We are at an impasse. Over the past decades, the growth of international trade and investment has allowed a number of developing countries to catch up with the rich countries, thanks to a strong, export-led growth. But many developing countries are still being left behind from this process. And even where the convergence process is at work, inequalities have often developed within the countries that benefit. The international charity group Oxfam calculated that seven out of ten people live in countries where the gap between the rich and poor is worse today than it was 30 years ago.\(^1\) Moreover, while growth has had powerful poverty-reducing effects in many developing countries, it has also led in many cases to environmental degradation and to an uncontrolled increase of greenhouse gas emissions. We now use about 1.6 planets annually to provide us with resources and to absorb our waste, and this ecological overshoot increases each year.\(^2\) The concentration of carbon dioxide (CO\(_2\)) in the atmosphere is now 40% higher than it was in 1750, before the industrial era, and the levels of concentration of methane (NH\(_4\)) and nitrous oxide (N\(_2\)O), the two other major greenhouse gases resulting from human activity, increased by 150 per cent and 20 per cent respectively in that time: these concentrations exceed what has been recorded during the past 800,000 years, and the rates of increase we are witnessing today are unprecedented in the last 22,000 years.\(^3\)

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The expansion of volumes of trade in recent decades may be successful, in certain respects, as long as we consider countries as a whole, and as long as we define success as increase in GNP per capita. But once we examine the situation of different groups within countries and once we abandon the fetishism of growth as measured by GNP increase to take into account the other pillars of sustainable development, serious doubts emerge as to its ability to deliver what it promises. If globalization as such is not to be blamed, then perhaps its current form is.

This book asks whether part of the problem may be in the fragmentation of international regimes, and specifically, in the failure to create effective linkages between the multilateral trade regime, on the one hand, and universally recognized labour and environmental standards, on the other hand. Trade liberalization has proceeded through bilateral and regional trade agreements, as well as through successive rounds of multilateral negotiations under the General Agreement on Tariffs and Trade (GATT), now integrated as part of the Agreements of the World Trade Organization which, by the end of 2014, 160 members had joined. Labour rights have been gradually defined at international level under the auspices of the International Labour Organization, which since its establishment in 1919 has led to the conclusion of about 400 instruments open for signature and ratification by its 185 members. And environmental standards have been defined in a set of conventions, covering a range of areas including the protection of the ozone layer, hazardous waste, endangered species, biodiversity and climate change (Box 2).

But these developments have hitherto remained largely separate and disconnected from one another. International trade law, international labour law, and international environmental law, co-exist. These various regimes are established under specific instruments. They each have separate negotiation fora and means of enforcement, including dispute settlement mechanisms. International lawyers refer to this as ‘fragmentation’, ie the differentiation of international law into a number of self-contained regimes, each with their own norms and adjudication mechanisms, and relatively autonomous both vis-à-vis each other and vis-à-vis general international law.

This book explores whether fragmentation, as it has developed since the Second World War, is an obstacle to the pursuit of sustainable development, and if so, what can be done about it. Specifically, it asks whether the

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5 Agreement establishing the World Trade Organization, Marrakesh, 15 April 1994, entered into force on 1 January 1995 (33 ILM 1125 (1994)).
multilateral trade regime, now developed under the auspices of the World Trade Organization, allows Members of the WTO to link their trade policies to concerns related to labour rights or the environment, in order to use market access as a leverage to encourage their trading partners to improve labour conditions and to better protect the environment. This volume is not about the flexibility each WTO Member has, at domestic level, to protect workers’ rights or the environment—for they undoubtedly have such a freedom, unless this leads to the adoption of measures that result in discriminatory trade policies, in violation of WTO disciplines. The book is, rather, about the use of trade to promote such values outside the jurisdiction of the country concerned: it is about whether WTO Members may use trade as a tool to influence the conduct of their trading partners, or of economic actors seeking access to their markets, by making market access conditional upon those partners or actors doing more in the areas of labour and the environment.

The issue has become increasingly divisive. On the one hand, as illustrated for instance by the continuous growth of bilateral free trade agreements and by the emergence of large free trade zones negotiated between major economies, countries and regions continuously work towards the expansion of trade as a means to stimulate growth. On the other hand, there is a wide recognition that ‘non-trade’ issues, including labour and the environment, should be taken into account in trade negotiations, in order to ‘level the playing field’, and might play a role in the shaping of trade policies. There are a number of channels through which this may be done: they include improving the multilateral trade regime in order to take these ‘non-trade’ issues more explicitly into account; the inclusion of social and environmental clauses in bilateral or regional free trade agreements; or, finally, the adoption of measures taken unilaterally by one trading partner in order to encourage the other partner, or economic agents exporting from that partner’s jurisdiction, to improve the protection of labour or environmental standards.

7 At the time of writing, in late 2014, negotiations are nearing completion for a Trans-Pacific Partnership (TPP) between the United States and a group of eight countries of the Asia-Pacific zone (Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Peru, Singapore, Vietnam); Canada and the European Union have signed the Comprehensive Trade and Economic Agreement (CETA); and a Transatlantic Trade and Investment Partnership (TTIP) is under discussion between the European Union and the United States. Clearly, the major economies in the world see the removal of obstacles to trade, in particular of non-tariff barriers through regulatory convergence, as a significant tool to overcome the impacts on growth of the economic crisis.

8 For instance, the negotiators of the TPP reported on 10 November 2014 that, ‘recognizing the commitment of all TPP countries to strong environmental protection and conservation’, they had ‘made progress toward agreement on a set of enforceable environmental disciplines’, and that ‘to ensure that the benefits of trade are broadly shared, we are close to agreement on a set of enforceable commitments on labour rights that embody key ILO labour rights’ (Trade Minister’s Report to Leaders, 10 November 2014, available from the website of the Office of the United States Trade Representative (last consulted on 30 January 2015).
Introduction

It is this latter question that is explored here. This book asks whether, even in the absence of an explicit clause to that effect in the instruments regulating the trade relationships between the parties, resorting to unilateral trade measures may be legitimate and allowed; and, in particular, whether the WTO framework authorizes its Members to establish such a link. In a well-known resolution on human rights and social and environmental standards in international trade agreements adopted on 25 November 2010, the European Parliament proposes a series of measures to ensure a greater compatibility between the trade, labour and environment agendas, including the use of unilateral trade measures. Under which conditions would it be legitimate to have access to the EU markets depend on compliance with certain labour or environmental standards? What are the tools that could be used in this regard? Is there a danger that these tools might be used for protectionist purposes, denying developing countries the comparative advantage they have in the global competition, and to which extent would the disciplines imposed on WTO Members prohibit such a linkage, in order to avert such a risk?

The negotiators of the WTO Agreements were themselves fully aware of the links between trade, employment, and the environment. They saw the growth of trade not as an end to be promoted for its own sake, but as a means to attain higher, non-instrumental objectives, including improved standards of living for all and a sustainable use of the world’s resources. The preamble of the Agreement establishing the World Trade Organization (WTO) states that Members’ relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.

The question however, is whether trade policies can be harnessed to encourage the very results that were expected to follow from the establishment of

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9 See operational paragraph 6: the European Parliament ‘reaffirms that the objectives of maintaining and preserving an open and non-discriminatory multilateral trade system on the one hand, and protecting the environment and promoting sustainable development on the other hand, should be mutually supportive; underlines that, pursuant to Article 20 of the GATT, the Member States may adopt trade measures to protect the environment, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination; encourages the Member States to make full use of this provision’ (European Parliament resolution of 25 November 2010 on human rights and social and environmental standards in international trade agreements (rapporteur Saïfi), EP doc P7_TA(2010)0434, inter-institutional file 2009/2219(INI)).
Introduction

a rules-based, multilateral trading system, and whether WTO Members may act unilaterally, through their trade policies, to humanize globalization.

In order to address this question, this volume first recalls the background of the debate. It does so in general terms, identifying what may be troubling about the current situation in which the trade agenda is being pursued in disregard of other, ‘non-trade’ issues, such as labour rights or environmental standards (Chapter one). It then reviews the various tools that could be used to ensure a linkage between trade policies on the one hand, and a concern for compliance with labour and environmental standards on the other hand. Five such tools are examined. Chapter two examines the potential use of a sanctions-based mechanism, consisting in a ban or in the imposition of higher tariffs on products or services that do not comply with certain requirements to use clean technologies or to respect labour rights in the production process. It offers a general presentation of the applicable legal framework under the main WTO Agreement, the General Agreement on Tariffs and Trade (GATT), applicable to trade in goods, the disciplines of which have been replicated in similar form in the General Agreement on Trade in Services (GATS). Chapter three assesses the role of border tax adjustment measures, including what is colloquially known as the ‘carbon tax’. Chapter four provides an assessment of the linkage between access to market at preferential conditions and compliance with certain labour and environmental standards within the General Systems of Preferences that were established in the 1970s in order to accelerate the integration of developing countries in the global economy. Chapter five discusses the role of ecolabelling schemes. Chapter six, finally, provides an overview of the use of public procurement as a means to encourage compliance with labour rights or environmental standards.

The final chapter, Chapter seven, provides a brief conclusion. The inquiry shows that governments, even acting unilaterally—that is, without having to go through the negotiation of a new international agreement—, could do much better at being consistent across the trade, social justice and environmental sustainability agendas. They could put trade in the service of sustainable development. The WTO framework only constrains them insofar as it prohibits them from using the various tools they have at their disposal for protectionist purposes. As the legal obstacles dissolve, however, the political responsibilities come to light. I argue that it is possible to reconcile trade with labour rights and with environmental objectives, in particular in order to mitigate climate change. An agenda establishing a linkage between trade on the one hand and labour rights and environmental standards on the other hand would only succeed, however, if coupled with strong support for developing countries, including by the transfer of technologies, the financing of clean development projects, and support for the establishment or strengthening of social protection schemes. Combining unilateral measures linking market access to social and environmental conditions, on the one
hand, with, on the other hand, support to the right to development of poor
countries may be seen as a new brand of multilateralism: one in which each
country or region uses trade as an opportunity, not just to export more and
to grow faster, but to move towards a more humane form of globalization.
This is a multilateralism of the ends, rather than a multilateralism of the
tools: though the tool of trade policies is in the hands of each country for
it to use, it can serve the ends that the international community has set for
itself, rather than the selfish interests of the few whom trade benefits today.
Setting the Stage: The Limits of Fragmentation

Trade has gradually been drifting apart from so-called ‘non-trade’ issues, including labour rights and environmental standards. This is not inevitable. It is in fact the result of a process of separation that began in the 1980s, and took a decisive turn with the establishment of the World Trade Organization in the mid-1990s. But international law has not always been as fragmented as it seems to be today. In order to understand how we can move towards a more coherent international legal order, and one that would be therefore better equipped to humanize globalization, it may be useful to recall where we come from. Trade has never been an end in itself. Its relative autonomization—its strengthening as a separate regime of international law—is recent, and it can be challenged.

I. TRADE AND LABOUR RIGHTS

Trade and labour rights have not always been treated in isolation. Indeed, their interconnectedness was acknowledged when the International Labour Organization (ILO) was established in 1919. One of the key factors leading to its creation was the conviction of governments that ‘the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries’:\(^1\) insofar as nations compete on global markets and enter into relationships through trade and investment, they might be discouraged from moving towards the improvement of workers’ rights unless other nations are doing the same. The ILO was set up, primarily, to address this collective action problem. Its purpose was to ensure that the development of international trade would not delay the achievement of progress in the area of labour rights, as would be the case if countries were to seek to improve their international competitiveness\(^2\) at the expense of the protection of workers.

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\(^1\) ILO Constitution, Preamble, para 3.

\(^2\) Strictly speaking, it is not countries, but economic actors—firms—that compete on international markets. Thus, the mention of ‘international competitiveness’ of countries is a shorthand way of referring to the conditions under which companies established under the jurisdiction of the countries concerned can export goods and services abroad.
The link was initially reaffirmed after World War II. Already in the Declaration concerning the aims and purposes of the International Labour Organization (Declaration of Philadelphia) adopted on 10 May 1944, and integrated to the Constitution of the ILO, the International Labour Conference included among the fundamental principles on which the ILO is based that ‘labour is not a commodity’ and that ‘poverty anywhere constitutes a danger to prosperity everywhere’, thus reaffirming the need to ensure that the growth of trade should not be at the expense of workers’ rights. Even more explicitly, it stated that all national and international policies and measures, in particular those of an economic and financial character, should be judged in this light and accepted only in so far as they may be held to promote and not to hinder the achievement of this fundamental objective [of ensuring that all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity].

In February 1946, negotiations began on the establishment of an International Trade Organization (ITO), as a specialized agency of the United Nations. The Charter of the ITO was agreed in Havana in March 1948. The Members pledged to implement Article 55 of the UN Charter by assuring ‘a large and steadily growing volume of real income and effective demand’, and by increasing ‘the production, consumption and exchange of goods, and thus to contribute to a balanced and expanding world economy’. They also committed to ‘foster and assist industrial and general economic development, particularly of those countries which are still in the early stages of industrial development, and to encourage the international flow of capital for productive investment’; to ‘further the enjoyment by all countries, on equal terms, of access to the markets, products and productive facilities which are needed for their economic prosperity and development’; to promote trade as an instrument of economic development; and generally, to ‘facilitate through the promotion of mutual understanding, consultation and co-operation, the solution of problems relating to international trade in the fields of employment, economic development, commercial policy, business practices and commodity policy’. The ITO thus was conceived as an

3 Para I(a) and (c).
4 Para II(c). These principles were reaffirmed in the ILO Declaration on Social Justice for a Fair Globalization adopted statement of principles and policies adopted unanimously on 10 June 2008 by the International Labour Conference at its ninety-seventh session. The Declaration builds on principles recognized in the Constitution of the International Labour Organization, including the Declaration concerning the Aims and Purposes of the ILO of 1944 and the Declaration on Fundamental Principles and Rights at Work of 1998.
organization in which countries could gradually agree on how to support international trade in order to ensure that it would contribute to employment and development, and in close cooperation with the United Nations Economic and Social Council.6 The Charter establishing the ITO also noted that unemployment should be treated as a common concern calling for international cooperation, and that the promotion of trade should not be at the expense of the protection of fair labour standards: it acknowledged that ‘all countries have a common interest in the achievement and maintenance of fair labour standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit’.7 It included strong provisions on the role of international assistance and cooperation in the service of development.8

Those objectives soon appeared to be overambitious, however. On 6 December 1950, drawing the conclusions from the strong opposition of the US Congress many members of which feared the ITO would represent an excessive check on the United States’ sovereignty, President Truman announced that the United States would not ratify the ITO Charter.9 In the meantime, the General Agreement on Tariffs and Trade (GATT) had become provisionally applicable in January 1948.10 But what had been lost was more than the promise of one international agency that would ensure a consistent approach across the areas of trade, employment, and economic development: as would soon become clear, it was the idea of international cooperation itself for the fulfilment of the latter two objectives that was being questioned.

The consequences of this initial failure to set up the International Trade Organization are well known. The GATT—initially made to enter into force on a purely provisional basis in order to avoid a sudden suspension of trade flows—was institutionalized. The Marrakesh Agreement of 15 April 1994 establishing the WTO, almost 50 years after the initial GATT, significantly strengthened the regime of international trade, and represented a decisive

6 See the definition of the functions of the ITO in Art 72 of the Charter. The Charter included chapters on Employment and Economic Activity (II); on Economic Development and Reconstruction (III); on Commercial Policy (IV); on Restrictive Business Practices (V); and on Inter-Governmental Commodity Agreements (VI). See also Steve Charnovitz, ‘The (neglected) employment dimension of the World Trade Organization’ in Virginia A Leary and Daniel Warner (eds), Social Issues, Globalisation and International Institutions (Leiden, Martinus Nijhoff, 2006) 138–39.
7 Charter of the ITO, Arts 2 and 7.
8 See Chapter III of the Charter of the ITO.
and potentially dangerous move towards its autonomization. The establishment of the World Trade Organization may be seen as the final stage in a process that began in 1948, through which international trade was gradually liberalized through a series of trade negotiations that were conducted formally outside the United Nations system, and without any explicit connection to other areas (such as labour rights, environmental standards, or human rights) that were subject to international cooperation. In addition, since the establishment of the WTO, the disciplines imposed in the multilateral trading system are enforced under the threat of economic sanctions: this is in contrast with the enforcement means at the disposal of the International Labour Organization or the UN human rights system, that essentially rely on the reputational costs incurred by countries who ignore their international commitments in these areas. The enforcement of labour rights and of human rights is relatively weaker, especially for countries who care less about their standing in international relations than about their export opportunities, and the dispute settlement mechanism established as part of the WTO Agreements is a particularly effective tool in the hands of the largest and most developed economies (which are in effect the only ones who can impose sanctions that can hurt), whereas enforcement is decentralized in the system of the ILO and in the UN human rights system. Countries may be pressured to conform to international law because of the fear of disrepute, of course: research shows that international law regimes typically succeed to the extent that compliance is rewarded by countries being seen as trustworthy and reliable participants in the international legal process. As regards economic sanctions that might be imposed on a country infringing its trade commitments, however, the weight on governmental decision-making of powerful economic interests who may suffer the most

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11 See, for a discussion of the successive trade negotiation rounds, A Hoda, 

12 See n 14 below.

13 The Memorandum of Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) is contained in annex 2 to the Marrakesh Agreement. Enforcement relies on the possibility, for the WTO Member affected by another Member’s non-compliance, to request consultations, and potentially a binding arbitration if consultations fail; ultimately, the complaining Member may be authorized to adopt counter-measures against the delinquent Member. Commentators have often remarked that the mechanism was highly biased in favour of the powerful. As Stiglitz writes: ‘The WTO’s international law is an imperfect rule of law; the rules are derived from bargaining, including bargaining between the rich and the poor countries, and in that bargaining it is the rich and powerful that typically prevail. Enforcement is asymmetric—a threat of trade restriction by the United States against a small country like Antigua will elicit a response, but the United States does not pay much attention if Antigua threatens a trade restriction. Only when the practice affects a large number of countries … is the threat of retaliation even credible’ (Joseph Stiglitz, Making Globalization Work (New York, WW Norton & Co, 2006) 76).

significant losses from restrictions to exports will often prove decisive, especially when the trading partner is too important to ignore and retaliatory measures adopted by that partner, therefore, particularly costly.

Following the entry into force of the WTO Agreement in 1995, the United States and the EU sought to introduce a link between international trade and labour standards. This was resisted by developing countries, who feared, understandably, that this would justify protectionism and would deprive them of what they saw as their comparative advantage, particularly for labour-intensive lines of production. The outcome of this battle was the adoption of an explicit recognition, within the WTO, that trade liberalization should not be linked to considerations related to labour rights. In the Singapore Ministerial Declaration adopted on 13 December 1996 at the first WTO Ministerial Conference, the WTO Members stated:

We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.  

In effect, this put an end to attempts to explicitly link trade to labour rights at multilateral level. The 2008 ILO Declaration on Social Justice for a Fair Globalization, the primary purpose of which was to ensure that the Decent Work Agenda would be effectively promoted, does task the ILO to ensure that other institutions support the agenda:

Other international and regional organizations with mandates in closely related fields can have an important contribution to make to the implementation of the integrated approach. The ILO should invite them to promote decent work, bearing in mind that each agency will have full control of its mandate. As trade and financial market policy both affect employment, it is the ILO’s role to evaluate those employment effects to achieve its aim of placing employment at the heart of economic policies.  

But it appeared clearly, by then, that the trade regime would continue to develop separately from the efforts conducted by the ILO in the area of labour rights.

Yet, linkage between trade and labour rights is far from being unprecedented. References to labour rights are included in some commodities agreements. For instance, consistent with its key objectives to promote

15 WT/MIN(96)/DEC, 18 December 1996, para 4.
16 Adopted by the ninety-seventh session of the International Labour Conference.
17 Paragraph II, C.
The Limits of Fragmentation

international trade of coffee by facilitating exchanges of information and adopting market-stabilizing measures, but also to encourage Members to ‘develop a sustainable coffee sector in economic, social and environmental terms’, the 2007 International Coffee Agreement provides that

Members shall give consideration to improving the standard of living and working conditions of populations engaged in the coffee sector, consistent with their stage of development, bearing in mind internationally recognized principles and applicable standards on these matters. Furthermore, Members agree that labour standards shall not be used for protectionist trade purposes.

At the request of the new Clinton administration—a request made after it came into office in the United States in 1992—the North American Free Trade Agreement also was concluded accompanied by side agreements on Labour and Environment Cooperation between the Parties. The conclusion of these agreements in 1993 was, in effect, a compromise solution between allowing a form of regulatory competition potentially destructive of environmental and labour standards and seeking to harmonize such standards, which could have been seen by Mexico in particular, one of the Parties to the agreement, as depriving it of its comparative advantage on the newly created North American free trade area. The side agreements impose essentially an argument of transparency, as the Parties commit to maintain such regulations at a high level and to enforce their labour and environmental regulations. The objective is to avoid the Parties being tempted to improve the competitiveness of the economic actors operating on their territory by reducing labour and environmental standards.

Are the fears of ‘social dumping’ justified? The evidence is inconclusive. Econometric studies tend to show that the countries with the most open

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18 Article 1, (3).
19 Article 37. In the Preamble of the Agreement, the Members also recognize ‘the need to foster the sustainable development of the coffee sector, leading to enhanced employment and income, and better living standards and working conditions in Member countries’ (para 4).
21 The notion of ‘social dumping’ may of course be given various definitions, ranging from situations in which an employer deliberately violates existing legislation in order to achieve a competitive advantage to situations where practices as regards working conditions and wages comply with the applicable labour legislation and simply reflect different levels of productivity between workers, without entailing any distortion of competition (see on these understandings Daniel C Vaughan-Whitehead, EU Enlargement versus Social Europe? The Uncertain Future of the European Social Model (Cheltenham, Edward Elgar, 2003) 325–27). The notion is used here to refer to the (perfectly legal) practice of companies to locate their activities in the state, and thus under the regulatory regime, that will make compliance with social regulations least costly, in order to be the most competitive on international markets.
Trade policies have witnessed improvements in working conditions, at faster rates than countries with closed trade policies. But that does not prove that fears of social dumping are without foundation. First, correlation does not imply causality. The improvement in labour conditions may be attributable to a range of other factors than trade per se. Among such factors, we may include the role of foreign investment and the arrival of multinational corporations in the country concerned, general progress in the standard of living (ie that trade may or may not have accelerated, depending on the position of the country in the international division of labour and the evolution of the terms of trade) or, perhaps most importantly, the level of organization of workers and the strength of their bargaining position. Secondly, a generally positive correlation between trade openness and working conditions does not provide information about the counter-factual: what if a country had resorted to more protectionist policies, shielding certain sectors from competition? Could it be that the working conditions would have improved even further?

It is equally difficult to arrive at definitive conclusions concerning the relationship between trade openness and the evolution of labour regulations in any particular country. How the regulatory framework evolves depends, first and foremost, on the balance of political forces in a country at any point in time, as well as on the respective bargaining power of employers and workers’ unions. Trade openness is one among many factors that influences the respective positions of the different social political actors in the country. It implies, for instance, that the employers may with some plausibility threaten to relocate production plants if the workers demand too much, or if the labour legislation imposes excessive costs on them: such a threat becomes realistic once it appears that they could easily produce goods in another location, or provide services from elsewhere, without losing access to the consumers in the home country. How much weight this argument will have, however, will depend on the particular context of the country concerned, and this again is only one of the inputs in a political system that shall receive many others.

Arguments about ‘social dumping’ are therefore difficult to assess. Those arguments are not to be confused, however, with the argument in favour of establishing a stronger linkage between trade and labour rights. This latter argument is not premised on the idea that trade openness will result in a

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22 See, eg, providing a systematic empirical analysis, Robert J Flanagan, *Globalization and Labor Conditions. Working conditions and worker rights in a global economy* (Oxford, Oxford University Press, 2006). Flanagan concludes that fears of ‘social dumping’ are largely ill-founded. However, even he does note one exception: ‘If trade threatens working conditions, the threat is strongest for some workers in the richest countries, not the poorest countries. The evidence suggests that trade has a small negative impact on the wages of unskilled workers in industrialized countries’ (ibid, 85).
deterioration of working conditions or a dismantling of labour regulations, all in the name of ensuring competitiveness on global markets. What is suggested here, rather, is that ‘trade openness’ can be designed in a number of ways, and that forms of trade liberalization that include a protection against the risks of social dumping are preferable to forms of trade liberalization that simply ignore that there may be any such link. Linkage, thus, is to be seen more like an insurance policy: it seeks to ensure that trade will not be used as an opportunity to lower labour standards or as a pretext to refuse to improve the protection of workers or to raise their wages as labour productivity improves. It is precisely because the risks of social dumping are difficult to ascertain that taking out an insurance policy makes sense.

II. TRADE AND ENVIRONMENTAL STANDARDS

The relationship between trade and climate change mitigation may be considered from two perspectives. We may ask, first, to which extent international competition is a disincentive for the adoption of regulatory standards that, though aiming to mitigate climate change, may raise costs of the enterprises operating from within the state seeking to adopt such standards. It is arguable at least that the more economies are characterized by a high degree of openness to trade—depending more on exports to be able to import more in order to satisfy their needs—the more difficult it will be to justify the adoption of measures imposing constraints on companies, in the form of stronger environmental requirements, that are perceived as reducing the competitiveness on global markets. The debates that followed the establishment of the carbon emissions trading system within the European Union illustrate this, as they included an important discussion on how to avoid companies based in the EU being penalized in international competition, in the sectors that

23 Of course, the relationship between constraints imposed on companies based on environmental concerns—leading for instance to a higher price of energy or to obliging a company to acquire allowances for greenhouse gas emissions—and the competitiveness of companies, understood as their ability to maintain sufficient profit margins, is not a direct one, and depends on a range of factors, including the trade openness of the sector concerned and the ability of the companies concerned to pass on the increases in production costs to the consumer: see, for a detailed discussion of this point, Trade and Climate Change. A Report by the United Nations Environment Program and the World Trade Organization (Geneva, World Trade Organization, 2009) at 99 (finding that ‘the effects on competitiveness of environmental regulations, including climate change policies, are relatively small, or are likely for only a small number of sectors, because the costs of compliance with a regulation are a relatively minor component of a firm’s overall costs’, yet acknowledging at the same time that environmental regulations impact the competitiveness of ‘a few energy-intensive manufacturing industries’ and that ‘the carbon constraint in some emission trading schemes ... is expected to be increasingly stringent, with fewer free allowances, which will therefore increase the potential impact on the competitiveness of a number of sectors’).
are relatively exposed to such competition and where compliance with the requirement to reduce emissions would be relatively costly.24

We may also take another perspective, and ask how the expansion of trade as such affects the growth of greenhouse gas emissions. On the one hand, trade favours in many cases the diffusion of cleaner technologies which, once taken up, can lead to less carbon-intensive types of growth in the importing country. This is the ‘technology effect’ of international trade, which the WTO Members have pledged to accelerate through prioritizing the liberalization of trade in environmental goods and services.25 On the other hand however, international trade favours increased economic growth and higher levels of consumption, as resources are freed-up from their less productive uses to be reinvested or spent elsewhere. This is the ‘scale effect’ of trade; it is built into the very idea of trade having to improve allocative efficiency, and thus leading to increased levels of outputs and reduced prices for the end consumer.

Studies are now converging to show that the ‘scale effects’ of international trade outweigh ‘technology effects’.26 In other terms, the increased consumption favoured by trade expansion raises the levels of greenhouse gas emissions more than the technological spill-over effects of trade. If this is true, it follows that we cannot pretend, at the same time, to pursue a free trade agenda leading to the expansion of North-South trade flows and also to combat climate change. Indeed, with the expansion of trade, consumers in industrialized countries continue to have access to cheap manufactured

24 See for instance Commission Decision of 24 December 2009 (2010/2/EU) determining, pursuant to Directive 2003/87/EC of the European Parliament and the Council, a list of sectors and subsectors which are deemed to be exposed to a significant risk of carbon leakage, [2010] OJ L1/10. The Decision identifies the lines of production within the EU that are at a significant risk of losing markets as a result of having to pay for carbon emission quotas under the EU’s emissions trading scheme (‘carbon leakage’), as organized by Directive 2003/87/EC of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community ([2003] OJ L275/32). In order to provide such a determination, it relies on two criteria: (i) the sum of direct and indirect additional costs induced by the implementation of the ETS Directive would lead to an increase in production costs, of at least 5 per cent of the gross value added; and (ii) the ratio between the total value of exports to third countries plus the value of imports from third countries and the total market size for the Union is above 10 per cent, indicating an important intensity of trade with third countries in that sector, thus exposing the EU-based companies of the sector to foreign competition.

25 See Doha Ministerial Declaration, WTO doc WT/MIN(01)/DEC/1, para 31 (iii) (committing to negotiate ‘the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services’).

products imported from developing countries—and they are cheap both because they are relatively labour-intensive and produced in low-wage countries, and because the negative externalities that result from polluting technologies are not taken into account in their retail prices. But this postpones the need for a change in affluent lifestyles, despite the urgency of such changes; it may in fact favour the kind of runaway, mindless consumption that increases our per capita ecological footprint.

Box 1. The answer of the international community to the threats associated with climate change

The rate at which greenhouse gases (GHG) are emitted into the atmosphere as a result of human activity has been continuously increasing since the beginning of the industrial era. During the period 1970–2000, such emissions (calculated as volumes of carbon dioxide equivalents—CO₂e) grew by 1.3 per cent annually. Despite growing awareness of the need to reduce greenhouse gas emissions and the launch of a number of mitigation strategies, emissions grew even faster, by 2.2 per cent per year, from 2000 to 2010. About half of the total cumulative man-made emissions of carbon dioxide, the most important of greenhouse gases, were emitted during the last 40 years, between 1970 and 2010.27

The most well-known and most widely discussed impact of increased concentrations of GHG in the atmosphere is global warming. According to the most recent assessments of the Intergovernmental Panel on Climate Change (IPCC), the Earth’s temperature already has risen by 0.85 °C in comparison to 1880,28 and the 10 warmest average global temperatures recorded since 1880 have occurred in the last 15 years: the decade of the 2000s (2000–09) was warmer than the decade spanning the 1990s (1990–99), which in turn was warmer than the 1980s (1980–89).29 Such global warming is only one facet of man-made climate change. The other associated phenomena include the contraction of snow-covered areas and the shrinking of sea ice; the rise of sea levels and higher water temperatures; more extreme droughts and heatwaves;

heavy rainfalls and resulting floods; and an increased intensity of tropical cyclones. This leads to severe impacts on livelihoods of many vulnerable populations, which are already being felt particularly in developing countries. A 2010 report called *The Anatomy of a Silent Crisis*, at the time the most detailed report on the human impacts of climate change to date, estimated that every year climate change is responsible for over 300,000 premature deaths, that 325 million people are already seriously affected, and that economic losses amount to US$125 billion. The report estimates that four billion people are vulnerable to climate change today, and that 500 million people are at extreme risk.30

The international community has not remained passive in the face of this challenge. Awareness about the unsustainability of demographic growth, combined with our modes of production and consumption, has been developing since the publication of the Club of Rome Report *The Limits to Growth*31 and the Stockholm Conference of June 1972, which resulted in the establishment of the United Nations Environment Programme (UNEP) as a subsidiary body of the United Nations General Assembly (UNGA).32 In 1987, the World Commission on Environment and Development, known as the Brundtland Commission,33 presented its report *Our Common Future*, leading the UNGA to convene a Conference on Environment and Development. This conference—known as the ‘Earth Summit’—was held in Rio de Janeiro from 3 June to 14 June 1992.34 In addition to adopting the Convention on Biological Diversity, the Rio Conference launched the UN Framework Convention on Climate Change (UNFCCC), which had been agreed upon only a month earlier.35 It also adopted a Declaration on Environment and Development, and an ambitious plan of action, Agenda 21.36

The objective of the UNFCCC is to ensure ‘stabilization of greenhouse gas concentrations in the atmosphere at a level that would

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32 UN doc GA res. 2997 (XXVII), 15 December 1972.
33 Established by the UNGA in 1983, see UN doc A/RES/38/161, 19 December 1983.
34 UN doc A/CONF.151/26.
35 The UNFCCC was opened for signature on 9 May 1992, after an Intergovernmental Negotiating Committee produced the text of the Framework Convention as a report following its meeting in New York from 30 April to 9 May 1992. It was signed by 154 countries on 12 June 1992. It entered into force on 21 March 1994 (1771 UNTS 107; 31 ILM 851 (1992)). As of December 2014, the UNFCCC had 195 states Parties.
prevent dangerous interference with the climate system’ (Article 2). The Parties agree on a set of principles listed in Article 3, including the principle of equity according to which the Parties have ‘common but differentiated responsibilities and respective capabilities’ (Principle 1) and the principle according to which measures taken to combat climate change should not lead to discrimination in international trade (Principle 5). The full text of Article 3 (Principles) reads as follows:

In their actions to achieve the objective of the Convention and to implement its provisions, the Parties shall be guided, inter alia, by the following:

1. The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.

2. The specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration.

3. The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors. Efforts to address climate change may be carried out cooperatively by interested Parties.

4. The Parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change.

5. The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change. Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.
The principle of ‘common but differentiated responsibilities’ is the basis of the distinction between industrialized and developing countries that is one of the key features of the climate change regime. In 2007 (but using data from 2004), it was estimated that industrialized countries (representing 19.7 per cent of the global population) emitted on average 16.1 tonnes of CO₂e annually per capita; developing countries (which included 80.3 per cent of the world’s population) had average annual per capita emissions of GHG of 4.2 tonnes of CO₂e. This gap is gradually being reduced, both as a result of the industrialization of a number of countries formally classified as ‘developing’, and because of mitigation strategies in rich countries that result in these countries having a less carbon-intensive type of growth. Yet, the gap remains. In 2010, all industrialized countries together, representing just above one fifth (20.5 per cent) of the world’s population, still accounted for 58.3 per cent of global GHG emissions, while the rest of the world with 79.5 per cent of population accounted for 41.7 per cent of global emissions. It is noteworthy that the gap is even higher if we consider consumption-based emissions: with one fifth of the world’s population, industrialized countries represent almost two thirds (65 per cent) of global consumption-based emissions. This illustrates that the main challenge mitigation policies face today has to do with high levels of consumption in rich countries, rather than with a failure to implement clean technologies in industrial processes of production.

This contrast between regions was even more striking at the time the UNFCCC was under discussion. It is this gap that the negotiators sought to capture. Under the UNFCCC, ‘Annex I’ countries are the industrialized countries and countries in transition, which have historically contributed most to greenhouse gas emissions and are best

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37 International Panel on Climate Change (IPCC), Climate Change 2007: Synthesis Report (adopted at IPCC Plenary XXVII (Valencia, Spain, 12–17 November 2007), and representing the formally agreed statement of the IPCC concerning key findings and uncertainties contained in the Working Group contributions to the Fourth Assessment Report) figure 2.2(a).

38 This includes North America (USA and Canada), the countries from the Pacific Organisation for Economic Co-operation 1990 (Japan, New Zealand and Australia), Eastern European countries and countries from the former Soviet Union (the so-called ‘economies in transition’), and Western Europe.

equipped to deal with climate change thanks to their financial and technological resources. These countries must ‘adopt national policies and take corresponding measures on the mitigation of climate change, by limiting [their] anthropogenic emissions of greenhouse gases and protecting and enhancing [their] greenhouse gas sinks and reservoirs’ (Article 4 § 2(a)). In addition, a subset of ‘Annex I’ countries—in fact, OECD countries that were not economies in transition in 1992—are expected to provide financial support to developing countries to allow them to meet their obligations under the UNFCCC, and to assist those that are particularly vulnerable to the adverse effects of climate change (including small island states, countries with low-lying coastal areas, or particularly prone to natural disasters) in meeting costs of adaptation.40

In contrast, developing countries are not expected to reduce emissions, although they must, like all Parties to the UNFCCC, report on the basis of a national inventory of anthropogenic emissions by sources and removals by sinks of greenhouse gases.41 In addition to imposing these obligations, the UNFCCC establishes certain areas of cooperation between Parties in the development and transfer of technologies, practices and processes to mitigate climate change; in the preparation to adapt to the impacts of climate change; in the exchange of information; and in education, training, and raising public awareness.

The UNFCCC is often described as an agreement that sets forth certain objectives, without being the source of legal obligations in the absence of binding targets. This is a common misrepresentation. It is based on the fact that the Framework Convention does not quantify the targets to be reached, and is therefore difficult to enforce. Indeed, it was in order to strengthen the Framework Convention that the 3rd Conference of Parties (COP-3) held in 1997 adopted the Kyoto Protocol.42 The Kyoto Protocol defined the greenhouse gas emissions reduction obligations for Annex I countries: under the Protocol, most industrialized countries and some central European economies in transition agreed to legally binding reductions in greenhouse gas emissions of an average of 6 to 8 per cent below 1990 levels between the years 2008–12.43

40 Article 4, §§ 3–4 and 8.
41 On the reporting obligations, see Art 12.
43 The United States initially agreed to reduce its total emissions by an average of 7% below 1990 levels. However, the US Congress blocked ratification of the Protocol, which was formally denounced by President George W Bush in 2001.
The Protocol also introduced so-called ‘flexibility mechanisms’ such as emissions trading, the clean development mechanism and joint implementation. Emissions trading means that Parties which, under the Kyoto Protocol, have committed to certain reduction targets, may sell their unused ‘assigned amount units’ (AAUs) to countries which exceeded their emission rights.\(^4\) This has led to the emergence of a market in carbon emissions, which is meant to reconcile a concern for equity (since the most advanced countries have agreed to stricter commitments) with a concern for efficiency (since it is presumed that allocative efficiency will be improved if countries can trade their emission credits).\(^4\) Under the Clean Development Mechanism provided for in Article 12 of the Kyoto Protocol to the UNFCCC, Annex I countries that have committed to reducing greenhouse gas emissions receive additional carbon emission reduction credits (CREs) if they help to implement emission-reducing projects in developing countries.\(^4\) In order to be eligible, the project must provide emission reductions that are additional to what would otherwise have occurred. A two per cent levy imposed on CERs contributes to the financing of the UNFCCC Adaptation Fund, which finances adaptation projects and programmes in developing countries Parties to the Kyoto Protocol that are particularly vulnerable to the adverse effects of climate change. The Joint Implementation mechanism finally, the third flexibility mechanism, is based on the idea that the Annex I Parties to the Protocol shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of [GHG] do not exceed their assigned amounts ... with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012:\(^7\)

Article 6(1) of the Kyoto Protocol provides that, under certain conditions, these Parties ‘may transfer to, or acquire from, any other such Party emission reduction units resulting from projects aimed at reducing anthropogenic emissions by sources or enhancing anthropogenic removals by sinks of greenhouse gases in any sector of the economy’.

4\(^4\) Kyoto Protocol, Art 17.
4\(^5\) The intellectual foundations behind the carbon market are of course to be found in the work of the Nobel Economics Laureate Ronald H Coase; see in particular Ronald H Coase, ‘The Problem of Social Cost’ (1960) 3 Journal of Law and Economics 1.
4\(^6\) At the time of writing (July 2011), more than 3.300 CDM projects had been registered, for a total 500 million CERs annually (or 2 billion CERs until the end of the commitment period in 2012).
4\(^7\) Kyoto Protocol, Art 3(1).
Perversely, because of how greenhouse gas emissions are computed in the global climate change regime (Box 1) it is highly tempting for industrialized countries to ignore these impacts of trade.\textsuperscript{48} The reporting mechanism under the 1997 Kyoto Protocol only records emissions arising from \textit{production and consumption within the country concerned}—and not the ‘virtual’ emissions arising from the production of export products that the same country imports in order to meet its consumers’ demands. You count as emitted in country A the pollution caused by driving the car within that country, but not the pollution caused by the production of the car in the car-exporting country B. This allows industrialized countries to meet their obligations under the UNFCCC to reduce their emissions simply by outsourcing the most polluting industries to developing countries: thus, confirming earlier studies that point to this trend,\textsuperscript{49} a team of researchers from the University of Munich, led by Rahel Aichele and Gabriel Felbermayr, estimated in 2011 that while accession to the Kyoto Protocol led the countries which made commitments under the Protocol to reduce their domestic emissions by seven per cent on average, their carbon footprints have not decreased.\textsuperscript{50}

This is the problem of ‘carbon leakage’, or ‘virtual emissions’. As trade volumes grow, a larger proportion of the greenhouse gases emitted in the production processes of products that are consumed will be emitted outside the national territory, and thus ‘externalized’—or outsourced to its trading partners—by the importing country. The current accounting of emissions thus gives an incorrect picture of the reality of what the industrialized countries are doing to reduce their carbon footprint. For the moment, the reason why we can pretend to limit greenhouse emissions without changing our lifestyles is not because we are smart at developing cleaner technologies: it’s because we outsource the most polluting types of production.

The volumes concerned are significant. It has been calculated that in 2001 the ‘virtual emissions’ of the EU amounted to 992 megatonnes (Mt) CO\textsubscript{2}, representing the emissions from products imported by the EU, whereas the emissions from EU exports represented 446 Mt CO\textsubscript{2}.\textsuperscript{51} In effect therefore, the EU displaced over 500 Mt of CO\textsubscript{2} emissions overseas that year: by the


\textsuperscript{49} GP Peters and EG Hertwich, ‘CO\textsubscript{2} embodied in international trade with implications for global climate policy’ (2007) 42 \textit{Environmental Science & Technology} 1401–7.


\textsuperscript{51} Climate and Trade. Why climate change calls for fundamental reforms in world trade policies, n 26 above, 9.
simple magic of trading more, it could make progress towards meeting its reduced greenhouse gas emissions targets with almost no impact on people’s consumption levels and habits. This trend has been continuing since. Researchers from the Carnegie Institute estimated in 2010 that 23 per cent of the greenhouse gas emissions linked to the goods consumed in developed countries—for a total of 6.4 billion tonnes of CO₂—had in fact been emitted elsewhere, and that 22.5 per cent of the GHG emissions from China were for the production of export goods—to satisfy the tastes of consumers in the North (see figure 1).52

![Figure 1. Largest interregional fluxes of emissions embodied in trade (Mt CO₂·y⁻¹) (the thickest arrows represent the most important flows of virtual emissions). Source: Steven J Davis and Ken Caldeira, ‘Consumption-based accounting of CO₂ emissions’ (2010) 107 Proceedings of the National Academy of Sciences 5687–92.](image)

These findings were confirmed a year later by the study of the University of Munich.53 Using data covering 40 countries for the 1995–2007 period, covering 80 per cent of global greenhouse gas emissions, Aichele and Felbermayr found that over the period concerned the carbon emissions embodied in international trade increased significantly: in 1995, nine per cent of globally produced emissions were traded, but the figure was 15 per cent in 2007 (figures 2 and 3). This increase leads to a growing wedge between the domestic CO₂ emissions and the carbon footprints of countries once we include their imports: the ratio of CO₂ imports over domestic CO₂ emissions increased by 17 per cent over this period, indicating a significant increase of carbon leakage.

53 R Aichele and G Felbermayr, Kyoto and the Carbon Footprint of Nations, n 50 above.
Figure 2. CO₂ content of trade and share of CO₂ emissions traded

Figure 3: Mean CO₂ intensity of imports and exports to and from the largest net importing/exporting countries (and Middle East region).
It is therefore inconsistent to pretend to tackle climate change without regulating international trade in ways that take into account its impacts on the increased production of GHG emissions. ‘Carbon leakage’ as documented in the studies cited\(^\text{54}\) entails three risks.\(^\text{55}\) First, there is a risk that countries that have only weak carbon-constraining environmental policies—for instance, low levels of taxation of carbon—will attract carbon-intensive industries, resulting in what has been described as ‘carbon havens’. Secondly, this in turn may entail the loss of employment in certain sectors in the most carbon-intensive sectors of the industry, in the countries which have more robust climate change mitigation policies. Thirdly, the fear of whole industries relocating may delay efforts aimed at reducing emissions even in the countries that would wish to do more in this regard, since this would come at an important economic cost.

Taken together, these concerns are both environmental and, in the countries that have the strongest carbon-constraining environmental policies in place, economic. The position of the EU is typical in this regard. In order to avoid a situation in which the introduction of the EU Emissions Trading Scheme would result in a loss of employment opportunities in certain particularly exposed industries (exposed both because of their high energy-intensity and because of the trade openness of the sector in which they operate), the EU has initially resorted to the free allocation of emission quotas to the sectors concerned. As it now seeks to move to the next phases of implementation of the EU ETS, and to gradually rise the percentage of allowances that are allocated through an auctioning mechanism (imposing further costs to the industry), it is facing increased resistance. We are thus caught in a vicious cycle. The free allocation of quotas is seen as a means to reduce the impact of the EU carbon emissions trading system on the ability of companies operating from within the EU to compete on global markets. But this reduces the fiscal revenues from the scheme, and therefore the ability of the EU to finance a climate change fund or the transfer of clean technologies to developing countries. Instead, if the problem of carbon leakage were effectively addressed, allowing the EU quotas-based system of allocation of carbon allowances to evolve (with a gradual generalization of the auctioning system for their allocation), this could lead to a virtuous cycle in which the financial resources collected by the EU could fund climate change adaptation and mitigation strategies in the developing world.

\(^{54}\) See also, more recently, Jie He and Jingyan Fu, ‘Carbon leakage in China’s manufacturing trade: An empirical analysis based on the carbon embodied in trade’ (2014) 23 *Journal of International Trade & Economic Development: An International and Comparative Review* 329–60, DOI: 10.1080/09638199.2012.713389 (noting that China is a net carbon exporter, though primarily due to the fact that China has a large trade surplus and a high carbon emission intensity compared to its trade partners, rather than because China would have a comparative advantage in the most highly polluting industries: in fact, these researchers note, China’s comparative advantage is essentially concentrated in relatively less polluting, labour-intensive sectors).

\(^{55}\) Compare *Trade and Climate Change. A Report by the United Nations Environment Programme and the World Trade Organization*, n 23 above, 99 (describing the two first risks but not the third one referred to here, though it would seem to follow as a direct consequence).
Box 2. The growing body of international environmental law
The two instruments dealing with the impacts of greenhouse gas emissions on climate change, the 1992 United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol adopted at the 3rd Conference of Parties (COP-3) to the UNFCCC, held in 1997, were referred to above (Box 1). The range of agreements forming the corpus of international environmental law is much broader, however. Among the most important are the 1985 Convention on the Protection of the Ozone Layer and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer; the 1989 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal; the 2001 Stockholm Convention on Persistent Organic Pollutants; the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES Convention); the Convention on Biological Diversity; the 2000 Cartagena Protocol on Biosafety.

III. THE USE OF ENVIRONMENTAL AND LABOUR CONDITIONALITIES IN TRADE POLICIES

It is against this background that the idea of linking trade to labour rights and environmental standards is gaining ground. Such a linkage can take a number of forms: it includes bans on certain products or increased tariffs, where such products are made in violation of such labour rights or environmental standards; the adoption of ‘border tax adjustments’, such as the so-called ‘carbon taxes’; the inclusion of social and/or environmental

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61 The Cartagena Protocol on Biosafety to the Convention on Biological Diversity was adopted on 29 January 2000 as a supplementary agreement to the Convention on Biological Diversity and entered into force on 11 September 2003 (39 ILM 1027 (2000)).
62 BTAs aim to compensate for differences between the respective taxation systems of the exporting and the importing countries: these taxation systems shall be ‘equalized’ by ensuring that the taxes that are paid are those applicable in the country of destination of the goods (ie, where the final products are bought by the end consumer), rather than in the country of origin. See further on BTAs Chapter three of this volume.
conditions in the design of preferential schemes benefiting developing countries (the so-called ‘Generalized Systems of Preferences’ (GSP) schemes that have sought, since the 1970s, to accelerate the integration of developing countries in the global trading system); or labelling schemes, to encourage the consumer to take into account compliance with labour rights or environmental standards in his/her purchasing practices. Table 1 below lists these different tools, relating them to the relevant provisions of the WTO Agreements, and referring them to the Parts of the book where they are discussed in greater detail.

Table 1. A typology of trade-related measures linking access to compliance with labour or environmental standards

<table>
<thead>
<tr>
<th>Definition</th>
<th>Key provisions under WTO law</th>
<th>Relevant portion of this volume</th>
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<tbody>
<tr>
<td>Sanctions</td>
<td>Bans or increased import tariffs applied to products or services that have not been produced in compliance with certain social or environmental standards (or originating in countries that do not comply with certain international standards)</td>
<td>Chapter two (non-discrimination requirements and prohibition of quotas and import bans; and the General Exceptions Clauses)</td>
</tr>
<tr>
<td>Border tax adjustments</td>
<td>‘Equalizing’ the tax treatment of imported products to the level of internal taxation imposed on like domestic products</td>
<td>Article II:2(a) GATT</td>
</tr>
<tr>
<td>Preferential access to developing countries combined with ‘sustainable development’ incentives</td>
<td>Granting preferential access to developing countries’ exports under the Generalized System of Preferences schemes, but imposing certain</td>
<td>‘Enabling Clause’ (1979) (Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries)</td>
</tr>
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(continued)
Table 1. (Continued)

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<tr>
<th>Definition</th>
<th>Key provisions under WTO law</th>
<th>Relevant portion of this volume</th>
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<tr>
<td>conditionalities and rewarding countries who accept supplementary obligations related to sustainable development and good governance</td>
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<td></td>
</tr>
<tr>
<td>Labelling</td>
<td>TBT Agreement (Agreement on Technical Barriers to Trade (applicable to technical regulations and standards)); and Article II GATT</td>
<td>Chapter five</td>
</tr>
<tr>
<td>Labels awarded to some products on the condition that they comply with certain conditions, linked to compliance with social and environmental standards</td>
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Some distinctions apply across these various instruments for linkage. A distinction can be made, first of all, between ‘general’ or ‘country-based’ measures and ‘tailored’ measures targeting certain lines of production.63 ‘General’ or ‘country-based’ measures would target all the products originating from a country not complying with certain conditions (for instance, found to be acting in violation of labour standards, or not taking measures that have been proven to be effective in slowing down the growth of greenhouse gas emissions). Such country-based measures can take a variety of forms.64 They include, in particular, import bans (where all products from one country are banned from being imported), quotas (where a quantitative limit is established on the volume of goods that can be imported from the country targeted), licensing requirements (where the products from one country are subject to a particular screening), or increased import tariffs. Border tax adjustments may also target all products originating from certain countries (for example, all countries that have not introduced a carbon tax

63 It would be tempting to use a terminology opposing ‘country-based’ measures to ‘product-based’ measures, but that would risk creating a confusion, since as mentioned above, the measures we have in mind here do not target products based on their physical characteristics, but rather on the process of production: they are thus ‘process-based’ rather than ‘product-based’.

in some form). And, of course, where GSP schemes are introduced, they may include certain advantages that are especially favourable to countries that have taken measures to strengthen the protection of labour rights or the environment.

Country-based measures can take the form of ‘sanctions’ or of ‘incentives’. ‘Sanctions’ reduce the advantages one trading partner would otherwise enjoy, because that partner does not comply with a certain condition. ‘Incentives’ consist in granting additional advantages to the trading partner which complies with certain conditions. Though it has been put forward in the debate on the conditionalities the EU has gradually attached to its GSP scheme in favour of developing countries (as detailed in Chapter four), the difference between ‘sanctions’ and ‘incentives’ should not be overemphasized. For the countries that are denied access to markets, whether this is in retaliation for a failure to comply with certain conditions or whether it is because they do not satisfy certain conditions for being granted preferential treatment makes no substantive difference; and from the point of view of the requirement of non-discrimination, differential treatment in both cases will have to be justified on the same grounds.

‘Country-based’ measures will typically be very difficult to justify, because of the strong suspicion that, as they penalize all exports from the targeted country, they are motivated by protectionist purposes. Such measures also may be seen as imposing unnecessary restrictions to trade since, per definition, they do not allow for a product-by-product examination. In contrast to ‘general’ or ‘country-based’ measures, ‘product-based’ measures target specific lines of products, either because of particular physical characteristics of the product itself, or because the process of production is considered not to comply with certain environmental or labour norms. Again, the range of measures is a broad one: they include bans (for instance, the prohibition on all imports produced with prison or child labour), the imposition of increased tariff rates, or labelling schemes. Labelling schemes are discussed in Chapter five of this volume. Though such schemes can occasionally be country-based—not only indicating the country of origin of the product, but also providing the consumer with information about whether the said country complies with certain standards—they generally are awarded to some products on the condition that they comply with certain conditions, thus potentially making them more desirable in the eyes of the consumer.

Between ‘country-based’ and ‘product-based’ measures, there are various intermediate situations, in which not a particular product, but a particular sector is targeted, based on the perceived need to encourage general improvements in that sector, and without a product-by-product examination of whether particular conditions were complied with in the production process. One example is the Kimberley Process Certification Scheme (KPCS), established in order to ensure that ‘conflict diamonds’ will not be traded and thus finance conflict in the diamond-producing countries. In
2003, the WTO General Council granted a waiver allowing the establishment of this scheme, exempting the countries participating in the process from their obligations under Articles I, XI and XIII of the GATT vis-à-vis the non-participants in the process (Box 3).

**Box 3. The Kimberley Process Certification Scheme for ‘Conflict Diamonds’**

The Kimberley Process Certification Scheme was established on 5 November 2002 by the Interlaken Declaration, as a means to implement resolutions of the UN Security Council relating to the trade in diamonds from countries in conflict. Its objective was to avoid such trade fuelling armed conflict in African countries such as Angola, Liberia and Sierra Leone. To achieve this, the KPCS established a certification scheme for rough diamonds, prohibiting the export to, and import from, participating countries, of diamonds that are not thus certified: so-called ‘conflict diamonds’, that are ‘used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments’, are excluded from such trade. Trade in diamonds between participating countries is thus limited to certified diamonds; trade in diamonds is prohibited between participating countries and non-participating countries.

The scheme entered into force on 1 January 2003. At the time it was launched, it involved 39 participating countries, representing in total 98 per cent of the production and trade of diamonds worldwide; 37 of them were WTO Members. In May 2003, the WTO Council for Trade in Goods agreed on a waiver exempting the participants in the Kimberley Process from the MFN clause with respect to measures ‘necessary to prohibit the export [and import] of rough diamonds to [and from] non-Participants in the Kimberley Process Certification Scheme’. Ostensibly, however, the decision to grant a waiver was stated explicitly to be ‘for reasons of legal certainty’ and according to its terms, ‘does not prejudge the consistency of domestic

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66 Kimberley Scheme, § 1.


measures taken consistent with the Kimberley Process Certification Scheme with provisions of the WTO Agreement, including any relevant WTO exceptions’. It therefore should not be taken as guidance for the interpretation of the WTO agreements. In particular, it should not be presumed that, because a waiver was adopted, the measures restricting trade in conflict diamonds were considered to be otherwise in violation of WTO rules.

Whether they are ‘country-based’ or ‘products-based’, and whether they take an approach that is negative (using ‘sanctions’) or positive (using ‘incentives’), the adoption of unilateral measures to link access to markets to certain labour or environmental standards is necessarily ‘outward-looking’: their main objective is not to protect certain important values within the importing country, but to encourage the countries exporting to that country to pay greater attention to these standards domestically. For this very reason, they have generally been considered with suspicion: why, after all, would one country care about whether certain labour or environmental standards are complied with in the exporting country, if not for protectionist purposes, ie, because of the fear of social or environmental ‘dumping’?

That was the concern expressed already at an early stage of the debate on the links between trade and the environment by one of the most influential commentators of the emerging trade regime. Writing in 1992, John H Jackson took the view then that while the trade regime established under GATT should not ignore environmental problems and instead ‘give specific and significant attention’ to potential trade-offs between trade openness and environmental concerns, the exceptions under which trade restrictions should be accepted should have well-established boundaries so as to prevent them from being used as excuses for a variety of protectionist devices or unilateral social welfare concerns. Possibly these exceptions should be limited to the situation where governments are protecting matters that occur within their territorial jurisdiction.69

In other terms, while it would be entirely understandable for a country to seek to protect important values at home, it is less understandable, and perhaps problematic, for a country to include ‘nosy preferences’ in its trade policies—ie, to demand that other countries take into account those same values under their jurisdiction.

The distinction between ‘outward-looking’ and ‘inward-looking’ forms of linkage between trade and non-trade values is not always a clear-cut one,

however, even for process-based trade measures where the focus of attention is not the product itself but the means through which it was produced. *Any* measure that affects trade, even if primarily aimed at the protection of domestic interests (‘inward-looking’), by definition has impacts outside the territorial jurisdiction of the WTO Member adopting it, because it will influence choices of producers located in other jurisdictions seeking to penetrate the markets of that Member: for instance, measures aimed at protecting the health of the consumer in the importing country by regulating products will influence how such products will be manufactured elsewhere. Conversely, even if a measure adopted by one WTO Member primarily seeks to protect some interests outside that Member’s territorial jurisdiction (and is, in that sense, ‘outward-looking’), such a measure will relate in certain respects to the domestic interests of that Member almost by definition, because it corresponds to the preferences expressed in the jurisdiction of the Member adopting the measure, and because it may influence the flows of trade: for instance, a ‘social clause’ seeking to encourage the trading partners of one Member to improve labour conditions under their respective jurisdictions by making access to markets for their products conditional upon such goods complying with certain labour standards, also caters to the ‘tastes’ of consumers-voters in the importing country imposing such a conditionality, and may be seen as protecting workers in that country from unfair competition from abroad. Consumers within one country may legitimately express a preference for products imported within that country that do not depend on forced labour or on child labour, or that are produced in conditions that respect the environment, and the linkage mechanism may be seen as a means to take into account such preferences. As we will see, such preferences may be relevant in tracing regulatory distinctions (see Box 7). Considerations linked to the preservation of ‘public morals’ within the country concerned may be useful, moreover, in assessing whether the adoption of the said measure will be compatible with undertakings under the General Agreement on Tariffs and Trade (GATT).\(^70\)

The distinction between ‘inward-looking’ and ‘outward-looking’ measures, therefore, is a relative one; it is in many cases contestable, and it is easy to deconstruct by relying alternatively on the professed *aim* of the measure and on the reality of its *impacts*. Nevertheless, the distinction does seem to play a role when assessing the acceptability of relying on environmental and social clauses in trade policies. The dominant perception remains that ‘inward-looking’ measures affect the trading partners of the Member adopting such conditionalities only indirectly, whereas ‘outward-looking’ measures directly affect the position of the trading partners—that is, indeed, their raison d’être.

\(^{70}\) See Art XX(a) of GATT, discussed in greater detail in section III of Chapter two.
It is perhaps unfortunate that the ‘inward-looking’/‘outward-looking’ distinction sometimes obfuscates the arguably more important question that concerns the nature of the interests that a WTO Member seeks to protect by the adoption of a certain regulatory measure. Labour rights and environmental standards, at least when they are defined in accordance with universally agreed norms, are not mere impositions that one WTO Member seeks to impose on others; nor do they simply reflect ‘preferences’ of consumers, comparable to preferences for products complying with certain quality standards or for foods that present certain nutritional qualities. Instead, labour rights and environmental standards relate directly to universally recognized human rights that are binding on all states. This may be more relevant than is traditionally assumed to assessing the compatibility of linkage with WTO disciplines. As any other international treaty, the interpretation of WTO agreements must take into account ‘together with the context … any relevant rules of international law applicable in the relations between the parties’. This may imply that human rights treaties, or international human rights norms as part of customary international law, should influence the reading of the WTO agreements, in particular in order to ensure that the disciplines imposed under these agreements shall not constitute an obstacle to the ability of the Members to comply with their human rights obligations.

This is not to say that any measure adopted by a WTO Member necessarily shall have to be treated as acceptable, for the mere reason that it contributes to the promotion of human rights, however weak the link is between the two. Uncertainties remain concerning the range of instruments that may be relevant to the interpretation of WTO agreements under this

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72 Vienna Convention on the Law of Treaties, opened for signature on 23 May 1969, entered into force on 27 January 1980, 1155 UNTS 331, 8 ILM 679 (Art 31.3(c)).
rule of interpretation (see Box 4). Moreover, even if we accept in principle
that human rights norms should be taken into account in the interpreta-
tion of WTO agreements, there remains a difference between (i) the meas-
ures that a WTO Member adopts in order to ensure the full protection of
human rights under its (territorial) jurisdiction, and (ii) the measures that it
adopts in order to promote respect for human rights outside its (territorial)
jurisdiction. Though the notion that human rights treaties impose extrater-
ritorial duties on states has made significant progress in recent years,73 the
mainstream doctrine would still challenge that there exists an obligation
for the state to adopt affirmative measures to ensure that human rights are
respected, protected and fulfilled outside its national territory. Whereas a
state is duty-bound to respect, protect and fulfil human rights of people
under its territorial jurisdiction, its duties to contribute to the protection of
human rights outside its jurisdiction are generally seen as more limited, due
both to the need to respect the sovereignty of the territorial state concerned
and to the fact that the powers of the first state to influence situations out-
side its national territory are limited. Therefore, whereas ‘inward-looking’
measures adopted by the state in order to protect human rights within its
national (territorial) jurisdiction may be defended on the basis of the duties
of that state under international human rights law—an argument that the
Dispute Settlement Bodies of the WTO cannot ignore—the same cannot
be said of ‘outward-looking’ measures: here, quite apart from the question
whether such measures are authorized under general international law or
under WTO law, it would be difficult to argue that they are a means for a
state to discharge its obligations under international human rights law.

Despite these restrictions, it cannot be dismissed as simply irrelevant that
measures aiming to link trade policies to labour rights or environmental
standards are related to the promotion of internationally recognized human
rights. In taking such measures, the importing state does not seek to impose
its own (unilaterally defined) values on its trading partners; it may be said,
rather, to be contributing to the enforcement of universally accepted values.74

73 See in particular the restatement of international human rights law in this regard, in
Olivier De Schutter et al, ‘Commentary to the Maastricht Principles on Extraterritorial Obliga-
tions of States in the area of Economic, Social and Cultural Rights’ (2012) 3434 Human Rights
Quarterly 1084–1171.
74 This is especially clear where the imposition of certain conditionalities based on labour
rights or environmental standards in fact deprives consumers in the importing country of access
to certain products subject to an import ban, or of access to foreign products at a low cost,
although these consumers would have preferred to be able to have access to these products.
The case of ‘carbon taxes’ imposed by industrialized countries at the border is typical: such
taxes would force consumers in the importing country to change their consumption patterns,
in contrast to the present situation where they may maintain their lifestyles unchallenged, while
governments can pretend to reduce greenhouse gas emissions simply by increasing the volumes
of imports.
Whatever the reasons are for the exporting state not effectively protecting such values, the imposition of linkage by the importing state may be seen as a means to facilitate the compliance of the exporting state with its international obligations under the international law of human rights.

This distinction plays an essential role, for instance, in the discussion on the so-called extraterritorial jurisdiction of states.\(^{75}\) In contrast with situations where states take ‘outward-looking’ measures to promote their own sovereign interests, where such measures promote solidarity between states, they should be considered as valid in principle. Indeed, the preservation of human rights has occasionally been referred to as of interest to all states, even in the absence of any more specific link between the state and the situation where human rights are violated. Although the significance of this *dictum* in the *Barcelona Traction* judgment referring to this specific character of international norms relating to ‘the basic rights of the human person’\(^{76}\) has been widely debated—and its consequences probably exaggerated by some commentators\(^{77}\)—the *erga omnes* character of at least a handful of internationally recognized human rights may justify allowing the adoption by states of certain measures, even in conditions which might otherwise make such measures suspect, where this seeks to promote such rights.

\(^{75}\) It is no exaggeration to say that this distinction is central to the work by the Select Committee of Experts on Extraterritorial Jurisdiction set up within the Council of Europe by the European Committee on Crime Problems, and which benefited, in particular, from the contribution of Professor Rosalyn Higgins. See *Extraterritorial Criminal Jurisdiction*, Report prepared by the Select Committee of Experts on Extraterritorial Jurisdiction (PC-R-EJ), set up by the European Committee on Crime Problems (CDPC) (Strasbourg, Council of Europe, 1990) 25–30.

\(^{76}\) The International Court of Justice declared in the *Barcelona Traction* judgment that ‘an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection. They are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law; others are conferred by international instruments of a universal or quasi-universal character’. International Court of Justice, *Case concerning the Barcelona Traction, Light and Power Co (Belgium v Spain)* (second phase—merits), 5 February 1970, [1970] ICJ Rep 3, paras 33–34.

Box 4. The relevance of international human rights to the interpretation of WTO agreements

Article 31.3(c) of the Vienna Convention provides that, in the interpretation of treaties, ‘[t]here shall be taken into account together with the context ... any relevant rules of international law applicable in the relations between the parties’. Consistent with Article 3(2) of the Dispute Settlement Understanding included among the WTO agreements, this should also guide the interpretation of WTO agreements, which must be interpreted ‘in the light of customary rules of interpretation’. Indeed, the relevance of the Vienna Convention to the interpretation of WTO agreements has been acknowledged in a large number of Reports by Panels or by the Appellate Body of the WTO.\(^{78}\)

However, diverging views have been expressed concerning the range of the human rights instruments that should be taken into consideration in the interpretation of WTO agreements. One view is that the only instruments that could be considered are those that are binding on all WTO Members.\(^{79}\) There is a logic to this position: any more generous approach—ie, any approach more open to taking into account other international treaties in the interpretation of WTO law—would result in WTO Members being opposed to agreements that they are not parties to, and that for them are res inter alios acta. This may explain why this view was apparently adopted, albeit in dicta, by a WTO Panel in the EC—Biotech dispute.\(^{80}\) However, in practice, this reading would deprive human rights treaties of any relevance to the interpretation of WTO law, since even the most widely ratified treaties would not be ratified by at least one Member of the

\(^{78}\) See, eg, United States—Convention and Reformulated Gasoline, n 84 above, pp 17–18.

\(^{79}\) See Joost Pauwelyn, Conflict of Norms in Public International Law: How WTO Relates to Other Rules of International Law (Cambridge, Cambridge University Press, 2003) 263. However, Pauwelyn argues that human rights instruments can and indeed must be taken into account directly in the Dispute Settlement bodies of the WTO, insofar as they cannot ignore the fact that such instruments may impose on the WTO Members obligations that contradict their commitments under WTO agreements: thus, while human rights instruments cannot be a means of interpretation of WTO agreements, nor could they be ignored in the adjudication of disputes within the WTO—on the contrary, they should be accorded primacy above trade commitments, given the special nature of human rights treaties that cannot be reduced to an exchange of bilateral rights and obligations between States. See Joost Pauwelyn, Conflict of Norms in Public International Law, cited above, 52ff; and Pauwelyn, ‘The Role of Public International Law in the WTO: How Far Can We Go?’ (2001) 95 American Journal of International Law 535. This suggestion is resisted, in particular, by Gabrielle Marceau: G Marceau, ‘WTO Dispute Settlement and Human Rights’ (2002) 13 European Journal of International Law 753–814, at 762. On this debate, see J Harrison, The Human Rights Impact of the World Trade Organisation, n 64 above, 189–91 and 200–205.

WTO. In addition, since some WTO Members are not states, that situation would not be a provisional one, attributable only to a failure by some WTO Members to ratify the relevant human rights instruments: it is bound to persist indefinitely, because, with few exceptions, such instruments are not open to being ratified by subjects of international law other than states.  

Another view is that the WTO agreements should be interpreted taking into account the other treaties that are applicable to the relationships between the parties to the dispute, whether or not all the WTO Members are also parties to these treaties. Though this view has been attributed to Martti Koskeniemmi, it bears notice that the conclusions reached by the Study Group of the International Law Commission chaired by Koskeniemmi do refer to the fact that, in the interpretation of one treaty, another treaty will be ‘of particular relevance’ where all the parties to the first treaty are also parties to the second treaty.

It is in any case doubtful whether these differences matter much. Few still would question that human rights recognized in international law through relevant international treaties, with very few exceptions, now belong to customary international law. As such, they cannot be ignored in the interpretation of WTO agreements: the Appellate Body has acknowledged that these agreements should not be read ‘in clinical isolation from public international law’. In the exceptional

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83 See International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission, UN doc A/CN.4/L.702 (18 July 2006), para 21 (‘Article 31(3)(c) also requires the interpreter to consider other treaty-based rules so as to arrive at a consistent meaning. Such other rules are of particular relevance where parties to the treaty under interpretation are also parties to the other treaty, where the treaty rule has passed into or expresses customary international law or where they provide evidence of the common understanding of the parties as to the object and purpose of the treaty under interpretation or as to the meaning of a particular term’ (emphasis added)) (also reproduced as: Report on the work of the fifty-eighth session of the International Law Commission (1 May to 9 June and 3 July to 11 August 2006) to the UN General Assembly, Official Records, Sixty-first Session, Supplement No 10 (A/61/10), chapter 12).
situations where a conflict may arise between WTO agreements and human rights as part of customary international law, it could be argued in principle that the latter should prevail, based on the special nature of human rights treaties. This, however, does not imply that, as bodies specialized to adjudicate trade disputes under the relevant WTO agreements—rather than bodies tasked with applying the full range of international law applicable to the dispute—the Dispute Settlement bodies of the WTO should necessarily recognize such primacy in their decisions. This question, in any event, is largely theoretical, and it is likely to remain unresolved until a WTO Member shall invoke its human rights obligations in order to justify the adoption of a measure that is otherwise found to be in violation of its commitments under the WTO.

development: the adoption of unilateral trade measures is a second best, in effect compensating for the adoption of trade agreements that have been insufficiently attentive to objectives other than the expansion of the volume of exports of each party (see Box 6).

Secondly, although labour rights and environmental standards are considered together here—although mostly analysed separately in what follows—it is important to acknowledge that they each present their own challenges: with respect to labour rights, it would be useful to distinguish between standards as they are set in the domestic legislation, and working conditions, as the latter may be either better or worse than what the legislative or regulatory framework requires; and the environmental impacts of any product considered in its whole life-cycle, are varied and touch on different values, whether we consider the depletion of natural resources, climate disruptions linked to the rise in greenhouse gas emissions, the inability for the ecosystems to recycle waste, or biodiversity loss (see Box 5). Moreover, labour rights and environmental standards present a different relationship to economic growth and higher levels of affluence: whereas growth means a greater pressure on resources and more pollution, it also generally means improvements in working conditions, and improved labour standards. Although such trade-offs cannot be considered in detail here, they would deserve to be part of any debate concerning the desirability of linking trade to social and environmental conditions.

Box 5. Social and environmental standards: commonalities and differences—by Edwin Zaccai

In the search of a trade policy in line with sustainable development, it would be desirable to distinguish between standards relevant either for social or for environmental matters, and among the latter, between different types of ecological impacts. Social and environmental standards differ first by the ease with which, based on such standards, we can assess the impacts of various manufactured products. Social standards on products are mostly based on manufacturing conditions. But environmental standards are not only related to the manufacturing stage, but also to the entire life-cycle of a product. These steps include the extraction of raw materials, manufacturing, transportation, use, and the end of a product ‘life’ (disposal or recycling). This means that, in the calculation of such an ecological profile, the conditions prevailing in several countries are often involved. This can make it difficult to actually highlight a particular impact generated in any specific country. In addition, the impact generated at different steps generally splits into various forms of pollution, affecting a combination
of targets, from human health to specific species. In contrast, and without minimizing the difficulties in establishing social criteria to be met in production processes, this latter issue seems a priori better circumscribed.

Another difference between the objectives of meeting social and environmental standards originates from the relations of those with the increase in global consumption, favoured by trade. A simplistic formula reflecting the evolution of Impact in a country or in the world, combines three factors, Population (P), Affluence (A) and Technology (T). In this approach, the Impact (I) is defined as the product of the last three terms (PAT). Most of the time the population factor will have much less variation than the increasing affluence, and thus consumption, favoured by economic growth. Thus, during the twentieth century the global population has been multiplied by a factor of four, and during the same period, the industrial output increased by a factor of 40. This explains the important role in international discussions of ‘clean’ technology. If affluence increases, and acknowledging that population does not decrease, it is only the factor technology, which represents technological solutions that could possibly make a difference to diminish the impact. To take a simple example, enabling more people to possess cars will generate more impact. But if they use highly polluting or less polluting cars (ie technology), the impact will vary accordingly.

With regard to labour standards, no such relations exist. An increase in affluence may in fact lead to an improvement in labour standards; in contrast, although the relationship between technological change and labour standards is undoubtedly an important issue, environmentally efficient technologies as such do not play a defined role for those standards.

Another general theory concerning the relationship between environment and economy is the so-called ‘Environmental Kuznets Curve’. The model assumes that as the wealth of a country increases its environmental impact starts with an increase, before reaching a maximum and then decreasing. If we combine this vision with the IPAT equation, it follows that, if this equation holds true, technology should be particularly effective above certain levels of wealth.

What has the observation of the evolution of environmental impacts shown in this respect during the last decades? Technologies have indeed been able to reduce some nuisances in richer countries, as is the case for some forms of air and water pollution, or by improving waste management. However technological responses have proved clearly insufficient, especially at global level, to reduce total material consumption, greenhouse gas emissions (both in absolute terms and as compared to the objectives the international community has set for itself) or remedy to biodiversity loss. It is thus apparent that the global increase in consumption is partly incompatible with a reduction of some environmental damage, at least in the present state of technology, for more fundamental reasons than the relative absence of environmental standards to be provided on commercial products. Of course, this contradiction does not occur in all areas, and many improvements are possible and desirable in the context of current consumption and trade. But in this regard, it may be useful, rather than talking about environmental standards in general, to better distinguish between different environmental issues within various national contexts.

Box 6. Trade and Sustainable Development: the role of impact assessments—by Elisabeth Bürgi Bonanomi
International sustainable development law research places emphasis on the requirement of substantive coherence between treaties: it leads one to ask whether one treaty, through its impacts, provides an enabling or a hindering environment for effective implementation of another treaty, and vice versa. The legal principle of sustainable development is well-suited for approaching substantive coherence, as it provides a multidimensional methodological norm that requires careful balancing of legal interests enshrined in the different regimes. This, in turn, calls for transparent uncovering of trade-offs and a focused and deliberative search for optimal options. Based on this approach, a trade regime is sustainable if it provides for an environment that is simultaneously optimal for the implementation of human

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rights and other social standards, for the protection of environmental standards, and for the promotion of economic vitality.\textsuperscript{91}

Sustainability impact assessments (SIAs)—undertaken both before (ex ante) and after the agreement in question has been concluded (ex post)—have a key role to play in the process of defining sustainable trade options, as they encourage evidence-based, informed, and creative decision-making in the process of transformation towards sustainable trade.\textsuperscript{92} Since the late 1990s, the EU has been conducting SIAs prior to concluding new trade agreements.\textsuperscript{93} However, while representing an important first step, the methodology that is currently applied\textsuperscript{94} needs to be strengthened, in particular by responding to obligations derived from the human rights framework.\textsuperscript{95} Accordingly, effective ex ante SIAs of trade agreements need to thoroughly examine how a tabled trade regulation option—via the dynamics it will trigger—will impact on the ability of the partner countries’ governments to implement human rights; whether the trade agreement will strengthen or weaken social safety nets; whether the players in the new market will respect environmental standards; and whether the trade agreement will improve or worsen economic performance at both aggregate and individual levels in the short and long run. It is imperative that trade-SIA results then inform the policy processes.\textsuperscript{96}

A core (and frequently neglected) aim of trade SIA processes is to identify the optimal and the most enabling trade regulation options. These may or may not correlate with the trade options originally tabled. To enable drafting of such optimal trade options, any relevant legal standards—which may derive from national, regional, or international law and include the human rights, fundamental principles of

\textsuperscript{91} Marie-Claire Cordonier Segger and Christopher G Weeramantry (eds), \textit{Sustainable Justice, Reconciling Economic, Social and Environmental Law} (Leiden, Martinus Nijhoff, 2005).


\textsuperscript{93} See: ec.europa.eu/trade/analysis/sustainability-impact-assessments/assessments/.


\textsuperscript{96} Elisabeth Bürgi Bonanomi, \textit{EU Trade Agreements and Their Impacts on Human Rights}. Study commissioned by the German Federal Ministry for Economic Cooperation and Development (BMZ) (Bern, CDE/WTI, 2014).
environmental law, and constitutional principles of the WTO—must first be put on the table in order to identify the range of most relevant targets to which the respective trade agreement should most optimally contribute (duty to include). These legal standards then need to be structured according to current theory of hierarchy of norms (duty to structure and weigh). In a further step, trade SIAs are carried out to establish an evidence base and help identify trade-offs. Their findings finally provide a basis for identifying optimal options (duty to balance and reconcile by developing optimal options).97

The search for optimal or most enabling trade options is a process of approximation and not an exact science, and ‘the optimal trade option generally lies somewhere in between’.98 Usually, there will be not just one, but a range of optimal options with different emphases. The search for these options must come without any foregone conclusions and requires openness to nuanced trade regulation options. It is about considering different forms of market access and of safeguards; about shaping exception clauses in such a way that they are invoked whenever necessary (eg by finding creative ways of dealing with procedural obstacles such as prohibitive bearing of the burden of proof); about including human rights clauses tailored to the needs of developing countries;99 about effectively combining trade benefits with good governance requirements; and about the introduction of effective sustainability incentives as discussed in this volume. When drafting nuanced trade options, consideration should be given to the fact that open-texture rules, if interpreted systemically, can be helpful in providing contextual flexibility.100

Linking market access to social and environmental conditionalities in order to ‘use market access as a leverage to encourage […] trading partners to improve labor conditions and to better protect the environment’, as suggested in this volume, deals with only one component of the entire ‘trade and sustainability package’. Even if such a sustainability measure is deemed compatible with WTO law, its implementation will not per se produce outcomes aligned with the

97 K Gehne, Nachhaltige Entwicklung als Rechtsprinzip, n 90 above; E Bürgi Bonanomi, Sustainable Development in International Law Making, n 89 above.
98 E Bürgi Bonanomi, Sustainable Development in International Law Making, n 89 above, 379.
100 See Article 31.3(c) of the Vienna Convention on the Law of Treaties; and see Box 4 in this chapter.
objective of sustainable development. Therefore, while linking market access to sustainability standards can be important in transforming the current trade regime into one that is sustainable, it is important to assess the impacts of such measures carefully. Further, sustainability standards should be introduced along with other provisions promoting sustainable trade, as the core contents of a trade agreement may be no less decisive in enabling sustainable development than measures that explicitly target sustainability.