205]. Unfortunately, the GATT/WTO dispute settlement system still has not had the opportunity to reconcile this matter. However, recent legal developments – e.g., the *Asbestos* case –

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[200] MOTA, Pedro Infante. *Op. cit.* p. 138. "Uma classificação pautal uniforme dos produtos pode ser útil para determinar se eles são ou não 'produtos similares'. Caso seja suficientemente detalhada, a classificação pautal pode constituir uma indicação útil sobre a similitude dos produtos (...)."

[201] 1970.

[202] *Id.* p. 138. "Alguns critérios foram sugeridos para este efeito: as utilizações finais do produto num dado mercado; os gostos e hábitos dos consumidores, variáveis de país pra país; as propriedade, a natureza e a qualidade do produto."

[203] *Id.* p. 179. "Por exemplo, não tem qualquer efeito no peixe enquanto tal ou no seu valor nutritivo ou gustativo junto do consumidor a proibição de utilizar na pesca uma rede-arrastão, embora tal medida possa ajudar a proteger o ambiente. Em contrapartida, a exigência de que não existam pesticidas no algodão, enquanto produto final, constitui um exemplo de um processo e método de produção incorporado."

[204] *Id.* p. 178. "(...) as distinções dos produtos baseadas nas características do processo de produção, ou do produtor, que não sejam determinantes das características do produto, são simplesmente vistas *a priori* como ilegítimas."

[205] LANFRANCHI, Marie-Pierre. *Op. cit.* p.61. "(...) que sont des produits 'similaires'? Deux produits, qui présenteraient des caractéristiques physiques équivalentes, sont-ils similaires si par ailleurs leurs processus de production diffèrent? Plus spécifiquement, peut-on considérer que deux produits sont similaires, si les processus de production respectent ou pas, suivant le cas, les normes sociales fondamentales?"

concerning the likeness of goods on an environmental perspective could set important precedents for future cases regarding labor rights[206].

In this respect, it is important to analyze the dichotomic interpretation shift that took place between two remarkable panel decisions on the environmental field, which could be used as important precedents on the defense of workers´ rights at the WTO dispute settlement system:

3.2.2.3.1. The Tuna/Dolphin cases (1991/1994)

The United States Marine Mammal Protection Act[207] (MMPA) banned the imports of commercial fish (and derived goods) produced with high mammal (Dolphins) mortality rates[208]. Imports would only be admitted if "(1) *the government of the harvesting country had a program regulating the taking of marine mammals, comparable to that of the US*" and "(2) *the average rate of incidental taking of marine mammals by vessels of the harvesting nation was comparable to the average rate of such taking by US vessels*[209]".

In practice, this act banned all imports from Mexico - and intermediate countries[210]. Therefore, in 1991 Mexico requested a panel decision[211], in order to discuss the compatibility of those American environmental norms with the article III, XI and XIII of the GATT system. The US, on its defense, invoked GATT articles III, 4 and the exceptions of article XX *b)* and *g).* Several other parties, such as Costa Rica, Italy, Japan, Spain, France, the Netherlands Antilles, the United Kingdom, Canada, Colombia, the Republic of Korea, and members of the Association of Southeast Asian Nations joined the discussion, in what might have given some weight to that ruling. **The Panel decided that the American embargo was against GATT rules since it was not based on the quality or content of the tuna imported, but merely on the way tuna was produced**[212]. In accordance with the panel, the definition of products is different than the characterization

[206]KAUFMANN, Christine. *Op.cit.*. p.142. "Although the WTO organs have not yet had the opportunity to decide a case involving labor rights, decisions related to the protection of the environment are relevant (...)."

[207] Enacted in October 21st, 1972.

[208] "The act meant a ban on the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of US standards". *Source*: WTO.

[209] *Source*:WTO.

[210] MOTA, Pedro Infante. *Op. cit.* p. 180. "Foi o que aconteceu com o México,que viu as suas exportações de atum para os EUA serem totalmente banidas (o boicote aplicou-se igualmente aos países intermediários, ou seja, os países onde o atum mexicano era processado e enlatado)."

[211] *United States – restrictions on imports of tuna from Mexico* case.

[212] LANFRANCHI, Marie-Pierre. *Op. cit.* p.63. "Le groupe spécial dans les deux cas, va rejeter la thèse américaine: il se fonde sur une interprétation littérale du GATT (...)."

of Processes and Production Methods (PPMs)[213]. Moreover, the panel decided that on this specific case the US was trying to give extraterritorial effects to its domestic environmental legislation[214]. This was not allowed by the GATT rules, *"even to protect animal health or exhaustible natural resources"*. The panel decided that it was not a regulation on a product, but a hidden import restriction, which violated GATT article XI[215]. It also did not fit into the exceptions stated in GATT, Article XX, since – the panel concluded – those exceptions do not have extraterritorial effects[216].

Nevertheless, in spite of the great attention received by this case, the decision was never adopted[217] since the US and Mexico resolved the matter through bilateral

[213] MOTA, Pedro Infante. *Op. cit.* p. 181. "Portanto, os EUA não podiam decretar um boicote às importações de atum e rodutos derivados do México, apenas porque o modo de captura do atum não satisfazia a legislação norte-americana, ou seja, o tratamento concedido ao atum importado deveria ser o mesmo que o concedido ao atum nacional, independentemente do impacto ambiental dos métodos de pesca de um e outro país."

[214] LANFRANCHI, Marie-Pierre. *Op. cit.* p.64. "On voit bien que le problème est très difficile, puisque ce qui est jeu c´est la souveraineté de l´État d´origine des produits; admettre la thèse américaine reviendrait schématiquement à reconnaître aux États du Nord une compétence universelle qui leur permettrait d´exporter leurs standards sociaux vers les États du Sud."

[215] "**Article XI: General Elimination of Quantitative Restrictions** - 1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party. 2.The provisions of paragraph 1 of this Article shall not extend to the following: (*a*) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party; (*b*) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade; (*c*) Import restrictions on any agricultural or fisheries product, imported in any form,* necessary to the enforcement of governmental measures which operate: (i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted; or (ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or (iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible. Any contracting party applying restrictions on the importation of any product pursuant to subparagraph (*c*) of this paragraph shall give public notice of the total quantity or value of the product permitted to be imported during a specified future period and of any change in such quantity or value. Moreover, any restrictions applied under (i) above shall not be such as will reduce the total of imports relative to the total of domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions. In determining this proportion, the contracting party shall pay due regard to the proportion prevailing during a previous representative period and to any special factors* which may have affected or may be affecting the trade in the product concerned."

[216] MOTA, Pedro Infante. *Op. cit.* p. 182. "Dito de outra forma, as regras do GATT não permitiam a adopção por uma parte contratante de medidas comerciais com o objetivo de tentar aplicar as suas próprias leis noutro país, mesmo que estivesse em causa a protecção ad vida de animais ou a protecção de recursos naturais (...). Caso os argumentos norte-americanos tivessem sido aceitos, qualquer país poderia impedir as importações de produtos de outro país com o fundamento de que o país que exporta tem políticas ambientais e sociais diferentes das suas."

[217] *Id.* p. 183. "(...) o relatório nunca chegou a ser adoptado. Tal não impediu que o caso tivesse sido alvo de grande atenção e objecto de anúncios de página inteira em alguns dos principais jornais norte-americanos,

arrangements. In 1992, the European Communities and the Netherlands raised the issue again, and in 1994 the Panel made a similar decision, which was also not adopted because of consensual lacking.

The relevant aspect of this jurisprudence was that the US was not allowed to unilaterally impose stringent environmental standards, even if they were justifiable, as exceptions on a multilateral liberalized trade system. **If this example were applied to the labor field, it would be possible to infer that a country could not restrict imports based on the accomplishment of core standards on its internal labor laws and on the non-observance of those same rules abroad, since this ban would have the effect to give extraterritorial effects to domestic labor legislation**[218]**. Secondly, in accordance to the *Tuna-Dolphins* interpretation, countries would not be allowed to differentiate products simply based on the PPMs involved in their production.**

Notwithstanding the Panel´s decision denying the application of PPMs on GATT article III, 4, it is significant that in 1992 it was celebrated a successful *Agreement for the reduction of dolphin mortality in the Eastern Pacific Ocean*, which has the United States and Mexico as parties. This proves that the active media and NGOs´ role on the WTO case was fundamental to the raise of favorable public opinion, and the consequent change on the Mexican fishing policies with positive environmental effects[219].

3.2.2.3.2. The Asbestos case[220] (2001)

Asbestos is one of the most significant World Trade Organization's cases, with several implications on further jurisprudential developments. *Exempli gratia*, it was the first WTO case to mention International Labor Organization conventions[221]. One important aspect is that **for the first time the WTO Appellate Body decided that the analysis whether goods are "like products" or not should not be restricted to physical**

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por iniciativa de grupos ambientais e outros grupos de interesses. Depois de apresentadas as conclusões do Painel, o GATT chegou mesmo a ser apelidado de GATTzilla (...)".

[218] LANFRANCHI, Marie-Pierre. *Op. cit.* p.64. "(...) mis en évidence par le Venezuela dans la première affaire (le Venezuela était intervenu dans la procédure en tant que tierce partie): accueillir la thèse américaine reviendrait à accepter que tout État ait alors 'la faculté de justifier l´imposition unilatérale de ses propres normes dans le domaine social ou économique ou dans le domaine de l´emploi, en tant que critère d´acceptation des importations'."

[219] MOTA, Pedro Infante. *Op. cit.* p. 192. "O Acordo foi implementado com tanto êxito que alguns cientistas observam que a zona oriental do Pacífico é actualmente 'o lugar do mundo onde se pesca atum mais seguro para os golfinhos."

[220] European Communities – measures affecting Asbestos and Asbestos containing products.

[221] KAUFMANN, Christine. *Op.cit.* p.146. "EC-Asbestos was the first case in which WTO dispute settlement organs referred to ILO Conventions (...)".

characteristics[222]. On this leading case, **the WTO *"rejected a purely market-based analysis of products", helding that "a harmful product cannot get the same free trade concessions under WTO rules as a harmless one"***[223].

Canada argued that the French prohibition of imports of chrysotile asbestos and asbestos-containing products was not in accordance with the WTO rules. Initially, the panel used Article XX (health risks) in order to justify the banning[224], without taking into consideration the "likeness" issue. Nevertheless, the Appellate Body stated that asbestos and asbestos-substitutes could not be considered "like products", since the asbestos' potential health risks should be taken into consideration on that analysis[225]. **PPMs were, for the first time, based on the analysis of likeness among products.**

This was certainly a significant precedent when one considers the outcome of the *Tuna-Dolphin* case. **The interpretation of *Asbestos* case will lead to further jurisprudential and legal developments, not only in establishing environmental rules, but also in the labor field.** Since the Appellate Body stated that it is necessary take into consideration all pertinent elements[226], it is possible arguing that goods produced without respecting internationally recognized fundamental labor rights, and goods produced in accordance to ILO core Conventions should not be treated as "like products", and therefore, should not be the object of the 'national treatment principle' nor of the Most Favorite Nation (MFN) clause. On this sense, bans on 'unlike products' are perfectly compatible with WTO norms if they have a reasonable scope, as debated in the cases *US-Malt Beverages*, *Japanese-Alcoholic Beverages* and *Bananas III*.

[222] *Id.* p.138. "(...) physical characteristics are not the only criterion for treating products differently."
[223] NEGI, Archna. *Op.cit.* p.106
[224] "Under Article III (which requires countries to grant equivalent treatment to like products) the Panel found that the EC ban constituted a violation since asbestos and asbestos substitutes had to be considered "like products" within the meaning of that Article. The panel argued that health risks associated with asbestos were not a relevant factor in the consideration of product likeness." *Source*: WTO.
[225] "On appeal, the WTO Appellate Body upheld the panel's ruling in favour of the EC, while modifying its reasoning on a number of issues. For instance, it reversed the Panel's finding that it was not appropriate to take into consideration the health risks associated with chrysotile asbestos fibres in examining the "likeness" of products under GATT Article III:4." *Source*: WTO.
[226] MOTA, Pedro Infante. *Op. cit.* p. 155. "Assim, aos quatro critérios avançados anteriormente no relatório do Grupo de Trabalho sobre *Border Tax Adjustments* e no relatório do Painel sobre o caso *Japan-Customs duties, taxes and labelling practices on imported wines and alcoholic beverages*, o Órgçao de Apelação adicionou no caso *European Communities – Measures Containing Asbestos and Asbestos Containing Products* 'a necessidade de examinar, em cada caso, todos os elementos de prova pertinentes."

3.2.3. Labour standards: GATT exceptions

3.2.3.1. GATT Article XX exceptions

Another potentially effective tool to promote labor standards under the WTO scheme would be the use of the exceptions prescribed in GATT article XX[227], which 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; (...)*
> *(e) relating to the products of prison labour;*
> *(...)"*

The scope of those exceptions is that trade may be restricted to ensure the protection of other objectives.

Obviously, wider the interpretation of this article, most severe would be the restrictions to international trade[228]. Therefore, the interpretation of the article XX should not be too wide to put in check the purposes of the GATT system, but not too narrow in order to fail on the defense of the principles protected by that article[229], as stated on the *US- Gasoline* case. Consequently, those exceptions may pass a necessity and

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[227] MOREAU, Marie-Ange. *Op. cit.* p.107. "La seconde possibilité est d´élargir le domaine d´application de l´article XX, qui permet à toute partie contractante d´adopter ou de maintenir des mesures restrictives aux échanges justifiées par des considérations d´ordre public ou économique, en particulier pour la protection de la santé et de la vie des personnes et pour les mesures se rapportant aux articles fabriqués dans les prisons."

[228] MOTA, Pedro Infante. *Op. cit.* p. 423. "Como é óbvio, quanto mais ampla for a interpretação do artigo XX, maior será a margem de manobra dos membros da OMC para recorrerem a medidas restritivas do comércio internacional."

[229] *Id.* p. 423. "Sobre a relação entre o artigo XX e outras disposições do GATT, o Órgão de Recurso declarou no caso *US- Standards for Reformulated Gasoline* que as disposições do artigo XX não podem ser interpretadas num sentido tão amplo que levasse a pôr seriamente em causa o fim o o objeto de outras disposições do GATT, nem estas disposições devem ter um alcance tão vasto que prive de sentido as políticas e interesses que o art. XX encarna."

proportionality exam, and must be exercised in good faith through transparent procedural rules, ensuring a non-arbitrary discrimination.

3.2.3.1.1. "Necessary to protect public morals"

The first exception prescribed by GATT's Article XX is 'public morals' reasoning. The main difficulty in defending this exception is that the GATT text does not give a clear definition of "*public morals*". Also, the WTO dispute settlement system has never indicated which categories of cases could be considered by this rule.

Some scholars - using methods of historical interpretation – argue that since there is already an explicit reference to prison labor in Article XX (e), and the fact that the Havana Charter has never come into force, the concept of 'public morals' within the GATT treaty would not include labor rights. 'Public morals', on its original meaning would imply exclusively classic connotations associated to the expression, such as the possibility to ban imports of pornographic material[230].

Nevertheless, this interpretation seems to be inaccurate, even if the ITO/GATT founders originally had that strict objective. In accordance with the *Vienna Convention on the Law of Treaties* (1969), an interpretation must also take into account subsequent agreements which are relevant[231].

Therefore, the GATT could not be interpreted as an isolated legal system[232]. In order to correctly interpret its clauses, one must consider several other treaties that regard human and labor rights signed by current WTO Members dating back to the late forties.

In accordance with this logic, it is undeniable that concepts change and develop, and must do so. An extensive interpretation of Article XX (a) must certainly include

[230] LANFRANCHI, Marie-Pierre. *Op. cit.* p.69. "En 1947, les rédacteurs du GATT entendaient certainement la notion de moralité publique au sens classique et étroit comme permettant par exemple à une Partie contractante d´empêcher l´importation de publications obscènes. Aujourd´hui, un consensus existe au moins sur la question de l´interdiction du travail des enfants, et de l´interdiction du travail forcé. Cette évolution n´influe-t-elle pas sur le contenu de la notion de 'moralité publique'?"

[231] ARUP, Christopher. *Op. cit.* p.915. "The Vienna Convention´s general principle is that, where treaties deal with the same subject-matter, the treaty later in time takes precedence. However, it also counsels tribunals to seek an interpretation that reconciles the treaty with other such treaties."

[232] LANFRANCHI, Marie-Pierre. *Op. cit.* p.61. "Le droit de l´OMC ne constitue pas un corps de règles isolées. Il s´applique en effet en parallèle et conjointement aux autres obligations qui s´imposent aux États dans la sphère internationale."

violations of fundamental labour standards – such as child work and indecent work conditions – as breaches of the concept of 'public morals'. [233]

A similar reasoning was presented before the WTO DSS on the already referred Tuna/Dolphins case, using an environmental perspective. On that occasion, however, the Netherlands and the EC – third parties on that demand – argued that an extensive interpretation of the Article XX would lead to a partial analysis, since the concept of 'public morals' could be easily identified with specific cultural and religious values.[234] On the case of core labour rights, however, this argument would not be accepted, since core labour standards are recognized as universal rights, imposed *erga omnes* by the 1998 ILO '*Declaration of Fundamental Principles and Rights at work*'.

3.2.3.1.2. "Necessary to protect human, animal or plant life and health"

In order to include a certain situation under this exception, it is necessary fulfilling to elements: (1) prove that the measure taken is necessary and (2) that it have an affect t improve human, animal or plant life and health.

The second element is easier to incorporate: on the already mentioned *Asbestos* case, the WTO embraced the notion of 'health risk'[235]. The definition of 'risk' was considered in a dynamic scenario, for the first time referring to WHO and ILO interpretations.

Forced labor obviously brings risks to human life, as does child labor[236]. Also, the ILO already proved the existence of important relationships between health and safety standards, which also link freedom of association and collective bargaining to health standards.[237]

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[233] LANFRANCHI, Marie-Pierre. *Op. cit.* p.65. "De même une interprétation extensive de l´art XX a) (relatif à la protection de la moralité publique) consisterait à dire que le travail des enfants et plus globalement des conditions de travail indécentes sont inclus car ils sont contraires à la moralité publique."

[234] LANFRANCHI, Marie-Pierre. *Op. cit.* p.65. "Ainsi, dans l´affaire Thon/dauphins II, la CE et les Pays-bas ont fait valoir qu´une interprétation extensive del´art XX a) conduirait 'à une partialité au nom de la moralité publique, notion que dépendait en général fortement des traditions religieuses et culturelles spécifiques'."

[235] LANFRANCHI, Marie-Pierre. *Op. cit.* p.70. "(...) l´évolution de la jurisprudence portant sur la relation commerce/environnement ou commerce/santé."

[236] The UN Convention on the Rights of the Child, *exempli gratia*, aims to protect children from health risks, and it was ratified by almost all States.

[237] KAUFMANN, Christine. *Op.cit.* p.147. "Health risks are obviously involved in the context of forced labour (...). With regard to freedom of association and collective bargaining, the 2005 Review of Annual Reports under the Follow-up of the ILO Declaration contains several examples of links to health and Safety standards. As a result, Article XX (b) gives Member States some room for manouvre in protecting labour standards."

Nevertheless, it is also relevant taking in consideration the concept of "necessity". In *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, for example, the Panel concluded that a State is not allowed to impose a trade restriction if there are other reasonable alternatives available (such as prohibition of publicity, information programmes and labeling)[238]. On the labour field, it seems that labour restrictions would fit into the necessity test, since countries are not allowed to

More, as we saw, on *US – Tuna/Dolphins*, the panel concluded that it is not possible to give extraterritorial effects to internal policies, in that the scope of the exceptions of article XX b) was to protect "human, animal and plant life and health" inside a certain jurisdiction.

Nevertheless, on the *United States- Shrimps*[239] case, PPMs have been already considered on the analysis of the exceptions of GATT article XX, recognizing that, in principle, it is possible to subordinate market access to the accomplishment of certain internal policies[240], since: (1) before the trade restriction the importing State make serious efforts in order to conclude bilateral and multilateral negotiations, (2) all exporting countries must beneficiate from the same transition period, (3) the certification processes must be transparent and allow the possibility of review mechanisms and (4) there must be efforts in order to perform the necessary technological transfer[241] [242].

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[238] MOTA, Pedro Infante. *Op. cit.*. p. 432. "Em suma, o Painel considerou que a Tailândia tinha razoavelmente ao seu dispor diversas medidas compatíveis com o Acordo Geral para controlar a qualidade e a quantidade de cigarros que se fumavam e que, tomadas em conjunto, podiam servir para atingir os objectivos de política de saúde que o Governo Tailandês tratava de alcançar mediante restrições à importação de cigarros incompatíveis com o n. 1 do artigo XI. (...)."

[239] *United States – Import prohibition of certain shrimp and shrimp products* case.

[240] MOTA, Pedro Infante. *Op. cit.* p. 189. "A resposta pode ser encontrada no próprio relatório apresentado pelo Órgão de Recurso no caso *United States – Import Prohibition of Certain Shrimp and Shrimp products*, no qual aquele órgão reconhece que, em princípio, é possível a um país importador subordinar o acesso ao seu mercado à adopção pelos países exportadores de certas políticas impostas por ele."

[241] *Id.* p. 190. "Não obstante, o Órgão de Recurso faz depender a legalidade das medidas comerciais aplicadas em função do processo de produção da observância de alguns requisitos, a saber: i) o Membro da MOC interessado na introdução de um determinado processo e método de produção deve realizar negociações sérias com todos os países que exportam o produto em questão para o seu território, com o objetivo de concluir acordos bilaterais e multilaterais de proteção e conservação (...); ii) o Membro da OMC em causa deve ter em consideração as diferentes condições nos diversos países que exportam o produto em causa; iii) todos os países devem beneficiar do mesmo período transitório; iv)o esforço realizado na transferência de tecnologia (...); e v)o processo de certificação deve ser transparente e permitir a audição dos países afectados, bem como a possibilidade de recurso contra a não ceryificação.

[242] LANFRANCHI, Marie-Pierre. *Op. cit.* p.64. "Les États-Unis ont cette fois gagné l´affaire mais la solution adoptée est prudente et conditionelle: la mesure américaine est validée uniquement parce qu´elle obéit à deux caractéristiques: - elle est flexible: elle impose aux États exportateurs non pas l´adoption des techniques de pêche américaines (ce qui serait une obligation de moyen) mais l´adoption de techniques écologiques (...) – elle a accompagné une négociation internationale menée en parallèle à l´instance avec des Ètats d´Asie exportateurs de crevettes. Cette négociation a débouché sur une convention régionale de protection des tortues. La mesure US n´ètait pas une mesure strictement unilatérale."

In sum, in spite of being a controversial interpretation[243], States could also argue the exception of Article XX (b) to take 'legal' discriminatory measures against goods/services coming from countries which do not efficaciously enforce labour rights.

3.2.3.1.3. Prison labor

The article XX (e) is the only exception which expressly refers to process and production methods on the original GATT treaty[244]. Another important consideration, as stated by LEARY[245], is that this exception have been included on the GATT with protectionist purposes, and not motivated by moral or ethical explanations.

Even though the meaning of GATT Article XX (e) is apparently clear, the question still remains as to whether it addresses only situations of prison labor or if it could be invoked in cases of forced labor as well. Some States aim to include on an extensive interpretation of this exception even cases of low-wages conditions.[246]

Nevertheless, it is not possible bring those arguments, since the Article XX (e) is evidently restricted to goods produced by prisoners. This distinction is stressed by the ILO Convention on forced labour itself.[247]

3.2.3.2. Other exceptions

In addition to article XX, the GATT system prescribes other exceptions to the application of the MFN clause and to the principle of national treatment, such as waivers

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[243] SENTI, Richard. *Op.cit.* p. 439. "Art. XX (b) GATT lässt, wie bei der GATT-relevanten Umweltschutzbestimmungen aufgezeigt worden ist, viele Fragen offen: (...) Darf der Kriterienkatalog auf weitere Aspekte wie arbeits Rechtliche und Sozial-Politische werte (z.B. Kinderarbeit oder Soziale Sicherkeit der Erwerbstätigen, der Arbeitslosen und Betagten) ausgeweitet werden?

[244] MOTA, Pedro Infante. *Op. cit.* . p. 178. "Apesar da existência de algumas pequenas exceções (por exemplo, a alínea e) do art. XX do GATT, ao permitir a aplicação de restrições à importação de produtos fabricados em prisões, tem sido assumido desde há muito que os produtos só podem ser distinguidos no âmbito do artigo III do GATT com base nas qualidades dos próprios produtos."

[245] LEARY, Virginia. *Worker´s rights and International Trade: the Social Clause (GATT, ILO, NAFTA, US Law*s). In: *Fair Trade and Harmonization*, Jagdish Bhagwati and Robert Hudec. Ed. Vol 2. The MIT Press, Cambridge-Massaschussets and London, 1996, referred by MOTA, Pedro Infante. *Op. cit.* p. 178.

[246] LANFRANCHI, Marie-Pierre. *Op. cit.* p.65. "Les États favorables à la clause sociale ont considéré un temps que l´art.XX e) (qui permet de ne pas importer les 'articles fabriqués dans les prisons') pourrait constituer une base juridique pertinente: une interprétation extensive de l´art XX e) permettrait par exemple d´étendre la dérogation à tous les produits provenant du travail forcé, fabriqués par un main d´oeuvre captive et peu ou pas rémunérée."

[247] SCHERRER, Christoph. *Op. cit.* p.65. "(...) Article XX (e), he argues that it is not forced labor as such, but the circumstance in which the prisoners work that should be the subject of trade measures. At this point he could find support from the ILO, as the ILO convention on forced labor makes precisely that distinction."

(art. XXV[248]), general safeguard clauses (art. XIX[249]), generalized systems of preferences[250] to developing and least-developed countries (and the so-called *enabling clause*[251]), customs unions and free trade areas (art. XXIV[252])[253].

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[248] *Article XXV - Joint Action by the Contracting Parties* – " 5. In exceptional circumstances not elsewhere provided for in this Agreement, the CONTRACTING PARTIES may waive an obligation imposed upon a contracting party by this Agreement; *Provided* that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties. The CONTRACTING PARTIES may also by such a vote: (i) define certain categories of exceptional circumstances to which other voting requirements shall apply for the waiver of obligations, and (ii) prescribe such criteria as may be necessary for the application of this paragraph[248]."

[249] *Article XIX - Emergency Action on Imports of Particular Products* –" 1.(*a*)If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession. (*b*) If any product, which is the subject of a concession with respect to a preference, is being imported into the territory of a contracting party in the circumstances set forth in subparagraph (*a*) of this paragraph, so as to cause or threaten serious injury to domestic producers of like or directly competitive products in the territory of a contracting party which receives or received such preference, the importing contracting party shall be free, if that other contracting party so requests, to suspend the relevant obligation in whole or in part or to withdraw or modify the concession in respect of the product, to the extent and for such time as may be necessary to prevent or remedy such injury. 2.Before any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action. When such notice is given in relation to a concession with respect to a preference, the notice shall name the contracting party which has requested the action. In critical circumstances, where delay would cause damage which it would be difficult to repair, action under paragraph 1 of this Article may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action. 3.(*a*) If agreement among the interested contracting parties with respect to the action is not reached, the contracting party which proposes to take or continue the action shall, nevertheless, be free to do so, and if such action is taken or continued, the affected contracting parties shall then be free, not later than ninety days after such action is taken, to suspend, upon the expiration of thirty days from the day on which written notice of such suspension is received by the CONTRACTING PARTIES, the application to the trade of the contracting party taking such action, or, in the case envisaged in paragraph 1 (*b*) of this Article, to the trade of the contracting party requesting such action, of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove. (*b)*Notwithstanding the provisions of subparagraph (*a*) of this paragraph, where action is taken under paragraph 2 of this Article without prior consultation and causes or threatens serious injury in the territory of a contracting party to the domestic producers of products affected by the action, that contracting party shall, where delay would cause damage difficult to repair, be free to suspend, upon the taking of the action and throughout the period of consultation, such concessions or other obligations as may be necessary to prevent or remedy the injury."

[250] DIEZ DE VELASCO, Manuel. *Op. Cit.* p. 446. "También, a pesar del principio de igualdad de trato, desde 1971, se permite a los Estados Partes desarrollados aplicar un arancel preferencial generalizado en favor de productos originarios de paises o territorios menos desarrollados. La razón de ser esta última excepción (sistema de preferencia generalizadas, SPG) es promocionar sus exportaciones y acelerar su crecimiento económico, ya que el principio de la igualdad de tratofavorece a Estados de niveles economicos semejantes, pero perjudica a Estados menos desarrollados. Por ello, a través de la UNCTAD, esos Estados consiguieron en 1971 la aceptación del SPG desprovisto de reciprocidad. Debido a su naturaleza discriminatoria, la aplicación de este sistema debe ser autorizado por el GATT, que lo aceptó, en un primer período como derogación temporal y desde la Ronda de Tokio sin limitación temporal (cláusula de habilitación)."

[251] Decision of 28 November 1979 (L/4903) – "Following negotiations within the framework of the Multilateral Trade Negotiations, the CONTRACTING PARTIES decide as follows: 1. Notwithstanding the

provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties. 2.The provisions of paragraph 1 apply to the following): *a)* Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences, *b)* Differential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT; *c)* Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another;*d)* Special treatment on the least developed among the developing countries in the context of any general or specific measures in favour of developing countries. 3. Any differential and more favourable treatment provided under this clause: *a)*shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties;*b)*shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis; *c)* shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries. 4.Any contracting party taking action to introduce an arrangement pursuant to paragraphs 1, 2 and 3 above or subsequently taking action to introduce modification or withdrawal of the differential and more favourable treatment so provided shall:*a)* notify the CONTRACTING PARTIES and furnish them with all the information they may deem appropriate relating to such action;*b)* afford adequate opportunity for prompt consultations at the request of any interested contracting party with respect to any difficulty or matter that may arise. The CONTRACTING PARTIES shall, if requested to do so by such contracting party, consult with all contracting parties concerned with respect to the matter with a view to reaching solutions satisfactory to all such contracting parties.5. The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries, i.e., the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. Developed contracting parties shall therefore not seek, neither shall less-developed contracting parties be required to make, concessions that are inconsistent with the latter's development, financial and trade needs.6.Having regard to the special economic difficulties and the particular development, financial and trade needs of the least-developed countries, the developed countries shall exercise the utmost restraint in seeking any concessions or contributions for commitments made by them to reduce or remove tariffs and other barriers to the trade of such countries, and the least-developed countries shall not be expected to make concessions or contributions that are inconsistent with the recognition of their particular situation and problems. 7. The concessions and contributions made and the obligations assumed by developed and less-developed contracting parties under the provisions of the General Agreement should promote the basic objectives of the Agreement, including those embodied in the Preamble and in Article XXXVI. Less-developed contracting parties expect that their capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the General Agreement would improve with the progressive development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement. 8. Particular account shall be taken of the serious difficulty of the least-developed countries in making concessions and contributions in view of their special economic situation and their development, financial and trade needs.

> 9. The contracting parties will collaborate in arrangements for review of the operation of these provisions, bearing in mind the need for individual and joint efforts by contracting parties to meet the development needs of developing countries and the objectives of the General Agreement."

Many GSPs and FTAs have specific provisions on the labour field, and they have been considered efficacious alternatives in order to guarantee the protection of fundamental labour rights internationally. Nevertheless, since they are separate agreements which

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[252] *Article XXIV - Territorial Application - Frontier Traffic - Customs Unions and Free-trade Areas* – "1.The provisions of this Agreement shall apply to the metropolitan customs territories of the contracting parties and to any other customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application. Each such customs territory shall, exclusively for the purposes of the territorial application of this Agreement, be treated as though it were a contracting party; *Provided* that the provisions of this paragraph shall not be construed to create any rights or obligations as between two or more customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application by a single contracting party.
2.For the purposes of this Agreement a customs territory shall be understood to mean any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories.(...) 4.The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.5. Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; *Provided* that:(*a*)with respect to a customs union, or an interim agreement leading to a formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be; (*b*)with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be; and (*c*)any interim agreement referred to in subparagraphs (*a*) and (*b*) shall include a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time.(...) 8. For the purposes of this Agreement:(*a*)A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that (i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and,(ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union; (*b*)A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.9.The preferences referred to in paragraph 2 of Article I shall not be affected by the formation of a customs union or of a free-trade area but may be eliminated or adjusted by means of negotiations with contracting parties affected.* This procedure of negotiations with affected contracting parties shall, in particular, apply to the elimination of preferences required to conform with the provisions of paragraph 8 (*a*)(i) and paragraph 8 (*b*). 10. The CONTRACTING PARTIES may by a two-thirds majority approve proposals which do not fully comply with the requirements of paragraphs 5 to 9 inclusive, provided that such proposals lead to the formation of a customs union or a free-trade area in the sense of this Article.(...)12. Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories."

[253] MOTA, Pedro Infante. *Op. cit.* p. 124. "Entre as exceções mais importantes, temos as relativas aos países em desenvolvimento e aos blocos econômicos regionais."

cannot be discussed before the WTO DSS, those topics will be discussed on a next chapter of this investigation.

3.3. THE WTO DISPUTE SETTLEMENT SYSTEM

3.3.1. General aspects: the WTO and the GATT DSS

The current dispute settlement procedure was set up by the Annex two of the Marrakesh Agreement, bringing up important changes in comparison with the previous GATT system[254]. The main scope was to constitute an innovative system able to solve international controversies ensuring a transparent and rule-based regime – what lacked under the former scheme – capable to bring the necessary legal security and predictability to the organization[255].

Controversies raised under **the 1947 General Agreement of Tariffs and Trade** were solved on an environment **in which political negotiations used to prevail[256]**, without major references to clear dispute settlement mechanisms and regulations, or to the possibility to bring the cases before international courts. During GATT´s first decade (1947-1957) controversies were solved by the presidency or by *ad hoc* working groups composed by GATT members – including the parties[257]. After 1952, those working groups were replaced by independent panels, which excluded the parties involved and occasionaly incorporated recommendations of non-governmental experts[258], what brought favorable

[254] DIEZ DE VELASCO, Manuel. *Op. cit.*p. 56. "Pero, sin duda, ha sido la Ronda Uruguay la que ha generalizado y perfeccionado el procedimiento de solución de cpntroversias en todos los Acuerdos a la luz de la experiencia de aplicación de los anteriores procedimientos. Obviamente, el sistema de solución de controversias de la Ronda Uruguay ya no se limita a las diferencias sobre el comercio de mercancías, sino que se extiende a todos los nuevos ámbitos regulados por la OMC (por ejemplo, servicios y propiedad intelectual)."

[255] ARUP, Christopher. *Op. cit.* p. 897. "The establishment of the WTO raised expectations of a new era of legalization in the conduct of trade relations by Nations."(...)"the WTO remains a work in progress"

[256] FERNÁNDEZ PONS, Xavier. *Op. Cit.* p. 68. "Como advirtiera Charles DE VISCHER, la propia 'estrutura de las relaciones internacionales' lleva que el 'recurso a la justicia' sea una 'fórmula subordinada a las contigencias politicas', pues los Estados suelen preferir un 'arreglo amistoso', por precario que éste sea, a una 'resolución judicial'."

[257] GREENWALD, Joseph. *Op. cit.* p.271. "Durante la primera década del GATT, 1947-1957, las controversias comerciales que no podían resolverse de común acuerdo (...) se solucionaban por Decisión de la presidencia o se canalizaban a grupos de trabajo compuestos por representantes de diversos miembros del GATT – incluso de los gobiernos en controversia – para que las estudiaran y emitieran las recomendaciones pertinentes."

[258] GREENWALD, Joseph. *Op. cit.* p.271. "A partir de 1952, los grupos de trabajo fueron remplazados por paneles independientes (...) que no incuían a miembros de las partes en controversia, y que ocasionalmente incorporaban expertos no gubernamentales. (...) En la medida en que aumentaba el número de miembros y la cantidad de controversias, crecía la insatisfacción en cuanto al funcionamiento del sistema. (...) Entre 1979, al

outcomings[259]. Nevertheless, due to the progressive increment on the number of GATT members – and controversies – those essentially diplomatic methods started to receive several criticisms – particularly from the United States, which aimed a more legalist and adjudicative dispute settlement system[260]. Some of the arguments raised were that the GATT DSS **was vulnerable to all kinds of political pressure**, **summed with an undesired lack of transparency and determinateness**. More, those arrangements had no pre-established and/or rule-based procedures – which were generally decided on a case-by-case basis – nor binding powers able to coercively impose its decisions. Consequently, this former "multilateral" dispute settlement system was progressively abandoned[261], and replaced by the popping up of unilateral trade sanctions[262].

Therefore, as an attempt to restore international thrust on multilateralism, **the Uruguay Round (Marrakesh Agreement) and the consequent constitution of the WTO played a decisive role to bring back the necessary transparency[263], stability[264] and predictability[265] on the settlement of controversies**[266] **on trade-related[267] topics**.

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finalizar la Ronda de Tokio, y mediados de los ochenta, al comenzar la Ronda Uruguay, los gobiernos empezaron a considerar un cambio sustantivo en el procedimiento de solución de controversias."

[259] FERNÁNDEZ PONS, Xavier. *Op. Cit.* p. 69. "En ese contexto, el mecanismo de resolución de diferencias desarrollado bajo el GATT de 1947 fue, pese a su aparente debilidad, bastante eficiente, emitiéndose un total de 115 informes, de los que fueron adoptados 101. Como obervara MENGOZZI, factores de diversa índole, como la conveniencia de mantener la credibilidad frente al resto de los *partners* comerciales y el interés recíproco en la buena marcha del sistema multilateral de comercio en su conjunto, propiciaron que las partes 'perdedoras' no se sirviesen habitualmente de su poder de bloqueo y que, por lo general, se atuviesen a lo determinado en los informes de los Grupos Especiales, cuyo paper se fue aproximando al de un órgano jurisdiccional."

[260]GREENWALD, Joseph. *Op. cit.* p.272. "La visión tradicional europea acerca de las controversias comerciales era que éstas no podían solucionarse sobre una base meramente jurídica. (...) la solución de controversias era una combinación de reglas y negociaciones. (...) ésta era la perspective que prevalecía en el sistema del Acuerdo General de Aranceles Aduaneros y Comercio (...)La actitud clásica estadounidense era más legalista. Los Estados Unidos fueron el principal promotor de la transformación del sistema del GATT, para volverlo más adjudicativo."

[261] FERNÁNDEZ PONS, Xavier. *Op. cit.* p. 69. "Sin perjuicio de ello, las debilidades del sistema se pusieron especialmente de relieve a partir de los años ochenta, cuando se incrementaron los casos de obstruccionismo del procedimiento, de bloqueo de la adopción de los informes de los Grupos Especiales y de recurso a medidas unilaterales de retorsión y represalia al margen del sistema."

[262] MERCURIO, Bryan. *Op. cit.* p.799 "(...) the GATT, where Members lost confidence in its ability to resolve disputes and, as a result, abandoned the system and began applying unilateral measures."

[263] GREENWALD, Joseph. *Op. cit.* p.275. "Al citar el laudo del juez Brandeis de la Suprema Corte de Justicia relativo a que 'el sol es el mejor desinfectante', el presidente Clinton propuso que todos los procedimientos de solución de controversias fueran 'abiertos al publico y todos los expedientes se pusieron a su disposición por medio de las partes'".

[264] GREENWALD, Joseph. *Op. cit.* p.273." Y en la acta final de la Ronda Uruguay: "los miembros de la OMC se han convencido de no actuar unilateralmente contra las posibles violaciones a las reglas comerciales. Por el contrario, se han comprometido a recurrir al nuevo sistema de solución de controversias y a ceñirse a sus reglas y procedimientos."

[265] ARUP, Christopher. *Op. cit.* p.898. "In the early days of the WTO, the common contention was that law would replace political power-based relations and deals made within closed circles with a transparent, rule-based multilateral regime."

The DSU (*Dispute Settlement Understanding*) imposed **jurisdictional powers to the WTO** and **pre-established legal procedures**[268]. More, other important inovations were incorporated, such as (1) **the formal impossibility of the imposition of unilateral trade sanctions without a WTO previous appreciation**, (2) **the creation of a negative consensus**[269]**,** facilitating the execution of decisions, (3) **the constitution of a permanent Appellate Body**[270], to serve as a second decision-making instance for legal and interpretation questions and (4) the **improvement of sanctioning mechanisms**[271].

The WTO´s dispute settlement system currently has jurisdiction to decide about any controversy related to **its** Members and derived from agreements signed on the WTO´s sphere - such as the GATS and the TRIPS[272] – including its constitutive one[273].

Notwithstanding, it is true that the system still finds important obstacles:

(1) **First of all, it is still clear on the WTO structure that the initial scope of a truly legalized DSS failed**[274]**, since the current system is still fully permeated**

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[266] MERCURIO, Bryan. *Op. cit.* p.795. "The advent of the WTO significantly reshaped the world trading system by not only expanding upon the topic coverage of the General Agreement on Tariffs and Trade (GATT), but also perhaps more importantly, by creating a system of binding dispute settlement based on legal rules and procedure."

[267] MERCURIO, Bryan. *Op. cit.* p.800 "In transforming the GATT into a vibrant organization with widely expanded topical coverage and binding dispute settlement, Member States altered the dynamics of the entire international trading system. No longer is the system only concerned with issues such as tariffs reductions, most-favoured nation status and national treatment, but now issues which substantially impact upon the daily lives of the average person are debated and regulated at the multinational level."

[268] ARUP, Christopher. *Op. cit.* p.910. "The vagaries of the agreements afford the tribunals space, not only to make choices in the individual dispute but, if they see fit, to fashion a jurisprudence for trade regulation and, in doing so, to shape the image of the institution.(...) the overriding objective is to 'provide security and predictability to the multilateral trading system' (...) allows the tribunals some choice between judicial activism and conservatism."

[269] ARUP, Christopher. *Op. cit.* p.902. "Its progress no longer depends on the need for a positive consensus among Members. The main change here is that the respondent country cannot veto (...)."

[270] FERNÁNDEZ PONS, Xavier. *Op. Cit.* p. 72. "Se crea un Órgano de Apelación,integrado por siete expertos elegidos por períodos de cuatro años que actúan a título personal y se pronuncian en formaciones de tres miembros, ante el que cualquiera de las partes em la diferencia podrá recurrir el informe elaborado por el Grupo Especial por 'cuestiones de Derecho' o de 'interpretación jurídica'."

[271] FERNÁNDEZ PONS, Xavier. *Op. Cit.* p. 72.."Se refuerza el mecanismo para vigilar y tratar de garantizar el cumplimiento de los informes adoptados, possibilitando que el Miembro reclamante 'vencedor' sea autorizado por el OSD a la 'suspensión de concesiones u otras obligaciones' con respecto al Miembro 'perdedor' que no observe los informes adoptados."

[272] ARUP, Christopher. *Op. cit.* p.906. "The majority of disputes so far have been brought under the established GATT (1947, now 1994) (...) very few disputes have been brought under the new economy agreements, the Agreement on Trade-related Aspects of Intellectual Property (TRIPs) and the General Agreement on Trade in Services (GATS)."

[273] DREYZIN DE KLOR, Adriana (et al.). *Solução de controvérsias: OMC, União Européia e Mercosul*. "De acordo com o ESC, o sistema de solução de controvérsias tem jurisdição para resolver quaisquer controvérsias entre os Membros da OMC que derivem dos acordos firmados no âmbito da OMC, inclusive de seu acordo constitutivo."

[274] ARUP, Christopher. *Op. cit.* p.899. "The initial enthusiasm for a rule-based system has been moderated by other demands. Something of the old inclination for diplomatic resolution has returned. However, now that a more diverse membership is becoming active, and a global civil society is being engaged from outside, calls are also made for a more open and democratic style of decision-making."

by external considerations[275]**– political, cultural, and even military reasons**[276] – which for several times influence the presentation of a specific demand or defense, so as the concrete application of the established legal rules.

(2) **At second, in spite of the progressive participation of developing countries on the DSS, several least-developed countries – particularly from Africa –still find technical and financial difficulties in order to take part of the system**.

(3) **Thirdly, non-State actors – trade unions, employer´s associations, environmental NGOs, companies – play a mere secondary role**[277] on the scheme – still dominated by WTO Members which count with exclusive prerogatives.

(4) Moreover, the organization´s **sanctioning mechanisms are not so effective whenever there is a significant disproportion between the parties involved**[278].

(5) **At last, many topics are still largely excluded from the WTO DSS appreciation, particularly environmental, human and labour rights** – the main interest of this investigation.

Even tough, besides all those obstacles, it is noteworthy that the WTO increasing 'legalized'[279] system , as stated by MERCURIO[280], "*is by and large working as designed and has proven itself to be the most successful multilateral dispute settlement system the world has ever known*".

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[275] ARUP, Christopher. *Op. cit.* p.899. "The WTO law does not operate in an autonomous space, but interacts with the economic, political and cultural currents that run through the WTO. (...) The legal processes available (...) may encourage co-operation and compliance. (...) legal practices are influenced by political sensitivities and cultural mores as well as by economic rationalities." (...) p.919. "While law is a significant influence in dispute settlement decision-making, this review suggests the system has not become rule-bound. The parties make pragmatic decisions (...) guided as much by economic and political considerations."

[276] ARUP, Christopher. *Op. cit.* p.905. "(...) countries do not merely conduct trade; they wish to maintain various military and cultural alliances with other countries as well. These considerations also affect how enthusiastically they prosecute or defend complaints."

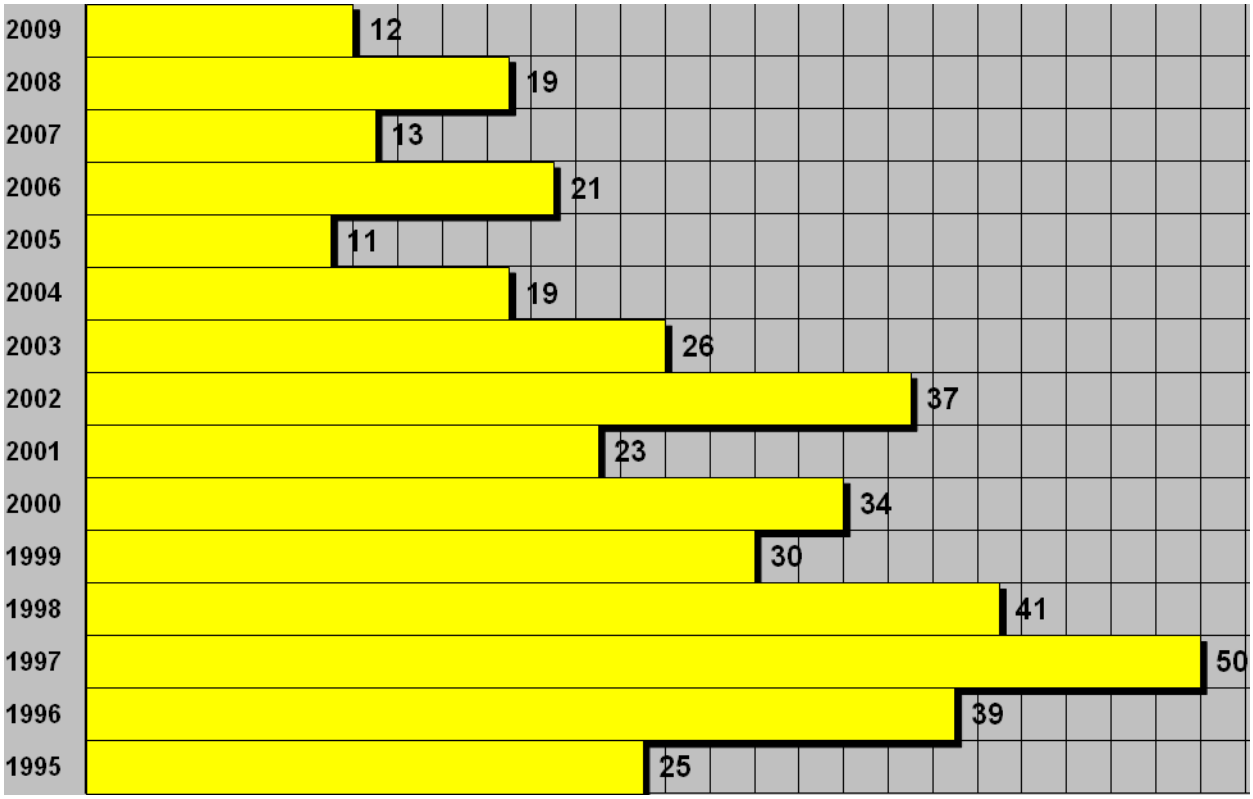
[277] ARUP, Christopher. *Op. cit.* p.901. "The refinement of due process will not suffice. For legitimacy, the WTO must develop a conception of justice and democracy that gives voice to a broader array of social interests or stakeholders."

[278] ARUP, Christopher. *Op. cit.* p.905. "A complainant country has to consider its own exposure too. Respondents may seek to retaliate by bringing their own complaints or paying the complainant back in some more indirect way."

[279] ROSENDORF, Peter. *Op.cit.* p.389. "The World trading system has become significantly more 'legalized' in the recent period (...), with the adoption of the Dispute Settlement Procedure (DSP) as part of agreements forming the World Trade Organization (WTO)."

[280] MERCURIO, Bryan. *Op. cit.* p.797. "The dispute settlement system is by and large working as designed and has proven itself to be the most successful multilateral dispute settlement system the world has ever known."

Number of cases presented before the WTO DSS (distribution per year)



Total: 400 cases (by November 2nd, 2009). *Source*: WTO.

A major proof of this enormous success is that in November 2nd, 2009, the system achieved the important mark of 400 controversies presented before it (see chart). As stated by the WTO Director-general Pascal Lamy: "*this is surely a vote of confidence in a system which many consider to be a role model for the peaceful resolution of disputes in other areas of international political or economic relations.*[281]"

3.3.2. Actors

The WTO is a Member-driven multilateral institution and, therefore, its Members are the exclusive subjects that play a central role on the system, being responsible to be part of negotiation rounds, to take decisions and, consequently, are the only legitimate actors to effectively be parties of its dispute settlement system[282]- nevertheless, it is

[281] *Source*: WTO. " 'This is surely a vote of confidence in a system which many consider to be a role model for the peaceful resolution of disputes in other areas of international political or economic relations,' said WTO Director-General Pascal Lamy to mark the occasion. 'All the political muscle-flexing and grandiloquence is discarded at the door once the case enters the WTO.'"

[282] ARUP, Christopher. *Op. cit.* p.903. "Only governments can bring complaints directly to the WTO."

noteworthy that oftentimes Members act in behalf of private interests, such on the cases *Kodak/Fuji* and on *Bananas*.

Other international institutions and non-State actors such as NGOs, trade unions and employer´s associations play no more than a secondary role on the DSS, as we will debate on this investigation.

3.3.2.1. The concept of WTO Member

A first question to consider, however, is the concept of "WTO Member". It is not correct to infer that the WTO is centered on an archaic conception that recognizes States as the exclusive entities on International Law[283], since among its 153 Members the WTO counts with entities which do not fit into the definition of full-sovereign States proposed by CASSESSE[284]:

> *"They are entities which, besides controlling territory in a Stable and permanent way, exercise the principal lawmaking and executive ´functions´ proper of any legal order. (...) They possess full legal capacity, that is, the ability to be vested with rights, powers and obligations."*

Contrariwise to this classic definition, WTO Members must only have "*a customs territory with full autonomy to conduct their external commercial relations*". The most significant examples of those exceptions are Hong Kong (which was already a WTO Member while it was under the UK sponsorship) and Taiwan (WTO Member since 2002, under the name "*Separate customs territory of Taiwan, Penghu, Kinmen and Matsu*"). Another entity which cannot be comprehended into the standard concept of State is the "European Union" (WTO member as "European Communities" since January 1st, 1995, became a member under the name "European Union" only with the enforcement of the Treaty of Lisbon, in December 2009).

[283] JIMENEZ DE ARÉCHAGA, Eduardo. *El derecho internacional contemporáneo*, Madrid, Tecnos, 1980. p.204. "(...) los Estados y sólo los Estados disfrutan de *locus standi* en el Derecho Internacional; ellos son los únicos poseedores de personería jurídica internacional."
[284] CASSESSE, A. *International Law*. 2nd edition. 2005. p. 71.

3.3.2.2. Developed x developing WTO members on the DSS

If WTO members are still the single actors on the dispute settlement system, many changes have been taking place since 1995. At first, contrariwise to what used to happen under the GATT 1947 scheme, when developed countries – particularly the United States[285] and the Western European countries – were predominant on the dispute settlement procedures, nowadays some developing countries (such as Argentina, Brazil, Chile, China, Mexico and India) have been assuming a considerable role on the system[286], as we may observe on the charts below. Moreover, groups as the G-20 have been performing an important function on the propagation of the interests of developing countries on the organization, particularly on the negotiation rounds.

In sum, as correctly stated by the WTO Director-General Pascal Lamy:

> *"The dispute settlement system is widely considered to be the jewel in the crown of the WTO" (...) "some critics claim that the system is monopolized by the developed countries, especially the US and EC. Certainly, these two trading giants are the most frequent users of the system. This is not surprising since they are the world's biggest traders, as is increasingly the case with China. But the figures also show that developing countries do not play coy hand-maidens to their richer trading partners. During the period 1995-2009, developing countries have been complainants in more than 45 per cent of all cases, and have been respondents in more than 42 per cent of the cases.*[287]*"*

[285] GREENWALD, Joseph. *Op. cit.* p.273. "los Estados Unidos han sido uno de los principales usuarios del procedimiento de solución de controversias y han ganado la mayoria de los casos".

[286] ARUP, Christopher. *Op. cit.* p.904. "The United States and the European Union have predominated. (...) developing countries are becoming more assertive reflects the dynamism in the system: for instance Brazil is now an active complainant(...).But, for many Members, litigation remains an unrealistic option."

[287] *Source*: WTO. " 'The dispute settlement system is widely considered to be the jewel in the crown of the WTO,' said DG Lamy. 'Some critics claim that the system is monopolized by the developed countries, especially the US and EC. Certainly, these two trading giants are the most frequent users of the system. This is not surprising since they are the world's biggest traders, as is increasingly the case with China. But the figures also show that developing countries do not play coy hand-maidens to their richer trading partners. During the period 1995-2009, developing countries have been complainants in more than 45 per cent of all cases, and have been respondents in more than 42 per cent of the cases.'"

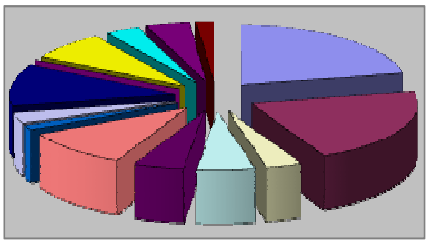
Complaints/Responses by country

Member	Complainant	Respondent
Antigua and Barbuda	1	0
Argentina	15	16
Australia	7	10
Bangladesh	1	0
Belgium	0	3
Brazil	24	14
Canada	33	15
Chile	10	13
China	6	17
Chinese Taipei	3	0
Colombia	5	3
Costa Rica	4	0
Croatia	0	1
Czech Rep	1	2
Denmark	0	1
Dominican Republic	0	3
Ecuador	3	3
Egypt	0	4
European Communities	81	66
France	0	3
Germany	0	1
Greece	0	2
Guatemala	7	2
Honduras	6	0
Hong Kong, China	1	0
Hungary	5	2
India	18	20
Indonesia	4	4

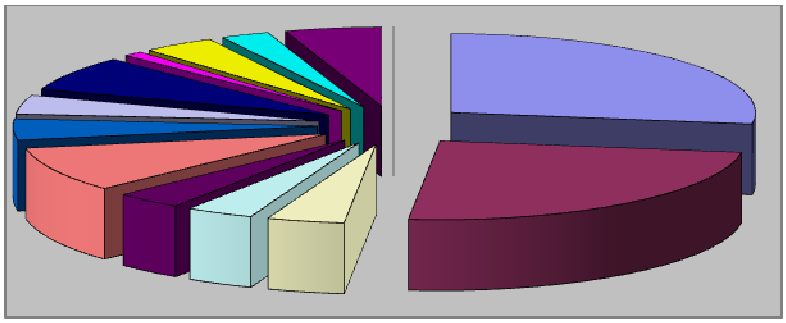
Member	Complainant	Respondent
Ireland	0	3
Japan	13	15
Korea	13	14
Malaysia	1	1
Mexico	21	14
Netherlands	0	1
New Zealand	7	0
Nicaragua	1	2
Norway	3	0
Pakistan	3	2
Panama	5	1
Peru	2	4
Philippines	5	5
Poland	3	1
Portugal	0	1
Romania	0	2
Singapore	1	0
Slovak Rep	0	3
South Africa	0	3
Spain	0	1
Sri Lanka	1	0
Sweden	0	1
Switzerland	4	0
Thailand	13	3
Trinidad & Tobago	0	2
Turkey	2	8
United Kingdom	0	2
United States	93	107
Uruguay	1	1
Venezuela	1	2

Source: WTO

Complainant States/groups of States



Respondent States/groups of States



United States	EC + EU countries	Argentina
Brazil	Mexico	Other Latin American countries
China	Japan	Other Asian countries
African countries	Canada	Oceania
India	EFTA	

Nevertheless, as we may see, it is important to highlight that the system is still too concentrated on a few countries. Several least-developed countries (particularly from Africa) still find major obstacles to take part of the WTO DSS – specially financial and

technical barriers to prepare and defend a case[288] and even to apply sanctions[289] - and are frequently marginalized of the system[290].

Only one third of all WTO Members (58/153) have already been part on the DSS. More, only ten members (Argentina, Brazil, Canada, EC[291], India, Mexico, Thailand, Japan, South Korea and the United States) are responsible for 75,87% of the complaints. Following the same logic, just ten members (Argentina, Brazil, Canada, China, EC[292], India, Mexico, Japan, South Korea and the United States) are present in 76% of the responses.

In order to solve overcome those difficulties, many solutions have already been pointed, as the creation of common funds in order to finance LDC´s participation on the system and attempts to increase technical cooperation with those countries.

3.3.2.3. Non-State actors: how to increase trade unions´ participation at the WTO dispute settlement system – the example of environmental NGOs and their amicus curiae unsolicited briefs

Another important modification occurred on the last few years is that the current WTO DSS brings up a more active function for the civil society, when compared to its predecessor. Even if the system still considers the initiative of a panel an exclusive prerogative of its Members - on this sense it differs from the ILO system, in which due to the particular tripartite structure, trade unions and employer´s associations have the initiative to bring up a case – non-State actors have been assuming an increasing distinguished importance[293].

As we´ve seen, non-governmental organizations are not qualified as parties nor third parties in the WTO system. Even though, they frequently participate of the dispute settlement system playing the function of *amicus curiae* – even if their States of origin are

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[288] ARUP, Christopher. *Op. cit.* p.905. "For some countries the financial and techical burdens of preparing and presenting the case itself are a decisive factor."

[289] BARRAL, Welber; DE KLOR, Adriana Dreyzin; PIMENTEL, Luiz O., KLEGEL, Patrícia. *Solução de controvérsias: OMC, EU e MERCOSUL.* Rio de Janeiro: Konrad-Adenauer-Stiftung, 2004. "(...) cujo poder econômico para forçar uma potência a cumprir uma decisão do OSC pode ser absolutamente negligenciado".

[290] MERCURIO, Bryan. *Op. cit.* p.813. "Some developing country Members already feel the system ignores their interests (...)".

[291] Considering the EC is a party, withoud adding the numbers of its State members.

[292] Considering the EC is a party, withoud adding the numbers of its State members.

[293] LANFRANCHI, Marie-Pierre. *Op. cit.* p.69. "Cette disposition pourrait tout à fait être utilisée pour consulter l´OIT, ou encore pour admettre l´intervention de syndicats, d´ONGs, par la voie de l´*amicus curiae*."

not part of the *litis* – presenting unsolicited briefs, as happened, *exempli gratia*, on the *Asbestos*[294], *US-Gasoline* and *EC-Meat Hormones* cases. Those contributions have already been presented on the first instance (*Shrimp/Turtles case*) and even during the appellate procedure (*British steel case*), and raised opposition from several Member States, and particularly from developing countries – India, the African Group – which feared that those external interferences would "*politicize the process and disturb the inter-governmental nature of the WTO*".[295]

Therefore, initially those unsolicited information were summarily rejected by the judges. Nevertheless, since *US-Shrimp/Turtle*, the jurisprudence shifted[296], considering that in accordance with the *Understanding on Rules and Procedures Governing the Settlement of Disputes* both Panels and the Appellate Body are allowed to "*seek information and technical advice from any individual or body they consider appropriate*"[297]:

> *" Article 13 - Right to Seek Information*
> *1.* ***Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate.*** *However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.*

[294] NEGI, Archna. *The WTO Asbestos Case – implications for the trade and environment debate* . p.106. "(...) it anticipated and prepared itself for accepting and considering *amicus curiae* briefs, through as established procedure, thus strenghtening the cause of transparency and openess of WTO proceedings."

[295] MERCURIO, Bryan. *Op. cit.* p. 804. "Many developing countries fear (...) amicus curiae briefs would politicize the process and disturb the inter-governmental nature of the WTO. (...) the African group and India submitted proposals that would explicitly prohibit Panels and the Appellate Body from considering unsolicited information and advice."

[296] MERCURIO, Bryan. *Op. cit.* p.801 "As part of their plan for greater inclusion in the WTO, NGOs began submitting unsolicited amicus curiae briefs to WTO Panels and the Appellate Body. (...) early Panels refused to accept the submissions (...) in US- Shrimp/Turtle, where the Appellate Body reversed the Panel decision to reject unsolicited amicus curiae briefs (...) a Panel did have broad authority to consider such briefs if it chose to do so."

[297] ARUP, Christopher. *Op. cit.* p.912."The DSU affords the tribunals the right to seek information and technical advice from any individual or body they consider appropriate. (...) The Appellate Body has read the DSU to allow the tribunals the freedom to receive submissions from external, non-state sources, even if they come unsolicited. (...) The Appellate Body has itself refused to consider amicus curiae briefs in several broad-ranging health and environment disputes, notably in the US-Gasoline, EC-Meat Hormones and EC-Asbestos disputes. The experience suggests that, like industry associations, NGOs must largely depend on their views being incorporated in Member government presentations."

> *2.* ***Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter.*** *With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4."*

The current interpretation is that this article should include the acceptance of non-solicited NGOs briefs as long as they "*substantially add to the case"* and do "*not simply restate facts, legal arguments or emotional pleas.*[298]" In sum, if panelists and the Appellate body are not obliged to accept NGO briefs, they are allowed to do so whenever they consider the unsolicited information is "*pertinent and useful*"[299] to the resolution of a given demand.

The participation of non-State actors under the WTO umbrella have been more effective on the environmental field[300], in which they have been responsible for "*shifting public and political attitudes towards the environment and placing environmental issues high on the political agendas of an increasing number of States; in publicizing the nature and seriousness of environmental problems; in acting as a conduit for the dissemination of scientific research; and in organizing and orchestrating pressure on States, companies, and international organizations*."[301]

On the other hand, **trade unions and employer´s associations have been surprisingly reticent in joining the WTO arena – contrariwise to what happens under the ILO umbrella. A more active participation of those institutions would foster the inclusion of labour rights on multilateral trade negotiations and on the WTO DSS**, and, analogously to what happened on the environmental debate, it would publicize the importance of labour rights globally and it would pressure States, companies and organizations on the accomplishment of those peremptory norms.

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[298] MERCURIO, Bryan. *Op. cit.* p.805. "(...) amicus submissions (...) must substantially add to the case, not simply restate facts, legal arguments or emotional pleas."

[299] MERCURIO, Bryan. *Op. cit.* p. 802 "The Appellate Body then stated that it does not have a 'legal duty' to accept submissions from non-state actors but it has 'legal authority to decide whether or not to accept and consider any information that we believe is pertinent and useful in an appeal."

[300] GREENWALD, Joseph. *Op. cit.* p.280. "El caso que generó mayor oposición de el GATT-OMC entre grupos ambientalistas fue el del atún-delfín y, más recientemente, el del camarón-tortuga."

[301] HURREL, Andrew; KINGSBURY, Benedict. *The international politics of the environment: an introduction.* Oxford, 1992. p. 20.

Nevertheless, it is not certain that an increasing role of non-State actors linked to workers´ rights on the international trade system would make the WTO more "socially responsible" – on the same way that the WTO did not become "greener" [302]. One of the reasons is that, in spite of the fact that many NGOs would be able to present their social concerns, other non-State actors would claim on the opposite direction, as, *exempli gratia*, employers´ associations and the great transnational corporations – which may have interests to continue to exploit comparative labour advantages on developing countries.

However, the inclusion of the social discussion on the WTO DSS context would make the organization more legitimated to effectively impose the decisions of the dispute settlement body. Hence, it is crucial that nor only WTO, but that all international courts approve this kind of manifestation of the civil society, raising a more legitimate and efficient system, reflecting directly the people´s will, which is the scope of any jurisdictional structure.

In sum, Law must reflect a certain society[303] in a determinate period[304]. And there is a huge challenge for the International Law of the 21st century to set up a structure that gives rise to a multinational panorama, preserving the stability and the security in supranational juridical relations without divorcing Law from the increasing changes and developments of our global society, *exempli gratia*, extending the civil society participation on the most important international *fori*, such as the WTO dispute settlement system.

3.3.3. Proceedings

As we´ve seen, the Annex two of the Marrakesh Agreement , the so-called DSU – *Understanding on Rules and Procedures Governing the Settlement of Disputes* – establishes common rules on the settlement of disputes under the WTO umbrella, since the

[302] WEINSTEIN, Michael; CHARNOVITZ, Steve. *The greening of the WTO*. 80 Foreign Affairs, 2001. "Although the WTO has begun to embrace environmental protection, it certainly can and should do more".
[303] DIEZ DE VELASCO, Manuel. *Instituciones de derecho internacional público.* p. 55 "...si consideramos el Derecho como un sistema o conjunto de normas reguladoras de determinadas relaciones entre individuos o entre grupos de ellos, bebemos inmediatamente referirnos a la sociedad en que éstos o aquéllos están insertos."
[304] JO, Hee Moon. *Introdução ao Direito Internacional.* p. 41. "o que se tem como Direito é a reflexão da característica de determinada sociedade em determinada época."

initial consultation/mediation procedures, passing through the establishment of panels, the appellate proceedings and the sanctioning mechanisms[305].

3.3.3.1. The WTO Dispute Settlement Body

The most important organ on the establishment of the WTO dispute settlement system is the WTO Dispute Settlement Body – a meeting of all WTO members – which "*has the sole authority to establish 'panels' of experts to consider the case, and to accept or reject the panels' findings or the results of an appeal. It monitors the implementation of the rulings and recommendations, and has the power to authorize retaliation when a country does not comply with a ruling"*[306]. Consequently, it sets up interpretations on its jurisprudence, but it has no authority to modify any of the WTO agreements, an exclusive competence of the Ministerial Conference[307].

3.3.3.2. Consultations

When a Member-State (or groups of States) presents a demand before the WTO dispute settlement system, the first step is to open consultations[308], in which both sides point the controversial measures and their respective legal arguments[309]. The consultations are confidential[310], and take up to sixty days[311]; they are mandatory and have the scope to

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[305] FERNÁNDEZ PONS, Xavier. *Op. Cit.* p. 70 "El ESD está integrado por veintisiete artículos y cuantro apéndices. Como el resto de 'acuerdos multilaterales' de la OMC, que son concebidos como un 'compromiso único' o 'single undertaking', el ESD vincula todos los Miembros de la Organización por el mero hecho de serlo, sin requerir una ulterior y específica prestación de consentimiento. (...) dentro del ESD se contemplan, junto ao procedimiento 'central' inspirado en el tradicional mecanismo de los Grupos Especiales o Panels, diversos procedimientos alternativos de muy distinta naturaleza, cuya denominación y características coinciden, en gran medida, con las de medios típicos del Derecho Internacional (como la negociación, la mediación, la conciliación o el arbitraje)."

[306] *Source*: WTO.

[307] LANFRANCHI, Marie-Pierre. *Op. cit.* p.67. "(...) l´ORD ne peut en aucune manière réviser les accords, compétence d´ailleurs formellement et classiquement confiée à l´instance politique suprême: la conférence ministérielle de l´OMC."

[308] DIEZ DE VELASCO, Manuel. *Op. cit.*p.457. "Las líneas directrices de la solución de diferencias se basan en la obligación de buscar soluciones conciliadoras, de forma que se debe actuar con buena fe y ánimo de cooperación a fin de descartar que se llegue propiamente a un contencioso."

[309] DSU – "*Article 4 – Consultations* – 1. Members affirm their resolve to strengthen and improve the effectiveness of the consultation procedures employed by Members."

[310] DSU – "Article 4 - 6. Consultations shall be confidential, and without prejudice to the rights of any Member in any further proceedings."

[311] DSU – "Article 4 - 7. If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, the complaining party may request the establishment of a panel. The complaining party may request a panel during the 60-day period if the consulting parties jointly consider that consultations have failed to settle the dispute. 8. In cases of urgency, including those which concern

compel the parties (third parties may join if they have a substantial trade interest on the case[312]) to settle the differences by themselves[313]. Notwithstanding, the agreed solutions are not totally open to the parties discretionary powers, since they must be compatible with WTO regulations[314]. On this sense, article 3, paragraph two of the DSU:

> *"**Article 3 - General Provisions***
> *(...)*
> *2. The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.*
> *(...)"*

More, those alternative methods in order to help on a mutually agreed solution may include good offices and mediation, frequently offered by the WTO director-general in an *ex officio* capacity[315].

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perishable goods, Members shall enter into consultations within a period of no more than 10 days after the date of receipt of the request. If the consultations have failed to settle the dispute within a period of 20 days after the date of receipt of the request, the complaining party may request the establishment of a panel. "

[312] DSU – "Article 4 - 11. Whenever a Member other than the consulting Members considers that it has a substantial trade interest in consultations being held pursuant to paragraph 1 of Article XXII of GATT 1994, paragraph 1 of Article XXII of GATS, or the corresponding provisions in other covered agreements[312], such Member may notify the consulting Members and the DSB, within 10 days after the date of the circulation of the request for consultations under said Article, of its desire to be joined in the consultations. Such Member shall be joined in the consultations, provided that the Member to which the request for consultations was addressed agrees that the claim of substantial interest is well-founded. In that event they shall so inform the DSB. If the request to be joined in the consultations is not accepted, the applicant Member shall be free to request consultations under paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATT 1994, paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATS, or the corresponding provisions in other covered agreements."

[313] ARUP, Christopher. *Op. cit.* p.908. "Complaints are brought then with the aim of establishing a bargaining relationship. The complainant is entitled to request consultations with the other Member, which are to be conducted with a view to settle the dispute voluntarily."

[314] FERNÁNDEZ PONS, Xavier. *Op. Cit.* p. 76. "Esta exigencia de compatibilidad concuerda con los fines expresamente asignados al sistema de solución de diferencias de la OMC por el ESD (...). Sin perjuicio de ello, estimo que la exigencia de compatibilidad con los acuerdos abarcados que impone el ESD a las soluciones mutuamente convenidas no priva a las 'consultas', 'buenos oficios', 'mediación' y 'conciliación' previstos en el ESD de caracteres típicos de los medios políticos para el arreglo pacífico de controversias internacionales. Así, la solución que, en su caso, se alcance nunca vendrá impuesta por un tercero y dependerá del mutuo acuerdo de las partes."

[315] DSU – "*Article 5 - Good Offices, Conciliation and Mediation* - 1. Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree. 2. Proceedings involving good offices, conciliation and mediation, and in particular positions taken by the parties to the

Consultations may take place not only on this preliminary stage, but also after a panel is established, and even during the appellate procedure, or whenever the parties are able to find a negotiated solution to the controversy.

This preliminary – and non jurisdictional – system is frequently effective, saving time and financial resources and avoiding constraints for both parties. Therefore, more than half of the controversies presented before the WTO DSS were solved on this first step (see chart below), without the necessity to recur to litigation procedures.

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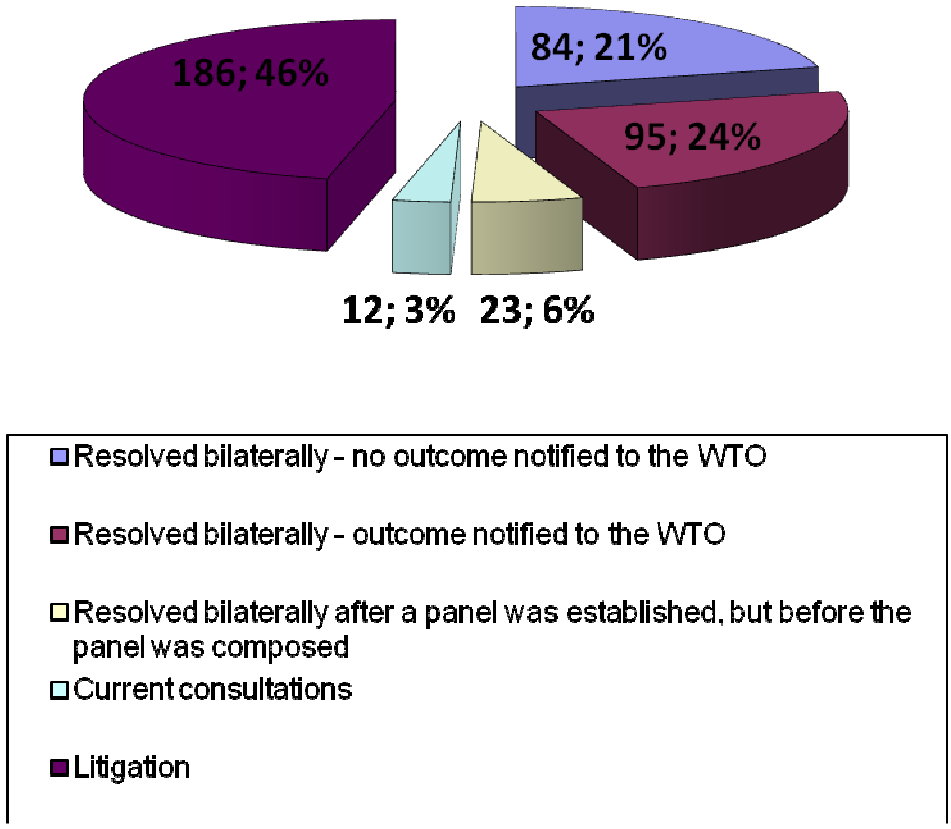
dispute during these proceedings, shall be confidential, and without prejudice to the rights of either party in any further proceedings under these procedures. 3. Good offices, conciliation or mediation may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time. Once procedures for good offices, conciliation or mediation are terminated, a complaining party may then proceed with a request for the establishment of a panel. 4. When good offices, conciliation or mediation are entered into within 60 days after the date of receipt of a request for consultations, the complaining party must allow a period of 60 days after the date of receipt of the request for consultations before requesting the establishment of a panel. The complaining party may request the establishment of a panel during the 60-day period if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute. 5. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds. 6.The Director-General may, acting in an *ex officio* capacity, offer good offices, conciliation or mediation with the view to assisting Members to settle a dispute. "

Summary of disputes under the WTO DSS (by Nov 2nd, 2009)



Source: WTO

3.3.3.3. Panels

Nevertheless, if no satisfactory agreement can be reached by the parties[316], a panel will be appointed[317] within 45 days. A panel is constituted by three (or five) individuals[318] drawn *ad hoc*, usually – but not obligatorily –chosen among an indicative list[319] of

[316] ARUP, Christopher. *Op. cit.* p.909. "By no means all disputes are settled 'out of court'."
[317] GREENWALD, Joseph. *Op. cit.* p.273. "Cualquier miembro de la OMC tiene derecho a que se establezca un panel".
[318] DSU – "Article 8 – 5. Panels shall be composed of three panelists unless the parties to the dispute agree, within 10 days from the establishment of the panel, to a panel composed of five panelists. Members shall be informed promptly of the composition of the panel."
[319] DSU – "Article 8 - 4. To assist in the selection of panelists, the Secretariat shall maintain an indicative list of governmental and non-governmental individuals possessing the qualifications outlined in paragraph 1,

previous well-qualified nominees[320] – indicated by WTO Members – which combine expertise and independence[321].

Besides being independent from their States of origin[322] - panelists serve on an individual capacity:

> *Article 8 (9) – "Panelists shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Members shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel."*

Nationals simply cannot analyze cases when their countries of origin are involved[323], unless there is an express agreement of the parties[324]. In accordance with the DSU:

> *Article 8 (3) - "Citizens of Members whose governments are parties to the dispute or third parties as defined in paragraph 2 of Article 10[325] shall not serve on a panel concerned with that*

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from which panelists may be drawn as appropriate. That list shall include the roster of non-governmental panelists established on 30 November 1984 (BISD 31S/9), and other rosters and indicative lists established under any of the covered agreements, and shall retain the names of persons on those rosters and indicative lists at the time of entry into force of the WTO Agreement. Members may periodically suggest names of governmental and non-governmental individuals for inclusion on the indicative list, providing relevant information on their knowledge of international trade and of the sectors or subject matter of the covered agreements, and those names shall be added to the list upon approval by the DSB. For each of the individuals on the list, the list shall indicate specific areas of experience or expertise of the individuals in the sectors or subject matter of the covered agreements."

[320] DSU – "Article 8. 1. Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.
2. Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience."

[321] ARUP, Christopher. *Op. cit.* p.911. "The panellists are drawn from a pool made of nominees of the Member countries (...) well-qualified individuals, combining expertise with independence."

[322] *Understanding on rules and procedures governing the settlement of disputes Annex 2 of the WTO Agreement* - Art. 8 (9) "Panelists shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Members shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel."

[323] BARRAL, Welber. *Op. cit.* p. 47. "Esses indivíduos atuam em caráter pessoal, independentemente de seus governos, e não podem atuar em casos em que seu país esteja envolvido."

[324] *Essays on International Law*. p. 63. "A national of a State who is involved in the dispute cannot be nominated as an arbiter without the express concordance of the other parties."

[325] *Understanding on rules and procedures governing the settlement of disputes Annex 2 of the WTO Agreement* - Art. 10 (2) – "Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report."

> *dispute, unless the parties to the dispute agree otherwise."*

More, in order to avoid criticisms that the WTO structure is dominated by developed countries, and to improve the legitimacy of the WTO´s system[326], some measures have been taken, as, for example, the right assured to developing countries - involved on a controversy against a developed country – to require the nomination of a Panel's member who is national from another developing State.

> *Article 8 (10) – "When a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member."*

If the parties do not find an agreement on the nomination of the panelists, the Director-General/Secretariat is allowed to designate the Panel´s members.

The panel must deliver a final report in 6 months, which must be shortened to three months (in cases of urgency), or prorogated to nine months[327].

Before the panel´s first meeting, the parties – and third parties[328] – present written demands to the panelists, explaining the case (facts and legal arguments). During the first

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[326] MERCURIO, Bryan. *Improving dispute settlement in the World Trade organization: the dispute settlement understanding review-making it work?*. p. 811. "Membership on the permanent body of panellists would be a high quality individuals and be representative in terms of geography, with panellists independent from any national government." p. 813. "Some developing country Members already feel the system ignores their interests and if, for example, the majority of panellists on the permanent roster were white, male, aged 50 and from developed countries, not only would developing country Members view the Panel process as suspicious but also so too would an already apprehensive public."

[327] DSU - "Article 12 – Panel Procedures - 8.In order to make the procedures more efficient, the period in which the panel shall conduct its examination, from the date that the composition and terms of reference of the panel have been agreed upon until the date the final report is issued to the parties to the dispute, shall, as a general rule, not exceed six months. In cases of urgency, including those relating to perishable goods, the panel shall aim to issue its report to the parties to the dispute within three months.
9.When the panel considers that it cannot issue its report within six months, or within three months in cases of urgency, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will issue its report. In no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months."

[328] DSU - "*Article 10 - Third Parties* - 1. The interests of the parties to a dispute and those of other Members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process.2. Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report. 3. Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel. 4. If a third party considers that a measure already the subject of a panel proceeding nullifies or impairs benefits accruing to it under any covered agreement, that Member may have recourse to normal dispute settlement procedures under this Understanding. Such a dispute shall be referred to the original panel wherever possible."

public[329] hearing, all parties (complaining, responding or third parties) have the opportunity to directly present their reasoning before the panel.

Afterwards, the parties present written rebuttals and present oral responses at a second hearing. At this point, the panel may consult experts (solicited by the parties or not) to prepare an advisory report.

Then, the panel delivers a descriptive report – facts and legal arguments – to the parties, without giving any specific conclusion[330]. The parties have two weeks to comment.

A second report (interim report) is then submitted by the panel, which already included findings. The parties have a week to ask for a review[331], which may take place within two weeks, when the panel may have extra hearings with the parties.

The final report is delivered to the parties and, three weeks after that, it is made public[332], and sent to all WTO Members. In cases of breaches of WTO agreements/obligations, the panel may also recommend the measures which should be taken[333], in conformity with WTO rules.This report becomes a ruling if within 60 days[334]

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[329] MERCURIO, Bryan. *Op. cit.* p.806. "Negotiations leading up to Panel hearings should remain private and if a matter concerns confidential information, then steps should be taken to ensure that the information remains confidential. But the hearings themselves should be conducted in a manner widely accepted in modern democracies; open to public attendance."

[330] DSU – *Article 15* – "*Interim Review Stage* - 1. Following the consideration of rebuttal submissions and oral arguments, the panel shall issue the descriptive (factual and argument) sections of its draft report to the parties to the dispute. Within a period of time set by the panel, the parties shall submit their comments in writing".

[331] DSU – *Article 15* – "2. Following the expiration of the set period of time for receipt of comments from the parties to the dispute, the panel shall issue an interim report to the parties, including both the descriptive sections and the panel's findings and conclusions. Within a period of time set by the panel, a party may submit a written request for the panel to review precise aspects of the interim report prior to circulation of the final report to the Members. At the request of a party, the panel shall hold a further meeting with the parties on the issues identified in the written comments. If no comments are received from any party within the comment period, the interim report shall be considered the final panel report and circulated promptly to the Members."

[332] MERCURIO, Bryan. *Op. cit.* p.806. "The lack of transparency pervading the WTO´s dispute resolution mechanism does a disservice to the interests of both Member States and the WTO more generally.(...)The legitimacy of the system is enhanced if the process by which a decision is reached is open to the public." p.804 "The reason many commentators advocate greater transparency in the system is two-fold: first, it is thought that greater transparency will provide the public with information in a timely manner, providing non-state actors with better access to participate the system; and second, it is thought that increased transparency will heighten public awareness in an effort to increase the legitimacy of the system." p.807. "(...) increased media coverage of the Panel process can only help the system."

[333] DIEZ DE VELASCO, Manuel. *Op. cit.*p.457. "El informe del panel deberá pronunciarse sobre si hubo o no vulneración de las obligaciones asumidas en la OMC (de cualquiera de sus Acuerdos) y determinará el plazo para restablecer la situación. ElOSD velará para que se cumpla el informe aprobado."

[334] DSU – "Article 16 - 4. Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting[334] unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal. This adoption procedure is without prejudice to the right of Members to express their views on a panel report."

no consensus of the Dispute Settlement Body rejects it[335] (negative consensus). In practice, the DSB is no likely to overturn the panel´s findings.

3.3.3.4. Appellate Body

The WTO Appellate Body (AB) is a permanent organism composed by seven members[336] – which are again not directly bound to any State – and serves as a permanent entity with a competence restricted to review issues of law and legal interpretations[337] raised by the parties of a given case[338]. Consequently, the AB is not competent to reexamine facts or to investigate new data.

On the same way that happens on the panel´s proceedings, third States and non-State actors are not allowed to request the appreciation of the Appellate Body[339].

The appeals are heard by three members of the AB, who must solve the cases – uphold, modify or reverse the decisions (art. 16.13) – within sixty days, a period which

[335] FERNÁNDEZ PONS, Xavier. *Op. Cit.* p. 81. "Como el OSD es quien tiene, formalmente, la competencia para decidir los términos de solución de las diferencias, también cabría barajar su calificación como un procedimiento de 'solución institucional por decisión de órgano político. Ahora bien, como se ha avanzado, los informes de los Grupos Especiales y el Órgano de Apelación son adoptados por el OSD en virtud de la regla del 'consenso negativo', según la cual dichos informes se considerarán adoptados en los plazos estipulados por el ESD salvo en el remoto caso de que hubiese un consenso en contra de todos los miembros de la Organización representados en el OSD."

[336] DSU – *Article 17 – "Appellate Review- Standing Appellate Body* - 1. A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body. 2. The DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once. However, the terms of three of the seven persons appointed immediately after the entry into force of the WTO Agreement shall expire at the end of two years, to be determined by lot. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of the predecessor's term. 3. The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the WTO. All persons serving on the Appellate Body shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities and other relevant activities of the WTO. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest. "

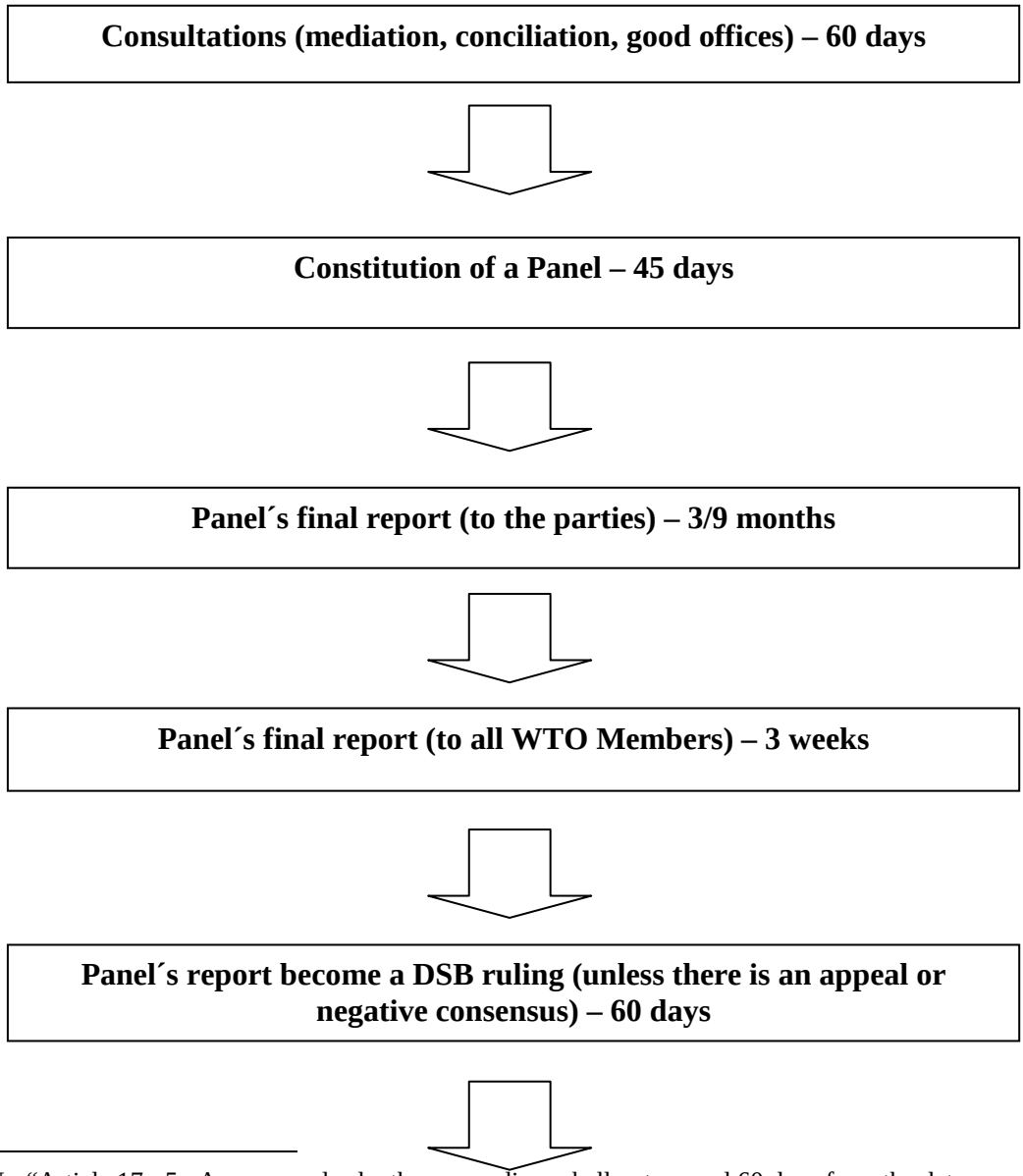
[337] DSU – *Article 17* – "6. An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel."

[338] FERNÁNDEZ PONS, Xavier. *Op. Cit.* p. 84. "El Órgano de Apelación, a diferencia de los Grupos Especiales, tiene atribuida sólo una función jurisdiccional o, como enfáticamente señala CANAL-FORGUES, '*la recherche exclusive de la vérité juridique*'. A tenor del art 17.6 del ESD, la apelación 'tendrá únicamente por objeto las cuestiones de Derecho tratadas en el informe del Grupo Especial y las interpretaciones jurídicas formuladas por éste."

[339] DIEZ DE VELASCO, Manuel. *Op. cit.*p. 458. "Las partes en la diferencia serán las que puedan apelar ante este Órgano y las cuestiones suscitadas se limitan a la interpretación en Derecho."

may be extended to a maximum of ninety days[340]. Afterwards, the DSB has thirty days to submit its decision[341], which may only modify the AP´s ruling by negative consensus[342].

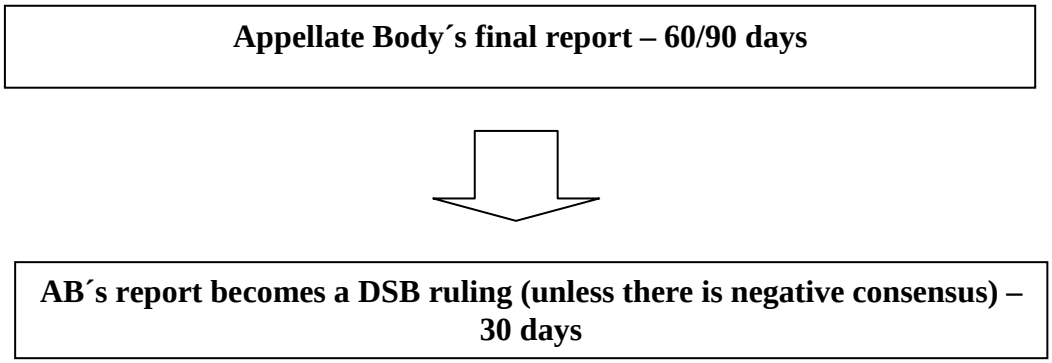
In sum:



[340] DSU - "Article 17 - 5. As a general rule, the proceedings shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its report. In fixing its timetable the Appellate Body shall take into account the provisions of paragraph 9 of Article 4, if relevant. When the Appellate Body considers that it cannot provide its report within 60 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 90 days."

[341] DIEZ DE VELASCO, Manuel. *Op. cit.*p. 458. "El plazo para emitir su informe será de sesenta días y lo presenta directamente ante el OSD, que sólo podrá rechazarlo por consenso en un plazo de treinta días."

[342] *Article 17* – "14. An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members.[342] This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report. "



3.3.4. Possible sanctions

As mentioned before, the main scope of the WTO DSS is not the imposition of trade sanctions – which are *per se* contrary to the main objectives of the institution –but the pacific settlement of trade disputes.

Therefore, before the imposition of any kind of coercive penalty, a last opportunity is given to the condemned party in order to adjust its trade policies in accordance with the WTO principles/recommendations/decisions[343]. The country has thirty days – from the final report´s adoption – to state its intention to do so before the DSB, which then determines a "reasonable period of time"[344].

[343] DSU - *Article 19 – "Panel and Appellate Body Recommendations*- 1. Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned[343] bring the measure into conformity with that agreement.[343] In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations. 2. In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements."

[344] DSU – *Article 21* – "3. At a DSB meeting held within 30 days[344] after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so. The reasonable period of time shall be: (a) the period of time proposed by the Member concerned, provided that such period is approved by the DSB; or, in the absence of such approval, (b) a period of time mutually agreed by the parties to the dispute within 45 days after the date of adoption of the recommendations and rulings; or, in the absence of such agreement, (c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings.[344] In such arbitration, a guideline for the arbitrator[344] should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances."

If the country fails to comply with this determination, it must negotiate with the complaining party(ies) to find a satisfactory compensation[345] "*consistent with the covered agreements*"[346]– e.g., tariff reductions – in order "*to restore the balance of negotiated concessions disturbed by the noncomplying measure*"[347].

At this point, the parties frequently find an agreement since, as explained by ROSENDORF, this action brings up mutual positive pay-offs:

> *"The payment is a penalty paid to preserve a country´s reputation as a cooperator (at least in 'normal' times). In response, the trading partners observe its willingness to pay to preserve its reputation and opt not to punish the offending partner by revoking concessions or even exiting the system."*[348]

Nevertheless, if no mutual-solution is found[349] in twenty days, the "*complaining side may ask the Dispute Settlement Body for permission to impose limited trade sanctions ('suspend concessions or obligations') against the other side*"[350]. Those sanctions[351] must

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[345] DSU – *Article 22 – "Compensation and the Suspension of Concessions* - 1. Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements. 2. If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements."

[346] ARUP, Christopher. *Op. cit.* p.917. "In deciding how to implement a ruling, the DSB should prefer a solution mutually acceptable to the parties and consistent with the covered agreements."

[347] ROSENDORF, Peter. *Op.cit.* p.391. "(...) the DSU permits possible 'compensation' or retaliation. The purpose is to provide compensatory benefits to restore the balance of negotiated concessions disturbed by the noncomplying measure."

[348] ROSENDORF, Peter. *Op.cit.* p.390.

[349] ARUP, Christopher. *Op. cit.* p.918. "If agreements cannot be reached, the prospect of sanctions comes into play. Some complainants do not start with markets attractive enough to make sanctions a real threat to respondents, certainly if they are operating alone. (...) there are legal limits to the sanctions (...) particularly in terms of cross-sector retaliation, and the necessary equivalence between the sanctions and the harm(...)."

[350] *Source:* WTO.

[351] DSU – Article 22 – "3. In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures: (a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment; (b) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement; (c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious

be preferably applied in the same sector in dispute, and must be proportional[352] to the damages caused by the controversial measure. In exceptional occasions, however, sanctions may be imposed in different sectors or even in different agreements – the so-called "crossed retorsion"[353] –, always under the direct supervision of the DSB.

3.4. FINAL REMARKS

As mentioned before, the international community faces the herculean challenge to conciliate the appropriate objective of social and environmental protection[354] with the current tendencies of global commerce liberalization[355].

More, on this present globalized society it is not possible deny the great impact of external topics on the international trade system – such as technical regulations, sanitary and phytosanitary barriers, environmental norms and, of course, labour rules.[356]

For those reasons, trade issues must not receive a purely market-oriented legal treatment, based on anachronic neoliberal findings. **As stated by PURSEY, *"t**he addition of a social clause to the multilateral system of trade rules is an essential element in reinforcing the still fragile consensus favouring further liberalization"*** [357].

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enough, it may seek to suspend concessions or other obligations under another covered agreement; (d) in applying the above principles, that party shall take into account: (i) the trade in the sector or under the agreement under which the panel or Appellate Body has found a violation or other nullification or impairment, and the importance of such trade to that party; (ii) the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations; (...)"

[352] ROSENDORF, Peter. *Op.cit.* p.391. "The 'proportionality principle' (...) is a crucial element of the DSP."

[353] GREENWALD, Joseph. *Op. cit.* p.275. "Las partes en controversia pueden, como último recurso, tomar medidas de retorsión para suspender concesiones dentro de un acuerdo distinto del que consideró la controversia contra el miembro que no hubiera aplicado las recomendaciones adoptadas por el panel (retorsión cruzada)."

[354] HURREL, Andrew; KINGSBURY, Benedict. *Op. Cit.* p. 40. "Development cannot be sacrificed as a means of stabilizing the global environment – because of the enormous social and political pressures facing all governments in the developing world; because sacrificing growth would perpetuate the unjust division between rich and poor; because the rich countries bear the greatest responsability for existing environmental problems; because poverty is itself a central cause of environmental destruction; and because the ability of poor countries to adapt to future environmental changes can only be increased by continued social and economic development."

[355] FRENCH, Duncan. *"The role of the State and International Organizations in Reconciling Sustainable Development and Globalization"*, 2002, p. 139. "It is wrong to claim that 'true' sustainable development is only possible through a rejection of the principle of free trade".

[356] DIEZ DE VELASCO, Manuel. *Op. cit.* p. 451. "Pero tampoco se puede poner todo el acento en los aranceles, pues desde hace algunos años son más negativas para la libertad del comercio las barreras no arancelarias como son las normas tecnicas, fitosanitarias, fiscales, o las preferencias legales por los provedores nacionales. Estas trabas no arancelarias, en conjunto, pueden encarecer más un producto que el arancel mismo."

[357] PURSEY, Stephen. *Op. Cit.* p.239. "The addition of a social clause to the multilateral system of trade rules is an essential element in reinforcing the still fragile consensus favouring further liberalization."

On the labor field, the WTO is frequently mentioned as a possibility to give effectiveness to the international protection of workers´ rights, since it has a dispute settlement system able to impose trade sanctions on its Members[358]. This is not a brand new idea, since the argument to use the trade 'stick' to protect labour standards was already presented on the Havana Charter (ITO) during the post-war period, and persisted during the second half of the 20th century in several GATT negotiation rounds.

More, as we have seen, theoretically it would be possible to extend the interpretation of the WTO main agreements (GATT, GATS, TRIPS) in order to include the observation of core labor standards as a *conditio sine qua non* to take part in the international trade system. "Simply" applying the interpretation developed in *Asbestos* the DSS could decide that the 'likeness' of goods and services (and the consequent application of the MFN clause and the principle of national treatment) also depends on non-incorporated PPMs (which should comprehend the accomplishment with the eight core ILO Conventions). Otherwise, the violations of labor rights could be included on the application of the exceptions prescribed by GATT article XX, letters (a), (b) and (e).

Furthermore, the precedents established on the environmental field seem to increase the participation of non-State actors on negotiations and even on the direct participation on the dispute settlement system. Consequently, trade unions and employers' associations should use those previous experiences in order to contribute with unsolicited *amicus curiae* briefs, aiming to include relevant technical issues and external viewpoints on Panel´s (and AB´s) considerations.

Notwithstanding, in spite of the existence of those possible legal solutions, the international community is still reluctant to include sanctions concerning labor standards on a multilateral trade system[359], mainly because of the radical opposition stemming from developing countries that argue it would be an open-invitation for protectionism. Significantly, the role of WTO is not to impose trade sanctions or restrictions, rather its main objectives are quite the opposite, that is, it seeks trade liberalization and the avoidance of all types of barriers to multilateral commercial exchange. The recognition in Singapore and Seattle that the ILO is the relevant body to deal with labor standards proves

[358] LANFRANCHI, Marie-Pierre. *Op. cit.* p.67. "(...) l´OMC est une organisation très attractive parce que ses règles sont sanctionnées par un mécanisme de règlement des différends quasi judiciaire, rapide et plutôt efficace."
[359] *Id.* p.65. "(...) cette clause n´a pas son équivalent dans le domaine social et l´inclusion formelle d´une telle clause n´est plus à l´ordre du jour."

the lack of general will, by the WTO Members, to link trade with labor standards on a multilateral level.

Therefore, the international society finds a great stalemate: while the ILO has no operative mechanisms in order to enforce core labor rights, the WTO – which has an efficacious “stick” – seems to have no interest on the discussion. Consequently, there is a patent necessity to find alternative methods to promote and enforce labour standards globally. One remarkable possibility is to foster the employment of social clauses on Generalized Systems of Preferences and on Free Trade Agreements – allowed exceptions by the WTO system – in order to incorporate labour issues on the international agenda, as it will be analyzed and discussed on the next sessions of this investigation.

4. SOCIAL CLAUSES ON UNILATERAL AND "BILATERAL" TRADE SYSTEMS

"This is the moment when we must build on the wealth that open markets have created, and share its benefits more equitably. Trade has been a cornerstone of our growth and global development. But we will not be able to sustain this growth if it favors the few, and not the many."
Barack Obama (1961 -), 44th President of the United States

4.1. GENERAL FRAMEWORK

4.1.1. Social clauses: positive and negative dimensions

4.1.1.1. Terminology

Social clauses should be understood as unilateral, bilateral, regional or multilateral attempts to legally bind trade and social standards, ensuring their enforceability through economic sanctions or incentives, accordingly to the degree of accomplishment on social matters by the different countries.

Before analyzing its pros and cons, it is crucial establishing relevant distinctions between two dimensions of social clauses: 'positive' social clauses (incentives) and 'negative' (sanctions) ones. The terms 'positive' and 'negative' do not bring any kind of moral or ethical judgment regarding those rules, since, as we´ll see, they simply stress characteristics of the norms themselves.

It is noteworthy that some authors apply the term "social clauses" in a stricter sense, only to identify the "negative"/sanctioning aspect of those regulations. *Exempli gratia*, in accordance with MOREAU, social clauses are *dispositions on bilateral (or multilateral) trade treaties that allow economic sanctions in the case of violations of previously agreed labor rights*.[360] In this study, however, we prefer to utilize the *latu sensu* significant, employing the expression "social clauses" to identity both the positive (incentives) and the negative (sanctions) dimensions of those norms, as we´ll see on the next sessions.

[360] MOREAU, Marie-Ange. *Op. cit.* p.90. "L´introduction d´une 'clause sociale' se rapporte à l´insertion fans un Traité de commerce international bilatéral, multilatéral ou mondial d´une disposition prévoyant des sanctions économiques en cas de violation de normes du travail jugées essentielles dans le traité."

4.1.1.2. Positive social clauses

'Positive' social clauses are those which ensure economic incentives to trade partners that successfully adhere to the pre-established social standards[361]. Those clauses find few resistance of the international community, and are based on an idea of material isonomy, that is to say, giving differentiate treatment to States with distinct characteristics (mainly different development levels). This 'positive' approach is illustrated by the most part of generalized systems of preferences, and also by several free trade agreements. Some important examples of FTAs with a 'positive dimension' include the United States-Cambodia bilateral three-year textile agreement (1999) and the Association agreements signed by the European Community and its Members with South Africa[362] (2000), Mexico[363] (2000) and Chile[364] (2003) – all of which shall be discussed later in this study.

4.1.1.3. Negative social clauses

The **'negative' dimension**, on the other hand, regards to sanctions[365] that may be applied in cases of breaching social standards. These sanctions may be moral, monetary or economic. In the case of economic sanctions, this may include an increase in trade tariffs and the elimination of benefits. It emphasizes the ability to enforce labor rights by coercive mechanisms other than political dialogue. Negative social clauses are based on a "carrot and stick" policy. The possible sanctions are applied as "sticks", while the "carrots" are the

[361]DI TURI, Claudio. *Globalizzzazione dell´economia e diritti umani fondamentali in materia di lavoro: il ruolo dell´OIL e dell`OMC.* Milano: Giuffrè, 2007. p. 220. "(...) mirano ad accordare benefici di tipo commerciale a quelle Parti contraenti che si impegnano a rispettare gli *standards* in materia di lavoro in esse prescritte: ne costituiscono altrettanti esempi alcuni sistemi di preferenze generalizzate di frequente utilizzazione."

[362] LENAGHAN, Patricia Michelle. *Op. cit.* p.144. "Following intensive negotiations, the Trade, Development and Cooperation Agreement between the European Union (EU) and South Africa was finally signed in Pretoriaon 11 October 1999."

[363] HOLBEIN, James R. *The EU-Mexico Free Trade Agreement.* Transnational Publishers. Ardsley, NY, 2002. p.6. "(...) The European Community-Mexico and member States treaty on Economic Partnership, Political Coordination and Cooperation Agreement and its Joint Decisions (the 'Mexico-EC and MS Agreement') are not only a mere FTA. This treaty involves areas that go beyond commercial matters, such as political coordination and cooperation."

[364] The Chile-European Union Association Agreement was signed on November 18th, 2002, and it is in effect since February 1st, 2003 (complete effect since March 1st , 2005). Complementary agreements were also signed with the inclusion of new European countries in 2004 and in 2007

[365] DI TURI, Claudio. *Op. Cit.* p. 229. "In conclusione, si può comunque affermare che tanto la prasi della CE che quella USA depongono nel senso dell´esistenza di regimi che consentono l´adozione di sanzioni commerciali a fronte di estese violazioni di diritti umani in materia di lavoro (...)".

potential advantages of global trade liberalization[366].This feature is present in 'unilateral' State acts (such as the *Burma Freedom and Democracy Act*), in regional arrangements (such as the NAFTA/NAALC system) and in recent FTAs such as the ones signed between the United States and Jordan (2001), Singapore (2003), Chile (2003), Morocco (2004) and Australia (2005).

Contrariwise to the clauses based on incentives, those sanctioning clauses are particularly controversial. Supported by developed countries[367] and trade unions[368] (such as the AFL/CIO and the ICFTU[369]), those mechanisms find strong opposition particularly from developing countries, liberal/neo-classicist economists and employers´ associations[370], still being strongly rejected in the most part of trade negotiations[371].

Some of the main arguments against 'negative' social clauses are:

1. 'Negative' social clauses are no more than 'hidden protectionism';
2. Social clauses are external invasions on traditional domestic sovereign powers;
3. The rule cannot be addressed by developing countries (and LDCs) against developed countries;

[366] MOREAU, Marie-Ange. *Op. cit.* p.93. "Le second objectif que poursuit la clause sociale est de renforcer la protection des travailleurs en permettant d´assurer le respect des obligations sociales par des sanctions économiques: le volontariat des pays qui ratifient les conventions de l´OIT conduit à une inefficacité relative. La clause sociale est alors le bâton; la carrote est faite des avantages qui résultent de la libéralisation du commerce mondial."

[367] SCHERRER, Christoph. *Op. cit.* p.62. "Because of their market-s size, the OECD countries´decision will carry great weight. Since the OECD countries are in the main not in direct competition with those countries that violate core labor rights they can act more like a disinterested party."

[368] RESTREPO, Marta A. *Op. Cit.* p. 317. "Aspecto de mayor importancia es el de las consecuencias de la globalización en las relaciones laborales, lo que es motivo de preocupación para las organizaciones sindicales, las más decididas promotoras de la 'cláusula social'." p. 322. "Las organizaciones sindicales, especialmente en los Estados Unidos, han sido siempre las más interesadas en vincular los derechos de los trabajadores con el comercio internacional. Al interceder por una legislación internacional sobre salarios minimos hacia los años 50, los proteccionistas trataron de impedir que los países con bajos salarios, especialmente el Japón, sacaran ventaja en la competencia con otros países, gracias al bajo costo de la mano de obra. Tanto en Europa como en los Estados Unidos el movimiento sindical insiste, y ahora con mayor énfasis, en la introducción de normas mínimas de trabajo entre las reglas del comercio internacional, argumentando que esas normas mínimas no tienen afán proteccionista, y que por el contrario contribuirían a contener la marea del proteccionismo. (...)."

[369] SCHERRER, Christoph. *Op. cit.* p.53. "However,its method of setting international standards by means of voluntary conventions is increasingly considered inadequate, as the ILO is finding it ever more difficult to enforce conventions. Furthermore, the process of adopting and implementing ILO conventions has slowed down significantly in the last decade. The International Confederation of Free Trade Unions has, therefore, demanded that worker´s fundamental rights be written into trade agreements as social clauses."

[370] *Id.* p.54. "Predictably, both employers´ associations and the overwhelming majority of economists contend that trade agreements are not an appropriate means of enforcing minimum standards."

[371] *Ibid.* p.64. "Social clauses continue to be rejected on the grounds that linkage between social standards and trade agreements runs counter to the tradition of multilateral negotiating rounds."

4. Social clauses are non-market mechanisms, artificial barriers to the reduction of the social gap;
5. If social clauses were good to foster development, they would be advocated by developing countries;
6. The accomplishment of fundamental rights will imply the lack of competitiveness;
7. Sanctions would only make the situation worse, labour reforms should be based on political dialogue and cooperation.

4.1.1.4. Rebuttals to the main arguments against the inclusion of negative social clauses

4.1.1.4.1. 'Negative' social clauses are no more than 'hidden protectionism'

Developing countries argue that they would be penalized with the inclusion of social clauses in the multilateral system, and on bilateral trade agreements. They say that those clauses would be invoked by developed countries as protectionist measures[372], non-tariff barriers to trade, which could diminish or eliminate comparative trade advantages of developing States on the international trade system[373].

This criticism, however, only would make sense whether the labour standards that should be accomplished by the parties were higher than what could be reasonably demanded on a specific situation - what would depend on the development and economic level of the each one of parties involved. That is to say that developed countries may agree on higher labour standards when contracting with another developed country. Actually, the deregulation phenomenon (flexibilization) on the labour rights legal systems of many OECD countries is not taking place only because of the 'unfair' competition coming from developing countries. Contrariwise, it has roots on the competition between developed countries themselves – since there is significant deregulation processes even in sectors which do not face concurrence from developing States[374].

[372] DICKEN, Peter. *Op. cit.* "Entretanto, sob o prisma de muitos países em desenvolvimento, há um forte sentimento de que o posicionamento dos padrões trabalhistas gerais de muitos países desenvolvidos é apenas mais uma forma de protecionismo contra suas exportações e, como tal, um obstáculo a seu tão necessário desenvolvimento econômico."
[373] PURSEY, Stephen. *Op. Cit.* p.237. "Perhaps the most commonly-heard view from Asia is that a social clause is simply a device to force industrial country wages and conditions on developing countries thus denying them the competitive advantage that their abundant supply of labor offers."
[374] SCHERRER, Christoph. *Op. cit.* p.62. "(...) around 80% of world trade is transacted among the OECD countries. The steady deregulation of social conditions in OECD countries in recent years is more a

Nevertheless, when agreeing with developing States, or at the WTO – as we´ve already seen – the ideal is to restrict labor protection to core worker´s rights[375] in order to avoid claims regarding to protectionism. Core labour standards, by the way, could never be misunderstood as protectionist instruments[376], since they are based on fundamental human rights recognized as such by the International Labour Organization, and the United Nations[377].

Social clauses are not attempts to internationally set up uniform labour conditions, or any kind of "global minimum wage". On the contrary, social clauses aim to guarantee the protection of basic rights[378] and to ensure 'fair' competition[379], particularly regarding the 'Southern' countries[380]. The international community must look for a situation of Pareto efficiency, changing the current panorama in which economic advantages are "*gained at the expense of extreme exploitation*".[381]

The main objective of social clauses is not the imposition of standards, but the recognition of a clear message stating that policies based on an inferior level than the minimum one pre-established by the International Labour Organization should not be

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consequence of fiercer competition among themselves than the result of competition from production locations in the industrializing countries."

[375] *Id.* p.64. "Only those standards and rights that already enjoy a high level of acceptance can be included in the catalogue of demands for social clauses."

[376] PURSEY, Stephen. *Op. Cit.* p.238. "(...) they are not industrial country standards but principles that governments of all countries, regardless of their stage of development, should legitimately be expected to observe."

[377] DEAKIN, Simon. MORRIS, Gillian S. Labour Law. 4th edition. Hart Publishing. Oxford and Portland, 2005. p.108. "Standards relevant to labour law are also present in a number of instruments which deal with a wider range of human, civil and political or socio-economic rights, These include the Universal Declaration of Human Rights, adopted by the United Nations general Assembly in 1948, to which effect was given in international law by the International Covenant on Economic, Social and Cultural Rights (ICESCR) and International Covenant on Civil and Political Rights (ICCPR), both of 1966. (...) At European level the European Convention on human rights (ECHR) and its economic and social counterpart, the European Social Charter (ESC) both include provisions related to labour law (...)".

[378] PURSEY, Stephen. *Op. Cit.* p.237. "The precise path which wages and other conditions of work take in the development process cannot be determined internationally through, for example, some sort of international minimum wage. What can and should be a condition of participation in the global market is that workers have the right to bargain collectively through a trade union of their own choosing which determine their conditions of work."

[379] MOREAU, Marie-Ange. *Op. cit.* p.91. "Dans une perspective économique, il s´agit tout d´abord de préciser l´intégralité des normes qui assurent, au niveau mondial, un commerce loyal: non seulement les normes tarifaires et non tarifaires, non seulement les règles relatives à la propriété intellectuelle, mais aussi les règles relatives au coût loyal d´un produit résultant des normes du travail."

[380] SCHERRER, Christoph. *Protecting labor in the global economy: a social clause in trade agreements?* In: New Political Science, Volume 20, Number 1. Boston (MA):1998. p.53. "Free export zones, where basic worker rights are denied, are spreading in the "South", with the motivation of attracting foreign investment. The question, therefore, arises of whether minimum international standards could not be agreed to prevent competition in terms of social conditions."

[381] PURSEY, Stephen. *Op. Cit.* p. 236. "Guarantees that trade advantages will not be gained at the expense of extreme exploitation is one of the most important ways of buttressing an open and fair system for international trade."

tolerated by the international community[382]. Without the establishment of this minimum ground there would be a concrete risk of a permanent "race-to-the-bottom" bringing up a progressive erosion of fundamental labour rights in the name of economic and trade comparative pseudo-advantages.

As precisely stated by PURSEY, *"viewed from the perspective of sustaining the growth of global demand and enlarging consumer markets in developing countries, it is essential that trade liberalization does not induce or add to a deflationary pressure on wages and conditions worldwide."*[383]

4.1.1.4.2. Social clauses are external invasions on traditional domestic sovereign powers

Yes, they are. Is it a problem in that?

Contrariwise to the thoughts of authors like EDGREN, social clauses are not a mere imposition of standards from developed to developing countries[384], but mechanisms to ensure the recognition and the enforcement of fundamental workers´ rights recognized as such by the International Labour Organization..

On our current globalized world, as described by RESTREPO, States are losing their sovereignty – at least on its classic absolute conception – and international organisms have been assuming an increasing protagonist role.[385]

As a result of the growing interdependence between the domestic and regional economies, the bond between trade and labour is even more evident.[386] Therefore,

[382] MOREAU, Marie-Ange. *Op. cit.* p. 94. "En raison de cette dualité d´objectifs, la clause sociale peut être agencées soit de façon à imposer l´application de normes déjà admises par les pays, ce qui permet alors d´atteindre l´objectif d´égalisation de la concurrence, soit d´imposer le respect des normes fondamentales sélectionnées, ce qui conduirait à un renforcement sur une base coercitive de l´action de l´OIT, qui a toujours choisi la coopération."

[383] PURSEY, Stephen. *Op. Cit.* p. 235.

[384] EDGREN, Gus. *Normas equitativas de trabajo y liberalización del intercambio*. Revista Internacional del Trabajo. Jul/Sep, 1979. *apud* RESTREPO, Marta A. *Op. Cit.* p.323. "Pero para el comercio internacional en conjunto, ello equivale a un juego cuyas reglas son establecidas por los jugadores más fuertes, que pueden cambiarlas cuando les conviene en desventaja de los jugadores más débiles."

[385] RESTREPO, Marta A. *Op. Cit.* p. 316. "Los Estados van perdiendo paulatinamente su soberanía, ante el papel cada vez más destacado de los organismos internacionales en el proceso de globalización."

[386] PURSEY, Stephen. *Op. Cit.* p.236. "With the growing interdependence of nations consequent of an expansion of world trade and investment, the linkages between trade and labour are increasingly obvious."

undoubtedly the relativity on the concept of sovereignty[387] must be understood as a positive aspect in favor of an "*welfare increasing efficiency*"[388]

4.1.1.4.3. The rule cannot be addressed by developing countries (and LDCs) against developed countries

Another critic to the inclusion of social clauses on trade agreements is that those rules have no efficiency against developed countries, and could not be effectively enforced by developing States. It is true that *in praxis* developing countries are not able to impose economic sanctions on bigger economies - and even if they do so, those sanctions are not economically relevant to developed partners, causing damages only to their own economies. Nevertheless, social clauses certainly play a relevant role on the establishment and on the reaffirmation of internal policies on developed countries, which are subject to the control of their own civil society.

4.1.1.4.4. Social clauses are non-market mechanisms, artificial barriers to the reduction of the social gap

It is true that social clauses are non-market mechanisms, artificial interferences on the free-market system. Nevertheless, this is not a valid argument against the inclusion of those norms.

At first, because even if is paradoxical, sometimes external interventions in the market may be necessary to improve the development of the market structure itself. For example, non-market instruments (see the WTO negotiation Rounds) have been bringing excellent results when they have been used in order to remove trade tariffs- since the market itself could not '*determine the optimum level of regulation*'[389]

More, as demonstrated by SCHERRER, opponents of social standards claim that negative social clauses are barriers to close the present social gap. They argue that better life and working conditions are not more than "*natural outcomes of industrialization*". As stated by PURSEY, neoliberals presume that the "*excessive intervention in the labour*

[387] *Id.* p.237. "(...)reference to them in trade agreements would be an unwarranted invasion of national sovereignty."
[388] SCHERRER, Christoph. *Op. cit.* p.62. "The erosion of national sovereignty in this manner is positively welcomed by authors of the free trade persuasion in the name of welfare-increasing efficiency."
[389] *Id.* p.56. "Hence, if non-market mechanisms were needed to remove tariffs, it cannot be argued that only the market can determine the optimum level of regulation."

market is the cause of industrial countries´ lack of competitiveness so that in international social clause would retard national efforts to deregulate labour laws and reduce the influence of unions".[390] Therefore, they say that the best alternative would simply be to leave the market operate "*as free as possible*"[391]

This argument finds an easy refutation: the development of exporters sectors do not necessarily bring up better working and life conditions. More, trade liberalization do not always bring those 'expected' positive social outcomes.[392] In fact, in many countries, such as Caribbean States, India, Thailand and even South Korea (during the 80´s), trade liberalization brought a "*massive expansion of the formal sector, where labour rights are generally violated*"[393].

Also, traditional market theory claims that under free competition:

> "*factor prices, in other words the costs of land, labour and capital, will tend to equalize. (...) For labour, this could lead to a deterioration of the wages and conditions of work offered by existing suppliers or an increase in productivity at a faster rate than output, both of which would reduce labour costs per unit of output. Theory also suggest that as output and productivity rise in low-cost suppliers, factor prices including wages and other labour costs, should tend to rise as currently underemployed resourses are brought into production. To a certain extent both trends are visible at least in some countries, but the gap between conditions of work remains uncomfortably large and constitutes an underlying source of tension in trade relations*."[394]

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[390] PURSEY, Stephen. *Op. Cit.* p.237. "The neoliberals tend to start from the presumption than excessive intervention in the labour market is the cause of industrial countries´lack of competitiveness so that in international social clause would retard national efforts to deregulate labour laws and reduce the influnce of unions."

[391] SCHERRER, Christoph. *Op. cit.* p.56. "Opponents of social standards see them as an obstacle to closing the industrial gap. They argue that better living and working conditions cannot be legislated but would be the natural outcome of industrialization. Economic development would be the best promoted by ensuring that the trading system was as free as possible."

[392] *Derechos y propuestas de las mujeres del Cono Sur frente a la liberalización comercial.* Santiago de Chile: Oxfam, Eds. Foro Social Mundial, 2001. p. 22. "(...) la apertura económica se ha transformado en un instrumento de crecimiento económico en los países del sur de las Américas, sin embargo, muchas veces ese crecimiento no se traduce en mejoramiento social ni ambiental; (...)"

[393] SCHERRER, Christoph. *Op. cit.* p.57. "(...) social standards do not prevent countries from closing the industrial gap and may even accelerate the process, and secondly that development and expansion of the export sector do not necessarily lead to an improvement in living and working conditions. (...) In many countries of the South, the liberalization of foreign economic policies went along with increasing social inequalities and a massive expansion of the informal sector, where labour rights are generally violated."

[394] PURSEY, Stephen. *Op. Cit.* p. 235. "Market theory suggests that under conditions of free competition factor prices, in other words the costs of land, labour and capital, will tend to equalize. (...) For labour, this could lead to a deterioration of the wages and conditions of work offered by existing suppliers or an increase

Obviously it is not possible to demand equal wages in countries with totally asymmetrical GDP per capita. Nevertheless, "*it is realistic to expect that as productivity rises and exports rise in the low cost countries wages would not be artificially kept down through restrictions on basic labour rights"*[395].

It is true that there is no current consensus regarding the potential effectiveness of social clauses[396], but what is certainly even more accurate is that the current unregulated trade liberalization has already been the cause of great part of the present social exclusion[397].

4.1.1.4.5. If social clauses were good to foster development, they would be advocated by developing countries

Another argument raised by opponents of social clauses is that the protection of labour rights would lead to the increase of labour costs in developing countries, which would undermine their main comparative advantage. More, they allege, the only fact that social clauses are promoted by developed OECD countries is an evidence of that[398].

At first, it is necessary differentiate the interests of a country and the interests of its dominant elite. Violations on core labour rights could not be understood as a synonym for efficiency[399].

At a first glance, from an exclusive "*demand-oriented perspective, highly unequal income distribution is regarded as an obstacle to development.*"[400] Nevertheless, the lack

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in productivity at a faster rate than output, both of which would reduce labour costs per unit of output. Theory also suggest that as output and productivity rise in low-cost suppliers, factor prices including wages and other labour costs, should tend to rise as currently underemployed resourses are brought into production. To a certain extent both trends are visible at least in some countries, but the gap between conditions of work remains umconfortably large and constitutes an underlying source of tension in trade relations."

[395] *Id.* p.237. "It would clearly be unrealistic to expect low cost exporters from countries with a GDP per capita well below those of the industrial countries to pay comparable wages not least because productivity per capita is often well below the established producers. However, it is realistic to expect that as productivity rises and exports rise in the low cost countries wages would not be artificially kept down through restrictions on basic labour rights."

[396] MOREAU, Marie-Ange. *Op. cit.* p. 95. "Il reste qu´il n´existe aucun consensus autour de la clause sociale ni sur son opportunité et ses objectifs ni sur son mécanisme et son effectivité potentielle."

[397] LANFRANCHI, Marie-Pierre. *Op. cit.* p.59."(...) il est avancé que le libre échange, dès lors qu´il est mis en ouvre au moyen de contraintes juridiques, conduit à encourager ou excuser l´injustice sociale."

[398] SCHERRER, Christoph. *Op. cit.* p.58. "Every increase in labor costs supposedly jeopardizes the developing countries- main comparative advantage. This argument is also bolstered by a conclusion deduced from an opposite standpoint: if social clauses really fostered development, it would be in the interests of the countries concerned to implement them and there would be no need for pressure from the USA or other OECD countries."

[399] RESTREPO, Marta A. *Op. Cit.* p. 324. "La imposición de medidas proteccionistas en el contexto global iría en detrimento de los objetivos de desarrollo de los países en vías de industrialización, en la medida en que se sancionaría a los productores eficientes favoreciendo a los menos eficientes."

of consumers in their internal markets could not directly provoke the diminution of domestic production, since countries nowadays export. Notwithstanding, this does not mean that low wages are legitimate comparative advantages. Contrariwise to what neo-classic economists use to claim, raising wages above the market-clearing price DO NOT lead to unemployment.[401]

More, as correctly suggested by SCHERRER, based on "supply-side neo institutionalist" lessons:

> *"First, higher wages promote the development of 'human capital' (...). Secondly, they argue, social standards are necessary to make the transition from the extensive to the intensive use of labor. Under the prevailing system of sweatshops, employers have no particular interest in using labor intensively, first because workers are paid on a piece basis and hence no fixed labor costs arise, and secondly because their capital stock is usually small and consists of cutdated machinery that cannot be used more efficiently. The resulting low labor productivity in turn precludes raising wages. In such situation, social standards could increase interest in measures to raise productivity by changing the structure of incentives for firms and workers."*[402]

In Puerto Rico, *exempli gratia*, an increase on the minimum wage cause benefits for the society as whole[403].

More, surprisingly, recent OECD studies demonstrated that the enforcement of labour standards is not a fundamental factor on the composition of the products´ final prices. The findings showed that goods produced in developing countries – independently of the degree of enforcement of fundamental labour standards – "*tend to be rather uniform*".[404]

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[400] SCHERRER, Christoph. *Op. cit.* p.58. "From a demand-oriented perspective, highly unequal income distribution is regarded as an obstacle to development".

[401] *Id.* p.59. "The neo-classicists doubt whether a minimum wage could eradicate the sweatshop system; they consider it more likely that a minimum wage above the market-clearing price would lead to unemployment."

[402] *Ibid.* p.58.

[403] *Ibid.* p.59. "For example, as the minimum wage in Puerto Rico increased, turnover and absenteeism declined, job applicants were more thoroughly screened and 'managerial effort' improved."

[404] *Ibid.* p.60. "Its finding was that the prices of imports from developing countries tend to be rather uniform, even though the degree of enforcement of freedom-of-association rights varies substantially among these countries. Similarly, the OECD found that export prices of hand-made carpets do not reflect the use of child labor, since the export proce of a hand-made caret ranges from about US$40 in China to almost US$70 in Nepal, where child labor is reportedly pervasive."

4.1.1.4.6. The accomplishment of fundamental rights will imply the lack of competitiveness

Another argument is that the protection of fundamental labour rights, and the consequent more expensive social costs would imply on the lack of competitiveness in comparison with other countries, on a concrete prisoner's dilemma:[405]

> *"(...)developing countries face a prisoner-s dilemma on labor rights. They join benefit if rights are upheld by all, but countries that upgrade rights unilaterally suffer a competitive disadvantage, while competitive benefits accrue to countries that unilaterally undercut the others."*

As demonstrated by RESTREPO, recent ILO Studies confirm that in the US those States with a low-level on unionizing rates tend to receive more external investments. The same logic prevails inside the European Union, where there is a significant amount of investments have been relocated to countries with inferior production costs. More, multinationals use their global position in order to explore the comparative advantages of different States[406], tending to invest in countries with a less restrictive labour legislation.[407]

Therefore, this argument proves to be completely true. Nevertheless, that is exactly why those standards have be negotiated and applied internationally[408]. In cases of

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[405] *Ibid*. p.61. "(...)developing countries face a prisoner-s dilemma on labor rights. They join benefit if rights are upheld by all, but countries that upgrade rigts unilaterally suffer a competitive disadvantage, while competitive benefits accrue to countries that unilaterally undercut the others."

[406] RESTREPO, Marta A. *El proceso de globalización y la cláusula social.* In*: IV Congreso Regional Americano de Derecho del Trabajo y de la Seguridad Social. Relaciones, informes nacionales, mesa redonda. Sociedad Internacional de Derecho del Trabajo y de la Seguridad Social.* Santiago: Sociedad Chilena de Derecho del Trabajo y de la Seguridad Social, 1998. p. 315. "(...) una firma global es aquella que participa en más de un país y que captura ventajas comparativas por el hecho de tener un posicionamiento global. Estas ventajas comparativas son resultado de economías de escala y efectividad en la producción y manufactura, en la logistica, en el mercado, en el manejo de su acceso más eficiente a los mercados financieros internacionales."

[407] *El trabajo en el mundo. Relaciones laborales, democracía y cohesión social.* Ginebra: OIT, 1997/98. *apud* RESTREPO, Marta A. *Op. Cit.* p. 317. "(...) las inversiones recientes de empresas japonesas y europeas en los Estados Unidos corresponden a Estados que se caracterizan por un índice muy bajo de sindicación, y que muchas de ellas han ido acompañadas de grandes concesiones fiscales. (...) Cabe suponer, al menos a primera vista, que ha habido en Europa un cierto corrimiento de inversiones extranjeras hacia aquellos países cuyos costos de producción son menores. (...) las multinacionales estadounidenses tienen en cuenta la reglamentación del empleo, y no crean filiales allí donde la reglamentación limita su libertad de actuación con unas disposiciones rigurosas en materia de despido, por ejemplo, o cuando la negociación colectiva se hace en un nivel más alto que el de la empresa (...)."

[408] SCHERRER, Christoph. *Op. cit.* p.61. "The 'soft' objections to social standards rest ultimately on the argument that social standards that push wages above the market-clearing proce threaten the competitiveness of firms. This threat to competitiveness, however, is the very reason why social standards have to be negotiated internationally."

unilateral/bilateral arrangements, however, this lost on competitiveness must be strongly compensated by low-tariff arrangements and preferential access to markets.

4.1.1.4.7. Sanctions would only make the situation worse, labour reforms should be based on political dialogue and cooperation

Of course cooperation and political dialogue must be permanently encouraged aiming to foster the international protection of labour rights.[409]

Notwithstanding, complementary sanctioning mechanisms should not be seen as completely ineffective tools. On the contrary, the examples of IMF and World Bank´s sanctions-based policies already demonstrated that economic constraints may work as an efficacious inducement for social reforms[410] which have been – on the most part of the cases – beneficial on a long-run perspective.

Moreover, sanctions are not more than a last possible alternative in cases of non-cooperation[411].

4.1.1.4.8. The inclusion of social clauses would embarrass an already complex international trade system

Another common argument cited against the inclusion of social clauses on trade agreements is that they will be significant additional obstacles to negotiations which are already *per se* complex.[412] Obviously difficulties are not a barrier for the inclusion of those commitments. Trade treaties nowadays deal with subjects which were initially excluded, such intellectual property rights, environmental regulations and dispites settlement systems, what are also very hard topics. Furthermore, the reluctance in accepting to comply

[409] PURSEY, Stephen. *Op. Cit.* p. 236. "International economic cooperation should be based on a firm commitment to basic human rights of which freedom of association, freedom from forced labour and freedom from discrimination in employment are critically important to the development of democracy and social justice."

[410] MOREAU, Marie-Ange. *Op. cit.* p.93. "La crainte de sanctions économiques peut être un levier efficace: les actions engagées par le FMI et la Banque mondiale démontrent bien que la pression économique peut donner à un governement la motivation d´une réforme sociale. Même si l´intervention des organismes internationaux n´a pas joué dans le passé dans le sens de l´accroissement des normes protectrices du travail, elle montre que l´existence d´une sanction ou de la non attribution d´un avantage économique est un outil efficace de modification des normes sociales."

[411] PURSEY, Stephen. *Op. Cit.* p.239. "It should be clear that a social clause should promote the observance of the basic minimum labour standards which determine wages and other conditions of work. The trade sanction would operate as the ultimate penalty for non-cooperation."

[412] SCHERRER, Christoph. *Op. cit.* p.66. "A frequent argument against social clauses is that they represent an additional hurdle in the conclusion of multilateral agreements on the dismatling of trade barriers."

with fundamental social standards is just another corroboration of the elementary importance of social clauses.

In sum, included with the main scope to promote equitable social and economic development, social clauses have an ambivalent nature: (1) for developed countries they work as efficient instruments in order to avoid the so-called 'social dumping' and (2) for developing countries they are used as a way to guarantee the enforcement of universally recognized social standards, ensuring better life conditions for their own populations.

Given the variety and complexity of such schemes, this study shall address the inclusion of labor standards on generalized systems of preferences (GSPs) and free trade agreements (FTAs) of two of the most important members in the international trade system, that is, the United States and the European Union. In spite of their economic and political importance *per se*, they have been important points of reference for other GSPs and FTAs the world over. Nonetheless, before analyzing specific trade arrangements, let us define some of the following terms**:**

4.2. UNILATERAL AND BILATERAL TRADE SYSTEMS

4.2.1. Generalized systems of preferences (GSPs)

Generalized systems of preferences are authorized exceptions to the Most Favorite Nation (MFN) principle prescribed by the World Trade Organization (WTO) system which aim to promote social and economic development, especially in under-developed countries. Encouraged by the WTO itself and by the United Nations Conference on Trade and Development (UNCTAD), they basically consist of beneficial tariffs and other "*discriminatory measures which favor exports from developing countries*[413]" which are unilaterally established by the most developed global economies[414].

As mentioned in Chapter 2, the MFN clause sets up the formal isonomy as one of the pillars of the WTO system**:** every trade concession given to one Member must be automatically extended to the multilateral system as a whole (GATT I:1).

[413] HUDEC, Robert E. *Essays on International Trade Law*. Cameron: London, 1999. "It consists of those discriminatory measures, by both developed and developing countries, which favour exports from developing countries, and which have been adopted for the stated purpose of assisting their economic development. "
[414] *E.g.*, the United States, the EU, Japan and Canada.

Notwithstanding, the GATT Part IV (which was incorporated in the GATT system in 1979, and commonly referred as the "*enabling clause*"[415] [416]) allows the GSP exception[417], reinforcing the concept of material isonomy at the WTO level**:** with the application of GSPs it is possible to give different treatment to different countries which are on distinct economic levels, in order to fulfill historical economic gaps[418]. If the same trade system was simply imposed to all Members – through a strictly formal interpretation of the MFN principle – developing countries and LDCs would simply not be able to compete "fairly" in the international trade arena.

However, GSPs should not be understood as mere unilateral trade concessions[419]. States (or groups of States) frequently apply all sorts of reasonable conditions to grant the preferential trade treatment established by GSPs[420]. *In concretu*, developed countries establish beneficial tariffs to developing countries that conform with geopolitical and social objectives, such as, effective measures to protect labor rights and environmental standards, measures to combat anti-corruption and international drug trafficking.

Nonetheless, GSPs are certainly not panaceas. As stated by BREUSS, "*according to the IMF and the World Bank the benefits of many GSP schemes for their beneficiaries*

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[415] VAN DEN BOSSCHE, Peter. *Op.cit.* p. 726. "The 1979 GATT decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing countries is commonly referred as the 'Enabling clause'."

[416] *Decision of 28 November 1979 - (L/4903)* – "Following negotiations within the framework of the Multilateral Trade Negotiations, the CONTRACTING PARTIES *decide* as follows: 1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties. 2. The provisions of paragraph 1 apply to the following: *(a)* Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences, (...)".

[417] KAUFMANN, Christine. *Op.cit.* p.136. "With regards to the discussion on labor rights, the following exceptions are important: Part IV of the GATT and the so-called 'Enabling clause' allow for a General System of Preferences (GSP) in favour of developing countries, which otherwise violates the MFN principle."

[418] VAN DEN BOSSCHE, Peter. *Op.cit.* p. 727. "The Enabling clause thus permits Members to provide 'differential and more favourable treatment' to developing countries in spite of the MFN treatment obligation of article I:1, which normally requires that such treatment be extended to all Members 'immediately and unconditionally'. What is more, WTO members are not merely allowed to deviate from article I:1 in the pursuit of 'differential and more favourable treatment' for developing countries; they are encouraged to do so."

[419] BREUSS, Fritz. *Op.cit.* p.258. "On average these preferential schemes are quite generous. In the EU the average tariff (for all goods) faced by LDCs or ACP members is below one percent, compared to the 7,4 percent average MFN tariff. GSP preferences in the EU are close to the 50 percent. In the United States LDC and GSP preferences offer more than a 50 percent average margin – LDC preferences being more generous around 65 percent. Japan offers a 48 percent preference margin under their GSP regime, and an average 60 percent for LDCs. Canada gives a 25 percent preference to GSP countries and 45 percent to LDCs." (1999 data)

[420] KAUFMANN, Christine. *Op.cit.* p.199. "The country that applies a GSP system has great freedom in its design and (...) establishes differences according to different criteria (...)".

have been limited. The reason is that preference margins are smaller for products that the importing country deems to be sensitive – which are also among the most protected.[421]"

4.2.2. Bilateral / Regional Free Trade agreements

There has been a boom of signatures on free trade agreements[422] all around the world[423]. Each bilateral/regional agreement is, *per se*, complex and with its own significance. Whether or not they are designed to directly force others than the parties involved, collectively, they set up an extraordinarily intricate network that seeks to dynamically balance the international trade system. This new commercial geopolitical order is a viable alternative to deepen trade liberalization, given the major deadlocks faced by the multilateral negotiations at the WTO Doha "development" Round[424].

Nonetheless, recent free trade agreements do not deal with traditional economical contents exclusively. They go much further – even further than multilateral organizations. These treaties propose genuine partnerships, construct bilateral associations which consider not only trade integration but also fundamental topics related to political dialogue and cooperation, such as environmental protection and intellectual property rights, technical barriers to trade, sanitary and phytosanitary measures. And, within the scope of this study, these agreements frequently also refer to minimum labor standards. Actually, the establishment of fair and transparent labour markets is an important step to achieve economic development. The "decent labour" must be considered a key issue on the implementation of a deeper trade liberalization system on a transnational economy[425], since the International trade system is not designed to only benefit a few States or governments, but mainly it must affect the individual's life, promoting better conditions for every citizen belonging to the States involved on the agreements and also to international community as a whole.

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[421] BREUSS, Fritz. *Op.cit.* p.266.

[422] *Id.*"In addition to GSP an important recent development has been the proliferation of bilateral and regional free trade agreements between industrial and developing countries. Such agreements have to cover substantially all trade, unlike GSP schemes."

[423] *Bilateralism and Regionalism: Re-establishing the primacy of multilateralism – a Latin America and Caribbean perspective.* Santiago: United Nations Publication, 2005.p. 28. "(…) bilateral and plurilateral FTAs have predominated over customs unions since the mid 1990s."

[424] WEINTRAUB, Sidney. *Op. cit.* p.92. "There may be a reduction in the degree of discrimination if the FTAs turn out to be stepping-stones to global trade liberalization in the Doha Round, an outcome that is uncertain at the moment."

[425] VICUÑA, Francisco Orrego. *Op. Cit.* " (...) the current process of economic globalization is having a potentially decisive impact on the structure of international society and the evolving role of international law".

Following this idea, bilateral social clauses are celebrated on the framework of trade agreements, being accepted as voluntary commitments, with no sort of additional international enforcement control.[426]

Apropos, some of the most important clauses in all recent free trade Agreements are directly or indirectly related to the labor market, a topic which has piqued considerable interest since it has the potential to cause huge ramifications in bilateral/regional trade relationships.

Notwithstanding, there are several differences regarding the treatment of labor norms among FTAs. Some of these differences concern specific labor rights which are protected by the agreements. We may classify these agreements into two main groups**:**

- ***The 'sovereign' model*** prescribes that the parties must, as a primary obligation, ensure the accomplishment of their domestic labour legislations. This model aims to protect country's sovereignty regarding its legislative powers. Nonetheless, it does not mean than the parties merely have to ensure the accomplishment with national legislations, disregarding of their material content. *Exempli gratia*, as we´ll see, the most important example of 'sovereign' social clause is the one established by the NAFTA/NAALC model, the first trade system to directly and effectively promote a linkage between trade and labor norms, with major influence on further agreements on this field. In accordance with this system the parties´ legislative powers are not totally discretionary, since they must obey eleven general principles prescribed by the NAALC itself. More recent FTAs signed by the United States, as we´ll observe, set particular labour standards which should be protected by the agreement, under the general denomination "internationally recognized labour rights", which do not necessarily converge with the ILO ones.
- ***The 'multilateral' model*** goes further, directly protecting labor standards acknowledged by universal status by multilateral *fori*, particularly the ones recognized by ILO Conventions as core rights and which must be imposed *erga omnes*, such as, the already referred to association agreements signed between Europe and Mexico, Chile and South Africa.

[426] RESTREPO, Marta A. *Op. Cit.* p. 323. "Ahora, conviene referirnos a lo que se conoce como las cláusulas sociales bilaterales, que son aquellas que se celebran en el marco de convenios comerciales entre dos países y que son impuestas por el país importador, acogidas como un 'compromiso voluntario' por el país exportador, las cuales carecen de algún control internacional."

Furthermore, free trade agreements generally constitute important instruments related to cooperation between the parties, which usually include**:** information exchange (particularly on issues related to good practices and legal structures); the promotion of joint investigations in sensitive areas of common interest; the development of small and medium-sized enterprises (SME); transparency and general social protection.

Most parts of a trade agreement are restricted to the 'positive' features of social clauses—without the possibility to resort to coercive mechanisms. Nevertheless, some FTAs, particularly the ones signed recently by the United States, go much further. They include social clauses which ensure concrete protection of labor rights through specific rules establishing dispute settlement systems. These guarantee the respect of transparent procedural rules and reserve the option to resort potential to moral, monetary and trade sanctions (the so-called 'negative social clauses'). The idea, which shall be discussed further, is that FTAs may play a significant role in the labor arena, fulfilling an international legal spread[427], being able to impose upon signatories the obeisance of basic labor standards through a foreseeable dispute settlement system with coercive effects.

4.2.3. Is there a true distinction between 'unilateral' and 'bilateral' trade systems?

As we´ve seen, there seems to be a lack of efficiency regarding the imposition of minimum labor standards through multilateral legal rules. In spite of invoking Article 33, the International Labor Organization (ILO) depends *in praxis* only on moral sanctions and the World Trade Organization (WTO) system still experiences internal opposition when applying its dispute settlement system on labor issues. Therefore, **unilateral, bilateral and regional trade arrangements perform an important complementary function for the advocacy and implementation of workers' rights around the world.**

Unilateral State acts are basically generalized systems of preferences (GSPs) and unilateral trade sanctions. Nevertheless, as we shall see on a further chapter of this research, some GSPs are more "unilateral" than others. *Exempli gratia*, the American trade sanctioning policies. Several GSPs, on the other hand, count with "bilateral" features, such as the possibility to open consultations with third parties on the European GSP.

Whereas, negotiated agreements are trade arrangements signed between two or more parties, which may or may not be part of the same geographic region (regional

[427] SENGENBERGER,Werner. *Op. Cit.* p. 7. "There are those who wish to see a harmonization of labor standards across competing countries, for example through social clauses in trade agreements."

agreements). **Several of those treaties, however, are not truly "bilateral", particularly when there is a significant economic disproportion between the parties involved**. Since developed countries have not been successful in adopting labor standards within the multilateral trade arena (WTO), they are pressing the issue and imposing labor clauses on "bilateral" trade arrangements.

Besides regional arrangements, such as the European Union and NAFTA, there are only a few free-trade agreements that have been signed between two developed countries, such as the United States-Australia FTA. There are not any bilateral free-trade agreements signed between the 'biggest players' of the international trade arena (the United States, the European Union, Japan, Canada, China, India, Russia and Brazil). Therefore, most free-trade agreements are signed by:

1. a developed country and a developing one (or a least-developed country);
2. two developing countries (or LDCs).

(1) Free Trade agreements signed by a "developed" country and a "developing" country (or an LDC) are generally based on a standard model pre-established by the stronger economic party. That is to say, when the United States signs its free trade agreements, there is a general "*American way of free trade*" which is reflected within the texts of the agreements. The United States exercises discretion and pragmatism when it pre-defines the treatment of labor in its trade agreements. The same concept is true with the treaties signed by Europe, Japan, Canada, and the other 'big players'. In this sense, it is possible to infer that **whenever there is significant economic disproportion between the parties of a bilateral free trade agreement, the inclusion of social clauses are not "generally" or "bilaterally" negotiated at all.** The "developed" State party decides whether the inclusion of a social clause in the main body of the agreement (or an amended agreement) and the manner in which it will bind the parties. This establishes their correspondent criteria and the way in which trade sanctions may be applied.

(2) In **FTAs signed between two developing countries (or LDCs),** it is possible to observe some degree of bilateralism. However, the parties tend to include within the treaty similar clauses to the ones that bind these same countries with developed States. For example, if developing country *A* has a Free Trade Agreement with developed country *B* (with a consequent labor clause proposed/imposed by B) then, country A, when it negotiates with another developing country, *C*, tends to apply the same clause that was stated in *A*-*B* in the *A*-*C* agreement. For example**:** the

Chile-Colombia FTA has an almost identical labor clause when compared to the US-Chile and to the US-Colombia FTAs.

In summary, the distinction between unilateral and bilateral trade systems is basically formalist, since in praxis there are negotiated elements in unilateral trade acts and vice-versa. The main difference between the mechanisms designed to include labor standards on trade arrangements (GSPs and FTAs) are not in the characterization of their "unilateral" or "bilateral" elements, but on the substantive analysis of the contents of their social clauses.

4.3. SPECIFIC SYSTEMS

4.3.1. The 'American way'

4.3.1.1. The historical link between trade sanctions and labor rights in the United States

Historically, it is possible to find precedents regarding the linkage between trade and workers´ rights in the American domestic legislation since the end of the XIX century: *exempli gratia*, the McKinley Tariff Act (1890) and the Smoot-Hawley Tariff Act (1930), due to exclusively protectionist interests In accordance to LAZO, "*the rationale behind these regulations was the desire to avoid trade based on unfair competition because of lower costs deriving from failure to respect labour standards which might introduce unjustified distortions in international trade.*"[428]

More, since the end of the World War II, the United States has a long history defending the connection between trade and labor rights in multilateral negotiations. As we have seen, the United States government proposed the creation of the International Trade Organization, which, among its tasks, should have had the latitude to promote and regulate

[428] LAZO GRANDI, Pablo. *Trade agreements and their relation to labour standards: the current situation*. Issue paper n.3. International Center for Trade and Sustainable Development. Geneva: 2009. p.7."There are precedents for this type of legislation going back to at least 1890 in the US. For example, the law known as the *Mckinley Tariff Act* which forbade the import of goods produced by convicts, repeated in the *Smoot-Hawley Tariff Act (section 307)* of 1930, which prohibited the import of products manufactured by prisoners or people forced to work, giving authority to the US President to raise tariffs to match production costs. The rationale behind these regulations was the desire to avoid trade based on unfair competition because of lower costs deriving from failure to respect labour standards which might introduce unjustified distortions in international trade."

connections between international trade and labor standards. More, US Administrations have tried, on several occasions, to include labor standards in multilateral trade negotiations under the GATT regime[429]—particularly during the Tokyo and the Uruguay Rounds. Already under the auspices of the World Trade Organization, the United States raised the issue during the Singapore and Seattle Ministerial Conferences and always faced opposition from developing countries which accused the US government of using the advocacy of labor standards as a hidden attempt for protectionism.

However, these social concerns have not always been applied to the unilateral/bilateral level of American trade policies. For more than three decades during the post-war period, the goal of the US was to set up bilateral arrangements that would reduce trade barriers (particularly tariffs), in order to create an environment of free-trade, regardless of labor regulations. This agenda started to change during the late 1970's, when the AFL-CIO—afraid of foreign competition and low wages—began a more assertive "*fair-trade*" agenda. It began a massive campaign to '*stop imports'* and '*buy American'*.

After the inclusion of the session 301 at the Trade Act in 1984[430] (complemented by the 'super 301' at ethe OTCA -1988), the American governments began to condition the idea of a liberalized trade system on the accomplishment of internationally recognized labor standards. It is meaningful that this inclusion of social topics on traditional trade fields was supported not only domestically – by the AFL-CIO, but also internationally – by the International Confederation of Free Trade Unions[431].

In this sense, several American internal regulations were enacted, such as the:

- Overseas Private Investment Corporation (OPIC), 1985;
- Omnibus Trade and Competitiveness Act (OTCA), particularly at the 'super' 301 session, 1988[432];
- Caribbean Basin Economy Recovery Act, 1990;
- Andean Trade Preference Act, 1991;

[429] KAUFMANN, Christine. *Op.cit.* p. 173. "The US has made several attempts to include labor rights in the GATT/WTO agreement. These initiatives can be traced back to Section 121(a)(4) of the 1974 Trade Act, where it was recognized that the best way of linking trade and labor rights is within a multilateral framework."

[430] HEPPLE, Bob. *Op.cit.* p.91. "Since the 1980s the promotion of labor rights in developing countries has become an increasingly important part of US trade policy."

[431] RESTREPO, Marta A. *Op. Cit.* p. 322. "Por otro lado, la CIOLS ha promovido permanentemente la idea de una cláusula social, introduciendo la evaluación del cumplimiento de los derechos laborales en el Sistema Generalizado de Preferencias de los países industrializados; Estados Unidos ha adoptado este sistema en 1984, y ha investigado la conducta de algunos países con los que tiene convenios comerciales."

[432] MOREAU, Marie-Ange. *Op. cit.* p.96. "À partir de 1988, l´Omnibus Trade and Competitiveness Act a élargit les possibilités de rétorsions dans le cadre de la section 'super 301' aux pratiques qui restreignent l´accès des produits américains."

- African Growth and Recovery Act, 2000 (revised in 2002);

This "*fair trade*" perspective is reflected in the current American generalized system of preferences, which provides discretionary unilateral power to the US Trade Representative in order to recommend sanctions to States that promote unfair labor policies or to those which are not "*taking steps*" to ensure core labor standards.

Recently, the connection between trade and labor standards may also be verified on the free trade agreements signed by the US governments, such as the North American Free Trade Agreement (and the NAALC), and on bilateral agreements with Cambodia (1999), Jordan (2001), Chile (2003), Singapore (2003), Morocco (2004) and Australia (2005), among others.

In the following sections we shall discuss the particularities of the "American way" of dealing with trade standards on its GSP and on free trade agreements[433].

4.3.1.2. The US GSP

One first interesting particularity of **the American Generalized System of Preferences is that it does not establish a link with** – in fact, it does not even mention – **the eight ILO Conventions establishing core labour standards**, defined as such by the 1998 ILO '*Declaration of Fundamental Principles and Rights at work***'.**

In spite of that, the American GSP embraces open-concept of "*internationally recognized workers´ rights*", which does not have a precise conceptualization, opening a great discretionary power to the American Administration[434]. Notwithstanding, it is possible to admit that traditionally the American concept of "*internationally recognized workers´ rights*" comprehends the most part of ILO labor rights, but brings up several remarkable distinctions**:**

(1) **Regarding freedom of association, the right to collective bargaining, prohibition on forced/compulsory and child labor, the American regulations are very similar to that of the ILO.**

[433] LAZO GRANDI, Pablo. *Op.cit.* p.7. "On the basis of GSP standards, and under the powerful pressure of public opinion, the US has vigorously promoted the inclusion of labour agreements in its trade negotiations, trying out various models which include the possibility of trade sanctions in its most recent agreements (...)."

[434] MOREAU, Marie-Ange. *Op. cit.* p. 97. "Cependant, cette action américaine repose sur les pouvoirs exorbitants: les 'droits internationalement reconnus' ne font pas l´object d´une définition précise en référence aux conventions de l´OIT, dans le texte, ce qui laisse une marge d´interprétation à l´Administration américaine et pose un problème de définition."

(2) Nonetheless, **the American GSP does not include the "elimination of discrimination in employment and occupation" –** a labor right with a fundamental status in accordance with the ILO – under its GSP regime. The explanation of its absence is because the US intends to avoid controversies with important American geopolitical trade partners, such as (1) some Arab oil-producing countries whose labor policies wrongfully discriminate in regard to sex and religion and (2) Israel, which has been accused of wrongful discrimination against Palestinian workers[435].

(3) Notwithstanding, **the US GSP embraces a principle of "acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health"**, which does not have a fundamental status in accordance with the ILO. Critics of this principle argue that this opens the door for American protectionist trade policies, since there is no standard definition for "*acceptable conditions*" regarding these matters.

Another important characteristic of the US GSP is its extreme and 'aggressive' unilateralism. United States authorities, particularly the US Trade Representative, show great discretion granting and in withdrawing special incentives from GSP beneficiaries[436]. The USTR is allowed to – without asking the Congress – withdraw beneficial treatment in specific situations, in which the beneficiary State does not meet the aforementioned criteria and further negotiations cannot achieve satisfactory outcomes[437].

Since the 1984 GSP, the USTR started approximately one hundred reviews regarding labor rights[438], and several States have had their GSP status temporarily or permanently suspended. In accordance with HEPPLE, many of them reformed their labor legislation, "*strengthening and streamlining procedures to form unions and negotiate*

[435] HEPPLE, Bob. *Op.cit.* p.94. "The Reagan Administration successfully resisted the proposal to include discrimination because of the fear of antagonising oil-producing States which practice discrimination against women and non-Muslims and in order to protect Israel which was accused of discrimination against Palestinian workers."

[436] MOREAU, Marie-Ange. *Op. cit.* p.97. "Mais la procédure américaine est probablement encore plus significative: faute de réglement négocié, le représentant américain du commerce peut établir unilatéralement des sanctions économiques, sans en appeler au Congrés, sans appel possible."

[437] HEPPLE, Bob. *Op.cit.* p.97. "The USTR, under the directions of the President, can withdraw previous GATT tariff concessions or impose new tariffs if the foreign country is judged to be in violation of the law, and if consultations between the USTR and the foreign government do not lead to a negotiated settlement."

[438] *Id.* p. 96. "Since adoption of the GSP labor rights amendment in 1984, the USTR had conducted approximately 100 reviews on whether countries were taking steps to afford worker rights."

collective agreements, establishing labor courts, enhancing labor inspection and enforcement capabilities."[439]

However, it is true that **this discretional appreciation of the USTR has been used as an opportunity to influence geopolitical and foreign policy**[440], such as, in the cases of Pakistan, Guatemala and Indonesia[441]. HEPPLE enumerates several remarkable examples of political decisions on the US GSP policy**:**

> *"The political nature of decisions made under the GSP programme is illustrated by the case of Pakistan. In 1996, President Clinton suspended GSP benefits on selected goods, including sporting goods, surgical goods and hand woven rugs because of Pakistan´s failure to take steps to remedy labour abuses, including child and bonded labour, the exemption of the Karachi Export Processing Zone from labour laws, and restrictions on the rights of State employees to strike or resign. Despite of the persistence of those violations, in 2002 the suspension of GSP benefits was lifted. Most observers believe that this decision, and other reductions of trade barriers, was a direct consequence of Pakistan´s support for the US in the Afghanistan war. The US has been willing to suspend benefits from countries whose trade has little impact on the US economy (e.g. Belarus), but not those (Thailand) where labour abuses are equally or more prevalent but the loss of trade would be detrimental to the US."*[442]

Another relevant example is the case of Guatemala – another relevant American geopolitical partner – when the USTR accepted that the simple presentation of legislation establishing respect to ILO conventions – even before the discussion in Congress – was

[439] *Ibid.* p.93. "As a result several of the suspended countries have undertaken labor law reforms to regain GSP beneficiary status (...). The reforms had included strengthening and streamlining procedures to form unions and negotiate collective agreements, establishing labor courts, enhancing labor inspection and enforcement capabilities."
[440] *Ibid.* p. 93. "Geopolitics and foreign policy are the chief considerations for applying the GSP labor rights clause, not the merits of a country´s compliance or non-compliance with the law." (Compar and Voight, 2001).
[441] KAUFMANN, Christine. *Op.cit.* p.175. "In practice, few countries are denied GSP benefits because of labor rights violations. The closer its trade relations with the US, the less likely a country is to face sanctions in the case of labor rights violations. Indonesia is a typical example."
[442] HEPPLE, Bob. *Op.cit.* p.101.

already proof that that country was '*taking steps*' to guarantee the respect of workers' rights[443], which in praxis maintained its status of GSP beneficiary.

4.3.1.3. US unilateral trade sanctions

The US aggressive unilateral regime on the linkage between labour standards and trade is not only present on the American GSP, but also reflected on several unilateral State acts in which the US uses its economic power in order to influence foreign States to comply with '*internationally recognized workers´ rights*'. *Exempli gratia*, on the federal level, the Clinton Administration prohibited federal agencies to buy goods produced with child labour[444].

Notwithstanding, in accordance with the United States legislation trade sanctions may be applied not only on federal level, but also by State and on local authorities. For example, (1) North Olmsted (Ohio) in 1998 prohibited that the local administration conducted business with countries where 'sweatshop' – "*child labour, forced labour, sub-living wages or a work week that is longer than 48 hours*" – is applied; more, (2) in 1996 the Commonwealth of Massachusetts restricted trade with Burmese companies or with companies doing business with Burma[445]. Three months later, the US Congress enacted sanctions on Burma[446].

By the way, a key-case concerning unilateral trade sanctions on violations of labor rights is the *Burma Freedom and Democracy Act*, enacted in 2003, which banned all trade between the US and Burma – and with companies doing business with Burma – based on gross violations of human (labor) rights committed by the Asian country.

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[443] *Id.* p.96. "(...) the mere fact of presentation of legislation to bring the country into conformity with ILO conventions even before parliamentary approval, was taken by the USTR as proof that Guatemala was 'taking steps' to afford workers rights."

[444] KAUFMANN, Christine. *Op.cit.* p.177. "(...) in 1999 President Clinton banned federal agencies from purchasing products made using child labour."

[445] *Id.* p.177. "At the local level, North Olmsted, Ohio, in 1998 was one of the first cities to ban the local government from doing business with countries where 'sweatshop' labour – defined as child labour, forced labour, sub-living wages or a work week that is longer than 48 hours – is employed. The most prominent recent example is the sanctions imposed by the Commonwealth of Massachusetts on Burma/Myanmar. In 1989, the US had indefinitely suspended Burma´s preferred trading status due to the country´s labour rights violations. In 1996, Massachusetts enacted legislation restricting its agencies from purchasing goods and services from companies in or doing business with Burma."

[446] *Ibid.* p.178. "(...) Doing business with Myanmar is defined broadly (...). Three months after the Massachusetts law was enacted, Congress passed a statute imposing a set of mandatory conditional sanctions on Burma."

In 1989 the US had already suspended Burma´s beneficial status under the American GSP regulations. In May 1996 – following the referred Massachusetts trade restrictions on Burma – the "*State Department characterized conditions in Myanmar as both a ´political stalemate´ and continuing ´egregious human rights violations´*"[447], what culminated with discretionary sanctions in *Cohen Amendment* of the 1997 OCAA[448] and in the 2003 *Burma Freedom and Democracy Act*.

An important consideration is that the WTO´s MFN clause prohibits strictly country-based trade measures, what means that a country cannot discriminate (impose tariffs, requirements or trade sanctions) based solely on the product´s origin. In this sense, the *Burma Freedom and Democracy Act* (2003) should be considered as a violation of GATT rules. As explained by KAUFMANN:

> *"The bill introduces an import ban on all products manufactured or grown in Burma/Myanmar. It refers to the ILO declarations in respect of Burma/Myanmar and explicitly quotes the gross violations of core labour rights as the one of the reasons for the ban. However, because the ban is imposed according to the national origin of the products and not according to whether the products are produced in violation of core labour rights, it could be seen as a violation of Article III."*[449]

Defenders of the US Act argue that Burmese products are not "like products", using the same arguments proposed on the WTO *Asbestos case*[450], discussed previously in this chapter.

Notwithstanding, the US administration seemed to apply rather Machiavellian lesson regarding this matter**:** "the end justifies the means". After US sanctions, Burmese authorities decided to cooperate with the ILO – something that they had refused for almost

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[447] MALLOY, Michael P. *United States economic sanctions: theory and practice*. Kluwer Law International. The Hague, 2001. p.130. "In May 1996, the State Department characterized conditions in Myanmar as both a ´political stalemate´ and continuing ´egregious human rights violations´. In that same month S.1511, the Burma Freedom and Democracy Act, was proposed in response to a crisis point reached in Myanmar when several Nation League for Democracy members were arrested by the government."

[448] *Id.* p. 132. "While mandatory sanctions towards Myanmar were ultimately rejected by Congress, discretionary sanctions were inserted into the Omnibus Consolidated Appropriation Act of 1997 (OCAA). Via the Cohen Amendment Section 570 of the OCAA is an odd mixture of mandatory (i.e., congressionally imposed) sanctions and discretionary authority for presidential sanctions."

[449] KAUFMANN, Christine. *Op.cit.* p.139.

[450] Following this logic, Burma comes to the unlikely situation when it should prove that the United States was discriminating Burmese products when compared to other countries that use forced and child labor.

three decades, even when the ILO threatened the country with the possibility of invoking Article 33, as we have seen in a previous chapter.

4.3.1.4. The US regional and bilateral free trade agreements

The North American Agreement on Labor Cooperation (NAALC), an adjacent agreement of the North American Free Trade Agreement (NAFTA)[451], is the first trade agreement that established an effective connection between trade and labor standards. Nevertheless, it deals with the topic from a strictly economic perspective[452], and not from a human rights approach.

In accordance with the NAALC model, the parties are compelled to enforce their domestic labor laws. The NAALC does not require the compliance with any other kind of international labor standards, since the only object of its dispute settlement system is the enforcement of national laws (in limited circumstances, it may apply trade sanctions). The main argument is that the NAALC respect a country's sovereignty.

The main problem is that NAFTA authorities do not have the power to appreciate the conformity of national legislations with International Labor Organization Conventions, such as, during the strike of flight attendants in Mexico:

> *"Striking flight attendants who accused the Mexican government of violating the rights to strike because they were forced back to work when the government intervened by executive order to take over the airline and end the strike, were denied a hearing of their case by the US NAO on the ground that the takeover was in accordance with Mexican Law.*[453]*"*

In this, and in other cases, the solution would probably be different if the NAFTA system could enforce ILO fundamental standards. The lack of effective enforcement

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[451] HEPPLE, Bob. *Op.cit.* p.107. "The North American Agreement on Labor Cooperation (NAALC), the companion 'side agreement' to the North American Free Trade Agreement (NAFTA), was the first-ever trade agreement to make a significant link between trade and labor rights (...). They have been the model, with some significant variations, for later Free Trade Agreements (FTAs) negotiated by the US with Jordan (2000), Chile and Singapore (2003), and Australia (2004) (...). These models also feature in negotiations for a Free Trade Agreements of the Americas (FTAA) (...).A new unique American system of crossborder monitoring of the enforcement of domestic labor laws is emerging."

[452] SARDEGNA, Miguel A. *Las relaciones laborales en el MERSOSUR*. Buenos Aires: La Rocca, 1995. p. 202. "El preámbulo del Tratado de Libre Comercio celebrado entre Estados Unidos de América, Canadá y los Estados Unidos Mexicanos, hace referencia al trabajo desde un punto de vista económico, pero no desde una perspectiva laboral."

[453] *Id.*p.120.

mechanisms ('soft-law nature') is the main reason that there are few submissions to the NAFTA DSS regarding labor rights violations[454]. Moreover, the system does not prevent the weakening of labor regulations in order to attract trade and/or investments[455].

The agreement aims to foster cooperation and mutual fiscalization regarding eleven fundamental principals, performed by a domestic authority which receives possible complaints.[456]It is also relevant that "*the eleven labor principles stated on the NAALC are similar to but not the same as those in ILO Conventions. They are less specific and sometimes lower than ILO obligations*."[457]

In summation, the main weaknesses of the NAALC system are:

(1) Soft-law nature;

(2) It does not refer to ILO standards;

(3) Does not prevent weakening of labor legislation in order to develop trade and/or investments;

The North American Free Trade Agreement (NAFTA) was negotiated under the framework established by the 1988 Omnibus Trade and Competitiveness Act (OTCA), which granted fast-track powers to the United States Government. Furthermore, it stated in three main provisions in accordance with the US Government the rights that shall be afforded to workers**:**

(1) defend the respect for worker's rights;

(2) ensure a review of the relationship of workers' rights and GATT articles;

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[454] *Ibid.* p.119. "The small number of submissions has been explained in terms of the nature of the NAALC process which involves a 'soft-law' review of the enforcement of domestic labor laws rather than the 'hard law' of enforcing labor rights which is left to domestic law. The NAALC provides a long-term mechanism for changing the culture of law enforcement and promoting adherence to internationally recognized labor rights."

[455] *Ibid.* p.120. "All of these cases where the application of ILO core standards on collective labor law would probably have led to a different conclusion. The NAALC core obligation tends to reinforce the status quo in domestic labor law, it lacks mechanisms to raise standards to a 'high-level', and it does not prevent the relaxation of domestic standards to attract trade or investments. It remains to be seen how far stronger texts of the newer FTAs can overcome these deficiencies."

[456] MOREAU, Marie-Ange. *Op. cit.* p. 99. "La première partie de l´Accord prévoit une prócedure de coopération et de surveillance mutuelle d´application des normes du travail de chaque État membre. En désignant onze droits fondamentaux, le domaine de cette surveillance réciproque counvre l´ensemble du droit du travail. La clause se réfère aux législations du travail de chaque pays. Cette surveillance est organisée par un secrétariat national qui reçoit les plaintes. Il a le pouvoir de sélectionner ces dernières, en fonction de leur recevabilité ou de l´opportunité politique de leur poursuite."

[457] HEPPLE, Bob. *Op.cit.* p.114. "The 11 labor principles in NAALC are similar to but not the same as those in ILO Conventions. They are less specific and sometimes lower than ILO obligations."

(3) adopt as a principle of the GATT that the denial of worker's rights should not be a way for a country or its industries to gain competitive advantage in international trade.

Comparatively, the 2002 Trade Act, the framework for some of the most recent American Free Trade Agreements, made several distinctions in American Trade policy regarding labor rights in order to solve some pronounced weaknesses of the NAALC system. In accordance with this legislation the US should:

(1) Ensure that a party does no fail effectively to enforce its labor laws through a sustained or recurring course of action or inaction in a manner affecting trade;

(2) Strengthen the capacity of US trading partners to promote respect for 'core labor standards';

(3) Ensure that labor policies and practices of parties to trade agreements with the US 'do not arbitrarily or unjustifiably discriminate against US exports or serve as disguised barriers to trade.'

The US negotiation model was revised in 2007, as a consequence of a bipartisan agreement at the US Congress.

In accordance with US legislation, if Congress decides that the Executive is not accomplishing its objectives, the fast-track authority may be taken away for that particular agreement[458].

A recent and impressive precedent was set when **the FTA signed by the US Administration with Jordan in October of 2000** (in force since December 2001[459]), which **was the first FTA which included labor,** and environmental, **regulations in the main part of the agreement**[460].

Like the NAALC, the main obligations of the parties are to guarantee the enforcement of domestic labor laws. Nonetheless, **the US-Jordan FTA sets links with the**

[458] *Id.* p.115. "If Congress determines that the Administration failed to meet these objectives, it may adopt a procedural disapproval resolution which renders the fast-track procedure inapplicable to the particular FTA."

[459] KAUFMANN, Christine. *Op.cit.* p.192. "An attempt to overcome the structural difficulties of the NAALC can be found on the Free Trade Agreement between the US and Jordan, which entered into force on 17 December 2001. (...). The US-Jordan Agreement is the first trade agreement in the history of the US to address labor issues within the text of the agreement itself. (...). Because the US-Jordan Agreement goes much further in protecting labor rights than the WTO law it could be seen as a means of circumventing the WTO´s focus on trade and slipping in a social clause through the back door."

[460] HEPPLE, Bob. *Op.cit.* p.116. "The US-Jordan FTA, signed on 24 October 2000 by the Clinton Administration, with Congressional approval, is the first to contain labor rights and environmental obligations in the text of the main agreement instead of a side agreement."

ILO, in its articles 6(1) and 6(6), overcoming one of the main criticisms made to the NAALC system.

> ***Article 6***
> *"1.* ***The Parties reaffirm their obligations as members of the International Labor Organization ("ILO") and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up.*** *The Parties shall strive to ensure that such labor principles and the internationally recognized labor rights set forth in paragraph 6 are recognized and protected by domestic law.*
> *(...)*
> *6. For purposes of this Article, "labor laws" means statutes and regulations, provisions thereof, that are directly related to the following internationally recognized labor rights:*
> *(a) the right of association;*
> *(b) the right to organize and bargain collectively;*
> *(c) a prohibition on the use of any form of forced or compulsory labor;*
> *(d) a minimum age for the employment of children; and*
> *(e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.*[461]*"*

[461] *Article 6* – "Labor - 1. The Parties reaffirm their obligations as members of the International Labor Organization ("ILO") and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up. The Parties shall strive to ensure that such labor principles and the internationally recognized labor rights set forth in paragraph 6 are recognized and protected by domestic law. 2. The Parties recognize that it is inappropriate to encourage trade by relaxing domestic labor laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws as an encouragement for trade with the other Party. 3. Recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations, each Party shall strive to ensure that its laws provide for labor standards consistent with the internationally recognized labor rights set forth in paragraph 6 and shall strive to improve those standards in that light. 4. (a) A Party shall not fail to effectively enforce its labor laws, through sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement. (b) The Parties recognize that each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other labor matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources. 5. The Parties recognize that cooperation between them provides enhanced opportunities to improve labor standards. The Joint Committee established under Article 15 shall, during its regular sessions, consider any such opportunity identified by a Party. 6. For purposes of this Article, "labor laws" means statutes and regulations, provisions thereof, that are directly related to the following internationally recognized labor rights: (a) the right of association;(b) the right to organize and bargain collectively; (c) a prohibition on the use of any form of forced or compulsory labor; (d) a minimum age for the employment of children; and (e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health."

Disputes concerning workers' rights are subject to the same procedures and solutions prescribed for violations on other chapters of the agreement (art 17)[462]. In case of violations, **consultation proceedings should begin and be reported to a joint committee** constituted in order to supervise the implementation of the FTA. If the Committee does not negotiate a solution, **the affected party is authorized to take "*any appropriate and commensurable measure*"**.

In the next 'generation' of FTAs, those signed with Chile and Singapore, the main difference from the US-Jordan model is that sanctions are restricted for '*sustainable failure to enforce domestic laws in a manner which affects the trade*' and that there is the establishment of maximum penalties[463] (via monetary sanctions or the equivalent suspension of benefits granted by the treaty)[464].

The FTA signed with Morocco in 2004 followed the same model, what obliged the African State to establish a brand new labor system, through "*substantial labor rights reforms (...) with a new labor law being enforced on 8 June 2004."* Due to the FTA signature, Morocco signed most of the ILO Conventions[465].

Another aspect is that every agreement allows for specific provisions, depending on the countries particularities. *Exempli gratia*, on the US-Australia FTA – mostly inspired by the US-Morocco FTA) – there is a specific provision defining "*internationally recognized workers rights*". The lack of such a statement might put into doubt the enforcement of legislation regarding violations of child labor and forced labor, which in Australia are dealt on the State level. Moreover, the Australian legal system traditionally does not prevent child labor through the establishment of labor laws, but through norms regarding compulsory education[466].

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[462] LAZO GRANDI, Pablo. *Op.cit.* p.9. "However, the most important point of principle achieved by the US in these negotiations was to submit labour matters to the same dispute settlement procedures as those negotiated for trade questions (Art. 17)."

[463]HEPPLE, Bob. *Op.cit.* p.121. "There is also a question whether financial sanctions of the kind found in NAALC and in the US-Chile and US-Singapore agreements are preferable to the open-ended discretion conferred by the US-Jordan agreement to impose trade sanctions."

[464] More about those treaties on a further chapter of this study.

[465] KAUFMANN, Christine. *Op.cit.* p.193. "The recent FTA with Morocco, signed in June 2004, follows the approach of the US-Jordan Agreement yet further develops the standard with respect to labor rights .(...).The FTA led to substantial labor rights reforms in Morocco with a new labor law entering into force on 8 June 2004. As of October 2006, Morocco has ratified the ILO fundamental conventions except for convention number 87 on freedom of association."

[466]*Id.* p.194. "On 15 July 2004, a FTA with Australia was approved by the US Senate. Its labor rights provisions follow the Moroccan example, with the exception that it defines in a separate provision what it considers to be internationally recognized labor principles and rights. This provision was introduced mainly

At last, **it is important to mention an exception to the general American trade policy, which is a bilateral three-year textile agreement signed in 1999 between the United States and Cambodia. Contrariwise to the aforementioned recent American FTAs, this treaty does not bring the possibility to impose sanctions, and privileges the ILO system**[467].

This treaty conditioned an expansion by fourteen percent on textile and apparel imports from Cambodia whether '*working conditions in the Cambodian textile and apparel sector substantially comply with Cambodian labour law and internationally recognized core labour standards'*[468].

This treaty allowed a 14% increase on textile and apparel imports from Cambodia if *'working conditions in the Cambodian textile and apparel sector substantially comply with Cambodian labor law and internationally recognized core labor standards'*[469]. In 2001, the agreement was amended for three more years, ensuring another substantial increase on Cambodian exports to the US if the Asian country supported the *'implementation of a program to improve working conditions'*[470].

Therefore, Cambodia required ILO technical assistance, and developed ILO projects (economically supported by the United States), in order to '*improve working conditions*' and *'monitor factories in the textile and apparel sector'*.

In brief, this US-Cambodia agreement is a remarkable exception on the "American way" of negotiating FTAs, which has to be highlighted.

In spite of this exception, it is possible to observe some common characteristics of American policy regarding labor standards in trade agreements. **As pointed by**

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because Australia provides labor protection for children primarily not through labor laws, but through regulations about compulsory education."

[467] LAZO GRANDI, Pablo. *Op.cit.* p.9. "A further experiment, developed by the US with Cambodia in 1998, consisted in a "Textile Agreement" which defines import quotas for textiles from Cambodia to the US on the basis of prior certification by the ILO of compliance with basic labour standards. There was some debate as to whether the ILO could accede to such requests but doubts were finally dispelled and the ILO agreed to participate in the project."

[468] HEPPLE, Bob. *Op.cit.* p.115. "(...) that included a commitment to expand the quota on textile and apparel imports from Cambodia by 14 percent if 'working conditions in the Cambodian textile and apparel sector substantially comply' with Cambodian labour law and 'internationally recognised core labour standards'."

[469] *Id.* p.115. "(...) that included a commitment to expand the quota on textile and apparel imports from Cambodia by 14 percent if 'working conditions in the Cambodian textile and apparel sector substantially comply' with Cambodian labor law and 'internationally recognised core labor standards'."

[470] *Ibid.* p.116. "(...) possible 18% annual increase in Cambodia´s export entitlements provided that Cambodia supports the 'implementation of a programme to improve working conditions´ including 'internationally recognised core labor standards, through the application of Cambodian labor law'."

HEPPLE[471], in spite of several differences between the NAALC system and later free trade agreements, and also among those FTAs, the main tendencies for the next US FTAs are:

(1) the presence of social clauses in the main part of trade agreements;

(2) a fundamental commitment to enforce domestic labor legislation;

(3) an obligation to '*strive to ensure*' that national legislations complies with ILO core labor standards and *'internationally recognized worker rights*';

(4) an obligation to not waive/derogate labor norms in order to promote trade or investments;

(5) parity concerning sanctioning mechanisms to ensure the accomplishment of labor and other trade-related rights.

The American resilience on those tendencies may be explained by their successful outcomes both to the U.S. and to its trade partners. Labour reforms have been conducted in different countries (Singapore, Morocco) in order to adapt domestic legislations to U.S. standards, what resulted on better working conditions all around the world. So far, the aggressive US posture proved to be more efficient than the exclusive political dialogue promoted by the EC – which will be discussed on the next section of this investigation.

Nevertheless, is this American posture efficient in every single case, being a "one size fits all" policy? Therefore, shall it be included in all negotiations promoted by the American authorities? Or, in the other hand, are there alternatives to this aggressive model?

By now there are no precise responses to those inquiries. Nevertheless, on further chapters of this investigation we will see more regarding the American intransigent negotiation procedures on this topic, so as, on the Chilean case, the concrete impacts of the American social clause on its domestic legislation and on the accomplishment of ILO fundamental standards. Certainly all those considerations regarding the Chilean context may serve as important evidences to answer those fundamental interrogations and somehow debate and improve U.S. trade policies.

[471] *Ibid.* p.117. "It can be seen that there are several differences between the NAALC model and later FTAs, and even between these FTAs. However, the emerging American labor rights clause has several distinctive features likely to appear in future agreements: (1) incorporation in the body of the FTA rather than in a side accord as in NAALC and the Canada-Chile, Canada-Costa Rica agreements; (2) a core obligation to effectively enforce domestic labor law; (3) a commitment to 'strive to ensure' that domestic law complies with ILO core standards and the list of 'internationally protected labor rights'; (4) agreement not to waive or derogate from domestic labor law in order to expand trade or investment; (5) parity in enforcement procedures and sanctions in respect of labor rights and other rights."

4.3.2. The European model

4.3.2.1. European common trade policies

4.3.2.1.1. Overview

The external relations and foreign affairs policies[472] of the European Union are based on different facets[473]: (1) common foreign security policy (CFSP), (2) enlargement of the EU itself, (3) development and humanitarian aid, (4) promotion of human rights, (5) neighborhood policies, (5) external cooperation programmes and, (6) certainly one of the most important pillars of the EU itself[474], its common trade policies (CTP)[475].

Common trade policies are exclusive competences of the Union, such as the common agricultural policy (CAP), common fisheries policy (CFP), competition policies within the internal market and monetary policies (Euro zone).[476]

Nevertheless, the concept of "European common trade policy" is in permanent dynamic evolvement: in the beginning it was restricted to common regulations concerning trade on goods and trade defense mechanisms, but now it comprises also areas such as agriculture, services, intellectual property rights, investments and trade-related topics such as development and environmental rules[477].

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[472] *Source:* European Commission.

[473] MICHEL, Denis. RENOU, Dominique. *Code commenté de l´Union Européenne*. Paris: Éditions de Vecchi S.A., 1999. p.255. "L´Union européenne est engagée dans les relations mondiales à tous les niveaux: relations extérieures et Politique étrangère et de sécurité commune (PESC), élargissement comprenant des accords spécifiques avec certains États, aide au développement et politique commerciale commune. Avec ces différents domaines, il s´agit pour l´Union européenne d´afficher sa place en tant que puissance mondiale, économique et commerciale."

[474] CARTOU, Louis. CLERGERIE, Jean-Louis. GRUBER, Annie. RAMBAUD, Patrick. *L´Union européene*. 3exe ed. Paris: Dalloz, 2000. p. 613. "Longtemps, la politique commerciale a constitué – avec la politique douanière – l´essentiel des relations extérieures de la Communauté."

[475] *Guide des politiques communes de l´Union Européene.* Ministère des Affaires Étrangeres – direction de la coopération européenne. Paris: La documentation française, 2006. p. 140. "La politique commerciale commune a longtemps constitué l´essentiel des relations extérieures de la Communauté."

[476] *Id.* p.141. "La politique commerciale est une compétence exclusive de l´Union européenne au même titre que la PAC, la politique de la pêche, la politique de la concurrence, la politique monetaire (zona euro)."

[477] *Ibid*. p.141. "La politique commerciale comune est en constante évolution. Cantonée initialement au commerce de marchandises et à la défense commerciale, elle a connu une extension graduelle à l´agriculture, aux services, à la propriété intellectuelle, aux investissements et à des sujets transversaux (développement, environnement, etc.). Conséquence de cette évolution, la politique commerciale commune a pris au fil du temps une dimension de plus en plus politique."

Some of the most important instruments of the common trade policy are: (1) the constitution of a common customs tariff[478] (CCT), (2) the implementation of trade defense actions (safeguards, anti-dumping measures, countervailing duties) and (3) the negotiation of trade agreements.

The UE Member States belongs to a customs union, that is to say that among them there are no import or export tariffs, and their imports are regulated by common customs tariffs[479]. The average tariff level charged on European imports has been progressively lowed[480] - exempli gratia, the EU´s average tariff for industrial products is currently around 4%[481] - making the EU one of the world´s openest markets for industrial goods[482] - in spite of the significant European resistance to open its agricultural market, which still counts with elevated rates (between 18 and 28%).

The elimination of barriers within the EU domestic market has been appointed as the reason of much of the European prosperity, and has been contributing for the EU expressive engagement in favor of international trade liberalization. Therefore, the EU, as one of the most relevant players in the global trade system, demonstrates considerable interest on the increment of trade liberalization[483] through the establishment of multilateral and bilateral agreements.

As we´ve seen on the specific chapter of this investigation, at the multilateral level (WTO system) Europe has been playing a substantial role in fostering progressive international trade liberalization, particularly since the Kennedy Round. This same commitment, as we´ll see below, is demonstrated in negotiations on a bilateral level.

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[478] "Since the completion of the internal market, goods can circulate freely between Member States. The 'Common Customs Tariff' (CCT) therefore applies to the import of goods across the external borders of the EU. The tariff is common to all EU members, but the rates of duty differ from one kind of import to another depending on what they are and where they come from. The rates depend on the economic sensitivity of products." *Source*: European Commission.

[479] MATHIEU, Jean-Luc. *L´Union Européene*. 8ème édition. Paris: Presses Universitaires de France, 2008. p. 103. "Les États membres sont en ´union douanière'; pour toutes les marchandises, sont interdits, entre eux, les droits de douane à l´importation et à l´exportation, ainsi que toutes les taxes d´effet équivalent Le tarif douanier, dans leurs relations avec pays tiers, est commun."

[480] *Id.*. p. 104. "Progressivement, le tarif extérieur commun a été fortement abaissé. La mondialisation s´est faite avec l´assentiment des États membres de l´UE. À travers les négociations commerciales internationales, le marché européen est devenu l´un des plus ouverts du monde aux importations (...)."

[481] *Guide des politiques communes de l´Union Européene. Op. Cit.* p.141. "(...) le niveau moyen des droits appliqués aux importations industrielles dans l´UE est tombé à 4%, soit l´un des plus bas du monde."

[482] *Id.* p.141. "La suppression des entraves aux échanges au sein de l´Union européenne a contribué à sa prospérité et renforcé son engagement en faveur du développement du commerce mondial. L´Union européenne a joué un rôle central dans les cycles de négotiation sur la libéralisation des échanges mondiaux: le Kennedy Round dans les années 60, le Tokyo Round dans les anées 80, l´Uruguay Round, achéve en 1994, et le cycle de Doha en cours depuis 2001."

[483] *Ibid.* p.141. "L´Union européenne est la première puissance commerciale mondiale. (...) l´Union européenne a un intérêt important à l´ouverture du commerce international."

At first, however, it is important to disclose how the recent adopted Treaty of Lisbon prescribes the way Europe shall conduct and conclude negotiations with its external trade partners.

4.3.2.1.2. Negotiation procedures

Since Members States are conscientious of the necessity to have a single voice in multilateral, regional or bilateral negotiations[484], the European Commission receives a mandate to speak in name all State Members in topics related to common trade policy[485]. The Commission conducts negotiations in accordance with articles 207 (former Article 133 of the TCE) [486] and 218[487] (former article 300 of the TEC) of the Treaty of Lisbon.[488]

The European Commission is the single representant of the EU on negotiations, even on the subjects where there is shared competence (Treaty of Lisbon, Article 4[489]) with the State Members[490]. Notwithstanding those negotiations do shall not intend to "*affect the delimitation of competences between the Union and the Member States, and shall not lead*

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[484] MICHEL, Denis. RENOU, Dominique. *Op. cit.* p.255. "Au titre des relations extérieures, les États membres sont conscients de l´interêt de s´exprimer d´une seule voix dans le monde mais aussi dans les négotiations internationales, régionales ou bilatérales."

[485] *Id.* p. 255. "La Commission reçoit mandat des États membres pour parler en leur nom, notamment pour la politique commerciale commune."

[486] CARTOU, Louis. CLERGERIE, Jean-Louis. GRUBER, Annie. RAMBAUD, Patrick. *Op. cit.* p. 617. "La Communauté, comme il est naturel dans le domaine du commerce extérieur conclut avec les tiers de nombreux accords commerciaux. (...)Ils sont négociés et conclus sur la base de l´article 113 du Traité (devenu 133). La Communauté est en effet seule compétente pour conclure un accord commerciale, même si parmi les marchandises se trouvent des produits CECA (...)."

[487] *Article 218* - "1. Without prejudice to the specific provisions laid down in Article 207, agreements between the Union and third countries or international organisations shall be negotiated and concluded in accordance with the following procedure."

[488] SAURON, Jean-Luc. *Comprendre le Traité de Lisbonne – texte consolidé intégral des traités – explications at commentaires*. Paris: Gualino éditeur, 2008.

[489] Article 4 – "1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6. 2. Shared competence between the Union and the Member States applies in the following principal areas: (a) internal market; (b) social policy, for the aspects defined in this Treaty; (c) economic, social and territorial cohesion; (d) agriculture and fisheries, excluding the conservation of marine biological resources; (e) environment; (f) consumer protection; (g) transport; (h) trans-European networks; (i) energy; (j) area of freedom, security and justice; (k) common safety concerns in public health matters, for the aspects defined in this Treaty. 3. In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs. 4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs."

[490] *Guide des politiques communes de l´Union Européene. Op. Cit.* p.142. "La Commission européenne est l´acteur clé des negotiations commerciales, sous le contrôle des États membres: elle est le répresentant/négociateur unique de l´Union européenne, même pour les sujets de compétences partagées avec les États membres."

to harmonization of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonization" (Treaty of Lisbon, Article 207.6).

Nevertheless, the common trade policy is an integrated policy of the EU[491], therefore the Commission does not work alone. Actually it acts in close partnership with the European Parliament, with a special committee (the so-called Committee 133), and with the European Council.

A first aspect to consider is that even before any kind of concrete trade negotiations, the European Parliament and the European Council (pre-) establish rules and principles which build up a general framework which shall permeate all acts regarding the European CTP.

> *Article 207. "1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.*
> *2.* ***The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy****. (...)."*

Afterwards, if negotiations should be opened, the Commission presents its recommendations to the Council, which shall authorize (or not) the start of negotiations, defines the framework in which the mandate have to be exercised, [492] and even nominates the EU´s negotiator or the Head of the negotiation team. This substantial role of the

[491] MATHIEU, Jean-Luc. *Op. cit.* p. 103. "La PCC est une compétence intégrée de l´UE. Pour toutes les négociations commerciales internationales, des propositions sont faites par la Commission au Conseil, qui autorise la Commission à négocier dans le cadre des directives que le Conseil lui adresse. Le Conseil conclut les négociations. Toute négociation internationale doit donc, pour aboutir, harmoniser les intérêts des États membres."

[492] *Guide des politiques communes de l´Union Européene. Op. Cit.* p.142. "Si des accords avec des pays tiers doivent être négociés, la Commission présente des recommandations au Conseil qui l´autorise à ouvrir les négociations nécessaires. Ces négociations sont conduites par la Commission en consultation avec le 'Comité 133' et dans le cadre des directives que le Conseil peut lui adresser."

Council aims to protect the fundamental interests of the State Members on the negotiation and conclusion of international trade agreements.

> *"Article 207 – 3. Where agreements with one or more third countries or international organizations need to be negotiated and concluded, Article 218 shall apply, subject to the special provisions of this Article.*
> ***The Commission shall make recommendations to the Council, which shall authorize it to open the necessary negotiations.*** *The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Union policies and rules. (...)"*
>
> *"Article 218 - 2.* ***The Council shall authorize the opening of negotiations, adopt negotiating directives, authorize the signing of agreements and conclude them.***
> *3.* ***The Commission,*** *or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy,* ***shall submit recommendations to the Council, which shall adopt a decision authorizing the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team****."*

The negotiation mandates are adopted by the Council´s qualified majority[493], with the exception of sensitive areas such as services, intellectual property rights and foreign direct investment.[494] More, in accordance with the article 207.4[495] of the Treaty of Lisbon,

[493] Actually the qualified majority os required during the whole procedure, with only a few exceptions. *Article 218* –"8. The Council shall act by a qualified majority throughout the procedure. However, it shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act as well as for association agreements and the agreements referred to in Article 212 with the States which are candidates for accession. The Council shall also act unanimously for the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms; the decision concluding this agreement shall enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements."

[494] *Guide des politiques communes de l´Union Européene. Op. Cit.* p.142. "Les mandats de négociation sont adoptés à la majorité qualifiée avec quelques exceptions. L´unanimité des États membres demeure en effet requise dans trois domaines: - le domaine des services, de la proprieté intellectuelle et des investissements directs étrangers (...); – le domaine des services culturels et audiovisuels; - la négociation et la conclusion d´accords dans le domaine du commerce de services sociaux, d´éducation et de santé lorsque ces accords risquent de porter atteinte à la compétence des États membres pour la fourniture de ces services."

[495] *Article 207.4*.- "For the negotiation and conclusion of the agreements referred to in paragraph 3, the Council shall act by a qualified majority. For the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the

the unanimity at the Council is also required on the negotiation and conclusion of agreements in the fields of trade in:

i. "cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity";

ii. "social, education and health services, where these agreements risk seriously disturbing the national organization of such services and prejudicing the responsibility of Member States to deliver them."

Moreover, a special committee is appointed by the Council, and may serves both in titular formation (composed by the direct responsible by the State Members´ foreign trade policies) or in sectorial formation (with representants of fisheries, agriculture, etc.)[496] Its main function is to supervise and periodically analyze the Commission´s reports regarding the ongoing negotiations.

> *Article 207 – "3. (...)**The Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it. The Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations**."*
>
> *"Article 218 - 4. The Council may address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted."*

After the conclusion of negotiations by the Commission, the EU´s Head negotiator (previously appointed by the Council) presents a proposal to the Council, which "*shall adopt a decision authorizing the signing of the agreement and, if necessary, its provisional application before entry into force*" (Treaty of Lisbon, Article 218.5).

Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules. The Council shall also act unanimously for the negotiation and conclusion of agreements: (a) in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity; (b) in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them."

[496] *Guide des politiques communes de l´Union Européene. Op. Cit.* p.142. "En vertu de l´article 133 TCE, la Commission conduit les négociations tarifaires et commerciales avec les États tiers ou auprès des organisations internationales. Elle agit en consultant un comité spécial appelé 'Comité 133' qui se réunit en formation titulaire (directeurs généraux du commerce extérieur des États membres) ou en formation sectorielle (textile, services, acier, etc.)."

In cases of association agreements, before taking a final decision, the Council must obtain a previous consent of the European Parliament (Treaty of Lisbon, Article 218.6. (a), (i)[497]), which supervises the whole negotiation/conclusion procedures:

> *Article 218 – "10. The European Parliament shall be immediately and fully informed at all stages of the procedure."*

A last significant comment is that *"a Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised*" (Treaty of Lisbon, Article 218.11)

4.3.2.2. European policies linking trade and labour:

For the most part, European countries have had a long-standing tradition defending and advocating labor rights. E.g., the accomplishment of labor standards is a condition to join the Council of Europe. More, workers' rights are present in the European Convention on Human Rights (1950) and in the subsequent European Social Charter[498] (1961, which incorporated a number of social rights imported from the ILO and from the EU in its revision in 1996).

[497] *Article 218* – "6. The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement. Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement: (a) after obtaining the consent of the European Parliament in the following cases: (i) association agreements; (ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms; (iii) agreements establishing a specific institutional framework by organising cooperation procedures; (iv) agreements with important budgetary implications for the Union; (v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required. The European Parliament and the Council may, in an urgent situation, agree upon a time-limit for consent.(b) after consulting the European Parliament in other cases. The European Parliament shall deliver its opinion within a time-limit which the Council may set depending on the urgency of the matter. In the absence of an opinion within that time-limit, the Council may act."

[498] ROUX, André. *Les apports de la Charte Sociale Européenne.* In: CHÉROT, Jean-Yves. REENEN, Tobias (dir.). *Les droits sociaux fondamentaux à l´âge de la mondialisation.* Aix-en-Provence: Presses Universitaires d´Aix-Marseille, 2005. "Élaborée dans le cadre du Conseil de l´Europe, la Charte sociale européenne a été signée en 1961 à Turin, dix and après la Convention européenne des droits de l´homme et elle est entrée en vigueur en 1965. En 1996 a été adoptée la Charte sociale révisée (entrée en vigueur en 1999) qui a étendu le nombre de droits sociaux garantis de 19 à 31 (les nouveaux droits étant souvent importés de l´OIT et de l´Union européenne) et qui a également 'amélioré' certains droits initiaux (congé annuel ou maternité, information des travaileurs)."

With the advent of a single European market, many countries expressed concerns regarding the possibility of social dumping, since many countries had different standards of working conditions. The EC made efforts to include a non-binding Community Charter of Fundamental Social Rights for Workers (1989) into the Maastricht scheme. However, because of opposition from the United Kingdom, those attempts were not fruitful. Nevertheless, the Maastricht Treaty established relevant provisions on the labor field, especially non-discriminatory practices for employment.

In 1997 the Treaty of Amsterdam included the Community Social Charter into EU law, and it elevated social policies to forefront of the European agenda which was inspired by international human rights regulations.

Three years later, in Nice, the European Council introduced a new agenda regarding European Social policy, which culminated with the inclusion of labor rights in the new Constitution.

Currently, the EC treaty states that:

> *"TITLE XX* - ***DEVELOPMENT COOPERATION***
> *Article 177*
> *1.* ***Community policy in the sphere of development cooperation****, which shall be complementary to the policies pursued by the Member States,* ***shall foster****:*
> ***— the sustainable economic and social development of the developing countries, and more particularly the most disadvantaged among them***
> *— the smooth and gradual integration of the developing countries into the world economy,*
> *— the campaign against poverty in the developing countries.*
> *2.* ***Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms****.*
> *3. The Community and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organizations.*[499]**"**

In 2003, the European Council enacted a resolution that *"supported all forms of incentives to promote core labor standards, including corporate social responsibility, the GSP, more effective dialogue between the ILO and the WTO, strengthening the monitoring*

[499]EN Official Journal of the European Union C 321 E/125 – 29.12.2006.

of the application of labor standards by the ILO, technical assistance to developing countries, programs with binding deadlines for abolishing all forms of child labor, and incentive measures such as social labeling.[500]"

As a result of such concerns with the promotion of labour right, Europe fostered social development using not only financial contributions (the UE and its Member States are the most important donators of financial aid in the world[501]), but also technical cooperation and political dialogue. A remarkable example of the European concrete policies on the promotion of social standards abroad is the active role played by the European Investment Bank (EIB). In accordance with the EIB Statement of Environmental and Social Principles and Standards (16.02.2009):

> *"**As the long-term financing body of the European Union (EU), the European Investment Bank (EIB) promotes EU policies through its financial and other support to sustainable investment projects**. **The increasing prominence given to environmental and social considerations within the EU and throughout the other regions of operation of the Bank is reflected in its priority lending objectives** as well as in the regular review and revision of its environmental and social requirements and operational practices. "*
> *(...)*
> *The EIB aims to add value by enhancing the environmental and **social sustainability of all the projects that it is financing and all such projects must comply with the environmental and social requirements of the Bank.***
> *(...)*
> ***The EIB restricts its financing to projects that respect human rights and comply with EIB social standards, based on the principles of the Charter of the Fundamental Rights of the European Union and international good practices**.(...)"*

Nevertheless, probably the most relevant steps taken by the EC and its members States in order to ensure an effective protection of ILO fundamental workers´ rights

[500] HEPPLE, Bob. *Op.cit.* p.126. "A Council resolution of 21 July 2003 supported all forms of incentives to promote core labor standards, including corporate social responsibility, the GSP, more effective dialogue between the ILO and the WTO, strengthening the monitoring of the application of labor standards by the ILO, technical assistance to developing countries, programs with binding deadlines for abolishing all forms of child labor, and incentive measures such as social labeling."
[501] MATHIEU, Jean-Luc. *Op. cit.* p.108. "L´UE et ses États membres sont les principaux pourvoyeurs d´aide humanitaire au monde."

internationally are the attempts to link labour standards and trade. Accordingly with the European Commission:

> *"The EU is committed to ensuring that the jobs created by open trade reflect minimum international standards of decent and dignified work and help foster long-term sustainable development and competitiveness. The EU's own experience shows that high labour standards that promote quality working conditions support economic development and increase competitiveness. The EU is firmly committed to promoting core labour standards and decent work for all in its trade policy, and routinely includes cooperation initiatives and incentives to better working conditions in the trade agreements it negotiates.*
> *Core labour standards such as non-discrimination in employment and equal opportunities for men and women are guaranteed by EU law. Freedom of association and collective bargaining are enshrined in the European Charter of Fundamental Rights. Although the EU does not expect developing countries to match its own high labour standards, it does not tolerate labour practices in its trading partners that fall below international norms."*[502]

As we saw on the last sections of this study, Europe has been one of the most active defenders of the inclusion of labour regulations on the WTO scheme. Notwithstanding, given the difficulties faced at the multilateral level the EC have been alternatively including positive social clauses at "unilateral/bilateral" mechanisms[503], such as what

[502] *Source:* European Commission.
[503] *Guide des politiques communes de l´Union Européene. Op. Cit.* p.143. "La politique commerciale communautaire répond notamment à un objectif de soutien au développement. L´Union europenne a accordé un accès privilégié a son marché intérieur à plusieurs groupes de pays au-delà des accords multilatéraux:
-des accords bilatéraux ont été négociés avec les voisins méditerranéens (dans l´objectif de créer une zone de libre échange en 2010 dans le cadre du processus de Barcelone), la Russie et les anciennes républiques issues de l´URSS, le Mexique, le Chili. Des négociations sont en cours avec le Mercosur, l´Afrique du Sud et les États du conseil de coopération du Golfe;
- L´Union européene a développé une stratégie privilégiée en matière de commerce et de développement avec ses 77 partenaires du groupe des pays ACP (...), qui vise à les intégrer dans l´économie mondiale et à leur donner un accès privilégié au marché européen;
- le système des préférences généralisées (SPG) (...) donne accès en franchise de droit de douane ou à taux réduit au marché communautaire pour la plupart des produits exportés par les pays en développement et les pays en transition;
- l´initiative 'tout sauf les armes' adoptée en 2001, donne accès, de manière permanente, sans droits de douane ni quota au marché communataire pour les produits exportés par les 49 pays les moins avancés (...)."

happens on its current Generalized System of Preferences (2008) and on several examples of bilateral trade agreements, initiatives that will be described and analyzed on the next sessions of this study.

In summation, the European viewpoint privileges the defense of human (labor) rights through the establishment of a humanistic and democratic conception of trade. All of these initiatives are not only concurrent with its long-standing tradition of the advocacy of these fundamental rights but also, obviously, they are in accordance with its economic interests – which aim to protect the Europe of international unfair trade competence.

4.3.2.3. The European Generalized Systems of Preferences (GSP)

Since 1971 the European Communities has granted a special and differentiated market access to imports from several developing and least-developed countries through a sophisticated Generalized System of Preferences, a topic which is central on the European agenda[504].

Notwithstanding, the main objective of the European GSP scheme is not only to aid developing States through beneficial tariff treatment[505], but also to grant additional special incentives to countries which comply with specific – and beneficial – domestic policies. Unlike the American GSP, the European one is less protectionist, and based more on an historical trade relationship between EU countries and its former colonies, and it is compatible with the non-discriminatory principle of the WTO enabling clause.

On January 1994 the SAINJON report, with the support of the French presidency of the EU, proposed a social clause to the European Parliament, which was included on the European GSP adopted in December of that same year, establishing a clear link between social rights and trade[506].

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[504] *Id.* p.144. "le développement est placé au coeur de l´agenda à la demande de l´Union européenne: il s´agit de promouvoir une ouverture asymétrique des marchés et un traitement spécial et differencié en faveur des pays en développement les plus pauvres. L´UE intervient également en faveur de la préservation de la solidarité en faveur des pays les plus pauvres."

[505] HOLBEIN, James R. *Op.cit.* p.XX. "The EU has also extended its influence through a sophisticated generalized system of preferences. This regimen aids the economies of developing nations through preferential tariff treatment pursuant to EU Generalized System of Preferences Rules of Origin."

[506] MOREAU, Marie-Ange. *Op. cit.* p.104. "Au niveau européen, en janvier 1994, le Rapport Sainjon a présenté au Parlement européen une proposition de clause sociale, reprise au Conseil des ministres en septembre 1994, puis le 27 mars 1995. La présidence française a souhaité faire adopter par le Conseil des ministres des affaires sociales des pays de l´Union européenne le principe de l´introduction d´une clause sociale qui tiennent compte du système généralisé de préférence adopté le 19 décembre 1994 par l´Union européenne, qui a affirmé la nécéssité d´établir un lien entre commerce at droits sociaux fondamentaux dans un instrument commercial de l´Union européen."

In December 12th, 2001, The European Council enacted the Regulation 2501/2001, establishing the rules of the former European GSP. In accordance to those norms, besides the general GSP regime, there were four different special arrangements: (1) for least-developed countries; (2) looking for the protection of labor rights; (3) aiming environmental protection; and (4) with the scope to combat drug production and trafficking.

Rules that established the general GSP regime and the special protection for least-developed countries (LDCs) were adopted without major controversies. Nevertheless, many difficulties raised from beneficial rules regarding additional preferences – that could even double general ones – focusing on labor and environmental protection and the combat of drug production and trafficking.

The most significant controversy was the unilateral criteria applied by the EC to grant benefits on a case-by-case analysis. This was the central issue in the *EC-Tariff Preferences case*, brought by India to the WTO dispute settlement system. (Europe unilaterally determined trade advantages to Pakistan conditioned on Pakistani's efforts to combat illegal drug production. India asked for the same beneficial treatment granted to its neighbors.) The WTO Panel decided that the European requirements of "*drugs combat*" were inconsistent with the non-discriminatory principles of the enabling clause. However, the appellate body reversed this conclusion, stating that:

> *"The term non-discriminatory in footnote 3 does not prohibit developed-country members from granting different tariffs to products originating in different GSO beneficiaries, provided that such differential tariff treatment meets the remaining conditions in the enabling clause. In granting such differential tariff treatment, however, preference-granting countries are required, by virtue of the term "non-discriminatory", to ensure that identical treatment is available to all similarly-situated GSP beneficiaries, that is, to all GSP beneficiaries that have the 'development financial and trade needs' to which the treatment in question is intended to respond."*[507]

In order to overcome these difficulties, in 2003, the EC established a new regulation regarding the European GSPs, the CR 221/2003. Inspired by that regulation, and aiming to set a stable model of GSPs, the EC Communication COM (2004) 461 – the

[507] Quoted by VAN DEN BOSSCHE, Peter. *Op.cit.*

Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, entitled '*Developing Countries, International Trade and Sustainable Development: The Function of the Community's Generalized System of Preferences (GSP) For The 10-Year Period From 2006 to 2015*'-of July 7th, 2004, constituted a general model of the GSP scheme for the 2006-2015 period.

Following these guidelines, the Council enacted regulation 980/2005[508]. The current European GSP rules were established by the Council Regulation 732/2008, which are responsible for setting the rules which must be applied to the European GSP during the 2009-2011 period, bringing no substantial changes in relation to the former scheme.

The present European GSP scheme establishes only three different arrangements:

a) **"General regime"—**standard beneficial treatment, extended to 176 countries and territories;

b) **"Special regime for the least-developed countries" ("Everything but arms") –** extended to 50 LDCs, all products (with the exception of arms) enter into the European market free of duties;

c) **"Special incentive arrangement for sustainable development and good governance" (GSP +)**.

For this investigation, the most important arrangement is the "GSP plus" scheme, which ensures substantial incentives[509] to 'vulnerable' countries which apply good governance rules and comply with fundamental human, labor[510] and environmental standards[511], covering 6336 sensitive products[512] which enter, with a substantial tariff reduction in the European market. The additional tariff reduction is, in accordance with the European Commission:

> *"For ad valorem duties of products covered by the arrangements, a reduction of 5 percentage points in addition to the basic reduction of 3,5 percentage points is provided (thus raising the total reduction to 8,5 percentage points). The additional reduction is 20% for textiles and clothing and 30% for specific*

[508] Of June 27th, 2005.

[509] HEPPLE, Bob. *Op.cit.* p.103. "The additional preferences for countries complying with these requirements, are substantial."

[510] LAZO GRANDI, Pablo. *Op.cit.* p.16. "The special development regime for protecting workers' rights is open to countries who adapt to 'fundamental labour standards'."

[511] LANFRANCHI, Marie-Pierre. *Op. cit.* p.70. "(...) la CE peut accorder des avantages commerciaux supplémentaires aux partenaires qui en font la demande et qui apportent la preuve qu´une législation incorporant les conventions de base de l´OIT a été mise en oeuvre."

[512] "These arrangements cover all sensitive products included in the general arrangements (as non-sensitive products are exempted from duties under the general arrangements, they cannot qualify for additional preferences)." *Source*: European Commission – DG Trade.

duties. Where duties include ad valorem and specific duties, only the ad valorem duties are reduced. This arrangement also applies to products of sectors which have been graduated (i.e. excluded from the GSP for a beneficiary country). Products of these graduated sectors then enjoy a treatment which is equivalent to the one offered by the general arrangements."[513]

Moreover, in accordance with the CR 732/2008 (22/07/2008):

"Article 8 - 1. The special incentive arrangement for sustainable development and good governance may be granted to a country which:
(a) has ratified and effectively implemented all the conventions listed in Annex III;
(b) gives an undertaking to maintain the ratification of the conventions and their implementing legislation and measures, and accepts regular monitoring and review of its implementation
record in accordance with the implementation provisions of the conventions it has ratified; and
(c) is considered to be a vulnerable country as defined in paragraph 2.

2. For the purposes of this Section a vulnerable country means
a country:
(a) which is not classified by the World Bank as a high-income country during three consecutive years, and of which the five largest sections of its GSP-covered imports into the Community
represent more than 75 % in value of its total GSP-covered imports; and
(b) of which the GSP-covered imports into the Community represent less than 1 % in value of the total GSP-covered imports into the Community."

The Conventions that must be ratified and implemented are[514]:

(1) Human and labour rights Conventions:

- International Covenant on Economic Social and Cultural Rights;
- International Convention on the Elimination of All Forms of Racial Discrimination;

[513] *Source:* European Commission – DG Trade.
[514] *Source:* European Commission.

- Convention on the Elimination of All Forms of Discrimination Against Women;
- Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment;
- Convention on the Rights of the Child;
- Convention on the Prevention and Punishment of the Crime of Genocide;
- **Minimum Age for Admission to Employment (N° 138);**
- **Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (N° 182);**
- **Abolition of Forced Labour Convention (N° 105);**
- **Forced Compulsory Labour Convention (N° 29);**
- **Equal Remuneration of Men and Women Workers for Work of Equal Value Convention (N° 100);**
- **Discrimination in Respect of Employment and Occupation Convention (N° 111) ;**
- **Freedom of Association and Protection of the Right to Organize Convention (N° 87);**
- **Application of the Principles of the Right to Organize and to Bargain Collectively Convention (N°98);**
- International Convention on the Suppression and Punishment of the Crime of Apartheid.

(2) Environmental and Good Governance Conventions:

- Montreal Protocol on Substances that deplete the Ozone Layer;
- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal;
- Stockholm Convention on persistent Organic Pollutants;
- Convention on International Trade in Endangered Species;
- Convention on Biological Diversity;
- Cartagena Protocol on Biosafety ;
- Kyoto Protocol to the UN Framework Convention on Climate Change;
- UN Single Convention on Narcotic Drugs (1961);
- UN Convention on Psychotropic Substances (1971);
- UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988);
- Mexico UN Convention Against Corruption.

The first important distinction between the American and the European GSPs on the labor field is that the last one clearly identifies a link with ILO fundamental standards. All members of the European Union ratified the eight core ILO Conventions, and therefore the European GSP establishes a nexus with the ILO system[515]. The GSP

[515] HEPPLE, Bob. *Op.cit.* p.105. "First, the EU does not undermine the rule of international law. It applies the ILO 8 core conventions, which all member States have ratified, unlike the US which has ratifies only two of these. Compliance with the core standards is a condition of membership of the ILO, even by those countries that have not ratified the core conventions. Unlike the US, the EU does not require compliance with any other unratified conventions. In the EU, unlike the US, a clear link has been established with the various supervisory bodies of the ILO."

regulations specifically refer to the 1998 ILO '*Declaration of Fundamental Principles and Rights at Work*'[516]: **countries may request the beneficial tariff treatment specifying the domestic laws/regulations incorporating the fundamental rights recognized by the eight core ILO Conventions and its implementation mechanisms.**

Notwithstanding, it is noteworthy that under the 2001 GSP rules, the ratification of ILO Conventions was not required to apply for the European GSP whether a country proved that it effectively complied with its basic principles. Nonetheless, an important feature is that currently **beneficiary countries must ratify and implement ILO's Conventions on core labor standards and relevant UN Conventions concerning human rights, and must submit themselves to a periodical monitoring of the EU institutions**[517].

For the 2009-2011 period, countries should have applied for the GSP+ advantages by October 31st, 2008. A mid-term window for applications will be opened in 2010 (deadline for requests: April 31st, 2010; entry: July 1st, 2010). This regime will expire in 2011 (a new regulation must be enacted by the EC), when beneficiaries will have to re-apply for the GSP+ incentives.

Following a country's request[518], the European Commission should publish it on the Official Journal and invite the parties to submit relevant data and/or further comments. Moreover, European authorities should take into account the information provided by international organizations knowledgeable in the labor field, such as the ILO. In the end, the GSP Committee still must decide on a *case-by-case* basis whether or not to grant the special incentives

Moreover, the European GSP prescribes a detailed complaint procedure against violations on fundamental labor standards. Contrary to former GSP regulations (before

[516] "(7) The special incentive arrangement for sustainable development and good governance is based on the integral concept of sustainable development, as recognized by international conventions and instruments such as the 1986 UN Declaration on the Right to Development, the 1992 Rio Declaration on Environment and Development, the 1998 ILO Declaration on Fundamental Principles and Rights at Work, the 2000 UN Millennium Declaration, and the 2002 Johannesburg Declaration on Sustainable Development.(...)"

[517] DI TURI, Claudio. *Op. Cit.* p. 226. "Per ciò che attiene al diritto internazionale del lavoro, il regime speciale d´incentivazione per lo sviluppo sostenible e il buon governo mira a garantire preferenze tariffarie supplementari a favore di quei Paesi per i quali l´effetiva applicazione della normativa internazionale in materia di lavoro comporta particolari oneri e responsabilità, ma che abbiano comunque ratificato ed effetivamente applicato le convenzioni OIL che incorporano i *core labor standards* (elencate in un allegato), nonchè alcune convenzioni ONU sui diritti umani ivi previste, e che s´impegnino a mantenere la ratifica accetandone la verifica ed il riesami da parte delle istituzioni comunitarie."

[518] "The arrangements are available upon request of any GSP beneficiary countries (not on request of individual companies). The requesting country has to commit itself to monitor the application of the special incentive arrangements and to provide the necessary administrative co-operation. The European Commission examines the requests. The authorities of the requesting country are involved at all stages and this process should be completed within a year." *Source:* European Commission – DG Trade.

2001), **the withdraw of special incentives under the new European GSP is not restricted to slavery of forced labor**[519] **- extending its protection to freedom of association, the right to collective bargaining, to the principle of non-discrimination and to the use of child labor**[520]**.**

Whether the European Commission or a EU Member State receives data that a beneficiary country is violating its obligations on the labor field, the GSP Committee (composed by representatives of the Member States and chaired by a Commission's representative) must be informed within fifteen days, and then immediately ask for consultations which must take place within following fifteen days[521].

The possibility to initiate an open consultation is a good example of what HEPPLE describes as **European "soft-unilateralism": ("the European Commission does not have the same discretion as the US Trade Representative")**, who unilaterally decides whether or not a country is 'taking steps' to ensure workers' rights.

In cases of systematic or gross violations of labor standards, the Commission monitors and evaluates the State for one semester. After this period, it informs the GSP Committee and the Council, which must make a decision (by a qualified majority) in 30 days. Finally, there is a last opportunity for the affected country, since the results from the decision are recognized only after six months from the Council's final answer.

The EU special incentives should continue to be granted if the third country agrees to take steps to overcome the problematic situation, and it must inform the EU about the correspondent implementation, such as, the situation that occurred in the Pakistani case concerning child labor[522].

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[519] As what used to happen until 2001. KAUFMANN, Christine. Globalisation and labor rights: the conflict between core labor rights and International Economic Law. Hart Publishing. Oxford and Portland, 2007. p.197. "Until December 2001, compliance with core labor standards qualified for additional trade preferences. However, a withdrawal of preferences in whole or in part was possible when beneficiary countries practiced any form of slavery or forced labor."

[520] *Id.* p.198. "(...) under the new regulation, general GSP benefits can be fully or partially withdrawn if a country is found to violate seriously and systematically the freedom of association, the right to collective bargaining or the principle of non-discrimination or use of child labor."

[521] HEPPLE, Bob. *Op.cit.* p.103. "In implementing the regulation, the Commission is assisted by a GSP Committee composed of representatives of the member States and chaired by the representative of the Commission. When the Commission or a member State receives information (e.g. from a trade union or NGO) that may justify temporary withdrawal and where it considers that there are sufficient grounds for an investigation, it must inform the GSP Committee and request consultations which should take place within 15 days."

[522] *Id.* p. 104. "(...) the Commission did not seek temporary withdrawal against Pakistan for the use of child labor because Pakistan had introduced legislation to outlaw child labor and kept the Commission informed about implementation".

Only if negotiations fail to address these objectives, **the EU may temporarily or permanently suspended the beneficial trade preferences.** Myanmar and Belarus were already sanctioned, and investigations regarding Sri Lanka and El Salvador are underway[523].

In accordance with the current GSP regime, sixteen developing countries benefit from the GSP+ special incentives: Armenia, Azerbaijan, Bolivia, Colombia, Costa Rica, Ecuador, Georgia, Guatemala, Honduras, Sri Lanka, Mongolia, Nicaragua, Peru, Paraguay, El Salvador and Venezuela. The top beneficiaries are Sri Lanka, Ecuador, Peru, Colombia, Costa Rica. The top European imports covered by this regime are prepared foodstuffs (edibles), vegetable products, textiles, live animals, plastics and rubber[524].

4.3.2.4. European Free Trade Agreements

Europe has been pursuing an aggressive trade strategy which includes the negotiation of free trade agreements within and beyond its enlargement purposes. Within the scope of its enlargement objectives, the European Union negotiated many stabilization and association trade agreements (SAAs) with the countries of Central and Eastern Europe, precursors of the EU admission. Beyond this process, Europe concluded bilateral trade agreements with the European Free Trade Association (EFTA–Norway, Iceland, Liechtenstein, Switzerland), with Southern and Eastern Mediterranean States (as a result of the so-called 'Barcelona process') such as Algeria (2005), Morocco (2000), Tunisia (1998), Egypt (2004), Israel (2000), Jordan (2002) and Lebanon (2006) and with South Korea[525] (2010). The European Union also signed important association agreements with South Africa (2000), Mexico (2000), Chile (2003), Serbia (2008) and Albania (2009). In addition, the EU is negotiating free trade agreements with Peru, Colombia, Ecuador, Saudi Arabia, Ukraine, Canada[526], India[527] and with ASEAN countries[528], MERCOSUR[529] and the CCCM[530] (Central American Common Market). There are also many other agreements,

[523] *Source*: European Commission – DG Trade.
[524] *Source:* European Commission.
[525] Negotiations started in 2007.
[526] Negotiations started in 2009.
[527] Negotiations started in 2007.
[528] Negotiations started in 2007.
[529] Negotiations re-started in 2009.
[530] Negotiations started in 2007.

such as a customs union agreement with Turkey (1996)[531] , a partial agreement with China and partnership agreements with Russia (1997), Fiji (2009), and Black Sea States[532], among others.

Since the Maastricht Treaty, all trade agreements signed by Europe have a clause regarding human rights as a fundamental element which embraces the concept of core labor rights[533], as defined by the International Labor Organization[534]. A breach of the "*human rights clause*" is sufficient cause for suspension and possible termination of the treaty. Also, treaties include an express reference to the final declaration of the 1995 Copenhagen World Summit for Social Development, which states**:**

> *"1. For the first time in history, at the invitation of the United Nations, we gather as heads of State and Government to recognize the significance of social development and human well-being for all and to give to these goals the highest priority both now and into the twenty-first century.*
> *2. We acknowledge that the people of the world have shown in different ways an urgent need to address profound social problems, especially poverty, unemployment and social exclusion, that affect every country. It is our task to address both their*

[531] HOLBEIN, James R. *Op.cit.* p. XX. "The EU´s aggressive negotiation of trade pacts extends beyond internal enlargement efforts. The EU continues to negotiate free trade pacts with countries within and beyond its enlargement designs. The EU has opened its trade to the European Free Trade Association, which includes Norway, Iceland, Liechtenstein and Switzerland. As well, the EU has negotiated a free trade agreement with South Africa. The EU has also negotiated 'Europe agreements', precursors to EU admission, with countries of Central and Eastern Europe. The EU has concluded bilateral trade and aid agreements with countries in the Southern and Eastern Mediterranean, that include: Algeria, Morocco, Tunisia, Egypt, Israel, Jordan, Lebanon, and Syria. The EU has Associations agreements with Malta and Cyprus, and has entered into a customs union with Turkey."

[532] MATHIEU, Jean-Luc. *Op. cit.* p.108. "L´UE conduit des accords avec des pays ou organisations lorsque cela est nécessaire pour atteindre des objectifs de l´Union. Ces accords sont très divers, par exemple: - accords de 'stabilisation' et d´association, tels que celui signé avec l´Albanie (...) et celui que a été signé avec la Serbie (...). Ces accords sont signés avec des États que l´UE tente d´attirer dans une spirale pacifique et démocratique; - accord-cadre (à des accords partiels) avec la Chine (...); - accord de partenariat, signpe en 1997 avec une Russie en décrépitude, pour atténuer le ressentiment provoqué par le rapprochement de pays qui avaient été dans sa zone d´influence, avec l´UE et l´OTAN. (...); - accord par lequel l´UE, en finançant une partie des besoins de la population palestinienne, tente de masquer sa totale impuissance au Moyen-Orient; - accord qui est censé préparer l´adhésion de la Turquie à l´UE, qui donne lieu à d´interminables travaux; - programmes somme ceux proposés 'à la Méditerranée' (processus dit de Barcelone) ou 'à la mer Noire', pour tenter d´amadouer les Ètats riverains; - accords tels que le 'programme d´accompagnement à la stabilisation' du Tchad (2008) (...); - accord de 'partenariat renforcé' avec Israël (juin 2008), dans le cadre de la 'politique européenne de voisinage' que l´UE voudrait aussi développer avec le Maroc, l´Ukraine et la Moldavie."

[533] HEPPLE, Bob. *Op.cit.* p.124. "The reference to ´internationally recognised core labor standards´ was clearly influenced by the 1998 Declaration of Fundamental Principles and Rights at work (...)".

[534] KAUFMANN, Christine. *Op.cit.* p. 196. "Since 1992 all agreements concluded between the European Community and third countries have been required to incorporate a clause defining human rights as a basic element. This clause also encompasses core labor rights as set out in the eight fundamental ILO conventions."

underlying and structural causes and their distressing consequences in order to reduce uncertainty and insecurity in the life of people.

*"**Commitment 1** - Create an economic, political, social, cultural and legal environment that will enable people to achieve social development;*

(...)

*(k) **Strive to ensure that international agreements relating to trade, investment, technology, debt and official development assistance are implemented in a manner that promotes social development**;*

(...)

(n) Reaffirm and promote all human rights, which are universal, indivisible, interdependent and interrelated, including the right to development as a universal and inalienable right and an integral part of fundamental human rights, and strive to ensure that they are respected, protected and observed.

*"**Commitment 3 –** (...)*

*(a) **Put the creation of employment, the reduction of unemployment and the promotion of appropriately and adequately remunerated employment at the centre of strategies and policies of Governments, with full respect for workers' rights and with the participation of employers, workers and their respective organizations**, giving special attention to the problems of structural, long-term unemployment and underemployment of youth, women, people with disabilities, and all other disadvantaged groups and individuals;*

(d) Develop policies to ensure that workers and employers have the education, information and training needed to adapt to changing economic conditions, technologies and labour markets;

(...)

*(i) **Pursue the goal of ensuring quality jobs, and safeguard the basic rights and interests of workers and to this end, freely promote respect for relevant International Labour Organization conventions**, including those on the prohibition of forced and child labour, the freedom of association, the right to organize and bargain collectively, and the principle of non-discrimination.*

(...)

*(k) **Foster international cooperation in macroeconomic policies, liberalization of trade and investment so as to promote sustained economic growth and the creation of employment**, and exchange experiences on successful policies and*

programmes aimed at increasing employment and reducing unemployment."

The first development agreement which included "*human rights, democratic principles and the respect to the rule of law*" as essential elements was the 4th Lomé Convention (1989), signed between the EC and African, Caribbean and Pacific (ACP) developing and least-developed States.

As stated on the *Mauritius Agreement*[535] (1995), which amended the Fourth ACP-EC Lomé Convention**:**

> *"Article 5 - 1.* ***Cooperation shall be directed towards development centred on man, the main protagonist and beneficiary of development, which thus entails respect for and promotion of all human rights.*** *Cooperation operations shall thus be conceived in accordance with the positive approach, where* ***respect for human rights is recognized as a basic factor of real development and where cooperation is conceived as a contribution to the promotion of these rights****.*
> *(...)*
> *2. Hence the Parties reiterate their deep attachment to human dignity and human rights, which are legitimate aspirations of individuals and peoples.* ***The rights in question are all human rights, the various categories thereof being indivisible and inter-related, each having its own legitimacy: non-discriminatory treatment; fundamental human rights; civil and political rights; economic, social and cultural rights.*** *Every individual shall have the right, in his own country or in a host country, to respect for his dignity and protection by the law. (...)"*[536]

[535] Signed on 4 November 1995.

[536] *Article 5* – "1. Cooperation shall be directed towards development centred on man, the main protagonist and beneficiary of development, which thus entails respect for and promotion of all human rights. Cooperation operations shall thus be conceived in accordance with the positive approach, where respect for human rights is recognized as a basic factor of real development and where cooperation is conceived as a contribution to the promotion of these rights. In this context development policy and cooperation are closely linked with the respect for and enjoyment of fundamental human rights. The role and potential of initiatives taken by individuals and groups shall also be recognized and fostered in order to achieve in practice real participation of the population in the development process in accordance with Article 13.
2. Hence the Parties reiterate their deep attachment to human dignity and human rights, which are legitimate aspirations of individuals and peoples. The rights in question are all human rights, the various categories thereof being indivisible and inter-related, each having its own legitimacy: non-discriminatory treatment; fundamental human rights; civil and political rights; economic, social and cultural rights. Every individual shall have the right, in his own country or in a host country, to respect for his dignity and protection by the law. ACP-EEC cooperation shall help abolish the obstacles preventing individuals and peoples from actually enjoying to the full their economic, social and cultural rights and this must be achieved through the development which is essential to their dignity, their well-being and their self-fulfilment. To this end, the Parties shall strive, jointly or each in its own sphere of responsibility, to help eliminate the causes of

Nevertheless, an explicit mention to labor standards was only included on the *Cotonou Agreement*[537], the revision of the 4th Lomé Convention for the 2000-2020 period. The *Cotonou Agreement* was signed in 2000 between the European Communities and 77 ACP countries.

> "*Article 50 – Trade and Labour Standards:*
> ***1. The Parties reaffirm their commitment to the internationally recognised core labour standards,as defined by the relevant International Labour Organisation (ILO) Conventions****, and in particular the freedom of association and the right to collective bargaining, the abolition of forced labour, the elimination of worst forms of child labour and non-discrimination in respect to employment.*
> *2.* ***They agree to enhance cooperation in this area****, in particular in the following fields:*
> *– exchange of information on the respective legislation and work regulation;*
> *– the formulation of national labour legislation and strengthening of existing legislation;*
> *– educational and awareness-raising programmes;*
> *– enforcement of adherence to national legislation and work regulation.*
> *3.* ***The Parties agree that labour standards should not be used for protectionist trade purposes****."*

Breaches on these fundamental commitments could lead to partial or even to the complete suspension of the European development aid to the abusing State. Just as what happens in its GSP, once more Europe did not have complete discretion in order to judge

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situations of misery unworthy of the human condition and of deep-rooted economic and social inequalities. The Contracting Parties hereby reaffirm their existing obligations and commitment in international law to strive to eliminate all forms of discrimination based on ethnic group, origin, race, nationality, colour, sex, language, religion or any other situation. This commitment applies more particularly to any situation in the ACP States or in the Community that may adversely affect the pursuit of the objectives of the Convention, and to the system of apartheid, having regard also to its destabilizing effects on the outside. The Member States (and/or, where appropriate, the Community itself) and the ACP States will continue to ensure, through the legal or administrative measures which they have or will have adopted, that migrant workers, students and other foreign nationals legally within their territory are not subjected to discrimination on the basis of racial, religious, cultural or social differences, notably in respect of housing, education, health care, other social services and employment.

3. At the request of the ACP States, financial resources may be allocated, in accordance with the rules governing development finance cooperation, to the promotion of human rights in the ACP States through specific schemes, public or private, that would be decided, particularly in the legal sphere, in consultation with bodies of internationally recognized competence in the field. Resources may also be given to support the establishment of structures to promote human rights. Priority shall be given to schemes of regional scope." *Source:* European Commission.

[537] MATHIEU, Jean-Luc. *Op. cit.* p. 106. "En 2000, un nouvel accord a été signé à Cotonou (avec 78 États ACP), avec encore des élements du système préférentiel et le renforcement affiché de la défense des droits de l´homme."

unilaterally the abuses of a foreign country, since the withdrawn would be taken only after open consultations with the other parties of the Agreement and after a review panel is established[538].

It is noteworthy that since 1975 Europe has been supporting the development of a growing number of LDCs included in the framework of the several Lomé Conventions (1975-1979-1984-1989), without asking any kind of economic reciprocity or trade advantage[539].

Nevertheless, the future of the Lomé scheme remains an open subject. During the last few years there is an increasing tendency inside the EC to gradually replace those agreements by economic partnerships agreements, which would sum an important element of trade reciprocity favoring the EU States. These replacement, notwithstanding, has been already object of criticisms from African governments. *Exempli gratia*, the President of Senegal Abdoulaye Wade declared to the French newspaper *Le Monde*, in 15.11.2007, that:

> *"Les nouveaux accords de partenariat économique prétendent démanteler les protections tarifaires et instaurer une parfaite égalité de compétition entre des économies européennes et africaines totalement asymétriques. En clair, cela revient à consacrer ey accentuer un déséquilibre de fait et à livrer totalement les marchés africains aux produits européens subventionnés."*[540]

Nevertheless, this possible element of trade reciprocity with ACP States would certainly not be a barrier to the maintenance of labour clauses. Some European bilateral

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[538] LAZO GRANDI, Pablo. *Op.cit.* p.17. "All matters in the Cotonou Agreement are subject to general procedures which lay down that any matter may be drawn to the attention of the Council of Ambassadors or the Council of Ministers. If no agreement can be reached, a review panel consisting of three members will be set up."

[539] MATHIEU, Jean-Luc. *Op. cit.* p. 106. "À partir de 1975, une aide a été fournie à un nombre toujours croissant (de 46 à 71) de pays ACP (c´est-à-dire d´Afrique, des Caraïbes et du Pacifique) dans le cadre de conventions signées périodiquement à Lomé (1975-1979-1984-1989). Dans ce cadre, l´UE a longtemps accordé des préférences aux exportations de ces pays, sans réclamer de réciprocité pour les siennes (...)."

[540] *Id.* p. 107. "(...) à proposer, en remplacement des accords de Cotonou, aux États ACP – dont les deux tiers sont africains – des 'accords de partenariat économique' supprimant les quelques avantages consentis jusqu´alors aux ACP. D´où la réaction du Président du Sénégal: 'Les nouveaux accords de partenariat économique prétendent démanteler les protections tarifaires et instaurer une parfaite égalité de compétition entre des économies européennes et africaines totalement asymétriques. En clair, cela revient à consacrer ey accentuer un déséquilibre de fait et à livrer totalement les marchés africains aux produits européens subventionnés."

arrangements were deeply influenced by the *Cotonou model* such as the Chile-European Union Association Agreement (2003)[541]:

> *"Article 44 - 1. The Parties recognize the importance of social development, which must go hand in hand with economic development. They will give priority to the creation of employment and respect for fundamental social rights, notably by* ***promoting the relevant conventions of the International Labour Organization*** *covering such topics as the freedom of association, the right to collective bargaining and non-discrimination, the abolition of forced and child labour, and equal treatment between men and women.*
> *(...)*
> *The Parties will give priority to measures aimed at: (...)*
> *(c) developing and modernizing labour relations, working conditions, social welfare and employment security; (...)"*

and the EC- Bangladesh Cooperation Agreement (2001):

> *"Article 10 - Human resource development*
> *The Parties agree that human resources development constitutes an integral part of both economic and social development.*
> ***The Parties acknowledge the necessity of safeguarding the basic rights of workers by taking account of the principles in the relevant International Labour Organisation instruments,*** *including those on the prohibition of forced and child labour, the freedom of association, the right to organise and bargain collectively and the principle of non-discrimination.*
> *The Parties recognise that both education and skills development as well as improving the living conditions of the disadvantaged sections of the population, with special emphasis on women, will contribute to creating a favourable economic and social environment."*

Notwithstanding, the aforementioned treaties are exceptions. The model of "European social clauses" applied to most parts of the agreements is still based on a

[541] This treaty will be object of further discussion on the second part of this study.

general "*human rights clause*". Europe does not follow the NAALC approach which ensures compliance with domestic labor legislation through sanctioning mechanisms. Nor does it follow the scheme of the most recent American FTAs which compel the parties to apply expressly stated *'internationally recognized labor standards'*. It is still restrained towards a more aggressive posture which include binding social clauses on trade agreements, avoiding unilateral actions and direct confrontation with abusing parties, privileging political dialogue. Agreements signed by the EC and its Member States usually contain only general declarations of principles within the scope of promoting cooperation on the labor field.

Some scholars, such as HEPPLE, defend the European Community's acquiescent attitude, stating that the "*EU rewards countries for complying with ILO core labor standards, and places the emphasis not on possibly destructive sanctions but instead on capacity—building, education and training and other positive co-operative activities that will raise labor standards at the same time as expanding the economies and job markets in developing countries. Conversely, access to the markets of developing countries also benefits firms and workers in the EU.*[542]"

Whether or not the European Community emphasizes cooperation and dialogue, the initial challenge for future European strategies must be the embracement of express mentions to labor standards – setting up true social clauses – in trade agreements. This is an initiative already supported by both the European Parliament and the European Commission[543], based on the *Cotonou* model.

More, it remains doubtful is whether the exclusive employment of these promotional policies will be able to efficaciously meet the desired goals of international improvements in the labour area. Perhaps it is time for Europe to continue with its cooperative policies, but it must also start working on a mix systen, with the possibility to recur to a complementary lasting policy based less on the ILO scheme and more closely to the US model, which apparently has been the catalyst for labor reforms all around the world.

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[542] HEPPLE, Bob. *Op.cit.* p.128. "The EU´s partnership agreements provide a more balanced approach than NAALC and newer FTAs. The EU rewards countries for complying with ILO core labor standards, and places the emphasis not on possibly destructive sanctions but instead on capacity –building, education and training and other positive co-operative activities that will raise labor standards at the same time as expanding the economies and job markets in developing countries. Conversely, access to the markets of developing countries also benefits firms and workers in the EU."

[543] *Id.* p. 126. "The European Parliament has, on a number of occasions, declared itself in favour of a specific social clause. The European Commission, too, has proposed that trade and co-operations agreements should in future include specific provisions on core labor standards."

In fact, as mentioned before, one of the main objectives of the next chapters of this investigation is precisely discuss the efficiency and the alternatives to those models. Using the Chilean case in order to raise and answer fundamental questions regarding the establishment of social clauses on bilateral trade agreements, this study may act as an important theoretical framework for possible modifications on bilateral trade and social policies, worldwide.